

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.02.2015

CORAM

THE HONOURABLE MS.JUSTICE R.MALA

Crl.A.No.249 of 2012
and M.P.No.1 of 2013

Sivanantham

.. Appellant/accused

..Vs..

The State
Rep. by Inspector of Police,
All Women Police Station,
Nagapattinam, Nagapattinam District.
Crime No.8 of 2009.

.. Respondent

Prayer:- Appeal filed under Section 374(2) of Cr.P.C. against the Judgment of conviction and sentence dated 06.02.2012, made in S.C.No.243 of 2010, on the file of the Assistant Sessions Court, Nagapattinam.

For Appellant : Mr.R.John Sathyan

For Respondent : Mr.S.Shanmugavelayutham
Public Prosecutor (State)
Assisted by
Mr.D.Sivaramkumar
Government Advocate (Crl.side)

JUDGMENT

This Criminal appeal arises out of the Judgment of conviction and sentence dated 06.02.2012 in S.C.No.243 of 2010, on the file of the Assistant Sessions Court, Nagapattinam, whereby the appellant/accused was convicted and sentenced as follows:

offence under Section	Sentence
376 IPC	To undergo ten years rigorous imprisonment and to pay a fine of Rs.5,000/- in default in payment to undergo one year rigorous imprisonment.

offence under Section	Sentence
376(1) IPC	To undergo ten years rigorous imprisonment and to pay a fine of Rs.5,000/- in default in payment to undergo one year rigorous imprisonment.
376 read with 417 IPC	To undergo one year rigorous imprisonment.
The sentence are ordered to be run concurrently.	

2.The case of the prosecution is as follows:

(i) On the side of the prosecution, P.W.1 to P.W.16 were examined and Exs.P1 to P7 were marked.

(ii) P.W.1/Shyamala/victim girl is a resident of Kidamangalam, Thirumarugal and P.W.2/Sakunthala is her mother. P.W.1 was staying at her aunt's house at Mela Oogai near Kodavasal and studying 10th standard in tutorial college. The accused is having two wheeler mechanical shop at Mela Oogai. When she was staying at her aunt's house and going college, the accused used to watch the victim girl/P.W.1 and contacted her over phone and also gave a promise to marry her. P.W.1/victim girl told him that she does not know about him and as to how she would marry him. During 2007, since the accused often told P.W.1 that he wants to marry her, P.W.1 also agreed to marry him. Thereafter, P.W.1 started to talk with him. P.W.1's aunt told her that the conduct of the accused is not good and asked her not to believe him. On account of Theerthagudi festival, after getting permission from her aunt, P.W.1 went to the festival along with her friend. At that time, since the accused promised to marry her, P.W.1 fell into the false promise of accused and they had sexual intercourse. Since P.W.1/Shyamala became pregnant, she asked the accused over phone to come to her home for marriage proposal and the accused asked her to go to her parents home at Kidamangalam. Thereafter, P.W.1 came to her parents home. Her aunt/P.W.5/Susila told her mother through phone that P.W.1 along with the accused went to temple and she does not know what had happened there. When P.W.1's mother scolded and beat her to disclose the fact, P.W.1 told that she was raped by the accused. Then Panchayat was convened and in that Panchayat, accused agreed to marry P.W.1. Then the accused asked P.W.1 to take her 10th standard certificate and Rs.300/- and come to Tiruvarur temple. But P.W.1's parents refused to let her out. Since the accused did not come to P.W.1's house for marriage proposal, relatives of P.W.1 have gone to the house of accused at Kudavasal and the accused told that he is willing to marry P.W.1. Thereafter, the accused stated that he has not committed rape on P.W.1 and hence, he refused to marry her. So P.W.1 lodged Ex.P1 complaint before Nagapattinam All Women Police Station. P.W.1

further deposed that when she was at her aunt's house, the accused had sexual intercourse with her several times by giving false promise to marry her.

(iii) P.W.16/Leelavathi, Inspector of Police, received Ex.P1 complaint from P.W.1 and registered a case in Crime No.8 of 2009 under Sections 417 and 493 IPC read with Section 4 of Tamil Nadu Women Harassment Act and prepared Ex.P5 printed F.I.R. and sent the same to the Judicial Magistrate's Court No.I, Nagapattinam. Then she took up the case for investigation and went to the house of P.W.1 and examined P.W.1/Shyamala, P.W.2/Sakunthala and P.W.8/Boopathi and recorded their statements. On 15.08.2009, she went to Mela Oogai and examined P.W.5/Susila, aunt of P.W.1 and P.W.6/Sivasankaran, brother of P.W.1 and recorded their statements.

(iv) On 19.08.2009, at about 19.00 hours, P.W.16 arrested the accused near Thittachery Bazaar and brought him to Velippalayam police station for investigation. On 20.08.2009, she gave a requisition for conducting potency test on accused and sent the accused through P.W.11/Pushpalatha, Head Constable to Judicial custody.

(v) P.W.10/Dr.Murali Mohan, Nagapattinam Government Hospital, examined the accused and gave Ex.P3 Accident Register copy of accused. He opined that the accused is having potentiality and he is fit for sexual intercourse.

(vi) Then P.W.16 gave a requisition for conducting medical examination on victim girl/P.W.1 through P.W.12/Tamilarasi/Head Constable to Government Hospital, Nagapattinam.

(vii) P.W.9/Dr.Thilagam, examined the victim girl/P.W.1 and gave Ex.P2 Accident Register copy of P.W.1. She opined that mouth of the uterus appears enlarge and torn across and no evidence found that the victim girl was not subjected to medical termination.

(viii) Then P.W.16 examined P.W.1 and recorded her statement and obtained Ex.P6 Transfer Certificate of P.W.1 from the competent authority.

(ix) On 20.08.2009, P.W.16 again went to Kidamangalam and examined P.W.3/Chinnammal, P.W.4/Chellappa, P.W.13/Thamaraikani and P.W.14/Kalyanasundaram and recorded their statements. Then she examined P.W.15/Dr.Mala and recorded her statement, after obtaining Ex.P4 Accident Register copy of P.W.1. P.W.15 opined that the victim girl was pregnant.

(x) On 25.08.2009, P.W.16 went to Mela Oogai and examined

P.W.7/Selvi and recorded her statement. On 22.02.2010 again she examined P.W.1, P.W.9/Dr.Thilagam, P.W.10/Dr.Murali Mohan and P.W.15/Dr.Mala and recorded their statements. Then she examined P.W.11 and P.W.12 and recorded their statements and altered the Sections into 376, 417 and 493 IPC and the alteration report was marked as Ex.P7. After completing investigation, she filed a charge sheet against the accused.

3.The Trial Court placed the incriminating evidence before the accused persons under Section 313(1)(b) of Cr.P.C. and the accused denied the same in toto. On the side of the defence, no oral and documentary evidence were let in. After considering the oral and documentary evidence on the side of the prosecution, the trial Court convicted and sentenced the accused as stated above.

4.Challenging the conviction and sentence passed by the trial Court, the learned counsel for the appellant/accused raised the following points:

(i) Since P.W.1 is above 16 years old, she is a consenting party.

(ii) P.W.1 has not given the correct date on which she was subjected to first rape.

(iii) P.W.1 lodged the complaint before the All Women Police Station, Nagapattinam on 24.06.2009, but she was examined by the Doctor only on 20.08.2009.

(iv) In the complaint itself, it was stated by P.W.1 that she is three months pregnant, but whereas in her cross-examination, she stated that while she lodging complaint, she was 1 ½ months pregnant. Further, as per the evidence of P.W.1, she stated that during Theerthagudi festival, the accused by giving false promise to marry her, had sexual intercourse with her. As per the evidence of P.W.15/Dr.Mala, she examined P.W.1 on 20.08.2009 and at that time, she was five months pregnant. So there is contradiction between the evidence of P.W.1 and P.W.15 as well as averments in Ex.P1 complaint. So the evidence of P.W.1 is not wholly reliable and hence, it needs corroboration.

(v) In the complaint, P.W.1 stated that the accused is her relative, but during her cross-examination, she stated that the accused is not her relative, but he belongs to her community.

(vi) The evidence of other witnesses are close relatives of P.W.1 and they stated that earlier the accused agreed to marry P.W.1, but subsequently, he denied.

(vii) Since P.W.1 was pregnant through some other person, by taking vengeance, the complaint was foisted against the accused. The trial Court without considering the above aspects erroneously convicted the accused for the aforesaid offences and hence, he prayed for allowing the appeal.

5. Resisting the same, learned Government Advocate (Crl.side) submits that the trial Court has come to the correct conclusion that even though P.W.1 is aged about 16 years, her consent was obtained only by way of giving false promise to marry her and by believing the statement of the accused, P.W.1 had given consent for sexual intercourse. So the trial Court considering all the aspects in proper perspective and rightly convicted the appellant/accused and therefore, he prayed for dismissal of the appeal.

6. Considered the rival submissions made on both sides and perused the materials available on record.

7. P.W.1/Shyamala is the victim girl and she is 16 years old and she was going tutorial college at the time of occurrence. Now this Court has to decide whether P.W.1 has given consent to the appellant/accused for sexual intercourse? Before that this Court has to consider whether the evidence of P.W.1 is reliable? P.W.2/Sakunthala is the mother of P.W.1, P.W.3/Chinnammal is the co-sister of P.W.2, P.W.4/Chellappa is the grand father of P.W.1, P.W.5/Susila is her aunt, P.W.6/Sivasankaran is the brother of P.W.1, P.W.8/Boopathi is the junior paternal uncle of P.W.1. P.W.7/Selvi, P.W.13/Thamaraikani and P.W.14/Kalyanasundaram are villagers belonging to the village of P.W.1.17.

8. Usually in the offences against women, i.e., rape, the family members want to settle the matter amicably and they will not disclose it to a third party, since it will create social stigma to the family. As per the dictum of apex Court that a single related victim in the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated.

9. It is settled law that the victim of sexual assault is not treated as accomplice and as such, her evidence does not require corroboration from any other evidence including the evidence of a doctor. In normal course a victim of sexual assault does not like

to disclose such offence even before her family members much less before public or before the police. The Indian women has tendency to conceal such offence because it involves her prestige as well as prestige of her family. Only in few cases, the victim girl or the family members has courage to go before the police station and lodge a case. A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of victim. A rapist degrades the very soul of the helpless female. The Court, therefore, shoulders a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out and otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. In such circumstances, this Court has to consider the evidence of prosecutrix and it is the duty of this Court to scrutinise the evidence of P.W.1 as to whether her evidence is wholly reliable or partly reliable. If the evidence of P.W.1 is partly reliable, it needs corroboration.

10. On 24.06.2009, Ex.P1 complaint was lodged by P.W.1 and in the complaint, it was stated that the appellant/accused is her relative and she was staying in her aunt's house and studying in tutorial college. It was further stated that she fell into the false promise given by the accused to marry her and had sexual intercourse. Since P.W.1 became three months pregnant, her relatives and villagers went to the house of accused and pressurized him for marriage, but he demanded dowry. Thereafter, the accused told that since her mother threatened him that she would commit suicide, he refused to marry her.

11. Whereas P.W.1 in her evidence deposed that the appellant/accused is not her relative, but belongs to her community and while she lodging complaint, she was 1 ½ months pregnant. So there is contradiction between the averments in Ex.P1 complaint and evidence of P.W.1. A suggestion was posed to P.W.1 that she wantonly suppressed the fact and had given a false evidence against the accused, but she denied the same. In Ex.P1 complaint, it was stated that on believing the statement of the accused that he would marry her, P.W.1 consented to have sexual intercourse with him. But whereas in her evidence, she stated that while she attending the festival at Theerthagudi, the accused by giving false promise to marry her, had committed rape on her. On considering the evidence of P.W.1, I am of the view,

her evidence is partly reliable not wholly reliable.

12. On perusal of the charge, it reveals as follows:

(i) The accused Sivanandam is the resident of Mela Oogai. The victim Shyamala is the resident of Kidamangalam, Thirumarugal, which is within the jurisdiction of Nagapattinam All Women Police Station. At the time of occurrence, the victim girl was under 18 years of age. When the victim was staying in her aunt's house at Melaoogai for attending tutorial college in the year prior to 2008, the accused slowly developed intimacy with her and loved her. Due to that intimacy, in the month of Panguni (Tamil month) of the year 2008 when the minor girl went to accused house, he induced her to have sexual intercourse without properly conducting lawful marriage.

(ii) On 15th Chitarai 2008 at about 10.00 P.M. at the time of Theerthankudi festival, when Shyamala played with other children, the accused induces her to come back side of the temple and by giving false promise to marry her, the accused compelled her to have sexual intercourse with him in the field and made her to believe that she would be the lawful wife of accused and had sexual intercourse with her several times.

(iii) Thereafter, the victim girl came back to her parents' house at Kidamangalam. There also the accused came and had sexual intercourse with her two times and lastly on 15.06.2009.

13. It is appropriate to extract ingredients of Sections 375 and 376 IPC, which read as follows:

"Essential ingredients of Section 375 IPC:

1. Accused committed sexual intercourse with a woman.
2. Such sexual intercourse was (i) against her will, (ii) without her consent.
3. When such consent was obtained by putting her any of relation or interested person in fear of death or hurt.
4. Consent was taken under deceitful belief that accused was her husband.
5. Consent was taken when she was incapable of understanding its nature and consequences due to (i) unsoundness of mind, (ii) intoxication, (iii) administration of any stupefying drug or substance by the accused personally or through some one else.
6. When accused is husband and woman was below 15 years of age.

Essential ingredients of Section 376 IPC:

1. Accused had sexual intercourse with a woman.
2. Such sexual intercourse was under any one of the six circumstances given in Section 375 IPC.
3. Accused had sexual intercourse with his own wife when she was under 12 years of age.

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.. .. "

14.It is the duty of the prosecution to prove that whether the appellant/accused had committed rape on the victim girl/P.W.1 and whether he obtained consent from P.W.1 by giving false promise to marry her? As already stated that evidence of P.W.1 is not wholly reliable and there is contradiction between Ex.P1 complaint and chief and cross-examination of P.W.1. So the evidence of P.W.1 needs corroboration.

15.Now this Court has to decide whether there is any corroborating evidence available to corroborate the evidence of P.W.1? It is true, P.W.2 to P.W.6 and P.W.8 are close relatives of P.W.1. It is well settled dictum of the Apex Court that evidence of relatives cannot be discarded merely because they are relatives and interested witnesses. The Court ought to have scrutinise the evidence whether it is natural, cogent, trustworthy and reliable.

16.As per the evidence of P.W.5/Aunt of P.W.1, when P.W.1 was staying in her house, she is having acquaintance with the accused. It is pertinent to note that the same was spoken by P.W.1 in her evidence that her aunt advised her not to believe the accused, since his conduct is not good. Even though P.W.3/Chinnammal, P.W.4/Chellappa and P.W.8/Boopathi are relatives, they are only hearsay witnesses and they have deposed that the appellant/accused is initially willing to marry P.W.1, but subsequently refused to marry her.

17.According to the evidence of P.W.2/mother of P.W.1, her husband died and her daughter P.W.1 was staying in P.W.5/aunt's house and going tutorial college. After P.W.1 came from aunt's house, since P.W.1 was crying, she enquired her at that time, P.W.1 disclosed the fact that she became pregnant, so P.W.2 scolded and beat her for her act, therefore, P.W.1 attempted to commit suicide by consuming poison, which leads to abortion.

18.As per the evidence of P.W.5, both P.W.1 and the accused are having intimacy, due to which, P.W.1 has become pregnant. During Theerthagudi festival, P.W.1 went along with the accused and at 5.00 a.m., he dropped P.W.1 in her aunt's house and when the same was questioned by P.W.5, at that time, the accused told that not to beat her and he is going to marry her. Subsequently, the accused refused to marry her.

19.Considering the evidence of P.W.1, P.W.2 and P.W.5, the appellant/accused had given false promise to marry P.W.1 and had sexual intercourse and subsequently, he refused to marry her. So the evidence of P.W.1, P.W.2 and P.W.5 clearly proved that the appellant/accused by giving false promise to marry P.W.1 had

sexual intercourse with her and subsequently, he refused to marry her. In such circumstances, I am of the view, the prosecution has proved that the appellant/accused had given false promise to marry P.W.1 and had sexual intercourse with her and hence, the ingredients of Section 415 IPC "by deceiving P.W.1 to harm the person in body, which amounts to cheat" have been made out. So the appellant/accused must be convicted for an offence under Section 417 IPC and not for offence under Section 376 IPC. The trial Court has committed an error in convicting the appellant/accused for offence under Sections 376 read with 417 IPC. Therefore, the conviction and sentence passed by the trial Court under Section 376 read with 417 IPC is hereby set aside. The appellant/accused is convicted for an offence under Section 417 IPC and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.5,000/- in default in payment to undergo six months rigorous imprisonment.

20. In respect of charge Nos.1 and 3 are concerned, it is not the case that the appellant/accused without consent of P.W.1 had sexual intercourse with her. So it is appropriate to consider Section 375 IPC, which is extracted hereunder:

"375. Rape. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First: - Against her will.
Secondly: -without her consent.
... ..
... ..
... .. "

21. In Ex.P1 complaint itself, it was specifically stated that since the appellant/accused had given promise to marry P.W.1, she consented for sexual intercourse. But whereas in her chief-examination, P.W.1 stated that without obtaining consent from her, the accused had committed rape on her. It shows that statement of P.W.1 is not wholly reliable.

22. Learned Government Advocate (Crl.side) submits that consent has not been obtained by free will and it is hit by Section 90 IPC. So it is appropriate to extract Section 90 IPC, which is as follows:

"90. Consent known to be given under fear or misconception A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was

given in consequence of such fear or misconception; or

.. ..
.. ..
.. .. "

From the above extract, it is clear that a consent is not a consent as is intended by any section of this Code, has reason to believe that the consent was given. In the case on hand, since the accused is willing to marry P.W.1, she has given consent for sexual intercourse and the same was also mentioned in Ex.P1 complaint. According to ingredients of Section 376 IPC, the accused had sexual intercourse with a woman and such sexual intercourse was under any one of the six circumstances given in Section 375 IPC. But no such circumstance has been proved by the prosecution. So the trial Court without considering the above fact erroneously convicted the appellant/accused for offences under Sections 376 and 376(i) IPC. Hence, the conviction and sentence passed by the trial Court under Sections 376 and 376(i) IPC is hereby set aside and the appellant/accused is acquitted from the charges levelled against him. Since the appellant/accused had already paid the fine amount of Rs.10,000/-, out of which, a sum of Rs.5,000/- is taken as the fine amount for offence under Section 417 IPC and the remaining sum of Rs.5,000/- is ordered to be refunded to the appellant/accused.

23. In fine,

- The Criminal Appeal is partly allowed.
- The conviction and sentence passed by the trial Court for offences under Sections 376 read with 417, 376 and 376(i) IPC is hereby set aside. The appellant/accused is acquitted from the charges levelled against him.
- The appellant/accused is convicted for offence under Section 417 IPC and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.5,000/- in default in payment to undergo six months rigorous imprisonment.
- Since the appellant/accused had already paid the fine amount of Rs.10,000/-, out of which, a sum of Rs.5,000/- is taken as the fine amount for offence under Section 417 IPC and the remaining sum of Rs.5,000/- is ordered to be refunded to the appellant/accused. The appellant/accused is set free.
- Consequently, connected Miscellaneous Petition is closed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

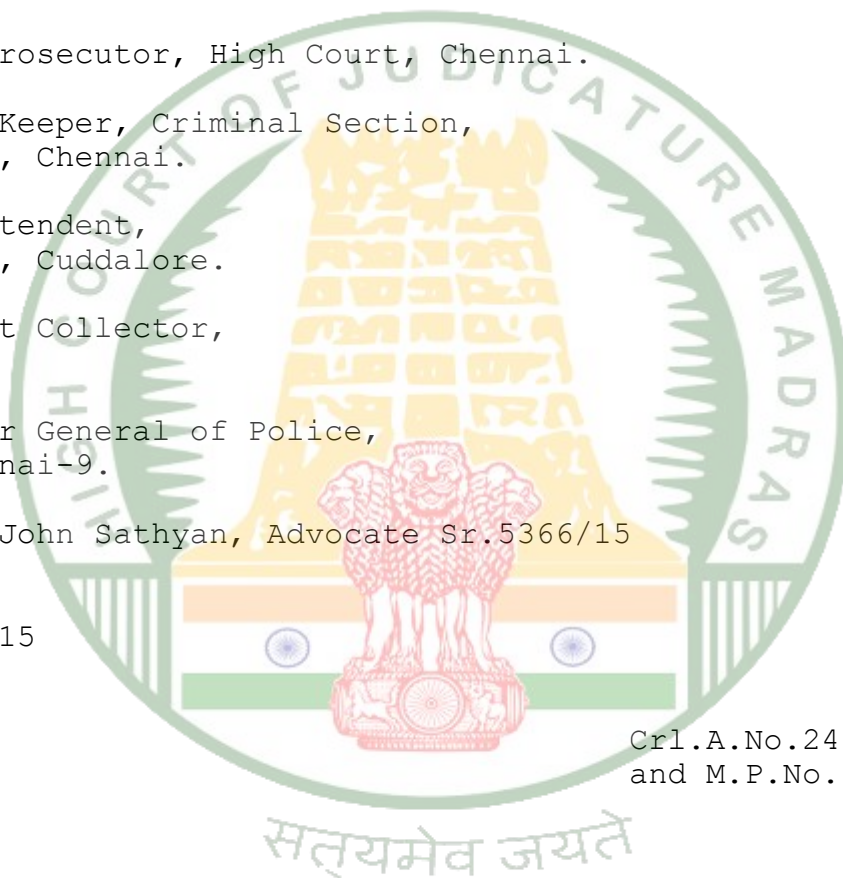
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To

- 1.The Assistant Sessions Court, Nagapattinam.
2. -Do- Thro' Principal Sessions Judge, Nagapattinam.
- 3 The Inspector of Police,
All Women Police Station,
Nagapattinam, Nagapattinam District.
- 4.The Public Prosecutor, High Court, Chennai.
5. The Record Keeper, Criminal Section,
High Court, Chennai.
6. The Superintendent,
Central prison, Cuddalore.
7. The District Collector,
Nagapattinam.
8. The Director General of Police,
Mylapore, Chennai-9.
- +1 CC to Mr.R.John Sathyan, Advocate Sr.5366/15

CO-CA

ths : 21.02.2015



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