

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.08.2016

(Judgment reserved on 23.08.2016)

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBBIAH

Crl.A.No.260 of 2015

and

M.P.Nos.1 and 2 of 2015

Ganesan

... Appellant

Vs.

State rep. by

Deputy Superintendent of Police,

Namakkal.

(Mohanur Police Station,

Cr.No.354 of 2009)

... Respondent

Criminal Appeal filed under Section 374(2) Cr.P.C., against the judgment, dated 25.09.2014 in S.C.No.90 of 2011 on the file of the Principal Sessions Court, Namakkal.

For appellant : Mr.A.S.Baalaji

For respondent : Mr.P.Govindarajan, Addl.P.P.

JUDGMENT

This appeal is filed against the judgment dated 25.09.2014 made in S.C.No.90 of 2011 on the file of the Principal Sessions Court, Namakkal. The appellant/accused is convicted and sentenced by the trial Court as tabulated hereunder:

Sl. No.	Conviction under Section	Sentence of Imprisonment	Fine
1	Section 417 IPC	Simple imprisonment for one year	Rs.1,000/-, in default, to undergo simple imprisonment for one month
2	Section 376(1) IPC	Rigorous imprisonment for ten years	Rs.5,000/-, in default, to undergo rigorous imprisonment for one month

Sl. No.	Conviction under Section	Sentence of Imprisonment	Fine
3	Section 3(2) (v) of the SC and ST (Prevention of Atrocities) Act	Rigorous imprisonment for ten years	Rs.5,000/- in default, to undergo rigorous imprisonment for one month

The trial Court ordered the sentences imposed on the appellant/accused to run concurrently.

2. The case of the prosecution leading to conviction of the appellant/accused is that P.W.1/victim/Jhansirani is a resident of Ranganathapuram, Kalladai Village, Kuzhithalai, Karur District. She is a minor girl, aged about 17 years, belonging to Arundathiar Community, which is notified as a Scheduled Caste. She is the elder daughter of P.Ws.2 and 3 (parents of P.W.1). The wife of the appellant/accused also belongs to the place of P.W.1. The accused Ganesan/appellant, son of Perumal belongs to Ambalakarar Community and he hails from Mohanur Village. The accused was working as Supervisor in a sugarcane field in Mohanur. He called P.Ws.2 and 3, the parents of P.W.1, to Mohanur, to do work in the sugarcane field. Hence, P.Ws.1 to 3 went to Mohanur. P.W.1 was asked to look after the child of the appellant/accused. During night time, the victim used to sleep in the pial of the house belonging to the accused. The accused, taking advantage of the tender age of P.W.1/victim girl, by putting her under threat as well as by giving a false promise that he would marry her, had sexual intercourse with her on several occasions. Further, the appellant has also threatened P.W.1/de-facto complainant/victim girl that if she reveals the factum of sexual intercourse, he would kill her. After four months, P.W.1 returned to her village along with her parents. Thereafter, she went for work in a cotton mill, where, on 03.09.2009, she fainted and fell down. P.W.11 Doctor, from the mill came and tested P.W.1, and found that she was seven to eight months pregnant. P.W.1 came back to her house and informed the same to her parents that the appellant/accused, by giving false promise that he would marry her, had sexual intercourse with her. She also further stated that the appellant threatened her that he would kill her if she reveals the same to anybody. Immediately, the parents of P.W.1, namely P.Ws.2 and 3 took her to Police Station on 09.09.2009 and lodged Ex.P-1 complaint before P.W.18 Inspector of Police, who received the complaint and registered a case in Crime No.354 of 2009 for the offences under Sections 417, 376(1) IPC read with Section 3(2)(v) of the SC and ST Act. Ex.P-15 is the FIR. Thereafter, P.W.18 forwarded the copy of the FIR to the jurisdictional Magistrate and also to his higher officials for

investigation through P.W.19 Head Constable. After two months from the date of complaint, P.W.1 developed labour pain and she was taken to Primary Health Centre of Kaavalkaaranpatty, where she was admitted and where she delivered a still-born male baby. Hence, P.W.12 Doctor of the said Primary Health Centre referred her for further treatment to Trichy Government Hospital along with dead child. In the meantime, the appellant/accused was arrested by P.W.21 Deputy Superintendent of Police, the investigating officer and the appellant/accused was sent to Namakkal Government Hospital on 11.09.2009 through P.W.17 Head Constable to conduct potency test on him. Meanwhile P.W.1 was admitted as in-patient and she was under treatment for five days in Trichy Government Hospital. On 27.10.2009, P.W.19 Head Constable went to Trichy Government Hospital. After getting the requisition from the jurisdictional Magistrate, he sent the leg portion of the deceased child for DNA test. P.W.20, the then Doctor/Professor of Trichy Government College Hospital, on requisition from Deputy Superintendent of Police, Namakkal Division, collected the hand-bones, leg-bones and lungs for DNA test to Regional Forensic Laboratory at Chennai. P.W.21 Deputy Superintendent of Police, Namakkal Division, continued the investigation. He went to the place of occurrence, prepared Ex.P-5 observation mahazar and drew Ex.P-18 rough sketch and examined the witnesses. After completion of investigation and after complying with all formalities, P.W.21 DSP filed charge sheet against the appellant/accused. The case was taken on file in S.C.No.90 of 2011. During the course of trial, P.Ws.1 to 21 were examined and Exs.P-1 to P-18 were marked. When the appellant/accused was questioned under Section 313 Cr.P.C., he denied his complicity in the crime and he neither examined any witness nor marked any document. Upon hearing the submissions of both sides and considering the oral and documentary evidence available on record, the appellant/accused was convicted and sentenced by the trial Court as tabulated above. Challenging the said conviction and sentence, the appellant/accused has filed this appeal.

3. Learned counsel appearing for appellant/accused submitted that though it is the case of the prosecution that the alleged occurrence was said to have taken place six months prior to 09.09.2009 being the date of Ex.P-1 complaint given by P.W.1/prosecutrix, the date of occurrence had not been specifically stated by her in the complaint. But, Ex.P-7 medical report, dated 19.09.2009 issued by P.W.10 Doctor shows that she was 37 weeks pregnant, i.e. P.W.1 was nine month pregnant. Even according to the prosecution case, P.W.1 came to the place of the appellant only six months prior to the date of complaint, whereas, as on 19.09.2009, she was nine month pregnant. When the prosecution case itself is that the appellant was having a sexual intercourse with P.W.1 prior to six months of the complaint, the fact that as on the date of

complaint, P.W.1 was nine month pregnant, would clearly falsify the allegation of P.W.1 that the appellant was regularly having sexual intercourse by threatening her and was responsible for the pregnancy of P.W.1.

4. Learned counsel for the appellant/accused further submitted that the DNA test report Ex.P-13 shows that the result of the test is inconclusive, and therefore, it shows that the parentage of the child could not be proved. Even as per the evidence of P.W.1, the appellant was having sexual intercourse with her regularly, but there was a delay of eight months in preferring the complaint Ex.P-1. This delay has not been properly explained by the prosecution. Even as per the statement of P.W.1, both in her evidence and in her complaint, she was 17 years at the time of commission of the offence. Even assuming for a moment that there was sexual intercourse between them, it should only be by way of consent, since P.W.1 was 17 years and the same would not amount to an offence under Section 376 IPC. For all these reasons, learned counsel for the appellant/accused submitted that the prosecution has miserably failed to prove its case beyond reasonable doubt and he prayed for acquittal of the appellant/accused by setting aside the impugned judgment of conviction and sentence.

5. Per contra, the learned Additional Public Prosecutor appearing for the respondent-Police submitted that the prosecution has proved its case beyond reasonable doubt, by cogent, clinching and convincing evidence and the evidence of P.Ws.1 to 3 themselves is sufficient to show that the appellant/accused, by threatening P.W.1, was regularly having sexual intercourse with her. Learned Additional Public Prosecutor submitted that no infirmity could be found in the evidence of the prosecution witnesses and hence, he prayed for confirming the conviction and sentence and dismissal of the appeal.

6. Keeping in mind the above submissions made on either side, I have given my anxious consideration to the same and perused the materials available on record.

7. It is the case of the prosecution that the appellant/accused brought the victim/P.W.1 to his village Mohanur, along with her parents P.Ws.2 and 3. The appellant was working as Supervisor in the sugarcane field. He brought P.Ws.1 to 3 to his village, stating that he would provide work for them in the sugarcane field. P.Ws.2 and 3 (parents of P.W.1) were regularly going for work of cutting sugarcane. P.W.1 was staying in the house of the appellant and was looking after the appellant's child. According to P.W.1, she used to sleep in the pial of the appellant's house. At that time, by threatening P.W.1, the appellant was regularly having sexual

intercourse. At the same time, P.W.1 has also stated in her evidence that the appellant had sexual intercourse with her by giving false promise that he would marry her. Therefore, it is apparent that the appellant was having sexual intercourse with P.W.1 on several occasions. The evidence on record shows that P.W.1 victim thereafter, i.e. after six months, went from the place of the appellant and worked in a cotton mill, and while she was working, she fainted and fell down. P.W.11 Doctor of the Mill tested her and found that she was seven to eight months pregnant and only thereafter, P.W.1 had chosen to lodge a complaint. There is no proper explanation for the delay in lodging the FIR. Therefore, it is clear that there was a delay of more than six months in lodging the FIR. Hence, in the absence of any proper explanation for an inordinate delay on the part of the prosecution in lodging the FIR, coupled with the fact that P.W.1/prosecutrix and the appellant had sexual intercourse on several occasions, it would clearly show that the prosecutrix/P.W.1 willingly submitted herself to the appellant to have sexual intercourse and had not chosen to lodge the complaint and only when it came to be known that she was seven to eight months pregnant, she had given Ex.P-1 complaint. Even according to the case of the prosecution, she was 17 years old at the time of commission of the offence. But, I find that in order to prove the age of the victim/P.W.1, the Transfer Certificate alone was marked. Hence, the evidence on record would show that knowing fully well that the appellant is a married man, P.W.1 had sexual intercourse with him and the delay in lodging the complaint, has not been satisfactorily explained by the prosecution, which is fatal to the case of the prosecution.

8. In support of his submissions, learned counsel for the appellant relied on a decision of the Supreme Court reported in 2011 (14) SCC 475 (K.P.Thimmappa Gowda Vs. State of Karnataka), wherein, the complaint was filed a few days before the birth of the child and there was a delay of eight months in filing the complaint and the prosecutrix was 16 years old. In the above circumstances, the Supreme Court held as follows:

"5. . . . We are of the opinion that the appellant deserves the benefit of doubt because on a careful consideration of the evidence on record, it cannot be said that the prosecution has been able to prove its case beyond reasonable doubt. In criminal cases, the rule is that the accused is entitled to the benefit of doubt. If the Court is of the opinion that on evidence, two views are reasonably possible, one that the accused is guilty, and the other that he is innocent, then the benefit of doubt goes in favour of the accused."

9. In support of his contentions, learned counsel for the appellant also relied on a decision of the Supreme Court reported in 2008 (14) SCC 763 (Vijayan Vs. State of Kerala), wherein, the Apex Court observed that, had the prosecutrix lodged the complaint soon after the incident, there would have been some supporting evidence like the medical report or any other injury on the body of the prosecutrix so as to show the sign of rape. The Apex Court further observed that it is very dangerous to convict the accused when the prosecutrix could venture to wait for seven months (in that case) for filing the FIR for rape. If the prosecutrix has willingly submitted herself to sexual intercourse and waited for seven months (in that case) for filing the FIR, it will be very hazardous to convict the accused on such oral testimony of the prosecutrix. In that case, in the face of lack of any other evidence, the Supreme Court held that it is unsafe to convict the accused. Moreover, no DNA test was conducted in that case, but in the case on hand, the DNA test of the child showed the result 'inconclusive', which is evident from Ex.P-13 DNA test report. Therefore, the parentage of the child could not be proved.

10. Further, even according to P.W.1, in her evidence and also in her complaint, she was 17 years old at the time of commission of the offence. In order to prove the age of P.W.1, the Transfer Certificate alone was produced before the Court. Moreover, I find that though the case of the prosecution through evidence, is that the appellant had sexual intercourse on giving false promise of marrying her, the evidence on record would show that P.W.1 along with her parents, P.Ws.2 and 3 were brought to Mohanur and P.Ws.2 and 3 were engaged in coolie work in the agricultural field, whereas, P.W.1 was looking after the child of the appellant/accused. Therefore, she is well aware of the fact that the appellant/accused was a married man and inspite of the same, she submitted herself for sexual intercourse on several occasions. But, it is the case of the prosecution that by giving false promise of marrying her, the appellant/accused had sexual intercourse with P.W.1.

11. In the above context, it is worthwhile to notice a decision of the Supreme Court reported in 2003 (4) SCC 46 = AIR 2003 SC 1639 (Uday Vs. State of Karnataka), wherein, the Apex Court held as follows:

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to

agree with the view, but we must add that there is no straightjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

.. . .

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

12. Further, in another judgment of the Apex Court reported in 2016 (4) SCC 140 (Tilak Raj Vs. The State of Himachal Pradesh), the Supreme Court observed as follows:

"16. We have carefully heard on both the parties at length and have also given our conscious thought to the material on record and relevant provisions of the Penal Code, 1860 (in short, "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial Court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of the FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

17. The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the appellant seems to be consensual in nature."

18. As far as conviction of the appellant under Sections 417 and 506 Part I of IPC is concerned, a close scrutiny of evidence of the prosecutrix (PW 2) along with other prosecution witnesses is done by this Court. Section 417 of IPC prescribes punishment for the offence of cheating as defined under Section 415 of IPC. Section 415 of IPC reads thus:

"415. Cheating.--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation.--A dishonest concealment of facts is a deception within the meaning of this Section."

19. The ingredients required to constitute the offence of Cheating have been discussed by this Court

in the case of Ram Jas Vs. State of U.P. (1970 (2) SCC 740) as under:

"(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii) (b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

20. A careful reading of evidence on record clearly shows that there is no evidence against the appellant from which it can be conclusively inferred by this Court that there was any fraudulent or dishonest inducement of the prosecutrix by the appellant to constitute an offence under Section 415 of IPC. For conviction of the Appellant for above said offence, it is important that all the necessary ingredients constituting an offence under the said Section must be proved beyond reasonable doubt. In the instant case, the appellant cannot be convicted for the offence of cheating punishable under Section 417 of IPC as the prosecution has failed to prove all ingredients of the said offence beyond reasonable doubt."

13. Moreover, in the judgment of the Supreme Court reported in 2014 (5) SCC 678 (Vinod Kumar Vs. State of Kerala), the Apex Court held as follows:

"14. We are in no manner of doubt that in the conspectus that unfolds itself in the present case, the prosecutrix was aware that the appellant was already married but, possibly because a polygamous relationship was not anathema to her because of the faith which she adheres to, the prosecutrix was willing to start a home with the appellant. In these promises, it cannot be concluded beyond reasonable doubt that the appellant is culpable for the offence of rape; nay, reason relentlessly points to the commission of consensual sexual relationship, which was brought to an abrupt end by the appearance on the

scene of the uncle of the prosecutrix. Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt. In our deduction there was no seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship."

14. The dictum laid down by the Apex Court in the above said judgments, is squarely applicable to the facts of the case on hand. In the case on hand, P.W.1 knowing fully well that the appellant/accused is a married man, voluntarily and consciously consented to have sexual intercourse with him and her consent was not in consequence of any misconception of fact. Therefore, the question of conviction and sentence imposed on the appellant/accused for the offence under Section 417 IPC does not arise and hence, the same is liable to be set aside. Consequently, the conviction and sentence imposed on the appellant/accused for the offence under Section 376(1) IPC is also liable to be set aside. As no case is made out to convict the appellant/accused for the offence under Section 3(2)(v) of the SC and ST Act, the conviction and sentence for that offence is also not sustainable.

15. Therefore, considering all the above facts, and applying the principles laid down by the Supreme Court in the decisions cited supra, I am of the opinion that the prosecution has not proved its case beyond reasonable doubt that the appellant had sexual intercourse by threatening P.W.1 and even according to P.W.1, the appellant had sexual intercourse on several occasions, but at the time of commission of the offence, she was 17 years old. The evidence on record shows that P.W.1, who had attained the age of understanding the consequences of the act, acted as a consented party to the act of sexual intercourse. Therefore, the benefit of doubt has to be given in favour of the appellant/accused. Hence, the impugned judgment of conviction and sentence are not sustainable and they are liable to be set aside.

16. For the reasons stated supra, the appellant/accused is entitled for acquittal on the ground of benefit of doubt for the following reasons:

(i) There was an inordinate delay in lodging the FIR by the complainant, inspite of the fact that the appellant was having regular sexual intercourse with her for several occasions, which would show that, by consent, the prosecutrix had wilfully submitted herself to the appellant to have sexual intercourse.

(ii) The consent was not in consequence of any misconception of fact and therefore, the benefit of doubt has to go in favour of the appellant.

17. Accordingly, the Criminal Appeal is allowed, setting aside the impugned judgment of conviction and sentence. The appellant/accused is acquitted of the charges framed against him. Pending appeal, since the appellant/accused is in jail, he shall be released forthwith, unless he is required in connection with any other case. The bail bond, if any executed by the appellant/accused shall stand cancelled. The fine amount (s) if paid by him, shall be refunded to them. The Miscellaneous Petitions are closed.

CS

Sd/-
Assistant Registrar (CS-II)
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Sub-Assistant Registrar

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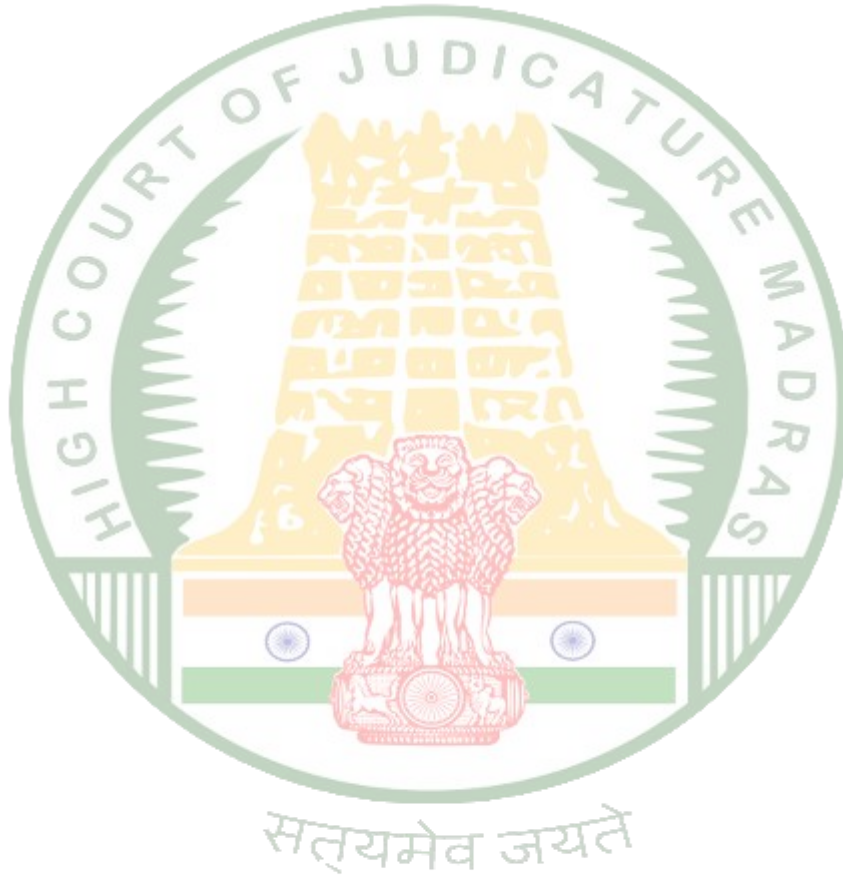
1. The Principal Sessions Judge,
Namakkal.
2. The Public Prosecutor, High Court,
Madras.
3. The Deputy Superintendent of Police,
Namakkal Range, Mohanur Police Station,
(Crime No.354 of 2009)
4. The Record Keeper, Criminal Section,
High Court, Madras.
5. The Superintendent, Central Prison,
Coimbatore.
6. THE JUDICIAL MAGISTRATE NO.II,
NAMAKKAL.
7. THE CHIEF JUDICIAL MAGISTRATE,
ERODE DISTRICT.
8. THE DISTRICT SESSIONS JUDGE,
ERODE DISTRICT.
9. THE DISTRICT COLLECTOR,
ERODE DISTRICT.

10. THE DIRECTOR-GENERAL OF POLICE,
CHENNAI.

+1CC to MR.A.S.BALAJI, Advocate SR.NO.48830

Cr1.A.No.260 of 2015

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