

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 27-01-2016

CORAM:

THE HONOURABLE MR. JUSTICE A. SELVAM

Criminal Appeal No.628 of 2015
and M.P.No.1 of 2015

Sathish Kumar
aged about 25 years
S/o. Akkumarn
No.1/43, Naganampatti
Periampatti, Karimangalam
Dharmapuri

... Appellant

Vs.

The State of Tamil Nadu
Represented by
The Inspector of Police
AWPS Dharmapuri
In Crime No.24 of 2011

... Respondent

Criminal Appeal against the judgment passed by the Fast Track Mahila Court at Dharmapuri in S.C.No.167 of 2014 dated 12-09-2015 by convicting him to undergo the sentence of 10 years Rigorous Imprisonment and to pay fine of Rs.10,000/- in default to undergo Simple Imprisonment for 6 months and to set aside the same.

For appellant :: Mr. A. Natarajan, SC
for Mr. A.Mathumathi
For respondents :: Mr. P. Govindarajan, APP

JUDGMENT

Challenge in this criminal appeal is to the conviction and sentence dated 12th day of September 2015 passed in S.C.No.167 of 2014 by the District and Sessions Court, Fast Track Mahila Court, Dharmapuri.

2. The contraction of the case of the prosecution is that the first accused is the son of the second and third accused. The first accused has given a false hope of marrying the prosecutrix viz., Anu. On 10-06-2011, at about 6:00p.m., the first accused has directed the prosecutrix to come to his sugarcane field and both of them have had carnal copulation. On several occasions, both of them have continued their sexual relationship and consequently, the prosecutrix has become

pregnant. After knowing her pregnancy, on 13-11-2011, the prosecutrix has tried her level best to marry the first accused. Since the first accused has refused to concede the demand of the prosecutrix, she has given a complaint on 13-11-2011 and registered in Crime No.24 of 2011 under Sections 417 and 506(i), IPC.

3. On the receipt of the complaint, the Investigating Officer viz., P.W.10, has taken up investigation. On 27-02-2012, the prosecutrix has given birth to a female child. The Investigating Officer has also made arrangements to conduct DNA test, and accordingly, P.W.9 has conducted the same and filed her report. After completing investigation, the Investigating Officer has laid a final report on the file of the Judicial Magistrate, Palakode and the same has been taken on file in P.R.C.No.5 of 2014.

4. The Judicial Magistrate, Palakode after considering the facts that the offences alleged to have been committed by all the accused are triable by Sessions Court has committed the case to the Court of Sessions, Dharmapuri Division and taken on file in S.C.No.167 of 2014 and subsequently made over to the Trial Court.

5. The Trial Court after hearing arguments of both sides and upon perusing the relevant documents has framed first charge against Section 493, second charge against him under Section 376 and third charge against all the accused under Section 506(i) IPC and the same have been read over and explained to them. The accused have denied the charges and claimed to be tried.

6. On the side of the prosecution, P.Ws.1 to 10 have been examined and Exs-P1 to P9 have been marked.

7. When the accused have been questioned under 313, Cr.P.C. as respects the incriminating materials available in evidence against them, they denied their complicity in the crime. No oral and documentary evidence have been adduced on the side of the accused.

8. The Trial Court after hearing arguments of both sides and upon perusing the relevant evidence available on record has not found the accused Nos.1 to 3, guilty under Sections 506(i), IPC and the first accused has not been found guilty under Sections 493, IPC and ultimately acquitted them. However, the Trial Court has found the first accused guilty under Section 376, IPC and sentenced him to undergo 10 years' RI and also imposed a fine of Rs.10,000/- with usual default clause. Against the conviction and sentence passed by the Trial Court, the present criminal appeal has been preferred at the instance of the first accused as appellant.

9. The consistent case of the prosecution is that the first accused by way of giving false hope and marrying the prosecutrix has started to have coition with her from 10-06-2011 and on several occasions, both of them have had sexual intercourse and due to that, she has become pregnant and after knowing her pregnancy, she approached the first accused to marry her. The first accused has not done the same and all the accused have tried to attack her and consequently, she has given a complaint and after registration of the same, on 27-02-2012, she has given birth to a female child. Even though, the Trial Court has framed as many as three charges against all the accused, the first accused has alone been convicted under Section 376, IPC.

10. The learned counsel appearing for the appellant/first accused has sparingly and also meticulously contended that at the time of alleged occurrence, the prosecutrix has attained 18 years' of age and both the prosecutrix and first accused have had consensual sexual intercourse and in fact, she has not given her consent under "misconception". Under the said circumstances, Section 90 of the Indian Penal Code, 1860 cannot be invoked in the present case. But the Trial Court without considering the nature of consent given by prosecutrix has erroneously found the first accused guilty under Section 376, IPC and therefore, the conviction and sentence passed by the Trial Court are liable to be interfered with.

11. In order to sustain the conviction and sentence passed by the Trial Court, the learned Additional Public Prosecutor has vehemently contended that in the instant case, before having carnal copulation, the accused has given promise of marrying the prosecutrix by way of laying his hands on her head and by way of speaking attractive words and also under misconception, the prosecutrix has given her consent for having sexual intercourse and therefore, the consent given by her cannot be treated as voluntary consent and the Trial Court after considering the overall evidence available on record has rightly invited conviction and sentence against the appellant/accused and therefore, the conviction and sentence passed by the Trial Court are not liable to be set aside.

12. On the basis of the divergent submissions made on either side, the Court has to look into as to whether the consent alleged to have been given by the prosecutrix for having sexual intercourse with the first accused would come within the purview of misconception, as per Section 90, IPC?

13. The learned counsel appearing for the appellant/first accused has drawn the attention of this Court to the following decisions:

(a) In 2003 SCC (Cr1) 775 (Uday Vs. State of Karnataka), the Honourable Supreme Court has dealt with a case of similar factual situation. In fact, the Honourable Supreme Court has followed the decision reported in 1984 Cr1 LJ 1535 = 1983 (2) CHN 290(Cal) (Jayanti Rani Panda Vs. State of W.B.) and in paragraph No.7 of the said judgment it is observed as follows:

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of, fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court' can be assured that from the very inception the accused never really intended to marry her."

From a close reading of the observations made by the Division Bench of Calcutta High Court, it is made clear that the present case is nothing but identical in factual situations, wherein it has been clearly observed that Section 90, IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from very inception, the accused never really intended to marry her.

(b) In 2013 (3) SCC Cri. 464 = 2011 (14) SCC 475(K.P. Thimmappa Gowda Vs. State of Karnataka), the Honourable Supreme Court has dealt with a case of similar situation and ultimately found that the prosecutrix has given a belated complaint and further, since she has given consent and also above 16 years of age, the act of the accused would not come within the purview of the Sections 376 and 417,IPC.

14. In the instant case, for the first time both the prosecutrix and first accused have had a sexual intercourse on 10-06-2011. The specific evidence given by her as P.W.1 is that after 10-06-2011, during weekends both of them have had voluntary sexual intercourse. The complaint in question has been given only on 13-11-2011. Further, on 13-11-2011, an

attempt has been made on the part of the prosecutrix to get married with the first accused.

15. From a close reading of the evidence given by the prosecutrix, it is easily discernible that only with her consent every sexual intercourse has been done.

16. The only point urged on the side of the prosecution is that since the first accused has given promise of marrying the prosecutrix by way of laying his hands on her head, due to misconception, the prosecutrix has given her consent for having sexual intercourse.

17. As per the dictum of the Honourable Supreme Court, there must be a consistent evidence for the purpose of showing that from very inception, the accused has never really intended to marry the prosecutrix.

18. In the instant case, such aspect is totally absent. The specific evidence of the prosecutrix is that after 10-06-2011 during weekends on several occasions, both of them have had sexual intercourse. Since on the side of the prosecution absolutely there is no evidence for the purpose of showing that from inception of episode, the accused has never intended to marry the prosecutrix, the Court cannot come to a conclusion that only under misconception, the prosecutrix has given her consent for having sexual intercourse with the first accused. Since the decisions referred to supra are identical to the facts of the present case, this Court cannot take a different view. Under the said circumstances, the argument advanced by the learned counsel for the appellant/first accused is having merit.

19. The Trial Court without considering the nature of consent alleged to have been given by the prosecutrix has erroneously found the appellant/first accused guilty under Section 376, IPC. In view of the foregoing elucidation of both factual and legal aspects, this Court is of the view that the conviction and sentence passed by the Trial Court are not factually and legally sustainable and the same are liable to be set aside.

20. In fine, this criminal appeal is allowed. The conviction and sentence passed in S.C.No.167 of 2014 are set aside. The appellant/first accused is acquitted. Fine amount, if any paid by him is ordered to be refunded forthwith.

glp

s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

1. The Sessions Judge,
Fast Track Mahila Court,
Dharmapuri.

2. The Inspector of Police
AWPS Dharmapuri
In Crime No.24 of 2011

3. The Superintendent,
Central Prison,
Vellore.

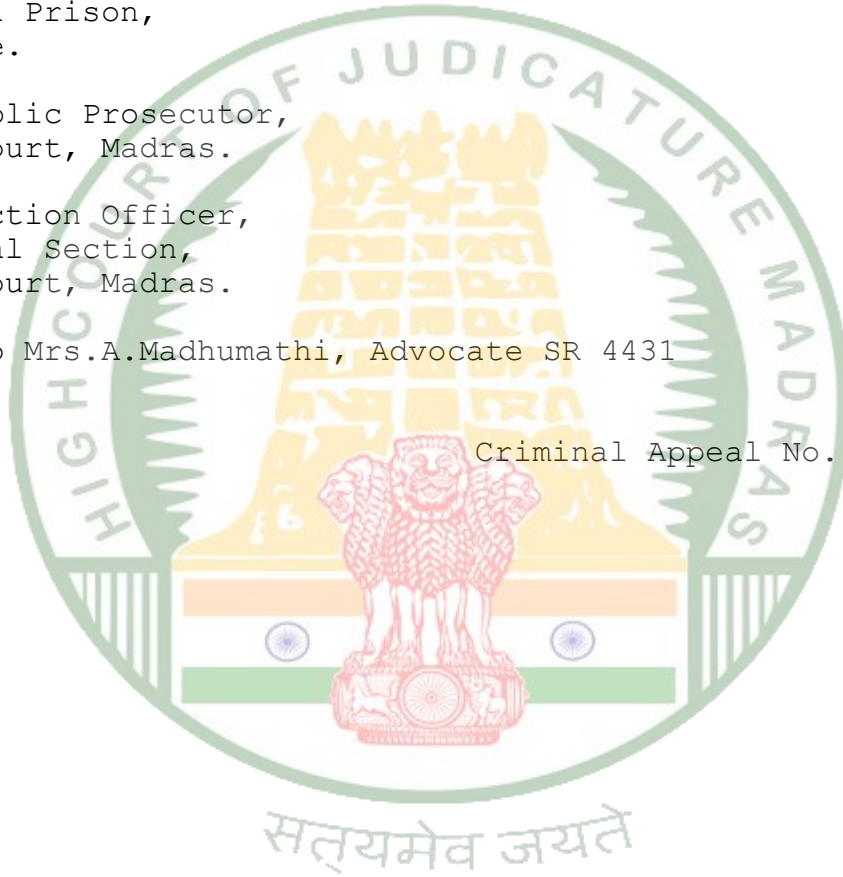
4. The Public Prosecutor,
High Court, Madras.

5. The Section Officer,
Criminal Section,
High Court, Madras.

+ 2 ccs to Mrs.A.Madhumathi, Advocate SR 4431

ksj(co)
prk27/1

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