

Bail Slip

The appellant/Accused namely Gopal, S/o. Nagaraj was released on 30.06.2014 in MP.NO.1/14 in CrI.A.342 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.03.2017

C O R A M

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Criminal Appeal No.342 of 2014

Gopal
S/o.Nagaraj

... Appellant/Accused

-vs-

State by
The Inspector of Police,
Vanur Police Station,
Villupuram District.
Crime No.128 of 2011

... Respondent/Complainant

Criminal Appeal filed under Section 374 of the Code of Criminal Procedure against the judgment of learned II Additional District and Sessions Judge, Tindivanam, Villupuram District, passed in S.C.No.73 of 2013 on 12.06.2014.

For Appellant : Mr.V.Gopinath, senior counsel
for Mr.L.Mahendran

For Respondent : Mr.M.Mohammed Riyaz
Government Advocate [CrI.side]

J U D G M E N T

This appeal arises against judgment of learned II Additional District and Sessions Judge, Tindivanam, Villupuram District, passed in S.C.No.73 of 2013 on 12.06.2014, convicting the appellant/accused for offences u/s.376 and 506(ii) IPC and sentencing him to 7 years R.I. and fine of Rs.10,000/- i/d 6 months S.I. for offence u/s.376 IPC and 6 months R.I. for offence u/s.506(ii) IPC.

2. The case of the prosecution is that when the de facto complainant was in her house, appellant/accused came there, threatened her and forcibly raped her, owing to which the de facto complainant became pregnant. When the de facto complainant

approached the appellant/accused and requested him to marry her, he accepted on condition of her aborting the child. Thereafter, the appellant/accused did not respond and on 16.12.2011, the de facto complainant gave birth to a male child. PW-1 preferred Ex.P1, complaint, on 26.07.2011 at 12.30 p.m. PW-7, Sub Inspector of Police, registered a case in Crime No.128 of 2011 on the file of respondent for offences u/s.376 IPC. Printed First Information Report is Ex.P8 and the same was forwarded to Court. PW-9, Inspector of Police, took up investigation on 26.07.2011, visited the place of occurrence in the presence of PWs.3 and 4, prepared Ex.P11 - Observation Mahazar and Ex.P12 - Rough Sketch. She examined PWs.1 to 4 and others and recorded their statements. He forwarded the victim for medical examination to the Government Hospital after obtaining permission from Judicial Magistrate, Vannur. The requisition letter is Ex.P13. Thereafter, PW-10, Inspector of Police, took up investigation on 30.01.2012. He examined PW-1 and others and recorded their statements. He arrested the accused on 31.01.2012 and remanded him to judicial custody. He sent a requisition to learned Judicial Magistrate, Vannur, towards sending the accused for medical examination. He examined the Scientific Officer, recorded her statement and obtained Ex.P14, report. He examined PWs.5 and 6, Doctors and recorded their statements. He altered the charges to reflect offences u/s.417 and 376 IPC. The alteration report is Ex.P15. Upon completion of investigation and filing of charge sheet informing commission of offences u/s.417 and 376 IPC, the case, upon committal, was tried in S.C.No.73 of 2013 on the file of learned II Additional District and Sessions Judge, Tindivanam, Villupuram District.

3. To substantiate its case, prosecution examined PWs.1 to 10 and marked Exs.P1 to P15. None were examined on behalf of the defence nor were any exhibits marked. On questioning u/s.313 Cr.P.C., the accused denied charges. Learned trial Judge, on appreciation of the evidence, under judgment dated 12.06.2014, convicted the appellant/accused for offences u/s.376 and 506(ii) IPC and sentenced him to 7 years R.I. and fine of Rs.10,000/- i/d 6 months S.I. for offence u/s.376 IPC and 6 months R.I. for offence u/s.506(ii) IPC.

4. Heard learned counsel for appellant and learned Government Advocate [Crl.side] as also perused the records.

5. Case in Crime No.128 of 2011 on the file of respondent has been registered for offence u/s.376 IPC admittedly four months after the occurrence. Although, the complaint would read as if appellant/accused entered the house of complainant/PW-1 and forced himself upon her and that she was forced into silence under threat of appellant/accused doing away with her sister's son, who was being brought up in the house and further that upon her pregnancy coming to the knowledge of family members, appellant/accused promised of marrying her if she aborted the

child and thereafter, appellant/accused kept away, the evidence of PW-1/de facto complainant and PW-2/her mother, in cross, read as follows (translated in English):

'PW-1's cross:

Presently, my age is 27. Accused Gopal was married 10 years ago. I know that. I know about sexual intercourse. I know that an unmarried girl should not indulge in sex. I know that doing so would spoil the family reputation and it would affect the girl more than the boy. I did not say to Doctor that I have indulged in sex on several occasions, during examination. I wrote the complaint, Ex.P1. I did not mention in the complaint the month, date and time of occurrence. During enquiry also, I did not say anything to police. Presently, my father is not well. There are houses around my residence. I said that after consuming poison only, I spoke about the occurrence. I did not mention in the complaint about consumption of poison and did so during enquiry by police. I did not say that the accused entered my house without my knowledge either in the complaint or in the enquiry. I used to see cinemas, but occasionally since there was so much of work to do. I am a daily wage earner. After the occurrence, I did not go to work. I suffered an injury in the chest during the occurrence but I did not mention the same either in the complaint or in the enquiry. I did not say that the accused disrobed me either in the complaint or in the enquiry. I did not say that there were frequent quarrels between me and accused either in the complaint or in the enquiry. Accused used to act in dramas. I have not seen the dramas. My sister is at Villupuram. Accused never went to my sister's house. There was no relationship between my sister Gowri and accused. He would not come to my sister's house. Witnesses Murugan, Sakthivel, are neighbours, Manickam is my mother, Gowri is my sister, Kandan is my sister's husband, Prabhu is my brother. Accused used to come to my house to give weekly wages. After the occurrence, accused has not visited my house. Accused did not belong to my village. He belongs to some other place. There are Panchayatdars and Village Presidents in my village. I know some persons at the work place and at my village. I consumed poison on 8th, I preferred complaint on 26th. On 8th, the day on which I consumed poison, I spoke about the occurrence to others. I did not see the accused for 4 months before consumption of poison and after the occurrence. It is incorrect to state that there was no connection between accused and the present case and that I am falsely stating that the accused raped me under force and threat. It is incorrect to state that if an occurrence had taken

place as projected by me I would not have informed the same for 4 to 5 months. It is incorrect to state that since the accused is an actor, I asked him to marry me. It is incorrect to state that there was no connection between accused and my pregnancy.

PW-2's cross:

Accused used to come to my house frequently. Accused and my daughter used to quarrel at my house. Before one week of consumption of poison, my daughter did not go to work. Before that, she went to work. Till then, accused had taken my daughter to work and dropped her at my house. Accused, as a friend, used to go to my elder sister's house at Villupuram. Before consumption of poison, accused used to come nearby. Thereafter, I have not seen the accused. Before consumption of poison, he used to come to house. I came to know that the accused was the reason for my daughter's pregnancy only through my daughter. I did not know which month my daughter consumed poison. On information given by hospital authorities, police officers at Vaanur Police Station, came to hospital and obtained complaint from me and my daughter. At first we have informed about consumption of poison in the complaint. We have also informed about the pregnancy of my daughter through the accused. At such time, police enquired us. Thereafter, police did not enquire us. Accused is a drama actor. Neither me nor my daughter have seen the drama. My husband has stayed home for four years. He did not go to work. If anybody took him in vehicle, he used to go. Always, he is at home. I used to go to work. My daughter used to go alone along with accused in a tractor to lift bricks for several years. My daughter used to return home in the same tractor, sometimes she used to return home by walk. I have not doubted the accused and my daughter. I thought that the accused treated my daughter in a good manner. I have no guilt complex on sending my daughter for work with a man. When I beat my daughter and asked, she said that there was only a day's relationship between her and accused. I did not ask my daughter when the occurrence took place. After the occurrence, I saw the accused several times. I know that the accused is a married man and is having children. Since the accused is an actor, my daughter asked him to marry her but the accused refused. The accused informed that he would marry my daughter after the child is born. Since the accused refused to marry, we have given a case alleging offence of rape.'

6. PW-5, Doctor, who examined PW-1, issued Ex.P5, Medical Certificate confirming her pregnancy. PW-1 merely informed her

of having indulged in sex and not that she was forced thereinto. PW-1 also informed her of having so indulged on several occasions and while at work. Particularly, she has spoken to PW-1 not informing her of indulgence in sex at home. Consideration of the evidence of PW-5, Doctor and that which is admitted by PWs.1 and 2 in the course of cross-examination reflects indulgence in sexual activities by PW-1 on her own volition and not at her house and further as admitted by PW-2, a false accusation of rape had been made. To the knowledge of both PWs.1 and 2 was the fact that appellant/accused was a married man with children. The evidence on record reveals that upon PW-1 consuming a poisonous substance she was admitted into hospital. As observed by trial Court, it is likely that the fact of PW-1 being pregnant came to the knowledge of PW-1 and her family only upon her admission to hospital but that would not take away from the fact of the case being one of consensual sex between adults. PW-1 was aged 27 at the time of occurrence. It is unfortunate that despite the position of PW-1 having given birth to a male child on 16.12.2011, no records of a DNA test as would establish that appellant/accused is the father of child has been produced. Offence u/s.376 IPC is not made out.

7. The Supreme Court in Deepak Gulati v. State of Haryana [2013 (7) SCC 675] has observed thus:

'21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention

of the accused was mala fide, and that he had clandestine motives.'

8. When PW-1 willingly engaged in sexual indulgence with appellant/accused with the knowledge that he was a married man with children, the claim of her having done so under promise of marriage sounds hollow. Nowhere in her evidence has she stated that appellant/accused promised to divorce his wife towards marrying her. Even her having done so would not carry forward the charge of cheating, as an adult woman ought to have realised the remoteness of such possibility. Thus, while allowing the appeal and setting aside the conviction of appellant, this Court would deem it open to PW-1 to seek maintenance for her minor son through proper legal process. It is expected that any Court dealing with such matter would direct conduct of a DNA test towards establishing parentage and accordingly deal with the matter.

For the aforesaid reasons, this Criminal Appeal shall stand allowed. The conviction and sentence passed by learned II Additional District and Sessions Judge, Tindivanam, Villupuram District, passed in S.C.No.73 of 2013 on 12.06.2014, are set aside and appellant is acquitted of all charges. Fine amount, if any, paid shall be refunded to him. Bail bond(s), if any, executed by him shall stand cancelled.

Sd/-
Assistant Registrar(CS-IX)

//True Copy//

Sub Assistant Registrar

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To

- 1.The II Additional District and Sessions Judge,
Tindivanam, Villupuram District.
2. The Judicial Magistrate No.II, Tindivanam.
- 3.The Public Prosecutor, High Court, Chennai.
- 4.The Inspector of Police,
Vanur Police Station, Villupuram District.
5. The Chief Judicial Magistrate, Villupuram.
6. The Superintendent Central Prison, Cuddalore.

Criminal Appeal No.342 of 2014

PVS (CO)
EU(24/09/2018)