

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 15.06.2017

CORAM

THE HONOURABLE MR. JUSTICE C.T.SELVAM

CRL.O.P.Nos.5905 and 5906 of 2014

and

M.P.Nos.1 and 2 of 2014 (in all cases)

1. Hemant Tiwari

...Petitioner in Crl.OP.No.5905 of 2014

2. Ghanshyam Tiwari

3. Asha Tiwari

4. Ritish Tiwari

... Petitioners in Crl. OP.No.5906 of 2014

vs.

1. State represented by
Inspector of Police,
G3, All Women's Police Station,
Kilpauk, Chennai-10.

2. Pooja Sengupta
No.9, Old No.61,
P.C.Hostel Road, Chetpet,
Chennai-31.
petitions

...Respondents in both the

Prayer in Crl.OP.No.5905 of 2014: Criminal Original Petition filed under Section 482 of Criminal Procedure Code praying to call for the records relating to crime No.03 of 2011 on the file of the G3, All Womens Police Station Kilpauk, Chennai 10 and quash the same.

Prayer in Crl. OP. No.5906 of 2014: Criminal Original Petition filed under Section 482 of Criminal Procedure Code praying to call for the records relating to crime No.03 of 2011 on the file of the G3, Kilpauk Police Station, Chennai 10 and quash the same.

For Petitioners:Mrs.Geetha Ramaseshan

For Respondent :Mr.B.Ramesh Babu,
Govt. Advocate (Crl.Side) for R1

C O M M O N O R D E R

These Criminal Original Petitions seek quash of case registered in Crime No.03 of 2011, on the file of 1st respondent/Inspector of Police, G3, Kilpauk Police Station, Chennai-10.

2. Heard learned counsel for petitioners and learned Government Advocate (Crl. Side) for 1st respondent.

3. In sum and substance, the complaint of second respondent dated 11.05.2011 is that Hemanth/petitioner in Crl.OP.No.5905 of 2014 fell in love with her when she was pursuing her MBA in Melbourne, Australia and they lived together and indulged in consensual sex. She had so indulged under promise of marriage. Towards entering upon marriage, she returned to India on 14.02.2008. Petitioners in Crl.OP.No.5906 of 2014, on 08.03.2008, family members of Hemanth visited Chennai and on 09.03.2008, they along with Hemanth met the 2nd respondents family. Marriage was formally agreed upon. The couple again indulged in consensual sex at Presidency club, Egmore, Chennai. 2nd respondents parents visited Hemanths family at Kanpur and ties were further strengthened. Subsequently, owing to dowry demands, differences arose. On Hemanth being upset with his family members demands for dowry and on his promise to marry her, their relationship resumed. However on finally realizing that he was not serious about marriage, the complaint has been preferred.

4. Learned counsel for petitioners seeking quash of the case submitted the case admittedly was one of consensual sex between consenting grown ups. Learned counsel brought to attention of this court judgment of the Apex Court in Uday v. State of Karnataka, (AIR 2003 SC 1639) paragraph 21 to 26 whereof reads 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 this view, but we must add that there is no strait jacket 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.

22. The approach to the subject of consent as indicated by the Punjab High Court in Rao Har Narain Singh (supra) and by the Kerala High Court in Vijayan Pillai (supra) has found approval by this Court in [State of H.P. vs. Mango Ram](#) (2000) 7 SCC 224. Balakrishnan, J. speaking for the Court observed :-

"The evidence as a whole indicates that there was resistance by the prosecutrix and there was no voluntary participation by her for the sexual act. Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of [Section 375](#) requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

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.

24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the

prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

26. In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 Fourthly and Fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.

5. Learned counsel submitted that on an earlier occasion, investigation has been dropped at the instance of the defacto complainant. However she has subsequently moved petitions in CrI. OP.NO.5905 of 2014 and M.P.No.10344 of 2013 seeking further investigation and which was allowed by the Court below under order dated 16.09.2013. Hence present Criminal Original Petitions became necessary.

6. Learned Government Advocate (crl. Side) submitted that there has been no progress in investigation since second respondent/ Defacto complainant is in Australia and there has been no cooperation from her. However, relying on the counter filed by first respondent he prayed for dismissal of the petitions.

7. This Court would allow the present petitions on the following reasoning:

1. Admittedly, the case is one of consensual sex between grown ups. No offence under section 376 IPC would be attracted.

2. The complaint of the 2nd respondent is most vague and alleges demand of dowry by the family members of Hemanth Tiwari. Investigation in the case has been dropped at her instance on her informing that she lodged a complaint in a hurry and agitated frame of mind.

In passing orders in CrI.O.P.No.1655 of 2014 on 21.07.2014, this Court interalia observed:

" 2. According to the case of the prosecution, the first petitioner is the son of the second and third petitioners and the fourth petitioner is the brother of the first petitioner. It is alleged that the first petitioner was residing in Australia. During that time, the defacto complainant namely Pooja changutha was residing with the first petitioner in living relationship as husband and wife. Then they came to India and they had proposal for marriage on 22.04.2009 but the same was dropped for various reasons. Thereafter, a complaint was made by the defacto complainant, upon which, the present case was registered in the year 2011. During the course of investigation, the defacto complainant reported to the resondent police that the matter had been amicably settled. She also gave statement under section 164 Cr.P.C before the 8th Metropolitan Magistrate, George Town, Chennai. Based on the same, a final report has been filed before the jurisdictional Magistrate on 28.04.2017. Thereafter in the year 2013, the defacto complainant filed CrI.M.P.No.10344 of 2013 before the same Magistrate, requesting the Magistrate to issue a direction for further investigation. The same was allowed on 19.06.2013. In pursuance of the said direction, further investigation was done in the case. During the course of further investigation, there is likelihood of arrest of the petitioners.

.....

5. The fact remains that originally, a case was registered in the year 2011 and the same was referred ' as mistake of fact' on

the basis of the statement made by the defacto complaint. Now, only on the direction given by the Magistrate, subsequently, this case has been registered. "

The criminal justice system is not to be used to satisfy anyone whims and fancies. In any event, the 2nd respondent is not serious about pursuing the complaint.

These Criminal Original Petitions are allowed. The proceedings in crime No.03 of 2011 on the file of the G3, All Womens Police Station Kilpauk, Chennai 10 are quashed. Connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar(CS-VIII)

//True Copy//

Sub Assistant Registrar

jv/rli

To

1. The Inspector of Police,
G3, All Women's Police Station,
Kilpauk, Chennai 10.

2. The Public Prosecutor,
High Court, Madras.

+ 2 ccs to Mr. Bader Sayeed, Advocate SR.42431 & 42432

CRL.O.P.Nos.5905 and 5906 of 2014

SK(CO)
EU(23/11/2017)

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