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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 28.11.2017

PRONOUNCED ON: 18.12.2017

CORAM:

THE HON'BLE MR. JUSTICE P.N. PRAKASH

Criminal Appeal No.749 of 2013

Sivaprakasam

Appellant

vs.

State represented by the
Inspector of Police
All Women Police Station
Dharmapuri District
(Cr. No.5 of 2008)

Respondent

Criminal Appeal filed under Section 374 Cr.P.C. seeking to set aside the judgment dated 11.10.2013 passed by the District and Sessions Judge, Magalir Neethimandram (FTC) at Dharmapuri in S.C. No.135 of 2010.

For appellant : Mr. I. Abrar Md. Abdullah

For respondent : Mr. J. Karuppiah
Additional Public Prosecutor

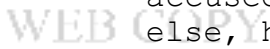
JUDGMENT

This Criminal Appeal has been preferred seeking to set aside the judgment dated 11.10.2013 passed by the District and Sessions Judge, Magalir Neethimandram (FTC) at Dharmapuri in S.C. No.135 of 2010.

2 For the sake of anonymity, the victim girl in this case is referred to as "X".

3 Shorn of the minute details, the case of the prosecution in a nutshell, is as under:

3.1 The victim girl "X", aged about 17 years (at the time of incident) was studying X standard. On 09.07.2007, around 2.00 p.m., the accused, whose relationship with the victim girl "X" is consanguineous (the accused being the brother of the victim girl X's mother), promised to marry her and deflowered her and



3.2 On 07.03.2008, when the victim girl "X" questioned the accused in the village temple about his marriage with someone else, he threatened her and tried to silence her.

3.4 In her complaint (Ex.P.1), the victim girl "X" has stated that the accused used to tease her frequently whenever he came to meet his sister Kavitha, who is her maternal aunt; while so, she had gone to her maternal aunt, Kavitha's house on a particular day and that Kavitha left her in the house saying that she has a work in the market; at that time, the accused came there, bolted the door from inside, switched on the television, kept the television volume high, persuaded her to have sex with him saying that after all, the relationship between them is consanguineous and that he would, for certain, marry her; on that promise, he had sex with her; after the first rendezvous, he continued this relationship with her, but, got married to one Mahalakshmi on 05.03.2008, on coming to know of which, when the victim girl "X" demanded justice, he threatened her.

3.6 The accused who was granted anticipatory bail by the Court was examined by Dr. Satish Kumar (P.W.12), who, in his evidence, has stated that he examined the accused on 26.06.2008 and issued the medical certificate (Ex.P.5), in which, it is stated that the accused is potent.

<https://hcservices.ecourts.gov.in/hcservices/>



3.8 On the transfer of Anbarasi (P.W.14), Inspector of Police, further investigation was taken over by Rathnakumar (P.W.15), Inspector of Police, who, completed the investigation and filed the final report in P.R.C.No.1 of 2010 before the Judicial Magistrate No.II, Dharmapuri under Sections 417, 376 and 506(ii) IPC, against the accused.

3.9 On the appearance of the accused, he was furnished with the copies of the relied upon documents under Section 207 Cr.P.C. and the case was committed to the Court of Sessions in S.C. No.135 of 2010 and was tried by the Sessions Court (Mahila Court), Dharmapuri. Charges for offences under Sections 417, 376 and 506(ii) IPC were framed against the accused and he pleaded not guilty.

3.10 To prove the case, the prosecution examined 15 witnesses and marked 10 exhibits. The accused was questioned about the incriminating circumstances appearing against him under Section 313 Cr.P.C. and he denied the same. The accused examined himself as D.W.1 and marked 2 exhibits.

3.11 After considering the evidence on record and hearing the learned counsel on either side, the Trial Court acquitted the accused for the offences under Sections 376 and 506(ii) IPC, but, convicted him for the offence under Section 417 IPC and sentenced him to undergo one year rigorous imprisonment and to pay a fine of Rs.25,000/-, in default to undergo three months rigorous imprisonment, challenging which, the accused is before this Court.

4 Heard Mr. I. Abrar Md. Abdullah, learned counsel for the appellant/accused and Mr. J. Karuppiah, learned Additional Public Prosecutor appearing for the respondent-State.

5 The learned counsel for the accused submitted as follows:

- that the prosecution have failed to prove that the accused had physical relationship with the victim girl "X";
- that the prosecution have failed to prove the ingredients of cheating under Section 417 IPC;
- that the promise by the accused to marry the victim girl "X" must have been prior to sexual act and any promise made thereafter, could not attract the provisions of Section 417 IPC;
- that Kavitha, maternal aunt of the victim girl



"X", was not examined; and

- that there is no corroboration to the testimony of the victim girl "X".

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6 In support of his submissions, the learned counsel for the accused placed strong reliance on the following judgments:

- Tilak Raj vs. State of Himachal Pradesh [(2016) 4 SCC 140]
- Kaini Rajan vs. State of Kerala [(2013) 9 SCC 113] and
- Zindar Ali Sheikh vs. State of West Bengal and another [(2009) 3 SCC 761]

7 Per contra, the learned Additional Public Prosecutor refuted the contentions put forward by the learned counsel for the accused.

8 The victim girl "X" was aged about 17 years when the incident took place. In the complaint (Ex.P.1) lodged by her, the victim girl "X" has not given the exact date of the incident, but, has stated that a year ago, the accused had ravished her in Kavitha's house. However, in the charge framed by the Trial Court, the date of the incident is given as 09.07.2007 at 2.00 p.m. In her evidence before the Court, the victim girl "X" has stated that on 02.03.2007, around 2.00 p.m., when she was alone in Kavitha's house, the accused came there, bolted the door from side, switched on the television, increased its volume, cajoled her to have sex with him on the promise of marrying her, lifted her underskirt and forcibly had sex with her; thereafter, he promised that he would marry her and continued to have sex with her in Kavitha's house. She has further stated that on one occasion, when they were in a compromising position in Kavitha's house, they were caught by Kalaivani (P.W.7) and Kaveri Ammal (P.W.8). She has further deposed that she came to know that the accused got married to Mahalakshmi and when she questioned the accused near the temple, he intimidated her and thereafter, she lodged the complaint (Ex.P.1) to the police.

9 It is to be noted that she gave evidence before the Trial Court on 19.01.2012 in respect of the incident that is said to have taken place in the year 2007. She was not cross-examined by the accused on the same day. She was recalled and was cross-examined on 23.01.2012. When she was asked as to why she did not tell her parents about the incident, she stated that it was due to fear that she did not tell her parents. A few contradictions in her evidence and the police statement were



elicited which are not of substantial importance and it was suggested to her that the accused did not have any physical relationship with her and that since the accused was rich, she wanted to get married to him and therefore, she had foisted a false case on him. In the examination by the Court, the victim girl "X" has stated that she is now married and also has a child and is living with her husband and child. This shows that there are still brave hearts in our country, which is essentially a patriarchal society, who are willing to give life to a deflowered girl and stand by her to fight for justice, however long, the legal battle gets drawn.

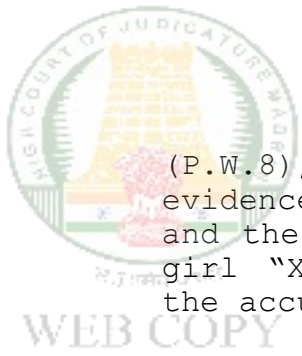
10 Kalaivani (P.W.7), in her evidence, has stated that four years ago (she gave evidence on 19.01.2012), when she and Kaveri Ammal (P.W.8) were passing by the house of Kavitha, she heard a loud TV noise from Kavitha's house and hence, peeped into the window and found the victim girl "X" and the accused in a compromising position; she knocked the door which was opened by the victim girl "X"; when she questioned the victim girl "X", she told her that the accused is going to marry her and that is why, she was having sex with him. In her cross-examination, Kalaivani (P.W.7) has stated that she saw the incident at 7 p.m. She has further stated that she informed the parents of the victim girl "X" about this incident.

11 Kaveri Ammal (P.W.8), in her evidence, has stated that she lives in the neighbourhood and four years ago, when she and Kalaivani (P.W.7) were crossing the house of Kavitha, she heard a loud TV noise from her house and when she peeped in, she saw the duo in a compromising position and that she informed this to the mother of the victim girl "X" immediately.

12 In the cross-examination, when Kaveri Ammal (P.W.8) and Kalaivani (P.W.7) were questioned as to whether any panchayat was done in the village to settle the issue, they answered in the negative.

13 The learned counsel for the accused contended that according to the victim girl "X", the incident had taken place on 02.03.2007, but, in the charge, the date of the incident is given as 09.07.2007 and the victim girl "X" had lodged the complaint only on 07.03.2008; but, Kalaivani (P.W.7) and Kaveri Ammal (P.W.8) who are concededly relatives of the victim girl "X", have stated that the police were informed about this three months after the incident and this evidence of Kalaivani (P.W.7) and Kaveri Ammal (P.W.8) is not in consonance with the date of the complaint.

14 On a careful perusal of the evidence of the trio, viz., the victim girl "X" (P.W.1), Kalaivani (P.W.7) and Kaveri Ammal



(P.W.8), it is seen that there is a ring of truth in their evidence with regard to the physical affair between the accused and the victim girl "X". It must be remembered that the victim girl "X" (P.W.1), Kalaivani (P.W.7), Kaveri Ammal (P.W.8) and the accused are all relatives and hail from the same community.

15 It is customary in several Tamil communities to give the daughter in marriage to her maternal uncle and in fact, violent consequences may also ensue, if the maternal uncle is ignored and the girl is given in marriage to an outsider. This idea is sown in the minds of both the girl and the consanguineous relative even at an early stage of their life. This prevalent custom must be borne in mind while appreciating the evidence of witnesses from rural Tamil Nadu. In such perspective of the matter, the evidence of the victim girl "X" that the accused took advantage of the consanguineous relationship between them and by promising that he would, for certain, marry her, had sex with her, cannot be easily rejected.

16 The incident in question had taken place in the year 2007 and the Indian Penal Code was amended only with effect from 03.02.2013. By the said amendment, the age of consent was raised to 18 and hence, it could not have been made applicable for the accused.

17 In Tilak Raj (supra) relied upon by the learned counsel for the accused, the facts are as under:

"12. The counsel further vehemently contended that the High Court has failed to appreciate certain facts, namely, the age of the prosecutrix at the time of the incident was about 40 years i.e. approximately 10 years more than that of the appellant. Further, she was a government servant at the time of the incident and in number of cases she was appointed as Protection Officer under the Protection of Women from Domestic Violence Act, 2005. Further, the prosecutrix was in relationship with the appellant for about two years prior to the alleged incident. All the aforesaid facts render the prosecution version completely unbelievable that the appellant established physical intimacy with the prosecutrix on the false pretext of marriage. Therefore, the impugned judgment and order is liable to be set aside by this Court."

In the above case, the prosecutrix was 40 years old and was ten years older than the accused. But, in the case at hand, the victim girl "X" was aged 17 years and the accused was 24 years old at the time of the incident.



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18 In Zindar Ali Sheikh (supra) relied upon by the learned counsel for the accused, the Supreme Court has held as under:

"26. We cannot, however, persuade ourselves to agree with the High Court about the offence of cheating. The evidence about the cheating is of slipshod nature and not believable. It is also self-effacing. After all, the first act of the sexual intercourse was without the consent and the accused had thereby committed rape, however, the version that he gave a marriage promise would really go against the prosecution whereby it would mean that the subsequent acts were done with the consent of the girl on account of the promise of marriage. We do not think that such could be the approach. After all, if the promise of marriage was given and the girl had succumbed on that account, by itself, may not amount to cheating. Besides this, the girl has very specifically stated that even subsequently she was ravished against her wishes. Therefore, the theory of promise of marriage and the consent for sexual intercourse will wither away. We, therefore, acquit the accused of the offence under Section 417 IPC."

19 In the above case, the Supreme Court confirmed the conviction for the offence under Section 376 IPC, though had acquitted the accused for the offence under Section 417 IPC. Whereas, in the case at hand, it is the other way round. The prosecutrix in that case was working as a weaver and the accused is said to have ruined her while she was returning home. In the case at hand, the accused, a 24 year old man, had played with the life of a 17 year old X standard student to make her succumb to his carnal pleasure by taking advantage of their consanguineous relationship. The victim girl "X" also believed that the accused would marry her and that is why, when she was caught by Kalaivani (P.W.7) and Kaveri Ammal (P.W.8), she told them that the accused had promised to marry her.

20 From a careful analysis of the evidence of Kalaivani (P.W.7) and Kaveri Ammal (P.W.8), this Court is of the view that they had not seen the accused and the victim girl "X" when they were in a compromising position on the first occasion. They have caught the duo only on a subsequent occasion and soon after that, they have informed the matter to Annapoorani (P.W.3), the mother of the victim girl "X". After the cat was out of the bag, the possibility of the victim girl "X" being subjected to abuse by the accused would not have been there.

21 In Kaini Rajan (supra) relied upon by the learned counsel for the accused, the issue was whether misconception of fact would come within the meaning of Section 90 IPC and hence,



the said judgment cannot be of much avail to the appellant.

22 The evidence of Kaveri Ammal (P.W.8) that she saw the incident at 7 p.m. does not run counter to the evidence of the victim girl "X", because, the latter has stated that the first act had taken place on 02.03.2007 at 2 p.m. At that time, the duo was not caught. She has stated in her evidence that on a subsequent occasion, when they were in a compromising position in Kavitha's house, they were caught by Kalaivani (P.W.7) and Kaveri Ammal (P.W.8). Therefore, Kalaivani (P.W.7) and Kaveri Ammal (P.W.8) are not the witnesses for the first incident, but, they are witnesses for the subsequent incident, after which, they informed the matter to Annapoorani (P.W.3), the mother of the victim girl "X".

23 The learned counsel for the accused contended that the accused examined himself as D.W.1 in order to show that a false case was foisted against him by the police in Cr. No.266 of 2008, in which, he was acquitted by the Judicial Magistrate No.II, Dharmapuri in C.C. No.181 of 2008.

24 Normally, it is not necessary for the accused to get into the witness box by waiving his right of silence under Section 315 Cr.P.C. and in this case, the accused has waived his right of silence and got into the witness stand and has not spoken anything about the charge against him, but, has merely stated that on 27.02.2008, on the complaint of one Masilamani, the police had registered a case in Cr. No.266 of 2008, in which, a charge sheet was filed against him and 6 others for offences under Sections 147,148,294(b) and 506(ii) IPC, in which, he was acquitted.

25 The learned counsel for the accused contended that the case in Cr.No.266 of 2008 was registered against the accused only in respect of an incident relating to the victim girl "X". However, neither the victim girl "X" nor her parents was examined as witness in the prosecution in C.C. No.181 of 2008 and that is why, in the cross-examination of the accused, the Public Prosecutor, has posed only one question suggesting that Exs. D.1 and D.2 have no relevance to the present case.

26 At the risk of repetition, the accused has not uttered a word about the allegation made by the victim girl "X", but, has merely marked two documents without anything more. Thus, neither the evidence of the accused nor Exs.D1 and D2 marked by him, could, in any way, improve his case. In the opinion of this Court, the evidence of the victim girl "X", establishes the commission of the offence under Section 376 IPC, but, since the State has not preferred any appeal against acquittal, this Court is helpless.



In the result, this Criminal Appeal fails as being devoid of merits and is accordingly dismissed. The bail bond executed by the appellant/accused is cancelled. The Trial Court is directed to secure the custody of the appellant/accused and send him to prison to suffer the remaining sentence imposed on him.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

cad

To

- 1 The Inspector of Police
All Women Police Station
Dharmapuri District
- 2 The District and Sessions Judge
Magalir Neethimandram (FTC)
at Dharmapuri
- 3 The Public Prosecutor
High Court of Madras
Chennai 600 104

+1cc to M/s.I.Abrar Md Abdullah, Advocate, S.R.No.90038

Cr1. Appeal No.749 of 2013

KAN(CO)
RRK(24/01/2018)