

Bail Slip

The Appellant/Sole Accused, namely Seenuvasan S/o. Anandan be and hereby is directed to be released on bail as per order of this Court dated 01.08.2011 made in CRL MP.NO.1/11 IN CRL A.NO.442/2011 on the file of this Hon'ble court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.12.2018

CORAM :

THE HONOURABLE MR. JUSTICE P.N. PRAKASH

Crl.A.No.442 of 2011
and
Crl.M.P.No.17614 of 2018

Seenuvasan ... Appellant/Sole Accused

Vs

State rep. by its
Inspector of Police,
Nellikuppam Police Station,
Cuddalore. Respondent
Crime No.914/07

Prayer : Criminal Appeal filed under Section 374(2) Cr.P.C., praying to call for the records and to set aside the judgment and sentence dated 29.06.2011 passed by the learned Principal Sessions Judge, Cuddalore in S.C.No.48 of 2009, by allowing this Criminal Appeal.

For Appellant : Mr.Om Sai Ram

For Respondent : Ms.P.Kritika Kamal
Government Advocate (Crl. Side)

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J U D G M E N T

This Criminal Appeal has been filed to call for the records and to set aside the judgment and sentence dated 29.06.2011, passed by the Principal Sessions Judge, Cuddalore in S.C.No.48 of 2009.

2.It is the case of the prosecution that the appellant deflowered Jothilakshmi (P.W.1) on the promise of marrying her and reneged; on the complaint (Ex.P1) lodged by Jothilakshmi (P.W.1), Vijayakumar (P.W.18) Inspector of Police, Nellikuppam Police Station,

registered a case in Crime No.914 of 2007, on 09.04.2007, for the offences under Sections 417 & 376 IPC r/w. Section 3(1)(xii) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for brevity 'SC & ST Act'), against the appellant and prepared the printed FIR (Ex.P13); Stephen Jesupatham, (P.W.19), Deputy Superintendent of Police, Panruti, took up the investigation of the case in Crime No.914 of 2007; went to the place of occurrence and prepared the Observation Mahazar (Ex.P2) in the presence of one Gunasekaran (P.W.6) and Jeganathan (not examined); he prepared the rough sketch (Ex.P14); he recorded the statements of various witnesses and applied to the Tahsildar, Panruti, for the issuance of community certificate for the appellant and Jothilakshmi (P.W.1); Luke, (P.W.11), the Tahsildar, issued community certificate (Ex.P3) stating that, the appellant belongs to Padayachi community (caste Hindu) and Jothi Lakshmi (P.W.1) belongs to Adi Dravidar community, falling within the meaning of SC & ST Act; he arrested the accused on 22.12.2007 and produced him before the jurisdictional Magistrate, for judicial custody; he made an application (Ex.P15) to the Judicial Magistrate No.I, Cuddalore, for sending Jothilakshmi (P.W.1) for medical examination; Jothilakshmi (P.W.1) was medically examined by Dr.Vidya (P.W.13) and radiological test was conducted by Dr.Natarajan (P.W.15), who has determined the age of P.W.1 as 'completed 17 years and not completed 18 years', vide Ex.P8; Avinesh Kumar (P.W.20), Deputy Superintendent of Police, continued the investigation further and made arrangements to have the appellant medically examined by Dr. Srinivasan (P.W.16), who, in his evidence, as well in the report Ex.P12, has stated as follows:-

'Opinion :

- (1) He is of about 25 years of age by appearance and by his word. Final opinion pending Radiologist opinion.
- (2)(3) There is nothing to suggest that the abovesaid person is impotent.
- (4) There is no sign of recent intercourse.'

3. After examining the doctors and collecting the reports, Avinesh Kumar (P.W.20) completed the investigation and filed final report, for the offences under Sections 417 & 376 IPC and Section 3(1)(xii) of SC & ST Act, before the Judicial Magistrate No.I, Cuddalore in PRC No.42 of 2008. On the appearance of the appellant, he was supplied with the copies of the relied upon documents and the case was committed to the Court of Session (Special Sessions Court constituted under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act, 1989). The trial Court framed charges for the offences under Sections 417 & 376 IPC and Section 3(1)(xii) of SC & ST Act, against the appellant. When questioned, the

appellant pleaded 'not guilty'. To prove the case, the prosecution examined 20 witnesses and marked 15 Exhibits. When the appellant was questioned under Section 313 Cr.P.C., about the incriminating circumstances appearing against him, he denied the same. No witness was examined, nor any document marked, on the side of the appellant.

4. After considering the evidence on record and hearing either side, the trial Court acquitted the appellant of the offences under Section 376 IPC and Section 3(1)(xii) of SC & ST Act, but, convicted him of the offence under Section 417 IPC and sentenced him to undergo one year rigorous imprisonment, challenging which, the appellant is before this Court.

5. Heard Mr. Om Sai Ram, learned counsel for the appellant and Ms. P. Kritika Kamal, learned Government Advocate (Crl. Side) for the respondent police.

6. The following facts have been established beyond cavil in this case:

- (a) Jothilakshmi (P.W.1) was around 17 years of age, when the appellant developed relationship with her;
- (b) the appellant is a caste Hindu, whereas, Jothilakshmi (P.W.1) is a dalit;
- (c) they both belong to the same village;
- (d) the appellant was around 25 years old, during the incident;

7. The learned counsel for the appellant contended that the appellant and Jothilakshmi (P.W.1) were in deep love and the appellant had no intention of cheating her. However, on account of caste differences, the appellant was not able to marry Jothilakshmi (P.W.1). In support of this contention, he placed strong reliance on the judgment of the Supreme Court in Uday v. State of Karnataka reported in (2003) 4 SCC 46, wherein, the Supreme Court has acquitted the accused therein, of the offence under Section 376 IPC, by holding that the prosecutrix had willingly submitted herself to the accused, as they were in deep love. In that judgment, Section 90 IPC "misconception of fact" has been discussed and it has been held that, the consent given by the prosecutrix therein, will not be vitiated by the principle of misconception of fact. This case is not a thumb rule for the proposition that, promise of marriage followed by physical affair will not attract Section 376 IPC. Uday v. State of Karnataka cited supra, has been considered subsequently by the Supreme Court in Yedla Srinivasa Rao v. State of A.P. reported in (2006) 11 SCC 615 and held as follows:-

conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence.''

Yedla Srinivasa Rao v. State of A.P. (supra) has been approved by the Supreme Court in State of Uttar Pradesh v. Naushad reported in (2013) 16 SCC 651.

8. In the opinion of this Court, no further discussion on this aspect is necessary, because the appellant in this case has been acquitted of the offence under Section 376 IPC and the State has also not filed appeal, against the acquittal of that charge. Therefore, any further discussion will only be academic. However, in criminal cases, stare decisis will have very less application, because, facts will invariably differ between cases.

9. Coming to the conviction of the offence under Section 417 IPC, Mr. Om Sai Ram contended that, for attracting Section 417 IPC, there should be deception at inception and that element is missing in this case and hence, the appellant deserves to be acquitted.

10. To appreciate this contention, it may be necessary to scrutinize the evidence of Jothilakshmi (P.W.1). She has stated that two years earlier, she (P.W.1) worked as load-woman in the tipper lorry of the appellant, along with Chitra (P.W.3), Vatchala (P.W.4), Bhuvaneswari (P.W.5) and one Rajam (not examined); on one day, the appellant called her (P.W.1) for a building demolition work and took her to a secluded place, behind a petrol bunk and had sex with her; before that, he promised that he will surely marry her and he will not abandon her and saying so, he had sex with her; he also had sex with her in a Motorshed in Viswanathapuram and in other places, until she became pregnant; when she informed the appellant of this, and asked him to marry her, he told her that he will marry her in the Thiruvanthipuram Temple and asked one Renu (P.W.17) to bring her (P.W.1) to the house of Rama (P.W.10) and accordingly, Renu (P.W.17) and she (P.W.1) went to the house of Rama (P.W.17) at about 6.00 p.m and waited there; on the next day, the appellant took her (P.W.1) with Renu (P.W.17) and Rama (P.W.10) to Sujatha Hospital, Cuddalore, and made her to undergo abortion, by saying that, he would marry her, only after she aborts the child; he promised her that he would marry her, after she undergoes abortion, for which, she agreed and underwent the process; after that, he left her at

Panruti Bus Stop and thereafter, did not turn up; she went home and informed her parents; her parents and other relatives went to the house of the appellant; on seeing them, the appellant jumped over the compound wall and ran away; the appellant's father promised that, in a week's time, he would come up with a decision; even after passing of a week, there was no news from the family of the appellant, so she went and sat dharna at the door-step of the appellant, after which, a police case was lodged against her; since, the appellant did not come forward to marry her, she had no other option but to lodge a complaint to the police. In the cross-examination, she admitted that, she was in deep love with the appellant and so, she had sex with him, several times. It was suggested to her that the appellant had compensated her, for having had sex with her, which she denied. This tenor of the cross-examination, clearly shows that, the accused had not denied the affair, he has had with P.W.1.

11.Mr. Om Sai Ram contended that, the evidence of P.W.1 shows that, she voluntarily had sex with the appellant, since, she was in deep love with him, and not because the appellant promised to marry her. As pointed out by the Supreme Court in Yedla Srinivasa Rao v. State of A.P. (supra), this Court has to assess the evidence of P.W.1, from the surrounding facts.

12.As stated above, Jothilakshmi (P.W.1) was an ordinary farm labourer and when she was in her adolescence, she came into contact with the appellant, who employed her in his tipper lorry. The appellant was around 25 years old and was economically affluent than P.W.1. P.W.1 has clearly stated that, on one day, the appellant took her for a job, saying that there is demolition work; she accompanied him and the time then was 8.00 p.m; she did not find anyone else; the appellant took her in his motor-cycle to a desolate place, behind Karamanikuppam Petrol Bunk, promised her that he will marry her and persuaded her to have sex with him; thereafter, he continued to have sex with her, at various places, until she became pregnant.

13.Mr. Om Sai Ram submitted that, the proof of pregnancy has not been properly established, because Dr.Vidya (P.W.13), who had examined P.W.1 has stated that, she found no indication of recent abortion.

14.Refuting this contention, the learned Government Advocate (Crl. Side), submitted that, Dr. Sulochana (P.W.14) has stated that, she performed abortion on P.W.1, on 01.12.2007, but Dr.Vidya (P.W.13) examined P.W.1 only on 23.12.2007 and it is in the evidence of Dr.Vidya (P.W.13) that, the tenderness of uterus, which is the indication of abortion, will be

available only for about 15 days, after abortion. In this case, the abortion was on 01.12.2017 and Dr.Vidya (P.W.13) examined P.W.1 only on 23.12.2007, and hence, there would not have been any trace of abortion, at that time.

15.In the opinion of this Court, there is no reason for Dr.Sulochana (P.W.14) of Sujatha Hospital, to depose falsely that P.W.1 had undergone abortion in her hospital, on 01.12.2007.

16.Unlike in western societies, where couples would have intense love for each other and still remain without marrying, by opting to have live-in-relationships, in the Indian context, intense love is a precursor for marriage, especially in the countryside, where live-in-relationships between unmarried persons would have had no takers in the year 2007. That apart, the English word 'Love' is used both for fhjy; and md;g[. Thus, there is a deficiency in the English language on this aspect. P.W.1 has used the word 'fhjy;' in her testimony. This tamil word is normally used to refer to a relationship between a boy and a girl who believe that it would end in their marriage. In this case, P.W.1 believed that their relationship with the appellant would end in their marriage and that is why, she gave herself to him. Unfortunately, the appellant did not share that intention. Therefore, this Court has no hesitation in concluding that the appellant had seduced P.W.1, by falsely promising to marry her.

17.The appellant, who was 25 years old, having his own lorry busines, would have surely known about the caste equations obtaining in the village, before promising P.W.1 that he would marry her. Had the appellant firmly stood his ground, against the wishes of his parents and kinsmen, then, this Court may have the material to infer that, he had not made any false promise. On the contrary, after abortion, when P.W.1 and her family members went to the house of the appellant, to speak to his parents, the appellant jumped over the compound wall and ran away.

18.In the cross examination of P.W.1, the appellant has had the temerity to suggest to her that, he had given compensation for having had sex with her, which only shows the low regard, he had for her. She (P.W.1) loved him intensely, but, he only wanted her body for satiating his lust.

19.Initially, P.W.1 had deposed in chief and cross against the appellant and thereafter, she was recalled by the appellant, by filing CrI.M.P.No.5279 of 2009, under Section 311 Cr.P.C, for further cross examination. In the further cross-examination, P.W.1 has stated that, she was 20 years old at the time of the incident and the appellant

was also firm in marrying her. She has even stated that she is married to the appellant and is now living with him.

20.Since, the trial Court had not considered this portion of the evidence, the learned counsel for the appellant called the attention of this Court to this, and submitted that, the appellant deserves to be acquitted. At the first blush, this argument did sound appealing to this Court.

21.However, this Court wanted to satisfy its judicial conscience, as to whether, the appellant had really married P.W.1. or not. Therefore, this Court directed the appearance of P.W.1. P.W.1 appeared before this Court and stated that, the appellant induced her to depose like that, but, in reality, even after deposing, he did not marry her. Hence, this Court exercised the powers under Section 390 Cr.P.C and recorded the evidence of P.W.1.

22.Jothilakshmi (P.W.1), in her evidence before this Court, on 19.12.2018, stated that, it was the appellant, who persuaded her to depose before the trial Court that he has married her, by promising to marry her, after his acquittal. She was subjected to cross-examination by the counsel for the appellant and in the cross-examination, she re-iterated her earlier stand. When the appellant was questioned by this Court under Section 313 Cr.P.C., in respect of the additional evidence, he denied the same. Thus, it is clear that, the appellant has not married P.W.1, whereas, when P.W.1 was recalled at the instance of the appellant before the trial Court, under Section 311 Cr.P.C, and was subjected to cross-examination, she has stated that the appellant had married her. Though, P.W.1 is liable for perjury, this Court is not inclined to take action for perjury, against her, because, she is an unfortunate victim of the fraud, played by the appellant.

23.In this case, there are sufficient materials to hold the appellant guilty of the offence under Section 376 IPC, in the light of the law laid down by the Supreme Court in Yedla Srinivasa Rao v. State of A.P. (supra) and State of Uttar Pradesh v. Naushad (supra). Since, the State has not filed any appeal against the acquittal of the charge under Section 376 IPC, the hands of this Court stands tied. The only option open to this Court is, to rue and lament and nothing more.

24.In the result, the appeal is devoid of merits and stands dismissed. Consequently, connected Miscellaneous Petition is closed.

The trial Court is directed to take the appellant into custody and commit him to prison, for undergoing the sentence.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

ssm/mkn
To

1.The Principal Sessions Judge,
(Special Sessions constituted under the Scheduled Caste and Scheduled Tribes (Prevention of Atrocities) Act)
Cuddalore.

2.The Judicial Magistrate no.I,Cuddalore.

3.do thro'Chief Judicial Magistrate ,Cuddalore.

4.The Inspector of Police,
Nellikuppam Police Station,
Cuddalore.

5.The Public Prosecutor,
High Court, Madras.

+2ccs to Mr. Mr.Om Sai Ram, Advocate SR.No. 89802

Crl.A.No.442 of 2011 and
Crl.M.P.No.17614 of 2018

A.SK(06/02/2019)

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