



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 04.04.2018

Date of Reserving the Order	Date of Pronouncing the Order
30.11.2017	04.04.2018

CORAM :

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Crl.R.C.(MD). No.914 of 2007

Amali Arockia Selvi ... Petitioner/P.W.1/Complainant

-vs-

1.Maria Michael @ Michael ... Respondent / Accused

2.The State

rep.by the Inspector of Police

Ilayankudi Police Station

Sivagangai District.

(Crime No.255 of 2003) ... Respondent / Prosecuting Agency

PRAYER : Criminal Revision Petition is filed under Section 397 r/w 401 of Criminal Procedure Code, against the Judgment, dated 12.09.2007, made in S.C.No.121 of 2006, on the file of the Chief Judicial Magistrate-cum-Assistant Sessions Judge, Sivagangai.

For Petitioner : Mr.R.Gowri Shankar

For Respondents : Mr.C.Jeyaprakash for R1

Mr.C.Ramesh

Additional Public Prosecutor for R2

O R D E R

The petitioner / complainant has filed this revision, challenging the Judgment, dated 12.09.2007, made in S.C.No.121 of 2006, on the file of the learned Chief Judicial Magistrate-cum-Assistant Sessions Judge, Sivagangai, acquitting the first respondent / accused from the charges framed against him under Sections 417 and 376 I.P.C.

2. The case of the prosecution is that on 24.04.2003, at 6.00 p.m., when the petitioner / de facto complainant was alone in her house, the first respondent/ accused went inside her house and after locking the doors inside, raped her and thereafter, he gave assurance that he would marry her. However, subsequently, the first respondent/ accused had refused to marry her and thereby, the first



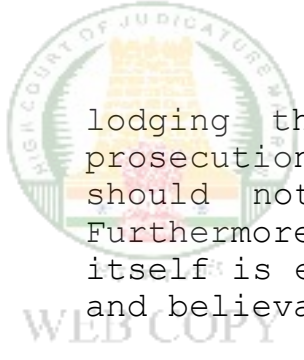
respondent / accused had committed the offence punishable under Sections 417 and 376 I.P.C. Subsequently, on 30.06.2003, with regard to the said incident, the petitioner / de facto complainant lodged a complaint before the respondent - Police.

3. The respondent - Police, based on the said complaint, registered a case in Crime No.255 of 2003 under Sections 417 and 376 I.P.C., and after thorough investigation, filed a final report before the learned jurisdictional Magistrate, who had taken cognizance of the final report in P.R.C.No.8 of 2004 and inasmuch as the offence punishable under Section 376 I.P.C., being triable exclusively by the Court of Sessions, the learned Judicial Magistrate, after furnishing the copy of the documents relied on by the prosecution to the first respondent / accused under Section 207 Cr.P.C., had committed the case, under Section 209 Cr.P.C., to the learned Principal Sessions Judge, Sivagangai, who took the same on file in S.C.No.121 of 2005 and made over the same to the learned Chief Judicial Magistrate-cum-Assistant Sessions Judge, Sivagangai, for trial. Subsequently, the Trial Court had framed charges under Sections 376 and 417 I.P.C., against the first respondent / accused. When the first respondent / accused was explained and questioned about the charges framed against him, he had denied the charges framed against him and sought for trial to prove his case and accordingly, trial was conducted.

4. During the course of trial, on the side of the prosecution, P.Ws.1 to 8 were examined and Exs.P1 to P7 were marked and on the side of the defence, no witness was examined and no document was marked.

5. After completion of the trial and after examining the oral and documentary evidence, the Trial Court, by Judgment, dated 12.09.2007, found the first respondent / accused not guilty for the offence punishable under Sections 376 and 417 I.P.C., and acquitted him from the said charges. Challenging the same, the present revision has been filed.

6. The learned counsel for the petitioner would submit that the trial Court has acquitted the accused/first respondent on the ground that there was 70 days unexplained delay in lodging the complaint. However, in the judgment the trial Court has discussed in para 2 that the revision petitioner's relatives have conducted local panchayat headed by P.W.6, asking the accused to marry her and thereby the alleged delay in lodging the complaint was caused. Further, the evidence of P.W.1 as prosecutrix is very clear about the occurrence and the accused made a promise to marry her and he failed to do so. It is settled law that having sexual intercourse with a girl even may be with her consent by giving false promise to marry her and later refusing to marry would attract offences punishable under Section 376 and 417 IPC. The learned counsel for the petitioner would further submit that in respect of delay in rape cases is concerned, the settled legal position is that delay in



lodging the complaint is not fatal and would not weaken the prosecution case. He would further submit that much significance should not have been attached to delay in a case of rape. Furthermore, no corroboration is needed and the prosecutrix evidence itself is enough to convict the accused if her evidence is confident and believable.

7. In support of his contentions, the learned counsel for the petitioner relied on the judgment rendered in:

1. Rethinam @ Raharethinam vs. State Inspector of Police in Crl.A.No.1345 of 2004.
2. Rajendran and others vs. State of Tamil Nadu reported in 2002 Crl.L.J. 2202.
3. Vetrivel vs. The State rep.by the Station House Officer in Crl.A.No.301 of 2003.

8. In Rethinam @ Raharethinam vs. State Inspector of Police in Crl.A.No.1345 of 2004, this Court held as follows: (Para 26),

"26.As stated supra, the motive for giving false case against the appellant by P.W.1 has not been proved. There is no contradiction between the ocular and medical evidence. Delay in preferring complaint has been properly explained. Even though the evidence of P.W.3 to P.W.6, who are the co-students of P.W.1, have not supported the case of P.W.1 and turned hostile, it will not fatal to the case of the prosecution. As per the dictum of apex Court that a single related victim in the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracised by society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated."

9. In Rajendran and others vs. State of Tamil Nadu reported in 2002 Crl.L.J. 2202., this Court held as follows: (paragraph 20)

"20. Much was said about delay in the F.I.R. Invariably in the rape cases, there would be delay. The parents of the victim would be reluctant to come to police to give a complaint of rape, since they may think that the victim's future will be spoiled. Under those circumstances, the delay in lodging the F.I.R. or the delay in F.I.R. reaching the Court in this case cannot be a ground to reject the prosecution case



unless there is a material to show that the delay has been used by the prosecution to implicate several accused persons falsely."

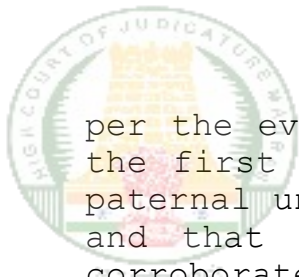
10. In Vetrivel vs. The State rep.by the Station House Officer in CrI.A.No.301 of 2003, this Court held as follows: (paragraph 18)

"18. Unlike in other cases, in Rape cases, delay in lodging the First Information Report cannot be urged as a point for doubting the prosecution case and discarding the same on the ground of delay. More than one reason could be pointed out for the delay in lodging the Complaint. P.W.2 was aged about 16-18 years and unmarried. If any police complaint is to be lodged making allegations of Rape being committed on her, her future would be at stake. That apart, she has to face the tauntings of the Villagers that she had been subjected to Sexual Violence at the instance of the accused. In that circumstance, quite naturally, there would have been reluctance on the part of the family of P.W.2 to report about the occurrence to the Police. Evidence of P.W.2 and prosecution case cannot be doubted merely on the ground of delay in lodging the First Information Report. The learned Additional Assistant Sessions Judge has rightly found that the delay in lodging the Complaint would not affect the prosecution case and the same is to be endorsed with."

11. The learned counsel for the petitioner would submit that if this Court is not considered to convict the first respondent u/s 376 IPC he prayed to alternatively convict him under Section 417 IPC since the accused had promised to marry the revision petitioner and on the promise of marriage committed sexual intercourse without her consent and cheated her. In that regard he relied on the judgment rendered in Sivaswamy vs. The Inspector of Police in CrI.A.No.41 of 2005.

12. The learned counsel for the first respondent would contend that the learned Chief Judicial Magistrate framed charges and conducted the trial, and during trial the defacto complainant has been examined as P.W.1, the Doctor who examined the defacto complainant was examined as P.W.2, the Doctor who examined the accused/first respondent was examined as P.W.3, the maternal aunt of the defacto complainant namely Marry was examined as P.W.4, the father of the defacto complainant was examined as P.W.5, Mr.Nallathambi the person who conducted panchayat was examined as P.W.6, one Swaminathan was examined as P.W.7 (Mahazar Witness) and the Investigating Officer was examined as P.W.8. Exs.A1 to A7 were marked and M.Os., were also marked.

13. The learned counsel for the 1st respondent would contend that a case of consensual sexual relationship has been falsely projected as a case of rape for reasons best known to the petitioner. Even as



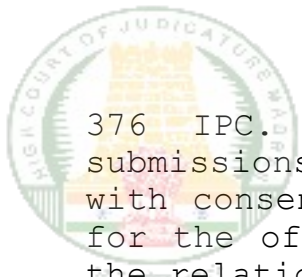
per the evidence of P.W.1 the prosecutrix, the relationship between the first respondent/accused and her is that of a niece and junior paternal uncle and that it is a prohibited relationship for marriage and that she was also well aware of it and the same was also corroborated with P.W.4 and P.W.5. Per contra P.W.1/defacto complainant has deposed that while attempt has been made by the accused/first respondent, P.W.1 had made an attempt to prevent im stating that he is brother by relation. On perusal of evidence of P.W.1 shows that the statement of prosecutrix did not inspire confidence and it cannot be taken into account. In this aspect, he relied on the judgment of the Hon'ble Supreme Court in Kaini Rajan vs. State of Kerala (2013) 9 SCC 113.

14. The learned counsel for the first respondent would further submit that as per the case of the prosecution on the very next day of the alleged occurrence, the fact came to the knowledge of P.W.5 the father of the defacto complainant and therefore, there is a serious infirmity in the case of the prosecution with regard to delay in preferring the complaint. In this regard he relied on the judgment of the Hon'ble Supreme Court in Mohd. Ali Alias Guddu vs. State of Uttar Pradesh (2015) 7 SCC 272.

15. The learned counsel also relied on the judgment of Hon'ble Supreme Court in Rajesh Patel vs. State of Jharkhand (2013) 3 SCC 791.

16. The learned counsel for the first respondent would further contend that according to the evidence of P.W.1/Prosecutrix during the time of alleged occurrence she sustained injuries on her private parts and the blood stains were found in her saree and it was handed over to the police. It is pertinent to note that no such material object has been recovered by the respondent police during the course of investigation and no such material was produced before the learned court below which also creates suspicion on the part of the investigation by the second respondent police. It is also pertinent to note that P.W.2 Doctor has stated that no injuries were found on the private part of the defacto complainant which clearly proves that the version of the defacto complainant is an exaggerated one and it lacks confidence. Therefore, the version of the defacto complainant is highly unbelievable. Apart from that P.W.2 Doctor has also deposed in his cross examination that on examination he found that the defacto complainant would have had sexual intercourse several times. In this aspect he relied upon the judgment of the Hon'ble Supreme Court in S.Karuppiyah vs. State rep. by Inspector of Police, Veppur Police Station, Cuddalore District (2016) 1 MLJ (Cr1) 483.

17. The learned counsel for the first respondent would further contend that the trial Court has concluded that though the accused denied the sexual intercourse, as per the evidence it can be presumed that the intercourse said to have taken place with the consent and therefore the accused cannot be convicted under Section



376 IPC. Without prejudice to the earlier contentions and submissions, even assuming the intercourse said to have taken place with consent then also accused/first respondent cannot be convicted for the offence under Sections 376 and 417 IPC by reiterating that the relationship between the victim and the first respondent/accused is that of junior paternal uncle and a niece (rpj;jg;gh Kiw). In this regard he relied upon the judgment of this Court in Ganesan vs. State rep.by Deputy Superintendent of Police, Namakkal (2017) 1 MLJ (Cr1.) 558 and Ekambaram vs. State by Inspector of Police, Kaatur Police Station, Ponneri, Thiruvallur 2016(2) TNLJ 126 (Criminal).

18. The learned counsel for the first respondent would contend that with regard to the delay in filing the FIR the reason adduced by the prosecution is that a panchayat was conducted by P.W.6 on four occasions. It is pertinent to note that the conduct of panchayat itself was not proved by the prosecution because as per the evidence of P.W.1 panchayat had been conducted on four occasions, whereas P.W.6 has deposed that only two times alone panchayat was conducted and no written resolutions were made. From this it is clear that conduct of panchayat and its alleged finding were not proved by prosecution beyond the reasonable doubt and as such delay in lodging the FIR was also not properly explained on the part of the prosecution. In this regard he relied upon the judgments in Mohd.Ali Alias Guddu vs. State of Uttar Pradesh (2015) 7 SCC 272 and Rajesh Patel vs. State of Jharkhand (2013) 3 SCC 791.

19. The learned counsel for the 1st respondent would submit that the trial judge who had also witnessed the demeanor of the respondent/PW1 in the witness box had also held that her evidence does not inspire confidence and he would further submit that as per Section 401 (3) of Cr.P.C., a finding of acquittal cannot be converted into conviction when there is no illegality or perversity in the finding of the trial Court. Therefore, he prayed for dismissal of the revision. He would further contend that all material and legal aspects have been well considered by the trial Court and no material has been overlooked by the trial Court.

20. While analysing the decisions referred by the counsel for the 1st respondent in Kaini Rajan Vs. State of Kerala reported in (2013) 9 SCC 113 the Apex Court held as follows: (Paragraph 12)

"12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite



of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "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. [See State v. Mango Ram (2000) 7 SCC 224]"

21. In Rajesh Patel vs. State of Jharkhand reported in (2013) 3 SCC 791 the Apex Court held as follows:

"Penal Code, 1860 - S. 376 - Rape - Appreciation of evidence - Contradictions, inconsistencies, exaggerations or embellishments - Testimony of prosecutrix unnatural and improbable - Delay in filing FIR not properly explained - Prosecution case not consistent - Case if one of consensual sex - Benefit of doubt extended and conviction reversed - Criminal Procedure Code, 1973 - S.154 - Delay in lodging /filing FIR - Not properly explained."

22. In S.Karuppaiah Vs. State, reported in (2016) 1 MLJ 483, this Court held as follows: (Paragraph 12 and 13)

"12. The Trial Court has completely believed the testimonies of the prosecutrix. At this juncture, the Court has to look into Ex.P6, Rough Sketch wherein it has been clearly stated that the entire occurrence has taken place on a rough surface and that too, in the midst of a garden-land. The specific evidence given by P.W.6, Doctor is that she has not found any injury on the person of the prosecutrix. Further, P.W.6, has clearly opined that the prosecutrix has been subjected to regular sexual intercourse.

13. The specific case of the prosecution is that the accused has taken the prosecutrix forcibly to an isolated place and forcibly raped her. Considering the fact that the entire occurrence has taken place in a garden-land and that too on a rough surface definitely, the prosecutrix would have sustained injury on her person. But, P.W.6, has given evidence otherwise. On the side of the prosecution, an abortive attempt has been made to the effect that the jacket of the prosecutrix has been marked as M.O.2 and M.O.2 is



was no seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship."

24. The dictum laid down by the Apex Court in the above said judgments of the Supreme Court, is squarely applicable to the facts of the case on hand. In the case on hand, P.W.1 knowing fully well that the appellant/accused is a married man, voluntarily and consciously consented to have sexual intercourse with him and her consent was not in consequence of any misconception of fact. Therefore, the question of conviction and sentence imposed on the appellant/accused for the offence under Section 417 IPC does not arise and hence, the same is liable to be set aside. Consequently, the conviction and sentence imposed on the appellant/accused for the offence under Section 376 IPC is also liable to be set aside."

25. In Sathish Kumar vs. State of Tamil Nadu reported in (2016) 1 MLJ (Crl.) 630, this Court held as follows:-

"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 (Crl) 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 Crl 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 woman 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. "

26. The learned Additional Public Prosecutor would submit that the state had not filed any appeal against the order of acquittal.



27. Heard the counsels carefully and consciously perused the materials on record.

28. The scope of revision against acquittal by a private party has been dealt with in the decisions reported in AIR 1962 SC 1788 K.Chinnasamy Reddy Vs. State of Andhra Pradesh and (2002) 6 SCC 650 Bindeswari Prasad Singh@ B.P.Singh Vs. State of Bihar(Now Jharkand) and held that in a revision against acquittal the High Court can interfere only in exceptional cases when there is some glaring defect in the procedure adopted by the court or there is manifest error on a point of law or that there is manifest illegality, perversity or infirmity in the judgment of the lower court which had resulted in the miscarriage of justice. The High Court cannot and should not re appreciate the evidence resulting in miscarriage of justice in exercise of revisional jurisdiction in the absence of manifest illegality.

29. Now on analyzing the case on hand and the judgment of the trial court it is seen that the trial judge had looked into various aspects with regard to the relationship between the parties, evidences regarding consent, delay in the F.I.R, medical evidences and also the conduct of the parties in the witness box and rendered a judgment of acquittal. In my considered opinion the trial court had not overlooked any material on record. I find no perversity, illegality or infirmity in the judgment of the trial court acquitting the 1st respondent/accused.

30. The revision lacks merits and is hereby dismissed. The judgment of acquittal dated 12.09.2007 in S.C.No.121 of 2006 passed by Chief Judicial Magistrate-Cum-Assistant Sessions Judge, Sivagangai is confirmed.

Sd/-

Assistant Registrar(CS-III)

/True Copy/

Sub Assistant Registrar

To:

- 1.The Chief Judicial Magistrate
-cum-Assistant Sessions Judge, Sivagangai.
- 2.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.
- 3.The Inspector of Police,
Ilayankudi Police Station,
Sivagangai District.

+1cc to M/S.C.Jeyaprakash, Advocate SR.No. 60211

Crl.R.C.(MD). No.914 of 2007

04.04.2018