

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE A.D.JAGADISH CHANDIRA

Cr1.A.No.80 of 2010

Rajeswari
Appellant

...

Vs

Pichaipillai
Respondent

...

Prayer:- This Criminal Appeal is filed under Section 378(4) of the Criminal Procedure Code, to call for records, set aside the order dated 23.11.2009 rendered in C.A.No.4 of 2009 passed by the learned Principal Sessions Judge, Permabalur and restore the judgment of the judicial Magistrate, Ariyalur dated 10.06.2009 in C.C.No.862 of 1996 convicting the respondent for the offence charged.

For Appellant :Mr.A.M.Rahamath Ali

For Respondent :M/S. Meenakshi

JUDGEMENT

1.This Criminal Appeal is filed by the appellant / complainant against the order passed by the learned Principal Sessions Judge, Permabalur in C.A. No.4/2009 dated 23.11.2009, whereby the lower Appellate Court allowed the appeal and reversed the judgement of conviction and sentence passed by the learned Judicial Magistrate, Ariyalur in C.C.No.832/1996, finding the respondent guilty for offence under Section 417 IPC and sentencing him undergo rigours imprisonment for one year and directing him to pay the compensation of Rs.25,000/-

2.The facts of the case are as follows:-

For the sake of convenience the appellant herein is referred as "the complainant" and the respondent herein is referred as "the accused".

a) CC.No.862/1996 was filed by the appellant/complainant before the learned Judicial Magistrate, Ariyalur, against the respondent for the commission of the offence under Section 417 IPC.

b) The case of the appellant/complainant was that the accused

is the brother-in-law of Uttrapathi,, the elder brother of the complainant.

- c) During the second week of the month Margazhi,1994, when no body was at home at around 12.30 PM the accused induced the complainant and threatened and compelled her and committed sexual assault on her. When the complainant had questioned, as to why he had spoiled her life, the accused told her that if she discloses it anybody else, he would kill her.
- d) Thereafter, the complainant came to know that she became pregnant due to the act of the accused. Fearing her brother, sisters and mother, the complainant had requested the accused to marry her during the fourth month of pregnancy. He had consoled her, saying that he will find a bridegroom for her and get him married to her and in the event that if the bridegroom comes to know of her pregnancy, had promised her to marry her. Thereafter, the accused had performed the marriage of the complainant to one Nalvasagam/PW.6, who is his cousin on 11.07.1995 at Thirumanur Mariyamman Temple according to Hindu Rites and Customs.
- e) Later, the said Nalvasagam/P.6, on coming to know that the complainant was pregnant, had questioned her about the pregnancy. She had confessed that she was cheated by the accused and thereafter on 06.10.1995 the complainant had delivered a male child at Thiruvaiyaru Sidha Hospital within three months of marriage and thereafter, a Panchayat was convened and since the said Nalvasagam had denied the paternity of the child, the marriage was dissolved as per communal customs. During the Panchayat she had revealed that the accused was the father of her child. The accused on coming to know about the panchayat had left to Chennai and the Panchayadars had informed the complainant that when he comes back from Chennai, the panchayat could be convened.
- f) Thereafter, the accused had returned from Chennai on 21.12.1995 and the panchayat was conducted in the presence of witnesses 3 to 6 and during the panchayat the accused had denied the paternity of the child.
- g) Thereafter, the complainant along with her sister had given a complaint to Ariyalur All women Police Station on 23.12.1995. The police has conducted enquiry in the village and the accused coming to know about the enquiry, once again left to Chennai.
- h) The accused was apprehended on 28.09.1996 and when the police had enquired him on the same day, the accused had denied the paternity and thereby, the police had directed the complainant to approach to the Court, stating that the paternity of her child was questionable. The complainant had filed private complainant against the accused for the

offence under Section 417 IPC. On the side of the complainant, six witnesses including the complainant were examined.

- i) During the trial, a petition for DNA test was filed. The respondent had refused to appear in the DNA test and taking into consideration, the evidence on the record, the Trial court found the accused as guilty for offence under Section 417 IPC and convicted and sentenced him to undergo rigorous imprisonment for one year and to pay a compensation of Rs.25,000/- to the complainant. Against the judgement passed by the Trial Court the accused filed C.A.No.4/2009 before the learned Principal District Sessions Judge, Permbalur. The Lower Appellate Court after analysing the materials available on record and the evidence, acquitted the accused, against which the appeal has been filed.

3.The learned counsel appearing on behalf of the appellant/complainant would submit that the Lower Appellate court had, on wrong presumption of law and fact, acquitted the respondent/accused. He would further submit that the evidence of PW.6 supports the case of the prosecution. The evidence of PW.1/complainant is corroborated by the evidence of the Panchayatdars (PWs.2 to 5) who have deposed that the appellant had delivered a child within three months of marriage due to which the marriage between her and PW.6 was dissolved and that they have deposed that the accused was responsible for the pregnancy of the appellant /complainant. He would submit that the Lower Appellate Court without taking into consideration the evidence on record, had acquitted the respondent/accused. He would further submit that the order passed by the Appellate Court needs interference since the judgment suffers perversity.

4.The learned counsel for the respondent/accused would submit that the charge against the respondent/accused is for the offence under Section 417 IPC. He would submit that it is the categorical admission of the complainant that the accused is her relative and she is aware that the respondent is a married man with three children. Admittedly no evidence had been set into prove that the accused had induced her with an intent to cheat her. It was a case of consensual relationship. However, the same was projected as if the accused had cheated her and there is absolutely no evidence to say the accused induced the complainant and had physical affair with her and the Lower Appellate Court had taken into consideration the law with regard to the offence under Section 417 IPC had rightly acquitted the appellant. She would further submit the burden is cast on the complainant to prove that the respondent/ accused is responsible for the pregnancy. Thereby, the Lower Appellate Court had rightly acquitted the accused. Further the evidence of the complainant is not clear as to the date, on which the marriage between the complainant/appellant and the PW.6 had taken place.

5. The learned counsel for the respondent/accused would submit that though there are certain lapses on the accused in refusing for undertaking a DNA test, the charge against the respondent/accused is only offence under Section 417 IPC. Even admitting that the accused had physical relationship with the appellant/ complainant, there is no material to show that the petitioner induced her and had physical relationship with her and thereby, cheated her and made her pregnant and in such circumstances, the order passed by the lower appellate court does not suffer from any illegality or perversity.
6. I have gone through the evidence available on record.
7. It is the evidence of the complainant that 6 years prior to the occurrence, during the second week of the month of Margazhi, the accused by saying sweet words, had compelled and sexually assaulted her and he had told that if she is not married by any other person he would marry her. Further, it is the evidence of the complainant that the accused had arranged her marriage with one Nalvasagam/PW.6, who was the cousin. During the cross examination, she had stated that the accused by relation is her uncle and that even before she got into relationship with him, she was aware that he was a married man and he was having three children. Further, she had stated that the said Nalvasagam/PW.6 was already married and that his wife had eloped with somebody and that she had married PW.6, knowing well that PW.6 was already married and that his wife eloped with some one else. Further, it is her evidence that on the day of marriage with Nalvasagam/PW.6, they had consummated and that PW.6 did not suspect her. She had further deposed that she did not inform PW.6, the act of the accused, having affair with her and having impregnated her and she had not taken treatment from any doctor.
8. Admittedly the complainant is an adult and mature lady aged about 20 years at the time of the incident and it is her admission that when she was in a relationship with the accused she was aware that the accused was married and was having three children. Further, she has not stated anything as if the accused on the promise of marriage induced her and had sexual relationship with her. Her evidence seems to be highly unrealistic and unbelievable. Though an adverse inference can be raised against the accused for not having agreed for DNA test, the charge is for the offence under Section 417 IPC and a burden is on the complainant to prove that the accused induced and cheated her.
9. In (2016) 4 SCC 140 [Tilak Raj V. State of H.P] the Hon'ble Apex Court has held as under:
- “ The prosecutrix was an adult and mature lady of around 40 years at the time of the incident. It is admitted by the prosecutrix in her testimony that she was in a relationship with the appellant for last two years prior to the incident and the

appellant used to stay overnight at her residence. After perusal of a copy of FIR and evidence on record the case set up by prosecutrix seems to be highly unrealistic and unbelievable. The evidence as a whole, including the FIR, testimony of prosecutrix and MLC report clearly indicates that the story of prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the appellant seems to be consensual."

10. Though the trial Court had convicted the accused, this Court is of the opinion that the complaint had not proved the charge against the accused beyond reasonable doubt. The appellate Court after analyzing the evidence, had held that there is no clarity with regard to the date of marriage between the complainant and PW.6 and thereby held that the complainant had not conclusively proved that the accused was responsible for her pregnancy. As stated above, the issue in the case on hand, is not with regard to the paternity of the child. The charge framed was for the offence under Section 417 of IPC. The lower Appellate court having found that the charges for the offence under Section 417 have not been proved beyond reasonable doubt, has acquitted the respondent/accused. I do not find any perversity or illegality in the impugned judgment of acquittal by the appellate Court and hence is liable to be confirmed. In the result, the present appeal stands dismissed.

s/d-

Assistant Registrar (CS VIII)

True Copy

Sub-Assistant Registrar

jrs

To:

1. The learned Principal Sessions Judge, Perambalur
2. The learned Judicial Magistrate, Ariyalur
3. The Public Prosecutor, High Court, Madras.

+1 CC to M/s.R. Meenakshi, Advocate sr 54798.

Cr1.A.No.80 of 2010

SS (CO)

SP (26/08/2019)