

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 09.12.2020

CORAM

THE HON'BLE MR. JUSTICE R. PONGIAPPAN

Cr1.A.No.76 of 2014

Thiruvvasagam

... Appellant/Accused

-vs-

State by Inspector of Police,
All women Police Station,
Jayankondam,
Ariyalur District.
(Crime No.06 of 2012)

... Respondent/Complainant

PRAYER: Criminal Appeal filed under Section 374 of Criminal Procedure Code praying to set aside the Judgment dated 25.10.2013 in S.C.No.2 of 2013, passed by the Fast Track Mahila Court, Ariyalur.

For Appellant : Mr.V.Gopinath, Senior Advocate for
Mr.L.Mahendran.

For Respondent : Mr.S.Karthikeyan,
Additional Public Prosecutor

JUDGMENT

(through video conference)

The present Criminal Appeal has been filed to set aside the judgment of conviction and sentence dated 25.10.2013 passed in S.C. No. 2 of 2013 by the learned Sessions Judge, Fast Track Mahila Court, Ariyalur.

2.The Appellant is the sole accused. He stood charged for the offence under Sections 376 and 506(i) of the Indian Penal Code, 1860. By judgment dated 25.10.2013, the learned Sessions Judge, Fast Track Mahila Court, Ariyalur convicted the Accused under Section 376 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs.10,000/- in default to undergo one year rigorous imprisonment. He is acquitted for the charge under Section 506(i) of the Indian Penal Code. Challenging the said conviction and sentence, the Accused is before this Court by

filing the present Criminal Appeal.

3.The case of the prosecution in brief is as follows:-

(i) PW1, viz., Tmt. Sargunambai, is the victim in this case. She is a Post Graduate. She is working as an organizer of Noon Meal Scheme in a Government School. She is living at Thathampet Village in Jayankondam Taluk with her family members. The Appellant/Accused is an Advocate by profession and residing at Periyakrishnapuram Village. There was a proposal for marriage between the Appellant/Accused and the victim. On 20.08.2011, the Appellant/Accused along with his brother went to the house of the victim following the marriage proposal. According to the custom prevailed in the society, the relatives of either side were also present during the event. After exchanging pleasantries, the proposed couples expressed their satisfaction and consent for the marriage. Marriage was agreed to be solemnized within the next few months. After one week, the Accused came to the house of the victim on 28.08.2011 and met the victim privately and had sexual intercourse with her by convincing her by citing their proposed marriage. The Accused stayed at the house of the victim till the evening on that day.

(ii) Later, the Appellant/Accused paid several visits to the house of the victim at the weekends and had sexual intercourse with her under the guise of the proposed marriage. The Accused used to speak with her over telephone after each visits. As a consequence, the victim became pregnant. When the Accused was informed about the pregnancy, he made all arrangements to terminate the pregnancy. Ultimately, the pregnancy was terminated at the instance of the Accused.

(iii) Few months later, when the victim and her relatives approached the Accused for marriage, he was saying some lame excuses. In the meantime, the brother of the Accused was making arrangements for the marriage of the Accused with another lady. After coming to know about this, the victim preferred a complaint before the All Women Police Station, Jayankondam under Ex.P.1 dated 18.05.2012.

(iv) On 18.05.2012, PW8, viz., Sivasubramanian, the then Inspector of Police received complaint from PW1 and registered a case in Crime No. 6 of 2012 under Sections 376, 417, 312 and 506 (i) of the Indian Penal Code. The printed FIR has been marked as Ex.P.7. He took up the case for investigation and on the next day, he examined the witnesses and recorded their statements. He took steps to forward the victim for medical examination by a lady doctor for which he sent a requisition to the Judicial Magistrate, Jayankondam for issuing proceedings.

(v) As per the requisition made by PW8, PW7, viz., Dr. Prabhavathi, examined the victim girl medically on 02.06.2012. The proceedings issued by the Registry and the requisition letter given by the Investigation Officer were marked as Ex.P.3 and Ex.P.4 respectively. According to PW7, the victim might have had sexual intercourse on many occasions. The age of the victim

was above 18 years. Opinion given by the Dentist has been marked as Ex.P.5. As per the medical investigation done by PW7, there was no chance for any abortion that could have happened within two weeks prior to the date of her examination. The certificate issued by PW7 has been marked as Ex.P.6.

(vi) In continuance of investigation, PW8 arrested the Accused at his village after informing the reasons for the arrest. Later, the Accused was sent to judicial custody. PW7 took steps to forward the Accused for medical examination to decide his potency for which he sent requisition to the Judicial Magistrate. In turn, upon the proceedings issued by the Judicial Magistrate, PW6, viz., Dr. Sathish, examined the Accused medically on 02.06.2012. According to him, the Accused was able to perform sexual intercourse. He issued medical certificate to that effect. The said certificate had been marked as Ex.P.2.

(vii) Upon the receipt of the certificates issued by PW6 and PW7, PW8, the Investigation Officer examined the doctors and recorded their statements. Thereafter, he altered the Sections of law to Sections 376 and 506(i) of the Indian Penal Code and sent the report to the Judicial Magistrate under Ex.P.8. Further, during the time of investigation, he examined PW2, viz., Gurunathan, who is the younger brother of the victim, and PW3, PW4 and PW5, who are the close relatives of the victim.

(viii) Finally, he came to the positive conclusion that the Accused committed offence under Sections 376 and 506(i) of the Indian Penal Code and filed final report.

4. Based on the above materials, the Trial Court framed charges for the offence under Sections 376 and 506(i) of the Indian Penal Code. In order to prove their case on the side of the prosecution, as many as eight witnesses have been examined as PW1 to PW8 and eight documents have been marked as Ex.P.1 to Ex.P.8 besides one material object (M.O.1).

5. Out of the said witnesses, PW1, viz., Tmt. Sargunambai, is the victim. She is employed in a Government School. She speaks about the marriage arrangements made by her relatives with the Accused. Further, she has stated that on 28.08.2011, the Appellant herein came to her house and forcibly had sexual intercourse with her. Further, she has stated about the regular visit of the Accused and about the pregnancy. She has stated that after terminating the pregnancy, while at the time her relatives approached the Accused for the solemnization of marriage, she came to know that there was second marriage arrangement for the Accused.

6. PW2, viz., Gurunathan, is the younger brother of the victim. He was living with the victim under the same roof. He speaks about the marriage arrangements that had happened in his house and about the incident in which the Accused met his sister

privately. According to him, the Accused stayed regularly in his house till the evening hours. He has narrated the incident, wherein the Accused had sexual intercourse with the victim girl under the guise of marriage proposal between them and also about the termination of pregnancy at the instance of the Accused.

7.PW3, PW4 and PW5, viz., S.Rajendiran, Natesan and Chinnaiyan, are the close relatives of the victim, who are all present at the time of arranging marriage between the Accused and the victim at the residence of the victim girl.

8.PW6, viz., Dr. Sathish, speaks about the examination of the Accused and about the issuing of certificate as the Accused was medically fit for sexual intercourse.

9.PW7, viz., Dr. Prabhavathi, speaks about the examination of the victim girl at the instance of the Investigation Officer. According to her, the victim girl might have had sexual intercourse on many occasions and there is no chance for any abortion that could have happened within two weeks.

10.PW8, viz., Sivasubramanian, is the Investigation Officer, who speaks about the receiving of complaint from PW1 and about the registration of the case. He has further stated about the examination of witnesses, arrest of the Accused and about the medical examination conducted over the victim girl and the Accused and about the filing of final report.

11.When the above incriminating materials were put to the Appellant/Accused under Section 313 of the Criminal Procedure Code, 1973, he denied the same as false. On his side, he examined one S.Syed Rasheed, Senior Administrative Assistant, TLSC, Kattumannarkoil as DW1. He has stated before the Trial Court that on 09.05.2012, the victim lodged complaint before the Legal Service Authority and the same was received and registered in Serial No. 54 of 2012. The copy of the complaint given by PW1 was marked as Ex.D.1. During the enquiry, despite repeated adjournments, the Petitioner has not turned up and therefore, on 14.06.2012, further action had been dropped in the complaint given by PW1.

12.The learned Sessions Judge, Fast Track Mahila Court, Ariyalur after perusing all the above materials and on considering the arguments advanced by either side, convicted and sentenced the Accused as stated supra. Aggrieved over the said conviction and sentence, the Accused is before this Court with this Appeal.

13.I have heard Mr.V.Gopinath, learned Counsel for the

Appellant/Accused and Mr. S.Karthikeyan, learned Additional Public Prosecutor appearing for the Respondent.

14.The learned Counsel for the Appellant contended that evidence putforth by the prosecution witnesses reveals the fact that the Appellant is ready to marry the victim girl, but the family members of the Appellant have refused for the same. In otherwise, the matter of sexual intercourse was happened between the victim girl and the Appellant, only after getting consent from the victim girl. He has mainly relied on the document which has been marked as Ex.D.1 and made submission that for the alleged offence under Section 376 of the Indian Penal Code, the victim girl gave free consent and thereby, the same has not attracted the definition of Rape, which is under Section 375 of the Indian Penal Code.

15.Per contra, the Learned Additional Public Prosecutor appearing for the Respondent would contend that evidence given by the victim girl is in order that after completing the marriage proposal on 28.08.2011, the Accused herein made compulsion and forcibly had sexual intercourse with the victim girl and therefore, it cannot be said that the alleged occurrence had happened only after getting free consent from the victim girl. He would further contend that the consent given on 28.08.2011 is not a free consent and also in the examination of the Accused under Section 313 of the Criminal Procedure Code, 1973, he had not given any explanation and accordingly, he prayed to dismiss the Appeal.

16.I have considered the rival submissions made on either side and carefully perused the materials placed on record.

17.It is an admitted fact on either side that during the time of occurrence, the Prosecutrix was employed as a Noon Meal Organizer in a School run by the Government. Further, before the occurrence on 20.08.2011, the relatives of the accused came to the house of the Prosecutrix and spoke about the marriage arrangements proposed to be held between the Prosecutrix and the Appellant/Accused.

18.It is also an admitted fact that after the said proposal, on 28.08.2011, at about 12 noon, the Accused came into the house of the Prosecutrix and compelled her for sexual intercourse. Resultantly, the Prosecutrix and the Accused had sexual intercourse and the same was continued for several months. One such time, the Prosecutrix came to know that she became pregnant and thereafter, the same was intimated to the Accused and after hearing the same, the Accused herein brought some medicines and compelled the Prosecutrix to take the same. Due to the compulsion made by the Appellant/Accused, the Prosecutrix also

consumed the same and resultantly, aborted the foetus.

19. After the said occurrence, the Accused has not met the victim girl regularly. One day, when the same was questioned by the Prosecutrix, the Accused replied that in due course, marriage will be arranged. Even after giving the said assurance, the Accused had not made any arrangement for performing the marriage with the Prosecutrix. Therefore, the family members of the Prosecutrix approached the family members of the Accused and requested to fix a date for the marriage. But, in the meantime, the family members of the Accused arranged marriage to the Accused with another lady. In this regard, the Accused herein requested the Prosecutrix to lodge complaint against him before the Pazhoor Police Station. By obeying the said request, complaint has also been lodged and enquiry has also been conducted.

20. Therefore, the entire attitude of the Accused reveals the fact that at any point of time, he is not having any intention for avoiding the marriage which has been proposed with the Prosecutrix. Particularly, during the time of occurrence, only with the intention to marry the Prosecutrix, the Accused herein cohabited with her. At present, during the time of registering the case, only due to the compulsion made by the family members of the Accused, he is in the situation for refusing the marriage with the Prosecutrix.

21. In the said circumstances, since the Accused had been convicted for the offence under Section 376 of the Indian Penal Code, it is necessary to find out whether consent given by the Prosecutrix is voluntary consent or consent given under misconception of fact. In fact, a false promise is not a fact within the meaning of Penal Code. In this regard, Section 90 of the Indian Penal Code refers the expression 'Consent'. Though Section 90 of the Indian Penal Code does not define consent, but describes what is not consent. Since for the purpose of Section 375 of the Indian Penal Code 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.

22. At this juncture, it is relevant to see the Judgment of our Hon'ble Apex Court in the case of "Uday -vs- State of Karnataka" reported in "2003 Supreme Court Cases (Cri) 775" wherein our Hon'ble Apex Court has held as follows:

"There is no straitjacket formula for determining whether consent given by the prosecutrix to sexual

intercourse is voluntary, or whether it is given under a misconception of fact. 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. The court 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."

Now applying the principles laid down in the above referred Judgment, here it is the case that even before the lodging of complaint against the Accused, the Accused is willing to marry the Prosecutrix alone. Only because of the said reason, while at the time, the elders of his family arranged marriage with another lady, he requested PW1 for lodging complaint before the Pazhoor Police Station. The said instruction given by the Accused was only to prevent his marriage with another girl.

23. In the above referred Judgment in paragraph no.24, our Hon'ble Apex Court has held as follows:

"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."

24. Only after observing as above, our Hon'ble Apex Court came to the conclusion that the Accused is not guilty for the offence under Section 376 of the Indian Penal Code.

25. Further, the evidence given by PW2, who is the brother of the Prosecutrix and also the evidence given by PW3 to PW5 reveals the fact that on 20.08.2011, both the families of the Accused and the Prosecutrix were ready to perform the marriage between them.

26. Herein also the evidence given by PW1 alone is sufficient to hold that at the time of giving promise to the Prosecutrix,

the Accused herein did not have any intention for not marrying the Prosecutrix. Therefore, it cannot be said that consent given by the Prosecutrix is not under the misconception of fact. 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.

27. Therefore, I am of the considered opinion that the consent given by the Prosecutrix is nothing but free consent. Further, at the time of getting consent, the Accused herein never intended to avoid marriage with the Prosecutrix. Only due to the other circumstances, now the promise made by the Accused was broken and resultantly, the Accused is before this Court. Therefore, the findings arrived by the Trial Court as the Accused is guilty under Section 376 of the Indian Penal Code is not correct and thereby, the conviction and sentence awarded to the Accused is liable to be set aside.

28. In the result, the appeal is allowed and the conviction and sentence imposed on the appellant by the Trial court are set aside and he is acquitted of all the charges. Fine amount, if any, paid, shall be refunded to the appellant/accused.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Mahila Court(Fast Track Court),
Ariyalur.

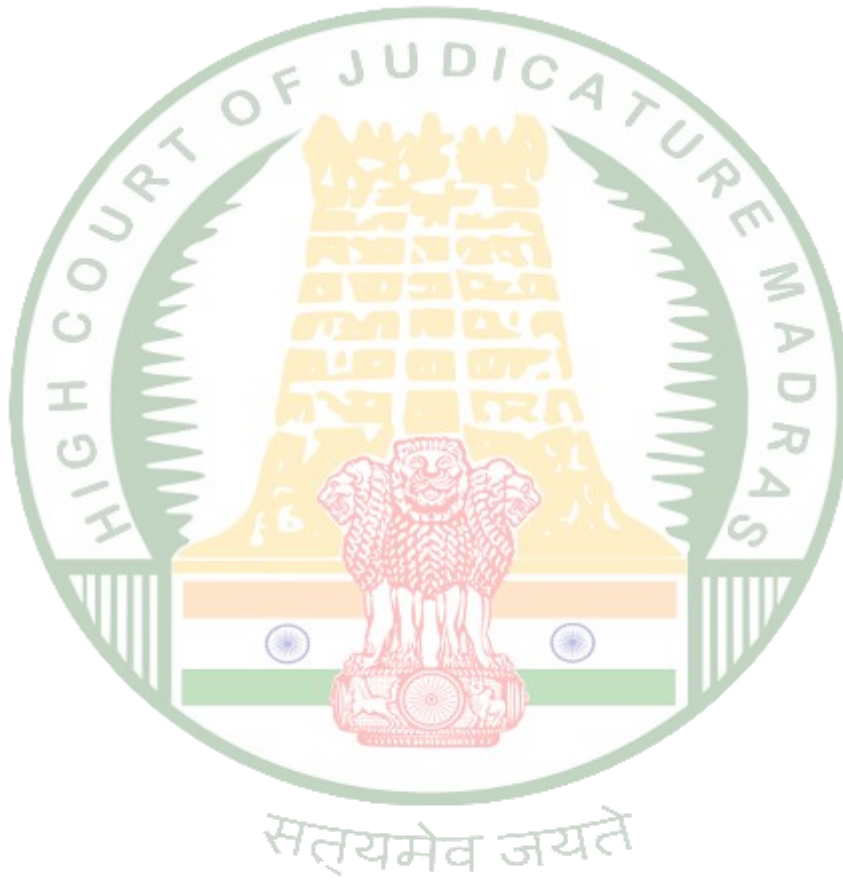
2. The Superintendent,
Central Prison, Tiruchy.

3. All women Police Station,
Jayankondam,
Ariyalur District.

4.The Public Prosecutor,
High court of Madras,
Chennai.

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PVS (CO)
NS (28/12/2020)



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