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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 14.09.2021

PRONOUNCED ON : 02.12.2021

CORAM:

THE HON'BLE MR.JUSTICE P.VELMURUGAN

CRL.A.NO.137 OF 2021

AND

CRL.M.P.NO.6735 OF 2021

Rajiv Gandhi
S/o.Selvaraj

... Appellant/Accused

.Vs.

The State represented by
The Inspector of Police,
All Women Police Station,
Kottakuppam.
(In Crime No.5 of 2012)

... Respondent/Complainant

PRAYER:-

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure, to set aside the order of conviction and sentence passed in S.C.No.20 of 2013 by the Court of Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Villupuram, dated 03.03.2021.

For Appellant : Mr.K.Muralidharan
For M/s.S.Suresh

For Respondent : Mr.S.Sugendran
Government Advocate
(Criminal Side)

JUDGMENT

This Criminal Appeal has been filed to set aside the order of conviction of the appellant/accused in S.C.No.20 of 2013 dated 03.03.2021 by the learned Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Villupuram.



2. The respondent Police has registered a case against the appellant/accused in Crime No.5 of 2012 for the offence under Sections 376 and 417 IPC. After completing the investigation, the respondent Police filed a charge sheet before the learned Judicial Magistrate No.II, Thindivanam. The learned Magistrate taken cognizance of the charge sheet in P.R.C.No.28 of 2012 and committed the case diary, since the offense is exclusively triable by the Court of Session and the Case was committed to the Court of Session. After completing the formalities, the Principal Sessions Judge taken the case on file in S.C.No.20 of 2012 and the case was made over to the learned Principal Assistant Sessions Judge. Subsequently, the case was transferred to the Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Villupuram, since the offence is against the women. The learned Special Judge, after completing the formalities, framed the charge as against the appellant/accused for the offence under Sections 376(1) IPC.

3. After framing charges and completing the formalities, during trial, in order to prove the case on the side of the prosecution, totally 11 witnesses were examined as P.Ws.1 to 11 and 7 documents were marked as Exs.P.1 to 7 and no material object was marked. After examining all the prosecution witnesses, incriminating circumstances culled out from the evidence of prosecution witnesses put before the appellant/accused, by questioning under section 313 Cr.P.C, he denied the same as false and pleaded not guilty. On the side of the defence, two witnesses were examined as P.Ws.1 and 2 and no document was marked.

4. On completion of trial, hearing the arguments advanced on either side and considered the materials, on conclusion of trial, found guilty of the appellant/accused for the offence punishable under section 376 IPC convicted and sentenced to undergo rigorous imprisonment for a period of 7 years and to pay a fine of Rs.3,00,000/- (Rupees Three Lakhs only) in default, to undergo simple imprisonment for further period of 6 months. From the above mentioned fine amount, a sum of Rs.1,50,000/- is ordered to be given to the child as compensation under Section 357(1) Cr.P.C.

5. Challenging the said judgment of conviction and sentence passed by the learned Sessions Judge, Magalir Neethi Mandram, (Fast Track Mahila Court), Villupuram, the appellant/accused has filed the present Criminal Appeal before this Court.

6. The learned counsel appearing for the appellant/accused would submit that the prosecution has not proved its case beyond all reasonable doubt and the conviction was made only based on the presumption and conjunction. Even the material shows that

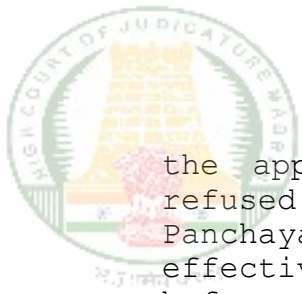


the victim has mentioned the name of three persons before the Panchayath and subsequently, after much deliberation, the victim gave a complaint against the appellant alone. The appellant/accused has not committed any offence and due to enmity, a false case has been foisted against him and the prosecution has failed to prove the case. Even otherwise, the victim herself has stated that she gave consent for sexual intercourse on several times with the appellant/accused. Therefore, the offence under Section 375 IPC would not attract and hence, the conviction for the offence under Section 376 IPC is erroneous.

7. Even on the side of the defence, two witnesses were examined and they have clearly spoken about the fact that the victim mentioned the name of three persons before the Panchayath, but she gave complaint only against the appellant/accused. The trial Court has failed to consider the materials that there is no proof to show that the appellant had intimacy with the victim and he is the only person responsible for the victim's pregnancy. Though the medical examination conducted by the Doctor on the victim has clearly opined that the victim is 31 to 32 weeks pregnancy, the prosecution has failed to take any steps, either during pregnancy or after gave birth to child, for DNA test, in order to prove that the appellant had sexual intercourse with the victim. The appellant/accused is the biological father of the child who born through the victim. The trial Court suo motu should have ordered for DNA test and having failed to do the same, had erroneously convicted the appellant/accused for the offence under Section 376 IPC, without any material.

8. It is a settled proposition of law that the prosecution has to prove its case beyond all reasonable doubts and in this case, there are material contradictions between the evidence and the prosecution witness and there are lacunae on the part of the investigation. During the pendency of the case, the victim died and there was no opportunity to examine the victim. Merely based on the complaint given by the victim and the evidence of the parents of the victim, the trial Court has wrongly come to the conclusion that the prosecution has proved its case beyond all reasonable doubt. Therefore, the judgment of the trial Court is liable to be set aside and the appeal may be allowed.

9. The learned Government Advocate (Crl.side) appearing for the State would submit that the victim and the appellant/accused both are living in the same village and while grazing the cattle, the appellant/accused approached the victim on several times by giving false assurance that he would marry her and on that pretext, he got the consent of the victim and had intimacy with her and had physical relationship with her on several time. As the victim got pregnant and gave birth to child, she insisted



the appellant/accused to marry her and the appellant/accused refused to marry her and therefore, she made a complaint before Panchayath. Since the Panchayathdars have not taken any effective steps to settle the issue, the victim made a complaint before the respondent Police. During the pendency of the investigation, the victim had committed suicide and died and therefore, she could not be examined before the trial Court as a witness.

10. Based on the complaint given by the victim, the respondent Police had investigated the matter. P.W.1 and P.W.2 are the parents of the victim and P.W.3 is the bother of the victim and they have clearly deposed that after coming to know that the victim got pregnant due to illegal intimacy with the appellant/accused, they approached the Panchayath. Since the Panchayath has refused to settle the issue, she made a complaint before the respondent Police. Even in the evidence of Doctor/P.W.7, who has examined the victim, has given her opinion that the victim had intimacy with the known person, due to which, she got pregnant of 31 to 32 weeks foetus has been formed. It is further stated that she detects the heartbeats of the child is normal and to find out the age of the victim, she was also referred to Radiology Test. From the complaint filed by the victim and the evidence of P.Ws.1 to 3 and P.W.7, the trial Court has rightly convicted that even though the victim gave consent for sexual intercourse, by giving false assurance that he would marry her and obtained her consent and therefore, the consent obtained by misrepresentation or by false promise would amount to rape, which is punishable under Section 376 IPC. The trial Court, has rightly appreciated the entire evidence and found that the evidence of defence is not believable on the ground that it is only in order to escape from the clutches of law. They object to the defence witness, which is not relevant to discharge the case and mere bald evidence is not enough to disbelieve the case of the prosecution. Without any material substance, the defence taken by the appellant is not acceptable. The trial Court has rightly rejected the evidence of the appellant/accused and even the prosecution has proved its case beyond all reasonable doubt and convicted the appellant/accused. Therefore, this Court does not warrant any interference in the judgment of the trial Court.

11. Heard Mr.Muralidharan, learned counsel appearing for the appellant/accused and M.S.Sugendran, learned Government Advocate (Crl.side) appearing for the respondent.

12. The case of the prosecution is that the victim while grazing the cattle, the appellant/accused approached her by giving false assurance that he would marry her, had physical relationship with her on several times, due to which, the victim



got pregnant. The victim had insisted the appellant/accused to marry her and the appellant/accused refused to marry her. Therefore, she approached the Panchayath and the parents of the appellant/accused and they did not properly respond. Hence, the victim lodged a complaint before the respondent Police against the appellant/accused.

13. The appellate Court is the final Court of fact finding and it has to re-appreciate the entire evidence and give an independent finding.

14. In order to substantiate the charges framed before the trial court against the appellant/accused on the side of the prosecution, totally 11 witnesses were examined and 7 documents were marked. In this case, the victim was not examined as a witness, since she had committed suicide and died during the pendency of the investigation. Therefore, the respondent Police also registered a case as against the appellant/accused for the offence under Section 306 IPC, for abatement and the same is pending for investigation. Therefore, there is no dispute about the death of the victim, after giving complaint, which was marked as Ex.P.5, in which, she has stated that the appellant/accused and the victim are in the same village and while grazing the cattle, the appellant/accused approached the victim by giving false assurance that he would marry her and obtained her consent and had physical relationship with her on several times, due to which, she got pregnant. Therefore, she insisted the appellant/accused to marry her. Since the family members of the appellant/accused did not respond to the words of the victim and her family members, they approached the panchayath and on the advise of the Panchayath, the victim gave a complaint before the respondent Police for taking necessary action. Though the case was initially registered a case for the offence under Sections 417 and 376 IPC, the trial Court framed the charge against the appellant/accused only for the offence under Section 376 IPC. In order to substantiate the charge framed against the appellant, since the victim already died before commencement of trial, it was not possible for the prosecution to make the victim to let in evidence.

15. The father of the victim was examined as P.W.1, and he deposed that he has three sons and one daughter viz., Suganthi, who is the victim in this case. The appellant/accused by giving false promise to marry her and by showering lovable words, had obtained the consent of the victim and had physical relationship with her on several times and due to which, she got pregnant. After coming to know about that, he approached the appellant's family and they have refused to accept the victim and therefore, he had complained before the Panchayath. Before the Panchayath, the appellant/accused denied that he had made false promise and



18. Upon reading of the Sections 375 and 90 IPC and also the evidence of P.Ws.1 to 3 and 8, and Ex.P.5 and the medical report/Ex.P.3, the act committed by the appellant/accused would fall under Section 375 IPC, which is punishable under Section 376 IPC. If the appellant/accused by giving false promise to marry her and obtained her consent and had physical relationship by misrepresentation or misconception, the act committed by the appellant is an offence punishable under Section 376 IPC. Even though DNA test has not been taken and it is a lapse on the part of the prosecution and mere lapse on the part of the prosecution may not be a sole ground to disallow the evidence of the prosecution witness. It is not the case whether the appellant/accused is the biological father of the child born to the victim or not. Therefore, mere non-conducting DNA test, may not be a sole ground to disbelieve the case of the prosecution.

19. Considering the facts and circumstances of the case and also the material evidence of the prosecution witnesses viz., P.Ws.1 to 3 and 8 and Ex.P.3 and Ex.P.5, this Court finds that the appellant/accused has committed the offence and the prosecution has proved its case beyond all reasonable doubt and substantiated the charge. Therefore, this Court does not find any merit in the appeal and the same is liable to be dismissed. Accordingly, the Criminal Appeal stands dismissed. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

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To

1. The Sessions Judge,
Magalir Neethi Mandram,
(Fast Track Mahila Court),
Villupuram,
2. The Principal Sessions Judge,
Villupuram.
3. The Judicial Magistrate No.II,
Tindivanam.



4. -Do- Thro The Chief Judicial Magistrate,
Tindivanam.

5. The Inspector of Police,
All Women Police Station,
Kottakuppam.

6. The Officer-in-charge,
Sub Jail, Villupuram.

7. The Superintendent,
District Prison,
Vedampattu,
Villupuram District.

8. The Superintendent,
Central Prison,
Cuddalore.

9. The Public Prosecutor,
High Court, Madras - 104.

10. The Section Officer,
Criminal Section,
High Court,
Madras - 104.

+1cc to Mr.K.Muralidharan, Advocate, S.R.No.63564

CRL.A.NO.137 OF 2021

RSI (CO)
PBS/05/01/2022