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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 25.02.2022

JUDGMENT PRONOUNCED ON : 20.04.2022

CORAM : JUSTICE N.SESHASAYEE

CRIMINAL APPEAL NO.547 OF 2021

AND

CRL.M.P.NO.11684 OF 2021

S.Senthilkumar

... Appellant/Accused

Versus

State rep. by
The Inspector of Police
Yethapur Police Station,
Crime No.21 of 2012,
Kariyakoil Police Station,
Salem District.

... Respondent/Complainant

PRAYER :

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the conviction imposed in judgment dated 20.09.2021 made in SC.No.184 of 2017 on the file of the Ld.Sessions Judge, Magaliar Neethi Mandram, Mahila Court, Salem.

For Petitioner : Mr.N.Manoharan

For Respondent : Mr.E.Raj Thilak
Government Advocate [Crl. Side]

JUDGMENT

The appellant herein was convicted and sentenced by the Mahila Court, Salem, the details of which are as follows :

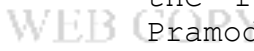


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Offences	Conviction
Section 376(1) IPC	Sentenced to undergo 10 years imprisonment with a fine of Rs.1,000/-, in default one year rigorous imprisonment.
Section 417 IPC	Sentenced to undergo one year rigorous imprisonment.
Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act	Sentenced to undergo 3 years imprisonment with a fine of Rs.10,000/-, in default, one year rigorous imprisonment.

2.The prosecution case opens with Ext.P.1, complaint dated 18.05.2012. P.W.1, the defacto complainant narrates that she was a Nun, that she was working in a convent at Kalakkampadi, and that the appellant was working in Annai Therasa Primary School, Kalakkampadi, that he would often visit the place where P.W.1 was working, that on one of the days,he had forced himself on her, owing to which, she had conceived, but had later refused to marry her and was planning to marry another women. Receiving the same, Ext.P.8, FIR was registered by P.W.7, the Sub Inspector of Police and the matter was taken up for investigation by P.W.10. He proceeded and investigated the scene of occurrence and prepared Ext.P.7, Observation Mahazar in the presence of witnesses, and also prepared Ext.P.9, Rough Sketch. The Investigating Officer then forwarded the victim for medical examination. The Investigating Officer would then interrogate various witnesses associated with the Home where P.W.1 stayed. In the course of the investigation, P.W.1 delivered a boy and the Investigating Officer caused a DNA test to ascertain if the accused had fathered the baby. The report (Ext.P.15) was made available by P.W.9, the forensic expert. In the report, the expert has found that the child born to P.W.1 was fathered by the accused. The Investigating Officer, in the course of the investigation, had also seized Ext.P.2, a notice which the accused has sent to P.W.1 though his counsel one day prior to Ext.P.1, complaint, to be precise, on 17.05.2012 and also Ext.P.3 reply dated 12.06.2012, which P.W.1 has issued to Ext.P.2 notice. In the meantime, the Investigator was changed. It was continued thereafter, by P.W.11 and a final report was laid by P.W.14.

3.Pursuant to the final report, the matter was committed to Sessions, where the learned Mahila Court, Salem framed charges against the accused for the offences as stated in the opening paragraph. The trial Court found the appellant guilty of all the offences and sentenced him as above. This is now in challenge.



6. This Court carefully weighed rival submissions and also the ratio cited by the learned counsel for the appellant in Pramod Suryabhan Pawar Vs. State of Maharashtra and another [2019 (9) SCC 608].

8.1 In proving a charge of this nature, two facts need to be proved: (a) That there was a pre-marital physical relationship between the prosecutrix and the accused person; and (b) that the consent of the woman for the sexual act was not voluntary, and that it was procured by certain representation amounting to a promise to marry, and hence there is an inducement to the woman to procure her consent for physical relationship. Therefore, a mere admission of the accused that he had physical relationship with the prosecutrix per se is inadequate to constitute an offence, nor is the proof of the sexual act, when the same is denied by the accused. There must be independent proof that the consent of the prosecutrix for the sexual act was founded on an inducement to marry her which the accused is alleged to have made without he ever believing in its truth.

<https://hcservices.ecourts.gov.in/hcservices/>

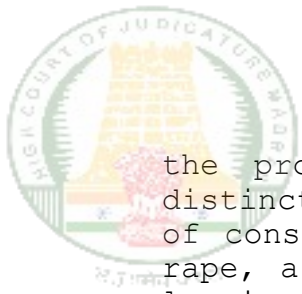


the proof of sexual intercourse between the accused person and the prosecutrix, but the proof of the ingredients of Sec.417 IPC. To repeat, a mere proof of an alleged sexual act between a man and a woman will be of no consequence to the Court, if it is not proved beyond all reasonable doubts that the woman's consent for it is induced by a representation of the accused person to marry her.

9. This has been the judicial view over the years, but the point is whether a woman's word that there was a promise to marry before the sexual act is sufficient to prove the charge? Or, does it require corroboration? Now, who knows best whether the sexual act was preceded by a promise to marry, other than the parties to it? After all, these are acts done under the shadow of absolute secrecy, and neither of the parties will publish it. When the prosecutrix makes the statement that there was a promise to marry, it is the version of one of the parties, and it may have to be proved when the other party - always the male partner, denies it. To state it differently, can it be presumed that merely because the accused had either admitted the sexual act, or the prosecution was able to prove a pre-marital sex, that the woman was induced by the male partner by a promise to marry her? In all such circumstances, a promise to marry will be a disputed fact merely, and therefore, will it be safe to create a presumption in favour of the prosecutrix's statement?

10.1 Here, Court cannot be oblivious to certain core fundamentals: The Court should neither ignore the right to sexual autonomy of an adult male and female, nor can it ignore the gender equality within our Constitutional scheme which grants an adult man and woman their right to express their sexual autonomy. It will be therefore, inconsistent in law to pick the man for a differential treatment under the penal law, and to treat the woman as a victim, merely because the woman might have lost her way in abandoning her sense of discretion when she had an opportunity not to disregard caution. After all, both the man and the woman take equal responsibility in expressing their right to sexual autonomy. This is the first part.

10.2 The other part is about proving the alleged promise to marry as generating a trust in the woman for her to ignore caution. But, whether there was a promise to marry at all will mostly be within the exclusive knowledge of the woman, but in a criminal law setting, this will be a disputed fact merely. Therefore, when it is required to be proved as a disputed fact, it might have to be proved exactly the same way as every disputed fact is proved in law. This now leads to the next question: Is it safe to rely on an uncorroborated version of



the prosecutrix as in rape cases? There is a fundamental distinction between proof in aid of a charge of rape, and cases of consensual sex on an alleged promise to marry. In cases of rape, a man forces his way over the body and mind of the woman, leaving his victim with no power to resist or prevent the act, but in cases of consensual sex on an alleged promise to marry, the prosecutrix always had her power to resist and avoid the act in tact. Therefore, in cases of rape, courts accept the solitary and uncorroborated version of the prosecutrix, and it is essentially founded on the principle that no woman of ordinary prudence will ever make a statement damnifying her interest in public as it will be inconsistent with the ordinary course of human nature, and therefore, when the prosecutrix alleges rape, Courts assume that there is a prima facie guarantee of truth about it, and acts on her uncorroborated version. But, in cases falling under the category of consensual sex coupled with alleged promise to marry, the woman knows, and at all times ought to know, that the act she might engage will, or is likely to damnify her, and still opts to engage in it when she had all the power left in her to avoid it. It may well akin to a case of volenti non fit injuria. This implies that a victim of a rape, and an alleged victim of a consensual sex coupled with a promise to marry cannot be equated, nor can they be placed in the same plane. This now means that in cases of consensual sex coupled with a promise to marry, it will be unsafe for the court to rely on the uncorroborated version of the prosecutrix in all circumstances, and the Court has to scan the evidence with utmost care and ascertain if the facts warrant corroboration for the solitary version of the prosecutrix.

11. Turning to the specifics of this case, it is seen:

- The way the prosecution case has taken off itself is flawed. If Ext.P-1 is closely read, P.W.1 has attempted to make out a case of rape, but the investigator has presented a case of consensual sex coupled with a promise to marry. But P.W.1 appears to be steadfast in her version. As has been indicated earlier, an offence of rape and an offence of consensual sex coupled with a promise to marry cannot be equated, and so are the victims thereof. These two are mutually exclusive.
- The version of P.W.1, cannot be accepted without corroboration. The reasons are: (a) P.W.1's case is that the appellant had forced his way on her on the date of occurrence. She is a nun, and she has volunteered to subscribe to certain discipline when she became a nun, and this discipline required that she had volunteered to give up her right to marry. Therefore, the promise to marry as a line of accusation as available to an ordinary category



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of women will not be available to a nun. And, when the accused person had forced his way on her, she knows that it was not just an assault on her person merely, but against the way of life she had adopted. Will it not shock her when the first act had taken place? It apparently has not, for she preferred to give a complaint some three months after she had conceived. Somewhere, neither of the theories - the allegation of the P.W.1 and the version of the investigator, meets the eye. And, neither of the version is corroborated. Instead this Court finds certain corroboration to the possibility of a consensual sex in the testimony of P.W.5, another nun, and an inmate of the very building where prosecutrix also stayed at the relevant time.

Considerable efforts were spent by the prosecution to prove the paternity of the child born to P.W.1. Paternity of the child however, is not an issue here. The issue is if P.W.1 had consented to sex on a promise to marry, at the very moment when the accused person made his advances, when the fact remains that she could not marry as she was a nun.

12. It is an unfortunate case, but penal law is guided by sympathy for a victim who stays into a lane of indiscretion, and chooses to walk voluntarily on it. To this Court, the facts strongly suggests that it is a case of consensual sex, and it ought to respect the sexual autonomy of the parties involved.

13. In conclusion, this Court finds that the prosecution has failed to establish the guilt of the appellant beyond all reasonable doubts, and consequently it acquits him of all charges. The appeal is allowed and the judgement of the learned Sessions Judge, Magaliar Neethi Mandram, Mahila Court, Salem, dated 20.09.2021 in S.C.No.184 of 2017 is set aside. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VII)

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Sub Assistant Registrar

Tsg



To

1. The Sessions Judge,
Magaliar Neethi Mandram,
Mahila Court, Salem.
2. The Judicial Magistrate No.1
Attur, Salem.
3. The Inspector of Police
Yethapur Police Station,
Crime No.21 of 2012,
Kariyakoil Police Station,
Salem District.
4. The Superintendent of Prison
Central Prison
Salem.
5. The Public Prosecutor
High Court, Madras.

+1cc to Mr.N.Manoharan, Advocate, S.R.No.27220

Cr1.A.No.547 of 2021

SKM(CO)
PM/10/05/2022