



Crl.A.Nos.388 of 2020 & 680 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.09.2023

DELIVERED ON : 25.09.2023

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

Crl.A.Nos.388 of 2020 & 680 of 2022

Crl.A.No.388 of 2020 :

Prakash

... Appellant

Vs.

The State of Tamil Nadu,
Represented by the Inspector of Police,
All Women Police Station,
Thirukovilur, Villupuram District.

... Respondent

Crl.A.No.680 of 2022 :

State represented by :
The Inspector of Police,
All Women Police Station,
Thirukovilur.
(Crime No.19/2010)

... Appellant

Vs.

Prakash

... Respondent



Crl.A.Nos.388 of 2020 & 680 of 2022

PRAYER in Crl.A.No.388 of 2020 : Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, 1973 to call for the records relating to the proceedings in S.C.No.27/2016 on the file of the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Villupuram, to set aside the order of conviction and sentence dated 18.09.2020 and set the appellant at liberty.

PRAYER in Crl.A.No.680 of 2022 : Criminal Appeal filed under Section 378 of Criminal Procedure Code, 1973 to set aside the acquittal rendered in judgment dated 18.09.2020 in S.C.No.27/2016 on the file of the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Villupuram.

In Crl.A.No.388 of 2020 :

For Appellant : Mr.M.Devaraj
For Respondent : Mr. S.Sugendran,
Additional Public Prosecutors
Assisted by
Mr.R.Vinothraja, GA (Crl. Side)

In Crl.A.No.680 of 2022 :

For Appellant : Mr. S.Sugendran,
Additional Public Prosecutors
Assisted by
Mr.R.Vinothraja, GA (Crl. Side)
For Respondent : Mr.M.Devaraj



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Crl.A.Nos.388 of 2020 & 680 of 2022

COMMON JUDGMENT

These criminal Appeals are filed against Judgment and order of the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Villupuram. made in S.C.No.27/2016, dated 18.09.2020.

2. The appellant in CrlA.No.388/2020 is the accused in S.C.No.27/2016 and he is convicted and sentenced as detailed hereunder:

<i>Conviction</i>	<i>Sentence</i>
Section 417 IPC	Rigorous imprisonment for one year and a fine of Rs.2,00,000/-, in default, to undergo Rigorous imprisonment for six months.

He was acquitted for the offence punishable under Sections 376 and 312 IPC. Challenging the said conviction and sentence the accused filed Crl.A.No.388/2020.

3. The State filed Crl.A. No.680/2022 challenging the order of acquittal of the accused for the offences punishable under Sections 376 and



Crl.A.Nos.388 of 2020 & 680 of 2022

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4. For the sake of convenience, the appellant in Crl.A.No.388/2020 is referred as accused and the appellant in Crl.A.No.680/2022 as prosecution/ State.

5. In order to bring home the guilt of the accused, the prosecution/state examined 10 witnesses and marked 13 documents.

6. The case of the prosecution as could be discerned from the prosecution witnesses is as follows:

6.1. The victim (P.W.1) is the daughter of Krishnan (P.W.2). P.W.1's mother died when she was a child. Therefore, P.W.2 married the second time. P.W.1 and P.W.2 are residing in Gengavaram Village, Gingee Taluk, Villupuram District.

6.2. The case of the prosecution is that P.W.1 and the accused were in love with each other and P.W.1 was eking her livelihood by being a cook.



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The accused was studying in a College in Chennai. His parents were also residing in the same village where P.W.1 is residing. The accused in fact was related to the 2nd wife of P.W.2 (step mother of P.W.1). P.W.1 had pledged her jewels weighing 2 sovereigns of gold for the educational expenses of the accused since she was in love with him. The deposition of P.W.1 is that the accused promised her that he would marry her and had sex with her, on account of which she became pregnant. She aborted the child at the behest of the accused since at that point of time the accused had not completed his studies. Subsequently, she became pregnant again and insisted the accused to marry her. Since the accused refused to marry her, a village panchayat was convened, in which the accused refused to marry P.W.1 but promised to pay a sum of Rs.50,000/- to her. Therefore P.W.1 lodged a complaint (Ex.P1) with the All Women Police Station, Thirukovilur on 06.07.2010. She did not abort her child the second time as insisted by the accused and on 18.01.2011, she gave birth to a girl child, by name Pavithra. The accused married another woman on 16.02.2016.

6.3. Tmt.Janaki(not examined), the then Head Constable of Police,



All Women Police Station, Thirukovilur, received the complaint (Ex.P1) dated 06.07.2010 from P.W.1 and issued a challan in C.S.R. No.205/2010 and subsequently on 05.10.2010 Tmt. Rajakumari (P.W.8), the then Sub Inspector of Police of the same Police Station, registered FIR (Ex.P8) in Crime No.19/10 against the accused for the offences punishable under Sections 417 and 294(b) IPC. She then took up investigation, went to the scene of occurrence, prepared an Observation Mahazar (Ex.P9) and a rough sketch (Ex.P10) in the presence of Chakrapani (not examined) and Elumalai (P.W.4). She arrested the accused on the same day near Kandachipuram bus stand and produced him before the Judicial Magistrate, Thirukovilur, who in turn remanded him to judicial custody.

6.4. Dr. Radhakrishnan (P.W.10) examined the accused on 17.10.2012 and issued a Certificate (Ex.P13) stating that "there is nothing to suggest that the male examined is not capable of performing sexual act".

6.5. Tmt. Rajakumari (P.W.8) examined the witnesses and recorded their statements under Section 161(3) Cr.P.C. Since the accused



disowned his own child, the Inspector of Police, All Women Police Station sent a requisition letter to the Judicial Magistrate, Thirukovilur, to subject the accused, P.W.1 and the child for DNA test. Accordingly, the learned Judicial Magistrate, Thirukovilur, vide his letter dated 07.05.2014 in A.No.1966/2014 requested the Additional Director (DNA Division) Forensic Laboratory, Mylapore to send FTA card to the Court for collection of blood samples.

6.6. Dr. Thilaga (P.W.7) Assistant Director, Forensic Science Laboratory, Chennai received the blood card with blood stains of the accused, P.W.1 and the child Pavithra and analyzed the same. According to her, the comprehensive analysis of the test results as shown in Annexure-IV of her report (Ex.P7) showed that the accused Prakash cannot be excluded from the paternity of the child Pavithra under any of the 14 STR Loci Tested. Her final opinion is extracted hereunder .

- i. The cumulative probability of paternity of Mr.M.Prakash for being the father of the child Pavithra is found to be 99.99999%.
- ii. The cumulative chance of exclusion of any random man from the



paternity of the child Pavithra is 99.999999999999%.

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6.7. Krishnan (P.W.2) father of the victim, Kasthuri (P.W.3) the maternal aunt of the victim corroborated the versions of the P.W.1 in all material particulars. However, Elumalai (P.W.4) who is one of the Attestors of the observation mahazar turned hostile to the prosecution. Similarly, Dhandapani (P.W.5) and Balakrishnan (P.W.6) also did not support the case of the prosecution.

6.8. Tmt.Maheshwari (P.W.9) Inspector of Police took up further investigation and verified the statements of the witnesses recorded by P.W.8. Since all the witnesses had repeated the same version of what they had stated before P.W.8, she did not record any separate statement of the witnesses. After concluding investigation she laid a final report before the Judicial Magistrate, Thirukovilur, against the accused for the offences punishable under Section 376, 312, 417 IPC.

6.9. Learned Judicial Magistrate, Thirukovilur took the case on file in PRC.No.70/2014 and furnished copies of records to the accused under



Crl.A.Nos.388 of 2020 & 680 of 2022

Section 207 Cr.P.C. Since the offence under Section 376 IPC is exclusively triable by Court of Sessions she committed the case to the Principal District Judge, Villupuram, who took the case on file in S.C.No.27/2016 and made over the same to the Sessions Judge, Magalir Neethimandram (Fast Track Court), Villupuram. When the accused was questioned with regard to the incriminating circumstances appearing in evidence against him under Section 313(1)(b) Cr.P.C., he denied of having committed any offence. However, he did not examine any witness on his side.

6.10.The learned Sessions Judge, Magalir Neethimandram (Fast Track Court), Villupuram, after analysing the evidence on record, convicted and sentenced the accused as stated in Paragraph No.2. The accused was acquitted for the offences under Sections 376 and 312 IPC.

7. Challenging the conviction and sentence, the accused filed Crl.A.No.388/2020 while the State filed Crl.A.No.680/2022 challenging the acquittal of the accused for the offences punishable under Sections 312 and 376 IPC.

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8. The victim lady is now a mother of a child without getting married. The accused, it is scientifically proved, is the father of the child. The DNA test result is the conclusive proof. The trial court held that while Section 312 and 376 IPC have not been proved by the prosecution beyond reasonable doubts and only Section 417 IPC is proved. The trial court concluded that there was 'misconception of fact' as the victim woman was made to believe that she would become the legally wedded wife of the accused and thus was convinced to have sex with him on more than one occasion. The first pregnancy, it is alleged, was terminated at the behest of the accused though no documentary evidence has been adduced for termination of the pregnancy. Then again she became pregnant (which resulted in the child birth) and despite this development the victim was left to fend for herself. This is when she went ahead with a police complaint against the accused. As observed earlier, the trial court held that though there was a consent for sexual relationship it was due to 'misconception of fact' as defined in Section 90 IPC and therefore, the consent is not construed as a consent to



take shelter under the provisions of law. However, the accused was acquitted for the offence punishable under Section 376 IPC.

9. The victim lady had lost her mother early in her age. Her father remarried and she was brought up by her aunt in Gengavaram Village, Gingee Taluk. The accused was a relative of the victim's step-mother. The accused was initially studying in Chennai and the victim had helped him financially for his education. The first time when the pregnancy was terminated, it appears, the accused had a 'valid' reason that he was studying in Chennai and hence asked her to wait till completion of his education. The second time when it happened, she was again advised to get it terminated but the victim resisted and put her foot down against the proposal. It was then, when the accused refused to marry her. According to the victim (P.W.1), she was constrained to lodge a police complaint on 06.07.2010 when she did not abide by the insistence of the accused for abortion and went ahead with continuing the pregnancy. This irked the accused who had different plans, it appears.

10. Mr.M.Devaraj, learned counsel appearing for the accused



contended that the trial court erred in concluding that there was a 'misconception of fact' and therefore, the offence under Section 417 IPC is proved beyond doubt. According to him, the prosecution has not proved the offence under Section 417 IPC as none of the ingredients of Section 417 IPC is attracted in the instant case. He also highlighted the absence of medical examination of the victim. His another contention is that there was an inordinate delay in registering FIR and sending the same to Court. He therefore, prayed for acquittal of the accused under Section 417 IPC.

11.Per contra, Mr.S.Sugendran, learned Additional Public Prosecutor contended that though the trial court had come to the conclusion that the present case falls under Section 90 IPC, had failed to convict the accused for the offence punishable under Section 376 IPC. His further contention is that the evidence of P.W.1, the victim, clearly goes to show that the accused under the promise of marrying her had sex with her but did not honour his commitment. It is also contended by him that P.W.1 had gone to the extent of bearing educational expenses of the accused by pledging her gold chain weighing 2 sovereigns only under the fond hope that he would marry her



after completing his studies. It is the further contention that the victim is motherless and she was not also taken care of by her stepmother and that the accused is closely related to the stepmother of the victim. According to him, in the instant case the accused had gone to the extent of disowning his own child and the DNA test report showed that he is the father of the child and that the trial court had committed an error by acquitting the accused for the offence punishable under Section 376 IPC. He drew the attention of this Court to Section 90 and Section 375 IPC which read thus:

Section 375 in The Indian Penal Code

1[375. Rape.—A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

(First)— Against her will.

(Secondly)—Without her consent.

(Thirdly)— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly)—With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.



(Fifthly)— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

(Sixthly)— With or without her consent, when she is under sixteen years of age. Explanation.—Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Section 90 in The Indian Penal Code

90. Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

His specific contention is that when a consent is given under misconception of fact it is not a consent and therefore, the accused should be convicted for the offence under Section 376 IPC also.

12.At the outset, it may be observed that the victim P.W.1 had lodged



a complaint with the police on 06.07.2010 itself and it was registered in CSR.No.205/2010. Only on 05.08.2010, FIR (Ex.P8) was registered by the police based on the complaint Ex.P1 given by the victim when she was pregnant for four months. The explanation of Tmt. Rajakumari (P.W.8) Sub Inspector of Police, All Women Police Station, Thirukovilur, is that on receipt of the complaint on 06.07.2010, CSR.No.205/2010 was registered by a constable Janaki (not examined) and that it came to her knowledge on 05.08.2010 when FIR was registered under Crime No.19/2010. The accused cannot take advantage of the inaction on the part of the police. Moreover, it was also argued that the victim had given birth to a child in the year 2011 but DNA was performed only in the year 2013, three years after the case was filed. But the prosecution had an explanation for it as evidenced by the deposition of Tmt.Maheshwari (P.W.9), Inspector of Police, All Women Police Station, Thirukovilur. She has justified the delay by stating that the accused was absconding for a couple of years and hence, there was a delay in conducting DNA test.

13.P.W.1, as already observed, had given birth to a child and she had



also lodged a complaint when she was four months pregnant. In the circumstances, the absence of medical examination of the victim cannot be construed as fatal to the case of the prosecution. Moreover the DNA test results (Ex.P7) had shown that the cumulative probability of paternity of the accused for being the father of the child Pavithra is found to be 99.99999% and the cumulative chance of exclusion of any random man from the paternity of the child Pavithra is 99.999999999999%.

14. P.W.1, the victim had cogently narrated the sequence of events and she also withstood the testimony of cross examination. Nothing useful was suggested to her during the course of cross examination to discredit or disbelieve her versions.

15. Kasthuri (P.W.3) the maternal aunt of the victim (P.W.1) has categorically stated in her deposition that she along with her husband had approached the police many times to get the problem resolved and that on one such instance, the accused had laid down a condition for the marriage that he wanted jewellery and a bike if he has to marry the victim. She



further deposed that he had given this undertaking in writing to the police.

However, no such evidence was brought to the trial court by the prosecution. Nevertheless, what is clear from the sequence of incidents is that the accused had indeed used the victim for his sexual needs by making false promises of marriage. It is pertinent to mention in this context that the aunt with whom the victim was residing expired even before the incident of alleged rape. This also exposes the helpless situation of the victim. On one side, according to me, she had given a long rope to the accused to come to terms with the reality that she is pregnant and it is his child she was carrying and on the other hand, the compulsion for her to take a legal recourse.

16.The trial court was right in concluding that the element of 'misconception of fact' was very much present in the instant case but at the same time failed to read and understand the provisions of Section 375 IPC. The trial court had miserably missed out the important aspect of the legal term of meaning of consent. Thus, the dual stand taken by the trial court defies logic. When there is a misconception of fact, the 'consent' within the meaning of Section 375 IPC fails. It has to be construed as 'without



consent'. Thus, Section 376 IPC and Section 90 IPC have to go together and if Section 90 IPC is applied for proving Section 417, 376 IPC gets proved automatically. The verdict of the trial court in this regard is perplexing.

17.In the decision in *Anurag Soni Vs State of Chattisgarh* reported in *(2019) 13 SCC 1* it was held that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per [Section 90](#) IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under [Section 375](#) IPC and can be convicted for the offence under [Section 376](#) IPC.

18.In the present case the victim had consented to have sexual intercourse with the accused only on the promise given by the accused that he would marry her. It is also clear from her evidence that she was not in a



Crl.A.Nos.388 of 2020 & 680 of 2022

casual relationship with the accused as she has given birth to the child of the accused. In the circumstances, the acquittal of the accused by the trial court for the offence punishable under Section 376 IPC is totally erroneous. Since no evidence is adduced for miscarriage of pregnancy the accused is acquitted of the offence under Section 312 IPC.

19. In the result,

- i. Crl.A.No.388/2020 is dismissed and Crl.A.No.680/2022 is allowed.
- ii. The conviction and sentence of the accused under Section 417 IPC by the learned Sessions Judge, Magalir Neethimandram (Fast Track Mahila Court), Villupuram., in S.C.No.27/2016, is confirmed.
- iii. Since the accused is found guilty of the offence under section 376 IPC, the case is posted to 26.09.2023 for questioning the accused with regard to the sentence to be imposed upon him.
- iv. The Inspector of Police, All Women Police Station, Thirukovilur, is directed to produce the accused before this Court on 26.09.2023.

25.09.2023



Crl.A.Nos.388 of 2020 & 680 of 2022

Index : yes/no
Speaking /Non speaking Order
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To

1.The State of Tamil Nadu,
Rep. by Inspector of Police,
All Women Police Station,
Thirukovilur, Villupuram District.

2. The Sessions Court,
Magalir Neethimandram (Fast Track Mahila Court),
Villupuram



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Crl.A.Nos.388 of 2020 & 680 of 2022

R.HEMALATHA, J.

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Pre-Delivery Judgment in
Crl.A.Nos.388 of 2020 & 680 of 2022

25.09.2023



Crl.A.Nos.388 of 2020 & 680 of 2022

Crl.A.Nos.388 of 2020 and 680 of 2022

WEB CO **R.HEMALATHA, J.**

In compliance of the Judgment of this Court dated 25.09.2023, the accused Prakash is produced by Ms.P.Rathika, Inspector of Police, All Women Police Station, Thirukovilur today i.e., 26.09.2023 at 10.35 p.m. The accused has been questioned regarding the sentence to be imposed on him.

2. கேள்வி :- உமக்கு வழங்கப்பட இருக்கும் தண்டனை குறித்து நீர் என்ன கூற விரும்புகிறீர்?

விடை :- எனக்கு திருமணம் ஆகிவிட்டது மற்றும் குழந்தைகள் உள்ளனர். எனவே குறைந்த தண்டனை அளிக்குமாறு மிகவும் தாழ்மையுடன் கேட்டுக்கொள்கிறேன்?

குற்றவாளி கையொப்பம்

3. Today, Mr.M.Devaraj, learned counsel for the accused and Mr.R.Vinothraja, learned Government Advocate (Crl. Side) and Mr.S.Sugendran, learned Additional Public Prosecutor appearing for the Police appeared before this Court.



4. In the instant case, the accused has committed rape which has been substantially proved beyond all reasonable doubts and the consent was obtained by promising to marry the victim which is clearly a misconception of fact as held by the trial Court. In my opinion, having fathered a child in the womb of the victim woman under the pretext of marrying her, deserves an adequate punishment. This Court is also aware of the fact that the accused is a married man with a family. But the gravity of the offence committed by him, cannot be diluted because of his new status of marrying someone else.

5. Therefore, the accused is convicted under Section 376 I.P.C., and sentenced to undergo Rigorous Imprisonment for a period of seven years and to pay a fine of Rs.1,00,000/- (Rupees One lakh only), in default to undergo Simple Imprisonment for a period of one year. The entire fine amount of Rs.1,00,000/- shall be paid to the victim towards compensation under Section 357 Cr.P.C., The sentence passed under Sections 417 and 376 I.P.C., shall run concurrently and the period of sentence already undergone by the accused is set off under Section 428 Cr.P.C., The trial Court shall pass orders with regard to disposal of properties, if any.

6. Registry is directed to prepare committal warrant against the accused and issue copy of the judgment by today itself (**i.e, on 26.09.2023**).



Crl.A.Nos.388 of 2020 & 680 of 2022

7.The Inspector of Police, All Women Police Station, Thirukovilur is directed to secure the custody of the accused to execute the period of imprisonment.

26.09.2023

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Copy to: The Superintendent of Jail, Central Prison,
Cuddalore District.

தீர்ப்பு நகலை பெற்றுகொண்டேன்.



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Crl.A.Nos.388 of 2020 & 680 of 2022

R.HEMALATHA, J.

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Crl.A.Nos.388 of 2020 and 680 of 2022

26.09.2023