



Crl.R.C(MD)No.726 of 2017

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 19.04.2023

CORAM

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

Crl.R.C(MD)No.726 of 2017

Krishnan

... Petitioner/
Appellant/Sole Accused

Vs.

The Inspector of Police,
All Women Police Station,
Theni.
(Crime No.23 of 2007).

... Respondent/
Respondent/Complainant

PRAYER: Criminal Revision Case filed under Section 397 r/w 401 of the Code of Criminal Procedure, to call for the records and set aside the conviction and sentence in so far as the offence under Section 376 of I.P.C passed in S.C.No.71 of 2008, dated 23.07.2012 by the learned Assistant Sessions Judge cum Chief Judicial Magistrate, Theni, confirmed in Crl.A.No.30 of 2012, dated 05.06.2017 by the learned Additional District and Sessions Judge, Theni at Periyakulam.

For Petitioner : Mr.K.Suyambulinga Bharathi
for M/s.Muthu Kamatchi

For Respondent : Mr.K.Sanjai Gandhi
Government Advocate (Crl. Side)



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ORDER

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This revision has been filed to set aside the Judgment made in Crl.A.No.30 of 2012, dated 05.06.2017 on the file of the learned Additional District and Sessions Judge, Theni at Periyakulam, confirmed the conviction and sentence made in S.C.No.71 of 2008, dated 23.07.2012, on the file of the learned Assistant Sessions Judge cum Chief Judicial Magistrate, Theni.

2.The case of the prosecution is that on 11.04.2007 at about 01.00 p.m., when the victim was alone in her house, the petitioner trespassed into her house at knife point and he committed rape on the victim. Thereafter, on compulsion and threat, he committed rape on her. Further, till 10.10.2007, on the pretext of marriage, he committed rape on the victim, due to which, he got pregnant. Hence, the complaint. On receipt of the complaint, the respondent registered the F.I.R in Crime No.23 of 2007 for the offences under Sections 451, 506(2), 376 and 417 of I.P.C. After completion of the investigation, the respondent filed a final report for the offences under Sections 451, 506(2), 376 and 471 of I.P.C. The trial Court had taken cognizance in S.C.No.71 of 2008 on the



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file of the learned Assistant Sessions Judge cum Chief Judicial Magistrate, Theni.

3.On the side of the prosecution, they had examined P.W.1 to P.W.15 and marked Ex.P.1 to Ex.P.11 and on the side of the accused, no one was examined and no documents were marked.

4.On perusal of the oral and documentary evidence, the trial Court found the accused guilty for the offence under Sections 451, 506(2), 376 and 417 of I.P.C. He was sentenced to undergo two years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months Rigorous Imprisonment for the offence under Section 451 of I.P.C; he was sentenced to undergo three years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo six months Rigorous Imprisonment for the offence under Section 506(ii) of I.P.C; he was sentenced to undergo seven years Rigorous Imprisonment and to pay a fine of Rs.5,000/-, in default to undergo one year Rigorous Imprisonment for the offence under Section 376 of I.P.C and he was sentenced to undergo one year Rigorous Imprisonment for the offence under Section 417 of I.P.C. The sentences for all the offences shall go concurrently.



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Aggrieved by the same, the petitioner preferred an appeal in Crl.A.No.30 of 2012 on the file of the learned Additional District and Sessions Judge, Theni at Periyakulam and the Appellate Court partly allowed the appeal and set aside the conviction and sentence for the offence under Sections 451, 506(2) and 417 of I.P.C and confirmed the conviction and sentence for the offence punishable under Section 376 of I.P.C. Hence, the present revision.

5.The learned counsel appearing for the petitioner would submit that the victim was aged about 16 years at the time of occurrence. The prosecution failed to prove the age of the victim that she was below 16 years at the time of the alleged occurrence. The petitioner and victim fell in love and as such, the victim, on her consent, had physical relationship. Therefore, it is a consensual relationship and the offence under Section 376 of I.P.C is not at all made out. Even according to the Doctor, she was aged about 15 to 18 years at the time of occurrence. P.W.1 lodged the complaint and stated that the victim was aged about 16 years at the time of occurrence. Even according to the case of the prosecution, the occurrence took place on 11.04.2007, whereas the complaint was lodged only on 19.10.2007. The victim girl also deposed that, on



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several occasions, they had physical relationship. Therefore, there was an enormous delay and the said delay was not properly explained by the prosecution. Though in the case of rape, the delay is immaterial, in the case on hand, there was consensual sex between the victim and the petitioner. Therefore, the delay is material to the case on hand.

6.The learned counsel appearing for the petitioner would further submit that now the victim girl got married another person and the petitioner also got married another person and both are living separately. When their relationship was consensual one and it was not on the misconception of fact, then the offence under Section 417 of I.P.C would not attract. Therefore, the Appellate Court rightly acquitted the petitioner for the other offence except for the offence under Section 376 of I.P.C. The prosecutrix was aged about 16 years at the time of occurrence and as such, the offence under Section 376 of I.P.C also would not attract as against the petitioner herein. Therefore, he prayed for the acquittal of the petitioner from all the charges.



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7.Per contra, the learned Government Advocate (Criminal Side) would submit that the victim was below 16 years at the time of occurrence. On 11.04.2007 at knife point, the petitioner trespassed into the victim's house and committed rape on her. The next day also on compulsion and threatening, he committed rape on her. He threatened her with dire consequences if disclose to anybody about the relationship, he would kill her. Therefore, she did not disclose it to anybody. When she got pregnant and after seeing the physical changes, she was found pregnant. Therefore, belatedly, the complaint was lodged. That apart, in the case of rape and crime against women, the delay is immaterial. In fact, the victim delivered a male child and the petitioner was subjected to DNA test. The test report also opined that the petitioner is the biological father of the child which was born to the victim. When the petitioner entered into the house of the victim to commit rape on the victim, the victim's aunt and her grandmother had seen him in the house of the victim. At that juncture, the petitioner had hidden in the house of the victim and also threatened the victim not to disclose anything to them. Due to previous enmity between the aunt of the victim and the father of the victim, she did not disclose the same to the victim's father. However, she categorically deposed and corroborated the evidence of P.W.1 and the victim. Therefore, the prosecution proved



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the case for the offence under Section 376 of I.P.C and it does not require any interference by this Court.

8.Heard the learned counsel appearing on either side and perused the materials available on record.

9.The victim was examined as P.W.3. She deposed that she returned to her house on 11.04.2007 for her lunch. At that juncture, the petitioner trespassed into her house and at knife point, he assured her that he would marry her and had physical relationship. He also threatened her with dire consequences not to disclose the same. If disclose to anybody, he would commit suicide . Therefore, only for the reason, the victim was afraid and failed to disclose it to anybody. The next day also at the same time on the pretext of marriage, he had sexual intercourse with the victim. She also deposed that, several times, they had physical relationship. On all the occasions, the petitioner assured her that he would marry her. On 10.10.2007, the victim vomited and enquired by her mother. On the enquiry, the victim deposed that her mensuration was stopped for three months and she was found pregnant at 16 to 18 weeks. Thereafter, she disclosed about the petitioner.



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Immediately, P.W.1/the victim's father questioned about the same with the petitioner and his grandmother. They also assured him that within 10 days, he would marry the victim. However, on the same day night, the petitioner had flown away along with her mother from the Village. Thereafter, P.W.1 lodged the complaint.

10.The victim also deposed that she got failed in her 10th standard at the time of occurrence. Therefore, she again continued with her education at the same standard of 10th. The prosecution, in order to prove the victim's age, subjected her to a medical examination. The certificate of examination for age estimation was marked as Ex.P.4. It revealed that the Doctor is of the opinion that the victim is of the age more than 15 years and less than 18 years issued by the Department of Forensic Medicine. Admittedly, except this certificate, there is no other proof to prove the age of the victim. The father of the victim was examined as P.W. 1 and he also lodged a complaint stating that the victim was aged about 16 years at the time of occurrence. It is relevant to extract the provision under Section 375 [as it stood before the Criminal Law (Amendment) Act, 2013] of the Penal Code, 1860 states:



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"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:

* * *

Sixthly. - With or without her consent, when she is under sixteen years of age."

In the light of the above, the issue regarding the determination of the age of the prosecutrix is crucial to establish whether the petitioner is liable to be punished for rape or not.

11.The prosecutrix produced Ex.P.4/the certificate of examination for age estimation, the opinion of the Doctor, who conducted a medical examination of the prosecutrix, bone ossification test and opined that the victim was aged about more than 15 years and less than 18 years. Except Ex.P.4, no other materials were produced by the prosecution in order to prove the age of the victim. Further, the prosecution also failed to examine any of the School authorities in order to prove the age of the victim. The prosecution also failed to mark any of the School certificates to



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justify the age of the victim as below 16 years at the time of occurrence.

12.On perusal of Ex.P.3/certificate of examination for sexual offence also revealed that the victim is moderately built and moderately nourished. Her physical and mental status were normal for her age alleged. Her secondary sexual characters are well developed. Pervaginal examination freely admits two fingers. She is pregnant (16 to 18 weeks). There is no evidence of external injuries or foreign bodies seen in and around her private parts or any where in the body.

13.Of course, the victim was examined after a period of five months from the date of the alleged occurrence. Even according to the prosecution, the victim and the petitioner had physical relationship on several occasions. No prosecution witnesses were able to give the exact age of the prosecutrix. The prosecution also failed to question about the prosecutrix age. Therefore, the prosecution failed to prove the age beyond reasonable doubt that the victim girl was less than 16 years of age at the time of occurrence. In a criminal case, the conviction of the accused cannot be based on an approximate age which is not supported by any



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record. It would be unsafe to base conviction on an approximate age. Therefore, as per the provision, the prosecutrix was competent to give her consent to have physical relationship with the petitioner. Hence, the question of rape does not arise as consensual intercourse has been proved.

14. Therefore, the benefit of doubt can be given to the accused and this Court is of the opinion that the prosecution failed to prove that the prosecutrix was less than 16 years on the date of occurrence. Therefore, the petitioner cannot be convicted under Section 376 of I.P.C.

15. On perusal of the deposition of P.W.3 also revealed that on the pretext of marriage at knife point, he committed rape on her on 11.04.2007. Again he came on the next day and had physical relationship on the pretext of marriage. Subsequently, till 10.10.2007 several times, they had physical relationship on the pretext of marriage. Therefore, it has to be seen that the consent was given under misconception of fact. The person who obtained the consent knew or had reason to believe that the consent was given in a consequence of such misconception. Admittedly, the



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prosecutrix and the petitioner had physical relationship on several occasions. Therefore, it cannot be said that the petitioner had physical relationship under a misconception of fact. Therefore, the Appellate Court rightly acquitted the petitioner for the offence punishable under Section 417 of I.P.C. However, due to their physical relationship she delivered a male baby and the DNA test also proved that the petitioner is the biological father of the child. Though this Court is not able to punish the petitioner for the offence punishable under Section 376 of I.P.C, since the prosecution failed to prove the age of the victim as she was below 16 years at the time of occurrence, this Court feels that the victim to be compensated by cost.

16.In view of the above, the Criminal Revision Case is allowed and the Judgment made in Crl.A.No.30 of 2012, dated 05.06.2017 on the file of the learned Additional District and Sessions Judge, Theni at Periyakulam, confirming the conviction and sentence made in S.C.No.71 of 2008, dated 23.07.2012 on the file of the learned Assistant Sessions Judge cum Chief Judicial Magistrate, Theni, are set aside on condition that the petitioner shall deposit a sum of Rs.2,00,000/- to the credit of S.C.No.71 of 2008



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on the file of the learned Assistant Sessions Judge cum Chief Judicial Magistrate, Theni, within a period of four weeks from the date of receipt of a copy of this order, failing which, in default to undergo three months Rigorous Imprisonment. On such deposit, the victim is permitted to withdraw the same by filing a proper application.

19.04.2023

NCC : Yes/No
Index : Yes/No
Internet : Yes
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To

- 1.The Assistant Sessions Court cum Chief Judicial Magistrate,
Theni.
- 2.The Additional District and Sessions Judge,
Theni at Periyakulam.
- 3.The Inspector of Police,
All Women Police Station,
Theni.
- 4.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.



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G.K.ILANTHIRAIYAN, J.

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Order made in
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