



Crl.A.(MD)No.20 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the order	Date of Pronouncing the order
20.02.2023	24.02.2023

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN**

Crl.A.(MD)No.20 of 2020

N.Kannan

... Appellant / Sole Accused

vs.

State Rep. by
The Inspector of Police,
All Women Police Station,
Nanguneri,
Tirunelveli District.
(Crime No.19 of 2015)

... Respondent / Complainant

Prayer :- Criminal Appeal filed under Section 374(2) of Cr.P.C., to call for the records from the lower Court and to duly set aside the judgment, dated 30.09.2019, passed in S.C.No.831 of 2016, on the file of the learned Sessions Judge/Mahalir Neethimandram, Tirunelveli.

For Appellant : Mr.A.Sankara Ramasubramanian

For Respondent : Mr.A.Thiruvadikumar
Additional Public Prosecutor



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JUDGMENT

DR.G.JAYACHANDRAN, J.

This Criminal Appeal is directed against the judgment of conviction rendered by the Sessions Court/Mahalir Neethimandram, Tirunelveli, in S.C.No.831 of 2016, dated 30.09.2019.

2. The appellant, who is the sole accused, was tried for the offences under Sections 417, 376(n) and 506 (i) I.P.C. After appreciating the oral and documentary evidences, viz., PW-1 to PW-13 and Ex.P-1 to Ex.P-11, the trial Court reached to the conclusion that the prosecution has proved the charges under Section 376(n) and 506(i) I.P.C against the accused. However, the charge under Section 417 I.P.C. held not proved. For the offence under Section 376(n) I.P.C., he was sentenced to undergo life imprisonment and to pay fine of Rs.1 Lakh, in default, to undergo one year rigorous imprisonment. For the offence under Section 506(i) I.P.C., he was sentenced to undergo one year rigorous imprisonment and to pay fine of Rs.10,000/-, in default, to undergo three months simple imprisonment. From and out of the fine amount, Rs.50,000/- each to the prosecutrix and to the female child born to the prosecutrix through the accused was ordered to be paid as compensation.



3. The case of the prosecution is that, a written complaint (Ex.P-1) from the victim, aged 21 years (P.W.1) was received at Nanguneri All Women Police Station from the Office of Superintendent of Police, Tirunelveli, through Tapal on 17.10.2015. Smt.Muthulakshmi (P.W.9), Head Constable attached to Nanguneri All Women Police Station received the Tapal and registered a case in Crime No.19 of 2015 under Sections 417, 376 and 506(i) I.P.C. against Kannan, S/o.Narayanan and forwarded the F.I.R. copy (Ex.P-6) to the Judicial Magistrate and placed it before the Inspector of Police, Smt.Kamala (P.W.12).

3.1. The sum and substance of the complaint was that, the complainant is a B.A. graduate and she belongs to Vannar Community. She live with her parents at North Meenavankulam Village. One Kannan (the accused) lives near her house and he belongs to Moopanar community. They both were moving friendly for a long time. While so, on 16.08.2015 at about 11.30 a.m. when she was at her house, the accused came and enticed her to have sexual intercourse promising to marry her. She believed his words and consented. As a result of the sexual intercourse with him, she got conceived. When she informed this to the accused and requested him to marry her, the accused refused to marry her citing that she belongs to a lower caste also threatened her if she disclose this to others, he will kill her.



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3.2. The respondent Police took up the investigation and recorded the statements of witnesses, which revealed that the accused and the defacto complainant were known to each other from childhood. In the month of October, 2015, the defacto complainant fell seriously ill and her mother Manonmani [P.W.2] took her to the Rani Hospital at Kalakadu. The Doctor, who examined the defacto complainant found that she is 3 months pregnant. When the mother came to know about it, the defacto complainant revealed that she was forcibly raped by the accused. Immediately, Manonmani along with her daughter went to the house of Kannan and requested him to marry defacto complainant whom he has raped and impregnated. Since he refused to marry her, they went to Superintendent of Police Office and gave the complaint. Pending investigation, the defacto complainant gave birth to a female child. D.N.A. mapping of the samples drawn from the accused, defacto complainant and the child proved that the accused is the biological father of the child. Hence, Final Report filed against Kannan (the accused), for committing rape of P.W.1, making false promise to marry her and also threatening to kill her when she asked him to marry as promised.

3.3. The victim was examined as P.W.1. As per the testimony of P.W.1 in chief-examination, on 16.08.2015 at about 11.30 a.m., when she was alone in her house, the accused came to her house and forcibly raped her, despite her resistance. When she told that she will inform her father about this, the accused threatened her. So, out



of fear, she did not reveal this matter to others. After three months, when she fell sick, her mother (P.W.2) took her to the Kalakadu Hospital, where, the Doctor after examining P.W.1, told P.W.2 that P.W.1 was 3 months pregnant. When P.W.2 asked the accused to marry PW-1, he refused to marry, saying he belong to Moopanar community and PW-1 belongs to Vannar community, which is an inferior caste. Also, he threatened to kill them if they disclosed the matter to others.

3.4. Thereafter, on 17.10.2015, PW-1 and P.W.2 went to the Superintendent of Police Office and gave the complaint Ex.P-1. She was produced before the learned Judicial Magistrate, Nanguneri and sent to Tirunelveli Government Hospital for drawing blood sample for D.N.A. test. In the cross examination, P.W.1 admits that she know the accused from her childhood. From the year 2012 onwards, she used to talk with the accused directly and over phone. The insertion of the words "என் வீட்டில் வைத்து 16.08.2015 காலை 11.30 மணிக்கு" (at my house on 16.08.2015 at about 11.30 a.m.) in Ex.P-1 is admitted. She also admits that she did not tell her mother or others about the incident happened on 16.08.2015 till she was found pregnant by the Doctor at Kalakadu. She has also deposed that she do not remember the date on which she and her mother went to Kalakadu Hospital. To the suggestion that it was a consensual sex without any misconception, that is why, she did not report it to others, the witness has denied the suggestion.



3.5. However, she admits that the complaint was written by a known person living next to her house and it was written by them on their own while she was sitting at a distance place since she was feeling nauseating. In the cross examination, when she was asked whether she tried to come out of the house when the accused tried to rape her, she has stated that when she tried, the accused tied her mouth with his lungi and hand behind. This fact being spoken by the witness for the first time and it was not found in her complaint or in her previous statement recorded under Section 161 Cr.P.C.

3.6. P.W.2, the mother of the prosecutrix, who came to know that her daughter is three months pregnant and the accused was the cause for her pregnancy, had deposed in corroboration with P.W.1 insofar as the fact that the accused refused to marry her citing the caste and threatened to kill them if they report to anyone. She has deposed about the complaint given to the Superintendent of Police, Tirunelveli.

3.7. P.W.3 is the brother of P.W.1. P.W.4 is the neighbour. They both have deposed that PW-2 told them the accused showed knife and threatened her when she requested the accused to marry her daughter. They both are hearsay witnesses and had deposed what they heard from PW-2. However, P.W.2 has not whispered in her chief-examination or in the cross-examination about threat by the accused showing knife.



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3.8. P.W.5, Mary Pappa is the witness to the observation mahazar Ex.P-2, which show the accused and the prosecutrix house are nearby. P.W.8 Suresh, Grade II Police Constable under passport Ex.P-5 had escorted the accused to the Hospital for potency test. P.W.6 Dr.Selvamurugan has conducted potency test of the accused on the request made by Investigation Officer through the Court. The potency test report Ex.P-3 says that there is no reason to believe the accused is impotent. P.W.7 Paarvathi, Grade I Woman Police Constable, attached to Nanguneri All Women Police Station has deposed that on 29.10.2015, she took P.W.1 to the Government Medical College Hospital at Tirunelveli for physical examination. P.W.10 - Dr.Theresa Karpagaselvi examined P.W.1., took vaginal swab and after examining the scan report, opined that P.W.1 carrying 13 weeks live foetus and gave the Accident Register Ex.P-7 and the wound certificate Ex.P-8. The vaginal swab collected from P.W.1 was forwarded to the Tirunelveli Regional Forensic Lab along with request letter from the Judicial Magistrate Court and the same was tested in the Lab by P.W.11 Mr.Gajendra Varadhan. No sperm found in the sample and his report is marked as Ex.P-9.

3.9. P.W.12 - Kamala, the Investigation Officer in this case has deposed about the investigation conducted and collection of blood samples from the accused, P.W.1 and her child for DNA test. After getting the DNA report Ex.P-11, he confirmed that



the accused has raped P.W.1 and the accused is the biological father of the child born to P.W.1. The Deputy Director of State Forensic Lab at Chennai has been examined as P.W.13, who has deposed that D.N.A. mapping test was conducted for the samples drawn from the accused, P.W.1 and the child and found that the accused is the biological father of the child and P.W.1 is the mother of the child.

4. The learned counsel appearing for the appellant/accused emphatically submitted that it was a consensual sex. The accused never promised to marry P.W.1. He never threatened P.W.1 or her mother-P.W.2. The prosecution case has been impinged on the ground of delay in giving the complaint, interpolation in the complaint about the date and time of the occurrence, the embellishment by P.W.1, P.W.4 and P.W.5 improving the case introducing new fact, which does not form part of the previous statement and contradicting each other, renders the prosecution case totally unreliable. The trial Court having rightly found that there was no proof for the charge of cheating, erred in convicting the accused for offences under Section 376(n) I.P.C. being carried away by the D.N.A. Report Ex.P-11 and by the inadmissible hearsay evidence of P.W.4 and P.W.5 regarding criminal intimidation. The trial Court has not considered the inordinate delay of three months to set the law into motion.

5. Per contra, the learned Additional Public Prosecutor representing the State submitted that evidence of the victim is of sterling quality. Her evidence about the



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forcible rape and thereafter, the promise to marry her stand unimpeached. The accused refused to marry her saying that she hails from lower caste and criminal intimidation are facts spoken by P.W.1 and corroborated by other witnesses. Merely because P.W.1 and P.W.2 are daughter and mother respectively, their evidence cannot be doubted, since the offence of this nature never committed in view of public and only the close relative will come to know about the incident through the victim. Hence, case of this nature, the victim is the best witness to speak about the offence. Any minor discrepancies or contradictions cannot outweigh the evidence of the victim, when she has deposed that her consent was obtained by misconception.

6. The learned Additional Public Prosecutor further submitted that when the D.N.A. Test Report Ex.P-11 clearly prove the fact that the accused is the biological father of the child and when he refuse to admit the same or plead that the intercourse was not by force, but by consent, it is his burden to prove the same. Having failed to prove that the consent was voluntary, the finding of the trial Court that the consent if any by the victim was obtained by misconception, has to be confirmed.

7. In this case, the fact that the accused and the victim known to each other since their childhood is uncontroverted. The accused is the biological father of the child born to P.W.1 is scientifically proved through Ex.P-11. When the complaint Ex.P-1, dated 17.10.2015 given to the Superintendent of Police office, Tirunelveli,



P.W.1 was carrying 13 weeks old foetus. This fact is proved through Ex.P-7 and through the evidence of P.W.10 the Doctor, who medically examined P.W.1 on 29.10.2015.

8. Therefore, the point for consideration is whether the accused had sexual intercourse with P.W.1, with consent voluntarily or not?

9. The learned counsel for the appellant/accused submitted that there is no evidence to show that P.W.1 protested at the time of intercourse, contrarily in the complaint, she has stated that she consented to the wish of the accused, since he promised to marry her, but, there is no evidence to infer that the accused promised to marry her. Further, the complaint was given after three months, only after her attempt to force the accused to marry her. The insertion in the complaint Ex.P-1 regarding the date and time of alleged occurrence besides the embellishment, gradual improvising of the prosecution case, as the witnesses marshalled by the prosecution not taken note by the trial Court.

10. To counter this argument, the learned Additional Public Prosecutor states that when the accused was questioned under Section 313 Cr.P.C., he has totally denied the charges and it is not his defence that he had sexual intercourse with P.W.1 only on her consent and her consent was voluntary. Neither his case that at the time



of having the consensual sex, he never promised to marry her or he had the intention to marry her, but due to reason beyond his control, could not keep the promise.

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11. When a case with similar facts came for consideration before the Supreme Court in **Dr.Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others** reported in (2019) 18 SCC 191, it has been observed in Paragraph No.23 as under :-

"23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC."



12. Again, in **State of Uttar Pradesh Vs. Naushad** reported in (2013) 16 SCC

651, considering the definition of rape given under Section 375 I.P.C. and the definition of consent under Section 90 I.P.C., the Hon'ble Supreme Court has held as below:-

"17. Section 376 IPC prescribes the punishment for the offence of rape. Section 375 IPC defines the offence of rape, and enumerates six descriptions of the offence. The description "secondly" speaks of rape "without her consent". Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix "against her consent". The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of "bad character".

18. How is "consent" defined? Section 90 IPC defines consent known to be given under "fear or misconception" which reads as under:

"90.Consent known to be given under fear or misconception.—A consent is not such a consent as is 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;"

(emphasis supplied)



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Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated.

19. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 IPC. Thus, the alleged consent said to have been obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her."

13. In the case of **Yedla Srinivasa Rao v. State of A.P.** reported in (2006) 11 SCC 615 with reference to similar facts, the Hon'ble Supreme Court in Paragraph 10 held as under:-

"10. It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became



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pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent."

14. In the present case, from the evidence, particularly the testimony of P.W.1, it is found that the accused had no intention to marry P.W.1, but to satisfy his lust, he has given promise knowingly he is not going to fulfil. The caste difference, which he has cited as a reason for refusal is not a new factor, which intervened subsequent to the act of intercourse leading to the pregnancy.

15. In view of the facts as mentioned above, we are satisfied that the consent, which had been obtained by the accused was not a voluntary one. It was given by her



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under misconception of fact that the accused would marry her. Such consent is not a valid consent in the eye of law. Therefore, intercourse even if by consent, but on misconception of facts, it is rape as defined under Section 375 I.P.C.

16. In the result, this Court confirms the trial Court's judgment of conviction and sentence and dismisses this Criminal Appeal. The accused is directed to surrender before the trial Court within 30 days from today. The trial Court is directed to commit the accused to prison to undergo the remaining period of imprisonment.

NCC : Yes
Index : Yes / No
Internet : Yes / No
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[G.J., J.] [K.K.R.K., J.]
24.02.2023

To

- 1.The Sessions Judge,
Mahalir Neethimandram, Tirunelveli.
- 2.The Inspector of Police,
Thogamalai Police Station,
Karur District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN, J.
and
K.K.RAMAKRISHNAN, J.

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PRE-DELIVERY JUDGMENT MADE IN
Crl.A.(MD)No.20 of 2020

DATED : 24.02.2023