



CRL. A. No.552/2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
26.07.2024	14.08.2024

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

CRL. A. NO. 552 OF 2021

Manikandan @ Vimal

.. Petitioner

- Vs -

State rep. By
Inspector of Police
All Women Police Station
Cuddalore, Cuddalore District.

.. Respondent

Criminal Appeal filed u/s 374 (2) IPC to set aside the conviction and sentence rendered in S.C. No.244 of 2019 on the file of the learned Sessions Judge, Mahila Court, Cuddalore and acquit the accused from the offence.

For Appellant : Mr. K.G.Senthil Kumar

For Respondent : Ms. G.V.Kasthuri, APP

JUDGMENT



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The conviction and sentence imposed on the appellant for the various offences by the learned Sessions Judge, Mahila Court, Cuddalore, in S.C. No.244 of 2019 vide judgment dated 26.08.2021 is under challenge in the present appeal.

2. The appellant was charged and tried for the offences u/s 354 (D), 452, 376, 417 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act and after trial, the appellant was convicted u/s 376 IPC and sentenced to undergo rigorous imprisonment for a period of ten years together with fine of Rs.50,000/-, in default to undergo simple imprisonment for a period of two years and convicted for the offence u/s 417 IPC and sentenced to rigorous imprisonment for a period of one year together with a fine of Rs.10,000/-, in default to undergo simple imprisonment for a period of three months. However, the appellant was acquitted of the charges u/s 354 (D) and 452 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act. Aggrieved by the said conviction and sentence, while the appellant/accused had preferred the appeal, however, insofar as the acquittal of the appellant u/s 354 (D) and 452 IPC



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and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, the State has not preferred any appeal.

3. The brief facts necessary for the disposal of this appeal are as under :-

P.W.s 1 and 2 are the mother and father of the victim, P.W.4, while P.W.3 is the neighbour of the victim. P.W.5 is the elder sister of the victim and P.W.6 is the co-worker along with the victim. P.W.4 was working in a fancy store at Thirupathiripuliyur. The appellant and constantly followed P.W.4 and had told P.W.4 that he is madly in love with her and that he will marry her and inspite of the fact that P.W.4 had told about the cultural and status difference between the two families, the appellant continued to stalk her and promised P.W.4 that he will marry her. The appellant, to show that he will marry P.W.4, had also presented P.W.4 with a silver ring on her ring finger and based on the said promise, P.W.4 also fell in love with the appellant. Thereafter, due to the lures of the appellant, while P.W.4 was returning from work during July, 2018, the appellant invited P.W.4 to his house and after speaking sugar-coated words and promising that he will marry P.W.4, and had indulged in sexual intercourse with P.W.4. Thereafter, the appellant had sexual intercourse with P.W.4 on more than



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five occasions and when P.W.4 insisted the appellant to speak with his parents for their marriage, the appellant pacified that he will speak with his parents and arrange for their marriage.

4. However, the appellant did not speak with his parents regarding their marriage. Since by then, P.W.4 was pregnant, P.W.4 informed the same to the appellant and the appellant took P.W.4 for the purpose of pregnancy testing, but returned back without undergoing the testing. However, bringing P.W.4 back to his friend's house, the appellant, with the help of the wife of his friend, took the test for pregnancy of P.W.4, which returned positive. In spite of the refusal of P.W.4 to consume tablets to abort the pregnancy, the appellant insisted P.W.4 to consume the same by promising that he will speak about their marriage with his paternal uncle and aunt. Due to the insistence of the appellant, P.W.4 consumed the tablets. P.W.4, thereafter, went to the house of the paternal uncle and met his wife and informed about the relationship of P.W.4 with the appellant and also about the consumption of tablets to abort the pregnancy for which his aunt advised P.W.4 to go over to the house of the appellant and speak about the marriage. When P.W.4 informed the same to the appellant, he scolded P.W.4



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and further informed her that he will not marry her and that he is about to be engaged with a girl selected by his parents and advised P.W.4 not to ruin her life and if required, he would maintain her as well after his marriage. The occurrence, according to P.W.4 had happened on 16.7.2018. Due to the act of the appellant in refusing to marry P.W.4, the mental turmoil faced by P.W.4 resulted in P.W.4 attempting to commit suicide at about 11.55 a.m., on 17.7.2018.

5. P.W.1, the mother of P.W.4 came to know through her daughter at her place of work that P.W.4 had attempted to commit suicide by hanging and on reaching her house, she came to know that P.W.4 had been taken to Cuddalore Government Hospital for treatment. From there, P.W.4 was shifted for higher medical treatment to JIPMER Hospital, Pondicherry. P.W.4 was unconscious when she was seen by P.W.1. After discharge, P.W.1 came to know that P.W.4 and the appellant were in love and that the appellant had ruined P.W.4 and also informed her that he will not marry her. Upon coming to know about the same, P.W.s 1 and 2 went to the house of the appellant and questioned him and the



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appellant castigated their daughter and, thereafter, P.W.s 1 and 2 went to the All Women Police Station and lodged the complaint, Ex.P-1.

6. On 20.06.2018, when P.W.9, the Sub Inspector of Police, All Women Police Station, Cuddalore, was on duty, P.W.s 1 and 2, who were sent by the Superintendent of Police, appeared before him and gave Ex.P-1, and upon receiving the same, P.W.9 registered the same in Crime No.8/2018 for the offences u/s 417 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act and prepared, printed FIR, Ex.P-5, which was forwarded to the Addl.. Mahila Court. Thereafter, at about 16.35 hours on the same day, P.W.9, taking up investigation, reached the scene of occurrence and prepared observation mahazar, Ex.P-2 and drew the rough sketch, Ex.P-6 in the presence of P.W.3 and other witnesses. P.W.9 enquired P.W.s 1 to 3 and other witnesses and recorded their statements. Thereafter, the statements of the witnesses along with the complaint and printed FIR were placed before P.W.10 for further investigation.



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7. P.W.10, the Inspector of Police, on receipt of the printed FIR, complaint and the statement of the witnesses, took up investigation and went to the scene of occurrence and observed the same. P.W.10 also enquired P.W.s 1 to 3 and other witnesses and as all of them deposed on the very same lines, their statements were not recorded once over. P.w.10, thereafter, altered the section of offence from Section 417 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act to one u/s 417, 376 and 313 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act and prepared alteration report, Ex.P-7. Once again further investigation led to the alteration of section of offence to one u/s 354 (D), 417, 452 and 376 IPC and Section 4 of the Tamil Nadu Prohibition of harassment of Women Act by preparing alteration report, Ex.P-8. On 9.7.2018, P.W.10 arrested the appellant near Thirupapuliyur railway Station and he was sent to court for judicial remand. After obtaining permission of the court, on 13.7.2018, P.W.10 sent the appellant for medical examination and obtained medical examination report, Ex.P-3 from P.W.7. P.W.10 also sent P.W.4 for medical examination to P.W.8 and obtained Ex.P-4, medical opinion. After completing the investigation, P.W.10 filed the final report against the appellant for the aforesaid offences.



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8. To establish the charges levelled against the accused, the prosecution examined P.W.s 1 to 10 and marked Exs.P-1 to P-8.

9. On completion of the evidence on the side of the prosecution, the accused was questioned under Section 313 Cr.P.C. on the incriminating circumstances appearing against him in the evidence tendered by the prosecution witnesses. He denied all the incriminating circumstances. On the side of the defence, neither any oral evidence was adduced nor any documents were marked.

10. The trial court, on consideration of oral and documentary evidence and other materials, while convicted and sentenced the accused for the offences u/s 376 and 417 IPC, however, acquitted the appellant of the offences u/s 354 (D), 452 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act. Aggrieved by the said conviction and sentence, while the present appeal has been filed by the appellant, insofar as the acquittal of the appellant



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u/s 354 (D), 452 IPC and Section 4 of the Tamil Nadu Prohibition of Harassment of Women the prosecution has not filed any appeal.

11. Learned counsel appearing for the appellant submitted that inspite of the specific case of the prosecution that the love affair of the appellant and P.W.4 was known to the villagers, yet no person has spoken about the same, which hits at the root of the prosecution case. It is the further submission of the learned counsel that the pregnancy of P.W.4 due to the sexual act of the appellant with P.W.4 has not been established.

12. It is the further submission of the learned counsel that P.W.8, the doctor, who examined P.W.4 had deposed that there is no injury in the private parts of P.W.4 and that the victim girl was not pregnant. Therefore, the sexual intercourse alleged to have taken placed between the appellant and P.W.4 has not been established and, therefore, no case could be made out against the appellant u/s 376 IPC.



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13. It is the further submission of the learned counsel that there is a categorical deposition by the prosecution witnesses, more particularly P.W.4 that her parents were looking for a bridegroom for her which she had rejected and who was later solemnised for their another daughter. However, even at that point of time, P.W.4 had not divulged about her affair with the appellant, which strikes at the case of the prosecution and, therefore, no reliance could be placed on the evidence of the said witnesses.

14. It is the further submission of the learned counsel that the alleged occurrence is said to have taken place on 17.6.2018 at about 12 noon, but the complaint was lodged belatedly on 20.06.2018 at about 15.15 hours and there is no plausible explanation for the delay. The delay in lodging the FIR coupled with the contradictions in the evidence of the witnesses render the prosecution version unacceptable and beyond the shade of truth.

15. It is the further submission of the learned counsel that the evidence of P.W.s 1, 2 and 5 bristles with contradictions and the same cannot form the basis for convicting the appellant. Further, it is the specific case of the prosecution



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that the appellant's friend of his wife had helped the appellant and P.W.4 to determine the pregnancy, but they have not been examined as witnesses and their non-examination is fatal to the prosecution case.

16. Learned counsel for the appellant also submitted that even if it is to be presumed that the appellant had sexual intercourse with P.W.4, however, the same could only be inferred to be implied consent of P.W.4, as the said consent for sexual intercourse has neither been given under fear or misconception attracting Section 90 IPC and, therefore, the consent being voluntary, the appellant cannot be proceeded with u/s 376 IPC and the conviction deserves to be set aside.

17. In fine, it is the submission of the learned counsel that the delay in lodging the complaint coupled with the contradictions in the evidence of the witnesses and also the non-examination of material witnesses, who are the link in the prosecution version with regard to the pregnancy of the victim strike at the root of the prosecution case and the prosecution has not proved its case beyond



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reasonable doubt and, therefore, the conviction and sentence recorded by the court below is liable to be set aside.

18. In support of the aforesaid submission, learned counsel placed reliance on the following decisions :-

- i) *Maheshwar Tigga – Vs – State of Jharkhand (2020 (10) SCC 108);*
- ii) *Sheikh Arif – Vs – State of Maharashtra (C.A. No.1368/2023 – Dated 30.01.2024 (SC)); and*
- iii) *Rahul Gandhi – Vs – The State (C.A. No.548/2021 – Dated 21.06.2024 (Madras HC))*

19. Per contra, learned Addl. Public Prosecutor appearing for the respondent submitted that the delay in lodging the complaint would in no way be detrimental to the case, as upon admission of P.W.4, the parents of P.W.4, viz., P.W.s 1 and 2, after speaking with P.W.4 and coming to know about the happenings, first as a normal parent had gone to the house of the appellant to seek marriage of the appellant with P.W.4, but upon rejection, they have gone to the police station and lodged the complaint. The attempt to suicide being on 17.8.2018 and the movement of P.W.4 between Cuddalore Government Hospital



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and JIPMER Hospital, and after interaction, the complaint had been given on 20.8.2018, the said period cannot be said to be delay and, therefore, the said contention cannot be sustained.

20. It is the further submission of the learned Addl. Public Prosecutor that the contradictions in the evidence of P.W.s 1, 2 and 5 cannot be held to be detrimental to the case of the prosecution as the said witnesses, being related to the victim, had spoken out their version, which is tend to contain certain infirmities, which cannot be ruled out and the said contradictions, unless it strikes at the substratum of the prosecution case, cannot for the basis to give the benefit to the appellant.

21. It is the further submission of the learned Addl. Public Prosecutor that Section 90 IPC would not stand attracted to the case on hand as the consent of P.W.4 was on clear and unambiguous terms of appellant marrying P.W.4. When such being the case, there arises no misconception as the appellant was an eligible bachelor for marriage and, therefore, the consent of P.W.4 was on the basis of love and not otherwise and, therefore, the appellant cannot seek the aid



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of Section 90 IPC and the decision of this Court in *Rahul Gandhi case* would not stand attracted to the facts of the present case.

22. It is the further submission of the learned Addl. Public Prosecutor that P.W.8, the doctor, who examined P.W.4 has, in P.W.4 clearly noted what P.W.4 had stated to her which clearly reveals that P.W.4 had informed the doctor that she had consented for sexual intercourse with Vimal and they had indulged in the said act many times and that after satisfying the sexual lust, the appellant had denied to marry her, which resulted in her attempting suicide. P.W.8 has also clearly noted that the victim had consumed abortion medication twice and that the hymen of the victim was not intact. The evidence of the victim, being in full consonance with her statement before P.W.8, the prosecution has established the case against the appellant beyond a pale of doubt and, therefore, the conviction and sentence recorded by the court below does not require any interference.



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23. This Court gave its anxious consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record as also the decisions relied on, on behalf of the appellant.

24. P.W.4, the victim, in unequivocal terms, has deposed that the appellant had, under the promise to marry the victim, had indulged in sexual intercourse with the victim. The deposition of P.W.4 is cogent and is fully corroborative with the statement given by her before P.W.8 the doctor, who had recorded the same in Ex.P-4. In spite of searching cross-examination, the defence has not been able to shake the evidence of the victim.

25. The evidence of the victim, coupled with Ex.P-4, the medical opinion of P.W.8 upon examining the victim, which clearly reveals the ruptured hymen of the victim, goes to show that the victim had sexual intercourse with the appellant. Though as contended by the appellant that pregnancy has not been established, however, the fact remains that the rupture of the hymen of the victim clearly shows that she had been in physical intimacy and, therefore, the pregnancy put forth by the victim cannot be brushed aside. True it is that the



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friend of the appellant and his wife have not been examined by the prosecution to prove pregnancy, but the same would not in any way derail the prosecution version on account of the deposition of P.W.4 before the court, which is in line with her statement in Ex.P-4 before P.W.8.

26. It should not be lost sight of that no girl would come out in the open and declare her pregnancy without she having entered into a wedlock with a male. Moreso, in the case of persons in the village, the cultural barriers erected around them would stop them from speaking about the same without they entering into the marriage. The act of the victim trying to commit suicide on account of her losing her virginity through the appellant and getting conceived only to be aborted due to the act of the appellant cannot be ruled out as the victim had no axe to grind against the appellant. The status of the two families is often stated to be the block in allowing two persons in love to enter into marriage and likewise in the present case as well, the same is projected as the reason with which this Court has no quarrel. However, it should not be lost sight of that there is no reason or rhyme for P.W.4 to point the appellant as the person



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who had physical intimacy with her and the defence has not projected any piece of material to project P.W.4 as a person with a bad character.

27. Further, it is to be pointed out that for such acts between two adolescents, there could be no witnesses and the Courts have to tread through the materials carefully to find out whether the accusations levelled against the male by a female in cases of this nature is borne out by materials and is believable, as women being of weaker sex, always tend to get carried away by the lures of a male and so long as there are no other material, which distorts the evidence of the victim, the courts are bound to accept the same while returning the verdict of guilt.

28. In the present case, the deposition of P.W.4, the victim is cogent, convincing and trustworthy. There is no material contradiction in her evidence vis-a-vis Ex.P-4, the medical opinion given by P.W.8. Further, her evidence is corroborated in sum and substance by P.W.s 1 and 2, the parents of P.W.4, who have lodged the complaint. The complaint, though given belatedly, however, is the normal course, which would have been adopted by any normal parents, as



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the first step that would be taken by any prudent parent is to approach the parents of the person, who had played in the life of their child, so as to streamline their child's life. Only when such effort goes in vain, the parents would knock on the doors of the law enforcing agency to take action against the perpetrator of the crime. Therefore, the delay, which has been blown out of proportion by the appellant is the normal time that would be taken to take any steps in cases of this nature and the same cannot be said to be delay, warranting this Court to doubt the prosecution version.

29. It is argued on behalf of the appellant that there is a grain of untruth and the deposition of P.W.s 1 2 and 5 is shrouded with contradictions and infirmities and placing reliance on the said decision would not be in the interest of fair justice to the appellant. In it has been reiterated by the Supreme Court that minor contradictions or inconsistencies, which does not affect the root and genesis of the prosecution case, are not to be given undue weightage for the purpose of discarding the evidence in toto. In this regard, useful reference can be had to the decision of the Supreme Court in **Waman – Vs - State of Maharashtra, (2011 (7) SCC 295)**, wherein it has been held as under :-



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“33. In **Gurbachan Singh v. Satpal Singh [(1990) 1 SCC 445 : 1990 SCC (Cri) 151]** this Court has held that despite minor contradictions in the statements of prosecution witnesses, the prosecution case therein has not shaken and ultimately accepting their statement set aside the order of acquittal passed by the High Court and restored the sentence imposed upon them by the trial court.

34. In **Sohrab v. State of M.P. [(1972) 3 SCC 751 : 1972 SCC (Cri) 819]** about minor contradictions in the statements of prosecution witnesses, Their Lordships have held in para 8 as under:

“8. ... It appears to us that merely because there have been discrepancies and contradictions in the evidence of some or all of the witnesses does not mean that the entire evidence of the prosecution has to be discarded. It is only after exercising caution and care and sifting the evidence to separate the truth from untruth, exaggeration, embellishments and improvement, the court comes to the conclusion that what can be accepted implicates the appellants it will convict them. This Court has held that **falsus in uno falsus in omnibus** is not a sound rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main



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incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered though where the substratum of the prosecution case or material part of the evidence is disbelievable it will not be permissible for the court to reconstruct a story of its own out of the rest."

35. It is clear that not all the contradictions have to be thrown out from consideration but only those which go to the root of the matter are to be avoided or ignored. In the case on hand, as observed earlier, merely on the basis of minor contradictions about the use and nature of weapons and injuries, their statements cannot be ignored in toto. On the other hand, we agree with the conclusion of the trial court as affirmed by the High Court about the acceptability of those witnesses, and accordingly, we reject the claim of the appellants as to the same."

(Emphasis supplied)

30. In the case on hand, there are discrepancies relating to the manner in which P.W.s 1 and 2 have proceeded after coming to know about the physical relationship between the appellant and P.W.4. The deposition of P.W.s 1 and 2 with regard to the raising of complaint before the law enforcing agency has certain contradictions, but those contradictions do not in any manner materially



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affect the genesis of the prosecution case. The manner in which the act has been committed by the appellant on P.W.4 has been spoken to by P.W.4. As stated above, there is no grain of untruth in the said version and it is cogent and straightforward and there is no material to infer that it is borne out of any enmity but it is more on the basis of the false promise given by the appellant through which the appellant has achieved what he had wanted which he would otherwise not have achieved. The cunningness in the manner in which P.W.4 had been utilised by the appellant has been spoken in a clear manner in the evidence of P.W.4 and the victim having spoken out about the act of the appellant, the contradictions in the evidence of P.W.s 1 2 and 5 do not in any way render the act of the appellant prone to doubt.

31. In spite of lengthy cross examination, no evidence fruitful or beneficial to the accused has been elicited by the defence. As aforesaid, the contradictions in the evidence of P.W.s 1, 2 and 5 would not in any way cloud the evidence of the victim, P.w.4 and so long as the said evidence is cogent and convincing and is prone to no serious doubts, this Court is bound to accept the said testimony. Accordingly, following the proposition laid down by the Supreme Court not only



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in the above decision, but which proposition has been laid down in a catena of decisions, this Court is of the considered view that the contradictions, even otherwise in the evidence of P.W.s 1, 2 and 5 would in no way take the case away from the prosecution to be held in favour of the appellant.

32. Further, the evidence of P.W.6, who is an independent witness corroborates the evidence of P.W.4. The deposition of P.W.6 is to the effect that she knows about the stalking of P.W.4 by the appellant and when enquired, the appellant informed her that he intended to marry P.W.4. Though the sexual relationship has not been spoken to by P.W.6, however, the act of the appellant in going behind P.W.4 claiming to being in love with P.W.4 stands corroborated and the whole case of P.W.4 is built only on the ground that the appellant had promised to marry her, which led her to have sexual intercourse with the appellant. Therefore, there being cogent and convincing materials, which corroborate on all material aspects, the court below has rightly found that the prosecution has proved the case against the appellant beyond reasonable doubt.



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33. Though learned counsel for the appellant sought to place reliance on the decision of this Court in *Rahul Gandhi case*, the facts in the said case would, in no way, be attracted to the case on hand. In the said case, the appellant was a married person with child and the alleged victim had known fully well that he is a married person and, therefore, the claim of promise of marrying the victim there was a misconceived fact by the victim. However, in the case on hand, the appellant is a bachelor and eligible to marry the victim and the victim was also well aware of his bachelor status, which led her to give way to him to indulge in sexual activity with her on the promise of the appellant marrying her. Therefore, it is very clear that from the very beginning there was no intention on the part of the appellant to marry the victim and thus her consent could only be said to be a consent on a misconception of fact as per Section 90 IPC.

34. The Apex Court in the case of *Anurag Soni case (supra)* in almost identical circumstances, deliberating upon misconception of fact as provided for u/s 90 IPC, has held as under :-

10.6. The High Court of Delhi in Sujit Ranjan v. State [Criminal Appeal No. 248 of 2011 decided on 27.01.2011], after referring to



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and considering several decisions of this Court, ultimately in paragraph 16, observed and held as under:

16. Legal position which can be culled out from the judicial pronouncements referred above is that the consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under "misconception of fact". Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that Accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to "misconception of fact" right from the inception.

11. So far as the decisions upon which reliance has been placed by the learned Counsel appearing on behalf of the Accused



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referred to hereinabove are concerned, the same shall not be applicable to the facts of the case on hand. In the case of Tilak Raj (supra), the prosecutrix was an adult and matured lady of around 40 years at the time of the incident. It was admitted by the prosecutrix in her testimony that she was in a relationship with the Accused for last two years prior to the incident and he used to stay overnight at her residence. Therefore, considering the evidence as a whole, including FIR, testimony of the prosecutrix and the MLC report, this Court found that the story of the prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable and on facts it was found that the act of the Accused seems to be consensual. It is required to be noted that before this Court the Accused was acquitted for the offence Under Section 376 of the Indian Penal Code, however, the High Court convicted him Under Sections 417 and 506 of the Indian Penal Code. Therefore, on facts, the said decision shall not be of any assistance to the Appellant in the present case.

11.1. Even in the case of Deepak Gulati (supra) it was observed that the Accused can be convicted for rape if the court reaches the conclusion that the intention of the Accused was mala fide, and that he had clandestine motives.

11.2. Even the decisions of this Court in Uday (supra), Deelip Singh (supra) and Shivashankar alias Shive v. State of Karnataka



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MANU/SC/0408/2018 shall not be applicable to the case of the Accused on hand.

12. The sum and substance of the aforesaid decisions would be 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 of the Indian Penal Code 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 of the Indian Penal Code and can be convicted for the offence Under Section 376 of the Indian Penal Code."

35. From the above, it could very safely be perceived that from the inception, the consent of the victim was on the basis of the promise made by the accused that he will marry her, but that promise was only a false promise, then the misconception of fact u/s 90 IPC would stand attracted. It is not the case of the appellant that he was not expressed his love for the victim, as his love has been spoken to by P.W.6, an independent witness, who was working with P.W.4 and in cross examination, no answer in favour of the appellant has been elicited.



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However, P.W.6 has clearly deposed that it was the appellant, who was following P.W.4 under the guise of love and P.W.4 succumbed to the lures of the appellant. Though the consent of the victim to the act of sexual intercourse on the promise of marriage and her continuance to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part, but it cannot be held to be a consented act, as the said act of consent was on a misconception of fact on account of the calculated attempt of the appellant to lure her under the assurance of marriage from the very inception, though he never really intended to marry P.W.4. Therefore, the act of the appellant from the very beginning itself is without an intention to marry the victim and in such circumstances, the consent could only be said to be a consent on misconception of fact and, therefore, the decision in *Rahul Gandhi case* cannot be imported to the facts of the present case.

36. Insofar as the contention with regard to the prosecution not establishing that the victim was pregnant and it was done away with by the act of the appellant, Ex.P-4, coupled with the evidence of P.W.8, the doctor, who examined P.W.4, clearly shows that upon examination, the possibility of the



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victim having sexual intercourse has been held to be possible. However, when the victim was examined, the doctor, P.W.8 had opined that the victim was not pregnant at that point of time. The mere fact that the victim was not pregnant at the material point when she was examined cannot be the basis to doubt that there was no sexual intercourse between the appellant and the victim. It is the specific case of the prosecution that upon coming to know that P.W.4 was pregnant, the appellant had given her tablets to abort the pregnancy, which fact finds a mention in Ex.P-4. Further, the two finger test into the vagina of P.W.4 has also been held to be positive, as it admits the two fingers rightly. Therefore, from the above, it is clear that the victim had been subjected to sexual intercourse and in the absence of any other evidence and the evidence of P.W.4 having not been shaken by the defence in any manner, the only view that could be arrived at is that the deposition of P.W.4 that P.W.4 had sexual intercourse with the appellant on the promise made that he will marry her deserves to be accepted.

37. Though there are certain prosecutorial lapses in not examining certain persons as witnesses, who would have bolstered the prosecution case, however,



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it is to be pointed out that the witnesses, who are to be examined is solely within the discretion of the prosecution and this Court cannot prevail upon the prosecution to examine one witness or the other. However, the mere fact that certain persons have not been examined as witnesses alone cannot be the basis to discredit the prosecution version when there are other materials which conclusively establish that what is spoken to by the victim is the truth.

38. Though the defence has projected that the victim was not interested in marrying a physically challenged person and that she rejected the marriage due to which P.W.s 1 and 2 did not treat her properly due to which she attempted to commit suicide, however, but for the suggestion made, the defence has not made inroads in the deposition of the witnesses and considering Ex.P-4 and the deposition of P.W.4, the probability of the prosecution case assumes much larger proportion for this Court to hold that the version projected by the defence does not have any merit, but is an attempt to clutch to the last straw available in the armoury of the defence to negate the deposition of P.W.4, which is impressive and has withstood the onslaught of the defence. Therefore, rightly appreciating all the above, the court below has held the accused/appellant guilty of the



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offence u/s 376 and 417 IPC and convicted the appellant, which cannot be found fault with.

39. However, turning back to the sentence imposed on the appellant u/s 376 IPC, the court below, on the materials, has sentenced the appellant to rigorous imprisonment for a period of ten years along with fine of Rs.50,000/-, in default to undergo simple imprisonment for two years. However considering the facts and circumstances of the case and also the age of the appellant as on date and on the basis of the request made by the learned counsel appearing on behalf of the appellant, this Court is inclined to reduce the sentence to a period of seven years.

40. Accordingly, while the appeal is dismissed by confirming the conviction imposed on the appellant u/s 376 and 417 IPC, but the sentence imposed u/s 376 IPC alone is modified by reducing the sentence from ten years to seven years rigorous imprisonment. The sentence imposed under Section 417 IPC and fine imposed u/s 376 and 417 IPC are confirmed. It is reported that the appellant is on bail. The trial court is directed to take steps to secure the appellant and



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commit him to prison to undergo the balance period of sentence imposed upon him.

14.08.2024

Index : Yes / No

GLN

To

1. The Sessions Judge
Mahila Court, Cuddalore.
2. The Inspector of Police
All Women Police Station
Cuddalore, Cuddalore District.
3. The Public Prosecutor
High Court, Madras.



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CRL. A. No.552/2021

M.DHANDAPANI, J.

GLN

**PRE-DELIVERY JUDGMENT IN
CRL. A. NO. 552 OF 2021**

Pronounced on



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CRL. A. No.552/2021

14.08.2024