



Crl.A.No.423 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.06.2024

CORAM :

THE HONOURABLE MRS. JUSTICE R.HEMALATHA

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1. R. Shobana

...Appellant

vs.

1. A. Iyyappan
S/o. Arunachalam

2. The Sub Inspector of Police,
All Women Police Station,
Thirupattur Taluk,
Vellore District.
Crime No.18 of 2006

...Respondents

PRAYER: Criminal Appeal filed under Section 374 (2) of Criminal Procedure Code, 1973, against the judgment and orders dated 30.12.2009 passed by the Assistant Sessions Court / Sub Court, Thirupattur, in S.C.No.192 of 2007.

For Appellant	: Mr. T. Arun for M/s. Karan and Uday
For R1	: Mr. T. Saravanan Legal Aid Counsel
For R2	: Mr.S. Rajakumar Additional Public Prosecutor.



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JUDGMENT

The present appeal is filed by the victim against the judgment and orders dated 30.12.2009 passed by the learned Assistant Sessions Judge, Sub Court, Tirupattur, in S.C.No.192 of 2007, acquitting the accused/1st respondent of the offences under Sections 417, 376 and 506(ii) IPC.

2. The case of the prosecution as could be discerned from oral and documentary evidence is as follows:

2.1. The victim (P.W.1) reportedly was in a relationship with the accused and according to her complaint (Ex.P1) she had physical intimacy on more than one occasion believing the appellant's promise that he would marry her. It was only when marriage arrangements of the appellant was taking place with some other girl, the victim realised that she was deceived and consequently preferred a complaint (Ex.P1) to All Women Police Station Thirupattur.

2.2. The evidence of P.W.1 (appellant) is that she was VIII Standard student and was residing with her parents in Puthurnadu village



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of Thirupattur Taluk. She came in acquaintance with the accused/Iyyappan who used to visit Chennai now and then. On 27.01.2006, the accused had called her through one Kali (P.W.9) to meet him, but she did not go. Later, on 28.01.2006, he came to her house, promised to marry her and had physical relationship with her. The physical intimacy between the two became a regular feature and according to P.W.1, the accused used to make a promise everytime that he would marry her. In between, she had to proceed to Bangalore for a couple of weeks and when she returned she confronted the accused knowing that he is getting married to another girl by name Mahalakshmi. The accused told her to do whatever she likes and that he is not afraid of her. Therefore, P.W.1 went to All Women Police Station, Thirupattur, and lodged a complaint with Tmt.Suryakala (P.W.18), the then Inspector of Police, All Women Police Station, Thirupattur, on 21.06.2006.

2.3. P.W.18 recorded the statement of P.W.1 and registered F.I.R (Ex.P6) in Crime number 18/2006 of All Women Police Station, Thirupattur, against the accused for the offences punishable under Sections 376 and 506(ii) IPC. She took up investigation, went to the scene of occurrence and prepared an observation mahazar (Ex.P7) and a



rough sketch (Ex.P8) in the presence of the witnesses Andi (P.W.8) and Raman(P.W.12). She examined the key witnesses and recorded their statements. The victim (P.W.1) was then sent, for medical examination, to Government Hospital, Thirupattur.

2.4. Dr. Meenakshi (P.W.15) examined P.W.1 on 23.06.2006 and found that her hymen was ruptured. She took vaginal smear and sent the same to Forensic Lab for analysis. According to P.W.15, P.W.1 was raped. Her opinion was marked as Ex.P4.

2.5. Dr. Rangasamy (P.W.16), Radiologist, Government Medical College Hospital, Vellore, opined (Ex.P5) that the age of the victim was above 17 years and below 18 years.

2.6. Raji (P.W.2) and Rani (P.W.3) are the parents of P.W.1 while Prathapa Chandiran(P.W.4) is the maternal uncle of P.W.1. Their evidence is that they were informed by the victim(P.W1) that she was raped by the accused on the pretext of marrying her. Srimathi (P.W.5) is the wife of P.W.4. Her evidence is that when they all went for the funeral of one of their relatives, P.W.1 confronted the accused and asked him to



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marry her.

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2.7. Kalpana (P.W.6) is the elder sister of P.W.1. Her evidence is that she was informed by her sister (P.W.1) that she is in love with the accused who is their neighbour and that the accused raped her on 15th day of Tamil month Thai (January). She had also averred that the accused threatened P.W.1 with dire consequences if she insists for a marriage.

2.8. Thukkan (P.W.7), Andi (P.W.8), Kali (P.W.9), Gnanaprakasam (P.W.10), Alamelu (P.W.13) and Rukmani (P.W.17) did not support the case of the prosecution and they were all treated hostile by the prosecution.

2.9. Thiru. Mani (P.W.11) is the Headmaster of the Government Higher Secondary School, Puthurnadu. According to him, the date of birth of P.W.1 is 15.04.1992.

2.10. Raman (P.W.12) is a resident of Puthurnadu village. His evidence is that he heard that the accused raped P.W.1 and subsequently married some other girl.



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2.11. Tmt. Suriyakala (P.W.18) after concluding preliminary investigation handed over the case to the Deputy Superintendent of Police, Thirupattur, who enquired the accused and sent him for medical examination. Since the accused already had obtained an anticipatory bail, he was not arrested by the police.

2.12. Dr.Kalivaradhan (P.W.14) examined the accused. According to him, the penis of the accused was well grown and the erectile functioning was good. His certificate was marked as Ex.P3.

2.13. The investigation, according to P.W.18, was once again transferred to her and she examined the Doctors and the other witnesses and recorded their statements under Section 161 (3) Cr.P.C. After completing investigation she laid a final report before the Judicial Magistrate No.II, Thirupattur in P.R.C. No.18/2006 against the appellant for the offences punishable under Sections 417, 376 and 506(ii) IPC.

2.14. The learned Judicial Magistrate No.II, Thirupattur, after furnishing copies of records to the accused under Section 207 Cr.P.C, committed the case to the Court of Sessions, Vellore. The Principal



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Sessions Judge, Vellore, took the case on file in S.C.No.192/2007 and made over the same to the court of Assistant Sessions Judge, Sub Court, Thirupattur.

2.15. The learned Assistant Sessions Judge, Sub Court, Tirupattur, framed charges under Sections 417, 376 and 506(ii) IPC against the accused.

2.16. In order to bring home the guilt of the accused the prosecution examined 18 witnesses and marked Ex.P1 to Ex.P8.

2.17. The accused, when questioned under Section 313 Cr.P.C with regard to the incriminating circumstances appearing in evidence against him, he denied of having committed any offence. He marked Ex.D1 to Ex.D9.

2.18. The learned Assistant Sessions Judge, Sub Court, Thirupattur, after analysing the oral and documentary evidence on record, acquitted the accused of the offences punishable under Sections 417, 376 and 506 (ii) IPC vide his judgment dated 30.12.2009.



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2.19. Aggrieved over the judgment and orders passed by the trial

Court, the victim has preferred the present appeal.

3. Heard Mr. T. Arun, learned counsel for the appellant, Mr.T.Saravanan, learned Legal Aid Counsel appearing for the first respondent and Mr.S. Raja kumar, learned Additional Public Prosecutor appearing for the second respondent.

4. The accused in this case has been charged for the offences punishable under Sections 417, 376 and 506 (ii) IPC for committing rape of a minor girl (figured as P.W.1 in this case) in the month of January 2006 on the promise of marrying her. Subsequently, when the accused was confronted by P.W.1 on hearing the news of his marriage with some other girl he threatened her with dire consequences. The victim girl lodged the complaint with the Inspector of Police, All Women Police Station, Thirupattur on 21.06.2006 i.e. long after the alleged act of rape. Broadly, the version of the victim girl was that she and the accused were neighbours and fell in love with each other and one day the accused forcibly raped her and also consoled her saying that he would marry her.

There were multiple occasions when the physical intimacy took place



between them based on her blind faith in him that he would make her as his wife. Subsequently, the accused's marriage was fixed with one Mahalakshmi. The appellant / victim when confronted the accused, he threatened her with dire consequences.

5. It is pertinent to point out that the alleged offence took place in the year 2006 much prior to the enactment of the Protection of Children from Sexual Offences Act (POCSO for short) 2012. Section 376 IPC was also amended only in the year 2013. Section 375 IPC before the amendment reads thus :

"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



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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.

Exception.-Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

6. The prosecution states the age of the victim was 14 years on the date of occurrence. However, neither the School Records nor the birth certificate of the victim was produced. Thiru. Raman (P.W.12), the Headmaster of the Government Higher Secondary School, Puthurnadu, where P.W.1 was studying, had deposed that P.W.1's date of birth was 15.04.1992. However, he did not produce any supporting documents in this regard. Dr.Rangasamy (P.W.16), Radiologist, after examining the victim girl opined that her age is above 17 years and below 18 years. In the absence of birth certificate or other School Records, it is difficult to conclude that the victim was aged below 16 years.

7. Such instances are always shrouded in a culture of silence since they go unreported and most often the perpetrator goes scot free causing a loss of faith in the legal system. However, in the instant case it is not



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only the age factor which has tilted the balance in favour of the accused but also the lack of credible oral evidence. P.W.1 (victim), P.W.2 (victim's father), P.W.3 (victim's mother), P.W.6 (victim's sister) have all made glaring contradictory statements, due to which the trial court could not rely on them. One crucial independent witness Kali (P.W.9) turned hostile to the prosecution. The trial court also pointed out the lack of other witnesses especially in the light of the fact that the place of occurrence was a crowded residential colony and ingress and egress of the accused could not have occurred stealthily without anyone's knowledge. It is not also the case of the prosecution that P.W.1 raised any alarm in case it was a forcible act of sex on the part of the accused. Even the bare reading of P.W.1's deposition did not cause any doubt as to her willingness to participate in the act. The expression 'against the will' in Section 375 IPC seems to connote that the offending act was done despite resistance and opposition of the woman. Though will and consent often interlace and an act done against the will of a person can be said to be an act done without the consent, the Indian Penal Code categorizes these two expressions under separate heads in order to be as comprehensive as possible. Now the question is whether the consent given by a woman believing the man's promise to marry her is a consent which excludes the



offence of rape. It is to be understood that Indian Penal Code does not define 'consent' in positive terms. However, Section 90 IPC reads thus :

"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."

8. Consent given firstly under 'fear of injury' and secondly under a 'misconception of fact' is not consent at all. The second part of Section 90 IPC enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively



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satisfied. The Court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the accused is conscious of the fact or has reason to think that but for the fear or misconception, the consent would not have been given. This is the essence of Section 90 IPC. An adult female's understanding of nature and consequences of sexual act must be intelligent understanding to constitute 'consent'.

9. In the instant case though P.W.1 has stated that she gave consent to have sex with the accused on multiple occasions since he promised to marry her, it is not known as to why she kept it a secret from her parents, if really she had belief in that promise. Even assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. Here, the fact alleged is a promise to marry, but when? If a full grown girl consents to the act of the sexual intercourse on a promise of marriage and continues to indulge in such activity until it comes to her knowledge



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that the offender's marriage has been fixed with some other girl, it cannot be concluded as a misconception of fact. A false promise is not a fact within the meaning of the code. However, if on the facts it is established that at the very inception of making of promise, the accused did not really entertain the intention of marrying the victim and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause.

10. A close scrutiny of the evidence of P.W.1 reveals that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her about the prospect of marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the FIR (Ex.P6). There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. Her evidence does not indicate that she was incapable of understanding the nature and implications of the act which she consented to.



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11. It is seen from Ex.D1, which is a copy of the order dated 16.06.2006 passed by this Court in CrL.O.P. No.14315/2006, that an anticipatory bail was granted to the accused for the offences under Sections 417 and 420 IPC. It is also evident from Ex.D1 dated 16.06.2006 that P.W.1 had on an earlier occasion given a police complaint which was pending for enquiry. The said complaint has not seen the light of the day. P.W.1 during the course of cross examination denied such a complaint.

12. Subsequently, it was alleged by P.W.1 that she was threatened by the accused to withdraw the case for which she had filed a separate complaint dated 07.08.2006 and FIR in Crime Number 20/06 of All Women Police Station, Tirupattur, was registered. The Inspector of Police, All Women Police Station, Tirupattur, after investigation laid a final report against the present accused in C.C.No.270/06 before the Judicial Magistrate No.II, Thirupattur, for the offences under Sections 341, 354 and 506 (ii) IPC. The learned Judicial Magistrate No.II, Thirupattur, acquitted the accused after full trial on 02.04.2007.



13. P.W.1 had also stated that she and the accused were in good terms and friendly till 21.06.2006 when she lodged the present complaint (Ex.P1). This created a suspicion in the case of the prosecution. Moreover, during the course of cross examination when a question was posed to P.W.1 regarding the filing of an earlier complaint based on which the accused had obtained an anticipatory bail, she did not deny but surprisingly expressed her inability to answer the question.

14. The last question which has to be answered is whether the promise to marry, if made by the accused was false to his knowledge and belief from the very inception and it was never intended to be acted upon by him. The burden is on the prosecution to prove that there was absence of consent. A close scrutiny of the evidence of P.W.1 could throw some light on this vital point. First, we must exclude from consideration that part of her version which accuses of forcible sexual indulgence on the first occasion as the same has already been held as unbelievable. P.W.1 seems to have known the moral quality of the act and the inherent risks involved in that. The accused might have promised P.W.1 to marry her. But there is no evidence on record which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his



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knowledge. No circumstances emerging from the prosecution evidence establish this fact.

15. In the circumstances, the order of acquittal passed by the trial court is perfectly in order and I do not find any reason to interfere with the same.

16. In the result,

(i) This Criminal Appeal is dismissed.

(ii) The judgment and orders dated 30.12.2009 passed by the Assistant Sessions Court / Sub Court, Thirupattur, in S.C.No.192 of 2007, is confirmed.

(iii) This Court places on record its appreciation to Mr.T.Saravanan, learned Legal Aid counsel, for his valuable assistance in deciding this case. The High Court Legal Service Committee shall pay a sum of Rs.10,000/- to the said counsel towards his fee.

05.06.2024

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Index : yes/no

Speaking /Non speaking Order



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Copy to

The Secretary,
High Court Legal Services Committee,
High Court Campus, Chennai - 104.

To

1. The The Sub Inspector of Police,
All Women Police Station,
Thripattur Taluk,
Vellore District.
2. The Assistant Sessions Court / Sub Court, Tirupattur
3. The Public Prosecutor, High Court, Madras.
4. The Section Officer, Criminal Section, High Court, Madras



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R.HEMALATHA, J.

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