

Kannan Vs. State

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Court : Chennai

Decided On : Jun-20-2014

Judge : The Honourable Mrs.Justice Aruna Jagadeesan

Appellant : Kannan

Respondent : State

Judgement :

IN THE HIGH COURT OF JUDICATURE AT MADRAS DATED :

20. 06.2014 CORAM: THE HONOURABLE MRS.JUSTICE ARUNA JAGADEESAN Criminal Appeal No.79 of 2010 Kannan .. Appellant Vs. State rep. by Inspector of Police, All Women Police Station, Kottakuppam, Villupuram District. (Crime No.3/2007) .. Respondent Prayer: Criminal Appeal filed under Section 374(2) of Criminal Procedure Code as against judgment and conviction and sentence passed by the learned Additional Sessions Judge cum Fast Track Court No.1, Tindivanam in S.C.No.311 of 2009 by judgment dated 21.01.2010. For Appellant : M/s.Sai, Bharath and Ilan For Respondent : Mr.V.MR.Rajendran Addl.Public Prosecutor.

JUDGMENT

This appeal is filed against the judgment of conviction and sentence passed by the learned Additional Sessions Judge cum Fast Track Court No.1, Tindivanam, in

S.C.No.311 of 2009 dated 21.01.2010 whereby the appellant/1st accused was convicted under Sections 417 IPC and sentenced to undergo 1 year rigorous imprisonment and to pay a fine of Rs.30,000/- in default to undergo three months imprisonment 2. The case of the prosecution is briefly stated as under: i) P.W.1 Vimala aged about 20 years had love affair with the first accused Kannan who was residing in her village. One year prior to 23.06.2007 i.e., the date of complaint, the first accused invited Vimala to the house situated in his field which is in a dilapidated condition and giving false promise of marrying her, had sexual intercourse with her. Thereafter, on several occasions they continued the same. Due to which the victim girl conceived and gave birth to a male child, named Sanjai on 6.8.2007. When the victim asked the 1st accused to marry her, he refused and also joined with the accused 2 to 4 and threatened the victim girl with dire consequences. Hence, she preferred a complaint in Ex.P1 before the All Women Police Station, Kottakuppam. A case came to be registered in Crime No.3 of 2007 under sections 417, 376 and 506(ii) IPC. ii) P.W.13 Sub Inspector of Police inspected the place of occurrence and prepared a sketch in Ex.P6. Thereafter, the victim girl was produced before the Government Doctor P.W.14 who conducted examination on her and gave certificate Ex.P7. Pushpa/A3 was arrested and remanded to judicial. In the meanwhile, the victim girl/P.W.1 delivered a child and D.N.A. Test was conducted and the first accused is proved to be the biological father of the child Sanjai. On completion of investigation, the investigating officer has filed the final report.

3. In order to substantiate the charges levelled against the accused, the prosecution examined 17 witnesses and marked 11 exhibits and no material object was marked. No witness and no exhibits were marked on the side of the defence. The accused were questioned under section 313 Cr.P.C. As to the incriminating circumstances found in the prosecution case and they denied them as false. On completion of trial and on hearing the arguments on either side and on scrutiny of the available materials on record, the trial Court found the accused 2 to 4 not guilty under section 506(ii) IPC and acquitted them and found the first accused not guilty under section 376 and 506(ii) IPC but convicted him under section 417 IPC and sentenced to undergo one year simple imprisonment and to pay a fine of Rs.30,000/- in default to undergo three months imprisonment. Hence, this appeal

at the instance of the appellant.

4. From the evidence of P.W.1/victim girl, it is seen that the victim girl and the accused had love affair for the past two years before the complaint was given and she went along with the accused when he called her to the secluded place and they had sexual relationship on several occasions. On all the said occasions, the victim girl did not make any protest or tried to escape from the accused. She went silently along with the accused when he called her and she did not even make any protest at the time of sexual intercourse.

5. The evidence of P.W.1/victim girl would further indicate that she had developed intimacy with the accused and had allowed him to have sexual intercourse with her on the assurance given by him to marry her. Therefore, it would be evident from the said evidence of P.W.1 that the accused had sexual intercourse with P.W.1 with her consent. The victim was aged nearly 20 years at the time of occurrence. The prosecution case is that she agreed to sexual intercourse because the accused promised to marry her. The prosecution has not brought home the guilt of the accused in respect of charges under Sections 417 of Indian Penal Code . When the charge of cheating rests upon a representation, which is false and which relates not to an existing fact but to a certain future event, it must be shown by the prosecution that the representation is false to the knowledge of the accused when it was made. It will be of no consequence to show that in fact the representation has ultimately turned out to be untrue.

6. The learned counsel for the appellant relied upon a judgment of the Hon'ble Supreme Court reported in AIR 2003 SC1639 in Uday Vs. State of Karnataka wherein in paragraph No.23, it is held as follows: Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the

significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

7. It is well settled that in order to bring home the charge of cheating, it is not only sufficient to prove that a false representation had been made, but it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the victim. The prosecution case is that the accused had frequent sexual intercourse with P.W.1. Even if it is assumed that P.W.1 agreed to sexual intercourse with the accused on account of promise of marriage, the charge under Sections 417 of IPC cannot be sustained in the absence of any evidence to show that the said representation by the accused was false to the knowledge at the time it was made.

8. On the other hand, there is no indication or material placed to show that even at the time when assurance was made by the accused it was false to the knowledge of accused i.e the accused was well aware that he would not marry her. Such a dishonest intention on the part of the accused cannot be inferred from the mere fact that he did not fulfill the promise subsequently for some reason or other.

9. On the basis of the evidence on record, it cannot be held that P.W.1 would not have agreed to have sexual intercourse with the accused but for the alleged promise. The evidence clearly indicated that there was intimacy between the accused and the victim girl and may be, that the accused would have given assurance at the time of sexual intercourse that he would marry her. The evidence would go to show that the appellant had sexual intercourse with the victim girl and it was not resisted by the victim girl at any point of time.

10. It would be apt and appropriate to refer to the judgment reported in (2013) 7 SCC675(Deepak Gulati v. State of Haryana) wherein it is held as follows: There is a distinction between the mere breach of a promise, and not fulfilling a false promise. There must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise of marry the victim. 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 misrepresentation made to her by the 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 so. Such cases must be treated differently. The failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

11. It is relevant to refer to the judgment reported in (2013) 9 SCC113Kaini Rajan v. State of Kerala) wherein it is held as follows: This Court examined the scope of section 375 IPC in a case where the facts have some resemblance with the one in hand. Reference may be made to the judgment of this Court in Deelip Singh v. State of Bihar. In that case, this Court examined the meaning and content of the expression without her consent in Section 375 IPC as well as whether the consent given by a woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent i.e., the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90 IPC. This Court further held that (SCC p.104, para 28) 28. ...If on

facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her 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 the second clause of Section 375 IPC. 12. During the pendency of the proceedings in this Court, the victim girl and the appellant appeared to have duly compromised. They appeared before this Court and would state that they got married and living together happily. The victim girl would state that she does not want to precipitate the matter further and she is now leading a peaceful life. An affidavit of compromise was filed by the victim girl and appellant stating that they are living together happily and they have also got another female child. The same is recorded.

13. Considering that the victim girl was a consenting party and was a matured girl and further her evidence indicated that she had agreed to have sexual intercourse with the accused not on account of misrepresentation made to her by the accused, I am of the view that the appellant cannot be convicted for the offence under section 417 IPC as there is no evidence to indicate that the intention of the accused was malafide and that he had clandestine motive of having sexual intercourse with her.

14. Further, in view of my findings as aforesaid, I do not deem it necessary to consider the said affidavit of compromise filed by the parties.

15. For the reasons aforesaid, I am of the clear view that the prosecution failed to bring home the charges levelled against the accused and the conviction and sentence awarded by the court below are liable to be set aside.

16. In the result, the criminal appeal is allowed. i) The criminal appeal is allowed. ii) The judgment of conviction and sentence imposed on the appellant by the learned Additional Sessions Judge cum Fast Track Court No.1, Tindivanam, in S.C.No.311 of 2009 by judgment dated 21.01.2010, is set aside. iii) The appellant is acquitted of the charges levelled against him. iv) Bail bond, if any executed by the appellant shall stand cancelled. v) It is brought to the notice of the Court that the fine amount has already been paid and a sum of Rs.25,000/- was already

deposited by the appellant before the Judicial Magistrate , Vanur on 16.11.2007 pursuant to the direction of this court while granting bail to the appellant in CrI.O.P.No.18529/2007. Therefore, the fine amount of Rs.30,000/- and the amount of Rs.25,000/- deposited by the appellant while granting bail, shall be refunded to the appellant. 20.06.2014 Index : Yes / No Internet : Yes / No vsi To 1. The Additional Sessions Judge cum Fast Track Court No.1, Tindivanam.

2. The Inspector of Police, All Women Police Station, Kottakuppam, Villupuram District.

2. The Public Prosecutor, High Court, Chennai. ARUNA JAGADEESAN, J.

vsi C.A.No.79 of 2010 20.06.2014

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