

**Moorthy Vs. State of Tamil Nadu Represented by the Inspector of Police
Karipatti Police Station, Salem District**

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Court : Chennai

Decided On : Dec-21-2016

Judge : M. Venugopal

Appeal No. : Criminal Appeal No. 759 of 2016

Appellant : Moorthy

Respondent : State of Tamil Nadu Represented by the Inspector of Police
Karipatti Police Station, Salem District

Judgement :

(Prayer: Criminal Appeal filed under Section 374(2) Cr.P.C., against the Judgment dated 22.10.2016 made in S.C.No.38 of 2014 on the file of the Court of Sessions Mahila Judge, Salem in convicting the Appellant/ Accused under Section 417 I.P.C. sentencing to undergo Rigorous Imprisonment for 1 year and to pay with fine of Rs.50,000/-.)

The Appellant/Accused has filed the instant Criminal Appeal before this Court (as an aggrieved person) being dissatisfied with the Judgment dated 22.10.2016 in S.C.No.38 of 2014 passed by the Learned Sessions Mahila Judge, Salem.

Preface:

2. The Learned Sessions Mahila Judge, Salem, while passing the impugned Judgment in S.C.No.38 of 2014 on 22.10.2016, at paragraph 39 and 40, had observed the following:

39. The accused is already charged u/s.376 and 450 of IPC. But this court concluded he has committed the offence u/s.417 of IPC. The facts are proved which reduce its to a minor offence against the accused person. Hence this court concluded that the accused has committed the offence of cheating and hence questioned u/s.235 of Cr.P.C. He started that Tamil .

40. This court carefully considered the plea of the accused person. Since the accused has cheated the young girl aged about 16 years and had sexual intercourse with her under the false pretext of marrying her. And refused marry her and by his act cheated the victim girl. Hence the accused is convicted and sentenced for the offence u/s 417 of IPC. to undergo R.I. For 1 year and to pay a fine of Rs.50,000/- I/d of payment of fine amount 3 months S.I. Out of the fine amount a sum of Rs.40,000/- is ordered to be given to the victim girl for the mental agony and to the damage caused by the accused person to her body, mind and reputation as compensation u/s.357(1) Cr.P.C. after appeal time is over. The period of detention already under gone by the accused is ordered to be set off u/s.428 of Cr.P.C.

and consequently, found the Appellant/Accused guilty under Section 417 I.P.C. and convicted and sentenced him to undergo one year Rigorous Imprisonment and further directed him to pay a fine of Rs.50,000/-. Moreover, the trial Court had proceeded to observe in the Judgment that in default of payment of fine amount, the Appellant/Accused was directed to undergo further three months Simple Imprisonment. That apart, out of the fine amount of Rs.50,000/-, the victim girl was ordered to be paid a sum of Rs.40,000/- for mental agony and to the damage caused to her body, mind and reputation as compensation under Section 357(1) Cr.P.C.

Appellant's Submissions: 3. Assailing the correctness and legality of the Judgment passed in S.C.No.38 of 2014 dated 22.10.2016, the Learned Counsel for the Appellant/Accused urges before this Court that the trial Court had not framed a

charge under Section 417 I.P.C. and erroneously convicted the Appellant/Accused on untenable grounds.

4. The Learned Counsel for the Appellant contends that P.W.1 to P.W.4 had admitted that there was a dispute between the Appellant's family and the victim's (P.W.1) family in regard to the money transaction of Rs.85,000/- and the marriage obligation was rejected by the Appellant's family relating to the victim's sister.

5. It is represented on behalf of the Appellant that P.W.3 had deposed in his evidence that more than 1 = years there was no connection between the Appellant/Accused family and that of the victim's family and in fact, the trial Court had wrongly come to the conclusion that there was a relationship between the Appellant and the victim, which is against the weight of evidence of concerned witnesses tendered.

6. Advancing his argument, the Learned Counsel for the Appellant vehemently takes a plea that P.W.10 (I.O.) had stated that in the Complaint, the time of occurrence was described as 11.00 a.m. but P.W.1 in her evidence had deposed that the time of occurrence was 11.00 a.m. As such, the trial Court had not appreciated a vital fact as to the place of purported occurrence itself and in fact, the trial Court ought to have acquitted the Appellant/Accused granting the benefit of doubt in his favour.

7. Expatiating his submission, the Learned Counsel for the Appellant projects an argument that when the Appellant/Accused was acquitted in respect of the offences under Section 376 and 450 I.P.C., then, the trial Court should not have convicted the Appellant/Accused for an offence under Section 417 I.P.C. without framing of necessary charge in this regard.

8. Besides the above, the Learned Counsel for the Appellant brings it to the notice of this Court that P.W.1, P.W.2, P.W.5 are same family members and therefore, they are interested witnesses and their evidence could not be taken into account by the trial Court in arriving at a conclusion.

9. Lastly, it is submitted on behalf of the Appellant that in terms of ingredients of 217 Cr.P.C., whenever a charge is altered or added to by the Court, after the commencement of trial, the Prosecutor and the Accused shall be allowed to re-summon and examine with reference to such alteration or addition, any witness, who have been examined. But, in the instant case, such a thing would not resorted to by the trial Court, which has resulted in serious miscarriage of Justice.

10. To lend support to the contention that the victim (P.W.1) had consciously consented to having sexual intercourse with the Appellant and in this regard, there was no misconception of fact, the Learned Counsel for the Appellant cites the decision in Md.Mahasin Sk. V. Sayeda Khatun Bibi and another, 2005 CRI.L.J.3162 at special page 3165 and 3166, wherein at paragraph 10, it is observed as follows:

10. The Supreme Court in Uday v. State of Karnataka reported in 2003 SCC (Cri) 775 : (2003 Cri LJ 1539) and this Court in Jayanti Rani Panda v. State of West Bengal reported in 1984 Cri LJ 1535 observed that if a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant, it is an act of promiscuity on her part and not an act induced by misconception of fact. The aforesaid principles are equally applicable in this case. From evidence it did not transpire that victim was a minor and it appears that the victim being a full grown lady and above 16 years voluntarily consented to have sexual Intercourse with the petitioner. She did not disclose anything to either the neighbours, villagers or to her parents till she was pregnant for three months. The evidence clearly establishes that there was no misconception of fact in the instant case and the victim was a consenting party and her conduct was nothing but an act of promiscuity on her part. The evidence and circumstances show that the victim consciously consented to have sexual intercourse with the petitioner and her consent was not in consequence of any misconception of fact. It is clear, therefore, that the subsequent refusal by the petitioner to marry the victim would be of no consequence when it has not been established that the representation was false to the knowledge of the petitioner when it was made.

11. The Learned Counsel for the Appellant relies on the decision of the Hon'ble Supreme Court in Vinod Kumar V. State of Kerala, (2014) 5 Supreme Court Cases 678, at special page 688 and 689 wherein at paragraphs 14 and 15, it is observed as under:

14. We are in no manner of doubt that in the conspectus that unfolds itself in the present case, the prosecutrix was aware that the Appellant was already married but, possibly because a polygamous relationship was not anathema to her because of the faith which she adheres to, the prosecutrix was willing to start a home with the Appellant. In these premises, it cannot be concluded beyond reasonable doubt that the Appellant is culpable for the offence of rape; nay, reason relentlessly points to the commission of consensual sexual relationship, which was brought to an abrupt end by the appearance in the scene of the uncle of the prosecutrix. Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt. In our deduction there was no seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship.

15. The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realise that retribution in another form has duly visited him. It can only be hoped that his wife Chitralekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found.

Respondent's Contentions:

12. Conversely, it is the submission of the Learned Government Advocate (Crl. Side) that before the trial Court, on behalf of the Respondent/Prosecution, witnesses P.W.1 to P.W.15 were examined and Exs.P.1 to P.15 were marked. Further, on the side of the Appellant /Accused, D.W.1 to D.W.3 were examined. Only after consideration of the entire gamut of available oral and documentary evidence on record, the trial Court had found the Appellant/Accused guilty under

Section 417 I.P.C. and imposed him with necessary punishment, besides directing him to pay a fine of Rs.50,000/- etc. That apart, the trial Court had also directed a sum of Rs.40,000/-, from out of the fine amount of Rs.50,000/-, was directed to be paid by the Appellant/ Accused to the victim girl (P.W.1) towards mental agony, damage caused to her body, mind and reputation as compensation. In reality, the trial Court had not found the Appellant/Accused guilty under Section 376 and 450 I.P.C. Therefore, the Judgment of conviction delivered by the trial Court in S.C.No.38 of 2014 does not suffer from any patent illegalities in the eye of Law.

13. To provide an entire conspectus of the factual matrix of the Respondent/Prosecution case, it is pertinent for this Court to make a meaningful and purposeful reference to the deposition of concerned witnesses.

Gist of Evidence of Witnesses:

14. It is the evidence of P.W.1 (victim girl) that she knows the Accused and in relation to the present case, the Appellant/Accused had informed her that he would marry her and he had sexual intercourse with her forcefully. Furthermore, she had uttered in her evidence that she was conceived for two months and on examination by the Doctor one Murugan of Ayothiapattinam. It came to light that she was two months pregnant and she took tablets and because of that, she got aborted and subsequently, when she was in her uncle's house, the Appellant/Accused had intercourse by force. She had also informed her parents about the fact that the Appellant/Accused had lured her by employing words showing interesting in this regard and had sexual intercourse.

15. P.W.1 proceeds to state in her evidence that her father went to the Appellant/Accused father and informed him that the Appellant/ Accused had ravished her by uttering lured words, but the Appellant/ Accused had stated to her father that he would not marry her. Moreover, she had also stated that for five minutes pleasure only, he had sexual intercourse with her and about this he informed her father. Later, she lodged a complaint before the Karipatty Police and at the time of lodging Compliant, she was 16 years and now she was aged about 18.

16. P.W.1 (in her cross examination) had deposed that in her complaint statement she had stated that three months prior to 16.03.2012, the Appellant/Accused with force and out of compulsion had committed rape on her. She had also proceeded to state that the occurrence took place during night time, but she could not remember time. Besides this, she had also stated in her evidence that on 16.03.2012 also at about 11.00 p.m. in the night, the Appellant/ Accused had committed rape on her under compulsion.

17. P.W.2 in his evidence had stated that two years before it about 11.00 a.m. he was viewing T.V. in his Father-in-Law's (Raj Kumar's) house along with his wife, P.W.1 and with the nearby children at that time, he along with his wife went out in connection with a job and returned back and when they came to the house, they found that the door of the house was slightly closed and after opening the door, they found that the Appellant/Accused had closed the mouth of P.W.1 and was having sexual relationship and he shouted by naming the Appellant/Accused and the Appellant/Accused had pushed P.W.1 and himself and ran away from the place. Later, when he went near P.W.1 and saw her, he found her in an unconscious state with semi naked position.

18. P.W.3 in his evidence had deposed that he knows P.W.1 and P.W.1 is his nearby resident and two years before when a noise was raised and he saw P.W.1 in a sitting posture in a disorderly manner and when he enquired her, she informed him that the Appellant/ Accused had lured words and ravished her. Further, he had deposed her that he gave information to P.W.1's father and the Panchayat was convened and among the community the Appellant/ Accused had not obeyed to the decision of Panchayat and that the Appellant/Accused had informed that he would not marry P.W.1 (victim).

19. P.W.4 had affixed his signature in Ex.P2 - Mahazar and the Rough Sketch, in the instant case, was marked as Ex.P7. Earlier, P.W.10 (S.I. of Police) had received the written complaint of victim P.W.1 at 1.00 p.m. on 21.03.2012 and registered the F.I.R. in Karipatty Police Station Crime No.312/2012 under Section 376 I.P.C. The said F.I.R. was marked as Ex.P6. As a matter of fact, P.W.10 had forwarded the First Information Report and the Complaint to the Inspector of

Police.

20. It comes to be known that P.W.11 (Inspector of Karipatty Police Station) after taking up the investigation, proceeded to the scene of occurrence and prepared Observation Mahazar and Rough Sketch in the presence of witness P.W.4 and one Ravi. That apart, he examined the witnesses like Dinesh Kumar, Amsa, Kajendiran and Vijay at the scene of occurrence and recorded their statements. He also examined P.W.1 (victim girl) with the aid of woman constable and recorded her 161 Cr.P.C. Statement. It transpires that the Appellant/ Accused had given a voluntary confession before the witness concerned and in fact, he was arrested by P.W.11 at 15.45 p.m. In the confession statement, P.W.5 and one Ramesh had signed. The Appellant/Accused was sent for medical examination with a requisition letter on 23.03.2012 through S.S.I Ravi and Grade I P.C. Kuppuraj. The concerned requisition for the purpose of medical examination of the Appellant was marked as Ex.P8.

21. It is the evidence of P.W.12 that when he was serving as Medical Officer on 23.03.2012 at Salem G.H. S.S.I. Ravi and Grade I P.C. 994 Kuppuraj brought the Appellant/Accused before him for the purpose of conducting medical examination upon him. On examining the Appellant/Accused, P.W.12 furnished a Certificate - Ex.P.11 that he is a man potent. Ex.P10 was the order given to J.M.No.II, Salem for conducting medical examination of the Appellant/Accused. The I.O. (P.W.11) sent the victim girl P.W.1 for medical examination together with the requisition through P.W.7 Kanagambal, Grade I P.C. 682.

22. P.W.9 (Doctor), while serving at Salem Government Hospital on 23.03.2012 had physically examined the victim P.W.1 as per the order of the Judicial Magistrate No.II, Salem and the said letter was marked as Ex.P.3. Indeed, P.W.9 (Doctor) found P.W.1's hymen was not intact and her vagina had admitted two fingers and she collected the vaginal smear in two slides and transmitted the same for the purpose of conducting chemical analysis examination.

23. P.W.14 (Doctor) had examined P.W.1 and furnished an Age Certificate and according to him (after analysing the x-rays of the Appellant/Accused), his age would be about 22 and below 25 and the said certificate was Ex.P13. In so far as

the victim/P.W.1 was concerned, P.W.14 had issued a certificate in her favour after analysing the x-rays and on appearance of the victim, he came to the conclusion that the age of the victim girl (P.W.1) was about 16 and 18. The collected blood and semen of the Appellant/Accused were sent for chemical analysis report and the blood group and semen report of the Appellant/Accused was Ex.P14. He had given Ex.P.15 - Age Certificate of the victim (P.W.1).

24. P.W.13, after taking up the further investigation on 31.12.2012, had examined P.W.14 (Dr.Gokularaman) and Manickam Junior Scientific Officer, Salem and recorded their statements. He also obtained the blood group report of the Appellant/Accused viz., Ex.P12 (which was marked as Ex.P14) and examined Dr.Manimegalai and recorded her statement and soon after completion of his investigation and after obtaining an opinion from the Deputy Director of Prosecution filed a final report.

Analysis:

25. At the out set, it is to be pointed out that in respect of an offence under Section 450 I.P.C., the Prosecution is to prove that (i) an Accused committed House Trespass; (ii) that the same was committed in order to commit an offence punishable with imprisonment for life.

26. It is to be borne in mind that there exists a difference between the just violation of a promise and not fulfilling a false promise, a Court of Law is to ascertain whether there was at an early stage false promise of marriage was given by the Accused. Further, whether the consent in question was given after fully appreciating the nature and consequences of sexual indulgence. In fact, the acknowledged physical relationship between the parties would not come within the purview of an offence under Section 376 I.P.C.

27. In this connection, this Court relevantly points out that the decision in *Manna and another V. State of Rajasthan*, 2001 CRI.L.J. 3496 at special page 3499, wherein at paragraphs 18 and 20, it is, among other things, observed and held as under:

18 (iv) From the statement of P.W.11 Mst. Kali, it is very clear that she did not receive any injury, but later on, she developed that she received injury. But later part of her statement is false one as it does not get corroboration from the medical evidence. The medical evidence shows that she did not receive any injury. The Court is aware that whenever resistance is offered, there must be some injury on the body of the victim but absence of injury on prosecutrix is not fatal in every case.

(v) In the present case P.W. 11 Mst. Kali has remained in the company of accused appellants for more than seven days and the medical evidence clearly disclose that the prosecutrix did not receive any injury, Thus, it can be presumed that P.W. 11 Mst. Kali did not put up any resistance at the time when she was being sexually assaulted.

(vi) The fact that she did not make any hue and cry when she was roaming in the Forest also goes to show that she was consenting party from the very beginning to the end. From this fact, irresistible inference which can be drawn is that P.W. 11 Mst. Kali was consenting party. If the story of P.W. 11 Mst. Kali is found true that she was forcibly raped by the accused appellants for seven days, then she should have received some injuries on the breast, chest or thighs or other parts of the body and absence of these injuries in the present case is another factor to negative the allegations of rape and to say that the appellants had sexual intercourse with the prosecutrix with her tacit consent.

20. From the above discussions, statement of P.W. 11 Smt. Kali that she was kidnapped and thereafter raped by the accused appellants forcibly does not inspire confidence and the case of the prosecution for offences under Section 366 and 376, IPC cannot be held to be proved and the findings of learned Special Judge are liable to be set aside and the appeal filed by the accused appellants is liable to be allowed.

28. In respect of an offence under Section 417 I.P.C., the Prosecution is to prove: (1) Deception of any person; (2)(a) Fraudulently or dishonestly inducing that person (i) to deliver any property to any person, or (ii) to consent with any person relating to any property; or (b) Intentionally inducing that person to do which he

would not do or omit to do, and that act or omission causes or is likely to cause damage or harm, to that person in body, mind, reputation or property. A dishonest concealment is a deception within the meaning of this Section.

29. In regard to the 'Award of Compensation', it is to be pertinently pointed out that a compensation can be allowed only out of entire part of fine which were recovered. A Court of Law can award compensation to a Complainant for which no limit is specified in Section 357 Cr.P.C. Ultimately, it is for a Court of Law to consider what would be the reasonable compensation payable to Complainant/Victim. After all, the compensation should be commensurate with the resourcefulness of an Accused to pay, seriousness of offence, the requirements of the victim's family etc. A significant fact is the nature of injury caused to a person is a pivotal factor to be taken note of by the Court concerned. In reality, a direction issued by the Court to pay compensation 357(3) Cr.P.C. is partly based on the assumption of 'Civil Liability' on the part of a wrong doer/deviation, mainly with a view to alleviate the plight of victim or his kith and kin as the case may be.

30. Although, in the present case, a contention was projected on behalf of the Appellant/Accused that P.W.1 had mentioned the time of occurrence at 11.00 p.m. on 22.03.2012 and also stated the timing of occurrence erroneously in the morning and further, the place of occurrence also differs, this Court is of the considered view that even though there is a mentioning of the date of occurrence at 11.00 a.m. on 16.03.2012 when no one was in P.W.1's house, the Appellant/ Accused came to her house and convinced her with loving words and committed rape against her, it is to be pertinently pointed out that the mere mentioning of the time as 11.00 a.m. in the morning instead of the correct hour would not in any way affect the credibility of the Prosecution, in the considered opinion of this Court.

31. At this juncture, this Court relevantly points out that a mere running of the eye over the Complaint Ex.P1, preferred by the victim girl, latently and patently indicates that the Appellant/Accused had visited the house of P.W.1 (victim girl) three months prior to the date of occurrence when no one was there in her house and under the false pretext of marrying her, ravished her. When P.W.1 had enquired with the Appellant/Accused as to when he would be marrying her, the

Appellant/Accused had informed P.W.1 that he was not willing to marry her and would marry another girl, which had resulted in informing the subject matter in issue to her parents and subsequently, she lodged a Complaint against the Appellant/Accused on 21.03.2012 at the time when she got aborted by receiving treatment from one Dr.Murugan from Ayothiapattinam, it is to be remembered that she was accompanied by her mother and the fact of the matter is that the Appellant/Accused had indulged in sexual relationship with P.W.1 (victim girl) not only on 16.03.2012, but three months prior to the date of occurrence nearly 10 times, the Appellant/Accused had ravished P.W.1 under the pretext of marrying her.

32. In so far as the present case is concerned, P.W.5, in a crystalline fashion, had deposed that the Appellant/Accused had given confession in his presence. It appears that P.W.1 (victim) is a school drop out and she discontinued her studies after 7th standard. Before the trial Court, the Investigation Officer had not produced any school certificate or birth certificate of the P.W.1. Apart from that, the concerned Headmaster of the school where P.W.1 studied was also not examined. As such, to prove the age of the victim girl, the Dr.Gokularaman was examined and he had given Certificate - Ex.P.15. From the said Certificate, it is lucidly clear that P.W.1 was above 16 years and below 18 years at the time of occurrence. The core fact which one has to bear in mind in the present case is that P.W.1 had clearly deposed in her evidence that the Appellant/Accused gave a false promise to her that he would marry her and only under the false pretext of marrying her, he ravished her. Only because of the false promise/hope given to the P.W.1 and also P.W.1 expected that the Appellant/Accused would honour words and would marry her and only under the fond hope that one day the Appellant/Accused would marry her, she had given the consent for committing sexual intercourse.

33. It cannot be disputed that P.W.1's family members came to know about the incident and her mother had accompanied P.W.1 to the Dr.Murugan and in fact, by consuming pills, P.W.1 had got aborted the fetus, viz., three months prior to the occurrence, at that point of time, no complaint was given by P.W.1 or by her parents. The incident had come to light only on 16.03.2012 at the time of indulging

in sexual intercourse. P.W.2 (P.W.1's sister husband) had seen the occurrence and at that time only P.W.1 victim had stated that the Appellant/ Accused had ravished her even prior to 16.03.2012. Even when the Panchayat was convened by the father of the victim girl (P.W.1), the Appellant/Accused had refused to marry her. Therefore, the Complaint was lodged against the Appellant/Accused after 5 or 6 days after the occurrence.

34. In regard to the aspect of delay in regard to the lodging of First Information Report, it is to be pointed out that when a girl in a family whether she is minor or major was ravished by some one, naturally, they would get sometime to compose themselves and come out of the predicament situation that they were in and naturally it would take some time for them to come out of the sorry incident. Therefore, only when the Appellant/Accused in the Panchayat had refused to marry P.W.1, the P.W.1 had lodged the Complaint - Ex.P1.

35. In view of the fact that the Appellant/Accused had ravished P.W.1 (victim girl) and P.W.1 herself had given consent to the act of sexual intercourse committed on her body by the Appellant either on 16.03.2012 or on earlier occasions three months prior to that, and also this Court, taking note of the fact that P.W.4 Doctor had given Age Certificate of the P.W.1 viz., Ex.P15 that she was about 16 years and below 18 years, the trial Court had rightly found the Appellant/Accused not guilty in respect of an offence under Section 376 I.P.C. Since the sexual intercourse had taken place between the Appellant/Accused and P.W.1 (victim girl) not only on 16.03.2012, but three months prior to that also, this Court is of the considered view that the victim girl (P.W.1) had given consent to the act of intercourse and since she was not under the age of 16 years and gave a consent for the sexual intercourse, this Court comes to a consequent conclusion that the offences under Sections 375 and 450 I.P.C. were not attracted. However, the Appellant/Accused's act of ravishing P.W.1 on 16.03.2012 and three months prior to that of course based on dishonest inducement come squarely within the ambit of Section 417 I.P.C., as opined by this Court. Therefore, the view taken by the trial Court, in finding the Appellant/Accused guilty and resultantly, convicting him and directing him to undergo a sentence of one year imprisonment for the offence under Section 417 I.P.C. and with a direction to pay Rs.50,000/-, in default of

payment of fine, three months Simple Imprisonment, does not suffer from any flaw. Likewise, the amount of compensation of Rs.40,000/-, ordered to be paid to P.W.1 towards mental agony and to the damage caused to her body by the Appellant/Accused (from and out of the fine sum of Rs.50,000/-), also is not displaced by this Court. Looking at from any angle, the present Appeal sans merits.

CONCLUSION

36. In fine, the Criminal Appeal is dismissed. The Judgment of the trial Court dated 22.10.2016 in S.C.No.38 of 2014 is affirmed by this Court for the reasons assigned in this Appeal.

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