

Shankar Vs. State Of Karnataka

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Court : Karnataka

Decided On : Feb-17-2020

Judge : K.Somashekar

Appeal No. : CRL.A 523/2010

Appellant : Shankar

Respondent : State Of Karnataka

Advocate for Pet/Ap. : Shri. S. Vishwajith Shetty

Judgement :

R :

1. : IN THE HIGH COURT OF KARNATAKA AT BENGALURU DATED THIS THE17H DAY OF FEBRUARY, 2020 BEFORE THE HONBLE MR. JUSTICE K. SOMASHEKAR CRIMINAL APPEAL No.523 OF 2010 BETWEEN SHANKAR AGED ABOUT30YEARS S/O NARAYANA J.C R/AT DEVAN ESTATE KOPPA CHIKKAMANGALORE. ... APPELLANT (BY SMT. HALEEMA AMEEN - ADVOCATE FOR SRI S VISHWAJITH SHETTY - ADVOCATE) AND STATE OF KARNATAKA REPRESENTED BY STATE PUBLIC PROSECUTOR HIGH COURT BUILDING BANGALORE. ... RESPONDENT (BY SRI. M. DIVAKAR MADDUR - HCGP) THIS CRL.A. IS FILED UNDER SECTION3742) OF THE CR.P.C PRAYING TO, SET-ASIDE THE

JUDGMENT

AND

ORDER

OF CONVICTION DATED 23.04.2010 MADE IN S.C.NO.78/2005 BY THE COURT OF I-ADDL., SESSIONS JUDGE, DAKSHINA KANNADA, MANGALORE AND ACQUIT APPELLANT/ACCUSED SENTENCED TO UNDERGO RIGOROUS IMPRISONMENT OF ONE YEAR AND ALSO A FINE AMOUNT OF RS.50,000/- IS IMPOSED :

2. : ON THE ACCUSED FOR THE OFFENCE P/U/S417 OF IPC. THE APPELLANT/ACCUSED IS SENTENCED TO UNDERGO SIMPLE IMPRISONMENT OF TWO MONTHS AFTER COMPLETION OF PERIOD OF SUBSTANTIVE SENTENCE. THIS CRIMINAL APPEAL COMING ON FOR DICTATING

JUDGMENT

, THIS DAY, THE COURT DELIVERED THE FOLLOWING:

JUDGMENT

This appeal is preferred by one Shankar - Accused challenging the judgment of conviction and order of sentence passed by the I Addl. Sessions Judge, Dakshina Kannada, Mangalore, in S.C.No.78/2005 by order dated 23.04.2010 for offence punishable under Section 417 of IPC. By the said judgment, the appellant was convicted for the offence under Section 417 IPC and was sentenced to undergo rigorous punishment for a period of one year and to pay a fine of Rs.50,000/- 2. Heard the learned counsel Smt. Haleema Ameen for Shri S. Vishwajith Shetty, learned counsel for the appellant and the learned HCGP Shri M. Divakar Maddur for the State and perused the records. :

3. :

3. Factual matrix of the appeal as per the case put forth by the prosecution, is as follows: The complainant Kumari Shashikala, D/o. Siddu @ Sadanand, Aged 21 years was residing in Mangalore along with her mother and sisters. Her elder brother Satish after his marriage, started residing separately but nearby the house

of the complainant. Her elder brother Satish PW-6 was a Dance Master by profession. It is stated that the accused - Shankar was regularly coming to her brothers house in order to learn dance. The accused though a native of Koppa Town, but was said to be residing in his uncles house at Hosabettu. As days passed by, the accused had become very intimate with complainant Shashikala and was asking her to marry him. It is stated that about one year prior to the lodging of the complaint, when the complainants family were celebrating the first marriage anniversary of the complainants brother Satish, the accused who was also an invitee, is said to have stayed that night in the house of the complainant. On that day, i.e., on 6.9.2003, he had insisted Shashikala to have sexual intercourse with him, :

4. : and is said to have himself gone to the place where the complainant was sleeping and had intercourse with her, promising that he would marry the complainant. There afterwards, the accused Shankar and the complainant Shashikala are said to have had sexual intercourse on several occasions, as a result of which Shashikala had become pregnant. The complainant had revealed to her mother that the accused Shankar was responsible for her pregnancy and also the fact that he had promised that he would marry her. In view of his promise to marry Shashikala, there was no cause for complaining the accused and thereafter she gave birth to a male child, which child was named Bharathesh. It is stated that the accused also came and saw the child. However, thereafter, when Shashikalas mother spoke with him about marriage, the accused curtly refused to marry Shashikala saying that he was not the father of the said child. Being shocked with his behaviour, the complainant Shashikala lodged a complaint against the accused with the police as per Exhibit P2. The Surathkal Police, Mangalore, took up the complaint from the complainant :

5. : on 23.06.2004 and registered the same as Crime No.127/2004 for the offences punishable under Sections 376 and 417 of IPC and lodged an FIR as per Exhibit P12. The accused was arrested on 24.06.2004 and was later released on bail on 6.7.2004. Thereafter, the Investigating Officer - PW14 after conducting investigation, filed a charge sheet against the accused for the offences under Sections 376 and 417 IPC and the case came to be registered as

C.C.No.4918/2005. The case was then committed to the court of Sessions and was numbered as Sessions Case No.78/2005. Subsequent to laying charge- sheet against the accused, the Sessions Court framed charges in respect of the aforesaid offences whereby the accused pleaded not guilty and claimed to be tried. In order to establish the guilt of the accused, the prosecution in all examined 15 witnesses as PW1 to 15 and got marked several documents as Ex.P.1 to P.12(a). Further, Purushothama was examined as a Court witness-1. On behalf of the accused, DW-1 / H.Y. Jagadish and CW-2 / Dr. Chandrayya Acharya were examined and several documents were got marked as Exhibits D1 to D6(e). :

6. : Portions of the contradictory statements of PW-6 were got marked as Exhibits D1 and D2; DNA Identification Forms were got marked as Exhibits D3 to D6; Signature of the Court witness no.1 was got marked as Exhibit D6(a); Gene Mapper I.Ds were got marked as Exhibits D6(b) to D6(e). Thereafter, the Trial Court, on hearing the arguments of both the prosecution and counsel for the accused, though acquitted him of the offence under Section 376 IPC, convicted the accused for the offence punishable under Section 417 IPC and sentenced him as aforesaid. It is this judgment which is under challenge in this appeal by urging various grounds.

4. Learned counsel for the appellant contends that the impugned judgment and order of conviction and sentence rendered by the trial Court for the offence under Section 417 of IPC is unreasonable and arbitrary since, the trial Court has committed serious material irregularities and illegalities in appreciating the material evidence available on record. She mainly relies on the DNA report as per Ex.D6 which states that the appellant/accused is not the biological father of the child, :

7. : but PW.3 - the prosecutrix is the biological mother of the child. Having regard to the said material on record, the trial Court ought not to have passed the impugned judgment convicting the appellant for aforesaid offence.

5. It is further contended that though the DNA test was conducted at the instance of the appellant in a proper and scientific manner, but however, the trial Court erroneously held that the DNA test has not been properly and scientifically conducted. The trial Court has disbelieved the DNA test on the ground that the

scientific officer who was examined as Court witness has not verified whether any of the parties who had undergone the DNA test was subjected to blood transfusion immediately prior to the collection of their blood samples. Further, there is nothing on record to show that any of the parties had undergone blood transfusion immediately prior to collection of blood samples and it is also not the case of the prosecution. Therefore, without there being any material on record, the trial Court ought not to have :

8. : disbelieved the DNA report and the conviction in this regard, is bad in law.

6. It is further contended by the appellants counsel that after receiving the FTA cards, the FSL, Bangalore handed over the DNA examination to the Scientific Officer on 11.05.2009 and he has proceeded with the DNA test and has given a report. But whereas, the trial Court has erred in holding that due to weather condition in Mangalore, the FTA card would have developed fungus and bacteria and the blood samples collected would have become disintegrated and the FTA card could have been contaminated.

7. Further, it is contended that the trial Court recorded the conviction only based on the interested testimony of PW.3, PW.4, PW.5 and PW.6 when the other material on record shows that the appellant/accused is innocent of the charges framed against him. Therefore, the judgment and order of conviction and sentence is illegal, arbitrary, unreasonable and opposed to facts and :

9. : probabilities of the case and the same is liable to be set- aside.

8. It is further contended that even though PWs.3, 4 and 5 have deposed on the part of the prosecution, but the prosecution has not established the guilt of the accused under Section 376 of IPC and the other offence under Section 417 of IPC has been diluted. Since PW.3 - victim had consented to have physical contact which continued to sexual intercourse, because of that deeper love in between the victim and the accused and also on the promise extended by the accused to marry her, she had become pregnant and gave birth to a male child. When the trial Court has held that from the evidence of Prosecutrix and other material witness the intercourse committed by the accused is with consent of the prosecutrix and that

after the first intercourse the accused had sexual intercourse several times on the pretext that accused would marry her and with the consent of the prosecutrix such act was committed, the trial Court held that accused was not guilty of commission :

10. : of offence of rape, but erred in coming to the conclusion that accused is guilty of cheating as per definition of Section 415 of IPC and convicted for the offence punishable under Section 417 of IPC. The same is illegal, unreasonable and arbitrary, and the impugned judgment deserves to be set-aside.

9. In support of her arguments, learned counsel for the appellant has relied on the following decisions: 1) (2014) 2 SCC576 Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another In this judgment, the Honble Supreme Court has held that Sections 4 and 101 to 117 - Presumptions - When may not be invoked - Truth or fact known - Held, while the truth or fact is known, there is no need or room for any presumption - The interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to facts in issue - When there is a conflict between a conclusive proof envisaged under law based on a presumption and a :

11. : proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former. Further it is held that Section 112 - Legitimacy of child - DNA test report provides scientifically correct proof - Report of DNA test stating husband is not biological father of child, if already available, would rebut presumption of legitimacy of child under Section 112 and would prevail over such presumption-Section 112 provides for presumption of a fact, not for a legal fiction - Husband disputed paternity of child on ground of his not having access to wife during period when she could have begotten the child - But no finding rendered by courts below on question of husband's access to wife during relevant period - DNA test conducted pursuant to court directions - Test report vindicates husband's stand that he was not father of the child - Held, scientific proof provided by DNA test report acceptable - Presumption of legitimacy of child stands conclusively rebutted - Hence, direction to appellant husband to pay maintenance for said child, set aside. :

12. : II) (2015) 1 SCC365Dipanwita Roy vs. Ronobroto Roy In this reliance, the Honble Apex Court has extensively dealt with Section 112 of Evidence Act. It is held Section 112 - Birth during subsistence of marriage, as proof of legitimacy - Presumption as to, under Section 112 of Evidence Act - Conclusive rebuttal of, by DNA test - Holding of DNA test of son born to wife, allegedly from adulterous relationship, to establish paternity/adultery - Husbands prayer as to - Grant of - When permissible - Wife if bound to comply with such direction - Effect of non-compliance with such direction - Right to privacy - Preservation of. III) (2003) 4 SCC46Uday vs. State of Karnataka In this judgment, the Honble Apex Court has held that Sections 375 and 90 and 376 - Rape - Consent - Voluntary consent or consent under misconception of fact - Determination of - Consent given by the prosecutrix to sexual intercourse with accused - appellant, with whom she was deeply in love, on a promise that he would marry her on a later date - Prosecutrix continuing to meet accused :

13. : and often having sexual intercourse and becoming pregnant - Complaint lodged on failure of appellant to marry her - In such case, held, the consent cannot be said to be given under a misconception of fact - A false promise is not a fact within the meaning of the Penal Code - For determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, held there is no straitjacket formula and each case has to be decided considering the evidence and surrounding circumstances of that case - Where (i) the prosecutrix (aged 19 years on the date of occurrence) had sufficient intelligence to understand the significance and moral quality of the act she was consenting to, (ii) she was conscious of the fact that her marriage with the appellant was difficult on account of caste considerations, (iii) it was difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix, held, appellants conviction and sentence under Section 376 IPC was liable to be set aside - Question as to :

14. : whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 fourthly and fifthly, or whether consent given under misconception of fact contemplated by Section 90 has a wider

application so as to include circumstances not enumerated in Section 375, held not necessary to be considered herein.

10. Placing reliance on the above judgments, learned counsel for the appellant contends that in the instant case, the prosecution has not been able to establish the guilt of the accused under Section 376 of IPC hence, the trial Court recorded conviction for the offence under Section 417 of IPC. But even though the accused had physical contact with the victim which turned into sexual intercourse and thereby the victim gave birth to a male child as indicated in Ex.P10 - Birth certificate issued by PW.11, the trial Court committed an error in convicting the accused under Section 417 IPC.

11. Learned counsel for the appellant has mainly concentrated upon the evidence of DW.2 - scientific officer :

15. : which reveals that the blood samples were received by head of the Department and was given code numbers and were sent to Scientific Officer and after furnishing report they were decoded. As per the DNA test conducted, it was found that PW.3 is biological mother of the child Bharatesh, but the accused is not the biological father of the child as per report at Ex.D6. Therefore, the trial Court erred in not considering the said report and solely based upon the evidence of the prosecutrix and the material witnesses, i.e., PW.4, PW.5 and PW.6 who are the sister, mother and brother respectively of the victim, went on to convict the accused for the offence under Section 417 of IPC which is bad in law.

12. It is further contended that the prosecution has not been able to establish guilt of the accused in respect of offence under Section 417 of IPC. As per the DNA profiling report, it is found that the accused is not biological father of the child Bharatesh since, in the DNA test the Genes between the child and the accused are not tallied. When the main offence under Section 376 IPC has :

16. : been ended in acquittal due to non-availability of evidence, the trial Court committed a serious error in convicting the accused for the offence punishable under Section 417 of IPC. Therefore, it requires intervention of the impugned judgment rendered by the trial Court, if not, it would be causing miscarriage of

justice to the case of the accused. On all these grounds, learned counsel for the appellant contends that the Court below has committed serious material irregularities and illegalities in appreciating the material evidence available on record and erred in convicting the appellant/accused for the offence punishable under Section 417 of IPC. Therefore, she sought for allowing the appeal by setting aside the impugned judgment and order of conviction and sentence rendered by the Court below by allowing the present appeal.

13. Per contra, learned HCGP for the State contends that the prosecution has been able to prove beyond reasonable doubt that on 6.9.2003 which was a marriage anniversary day of brother of prosecutrix and the accused :

17. : attended the said function and stayed in the house of prosecutrix on that day. At about mid night, accused came to her room and slept with her wherein the prosecutrix resisted but the accused telling that he would marry her had sexual intercourse and thereafter, had sexual intercourse several times with the prosecutrix. Due to the said act, the prosecutrix became pregnant and delivered a male child.

14. Further from the evidence of Scientific Officer, it is elicited that the blood samples were received by head of the Department and was given code numbers and were sent to Scientific Officer and after furnishing report they were decoded. As per the DNA test conducted it is found out that PW.3 is biological mother of the child Bharatesh, but the accused is not the biological father of the child as per Ex.D6. But the trial Court has rightly opined that the DNA report as per Ex.D6 is not found to be a trust worthy and a believable one so as to set aside the evidence of the prosecutrix and the material witnesses and it did not relied upon the DNA report and the evidence of the :

18. : scientific officer. But whereas, the evidence of prosecutrix - PW.3, PW.4 - sister, PW.5 - mother and PW.6 brother of the victim, corroborate with the case of the prosecution and the prosecution has proved beyond reasonable doubt that the accused had sexual intercourse with the prosecutrix and responsible for delivering the male child by promising to marry her. Even though the trial court acquitted the accused for the offence punishable under Section 376 stating that the act of the

accused does not coming under category rape, but relying on the evidence of PWs.3, 4, 5 and 6 and so also, the Birth Certificate as per Ex.P10 issued by PW.11 who is the official of Mangalore Mahanagara Palike, Mangalore, in which the name of child Bharathesh was registered in the Birth register showing the accused name as father, the trial Court has rightly recorded the order of conviction against the accused stating that the prosecution has proved beyond reasonable doubt that accused is found guilty of cheating as per the definition of Section 415 of IPC and hence, liable to be convicted for the offence punishable under Section 417 of IPC. The trial Court on appreciation of :

19. : entire material evidence on record, has rightly convicted the accused under Section 417 of IPC and the same does not call for interference of this Court. The appeal being devoid of merits, is liable to be dismissed.

15. Learned HCGP for the State in support of his arguments placed reliance on the following judgments: i) State of Uttar Pradesh vs. Naushad (2013) 16 SCC651 In this judgment, the Honble Supreme Court has held that Section 375, Secondly 376 and 90 - Rape - Consent given under misconception of fact - consent of victim obtained by accused by giving false promise of marrying her and when in consequence of their repeated sexual acts she became pregnant, accused refused to marry her - Held, accused guilty of committing rape and liable to be convicted under Section 376. Section 376 - Sentence - Maximum sentence - When called for - offence of grave nature - breach of trust - taking advantage of close relationship between families of accused and prosecutrix, accused often used to stay at prosecutrix's home and by procuring her consent on false promise of :

20. : marrying her, indulged in sexual acts with her and when she became pregnant, refused to marry her - Held, accused committed breach of trust of prosecutrix based on relationship and a brazen fraud just to appease his lust - Maximum sentence of life imprisonment appropriate - crimes against women and children - rape - maximum sentence - when warranted. ii) Anurag Soni vs. State of Chattisgarh AIR 2019 SC1857 In this Judgment the Honble Apex Court has held that Section 376 (1), Section 90 - Evidence Act (1 of 1872), Section 3, Section

114A - Rape - Consensual sex - Accused allegedly establishing physical relation with prosecutrix on pretext of marriage - Prosecutrix gave consent relying upon false promise of marriage by accused and hence amounts to consent on misconception of fact - such consent cannot excuse accused from charge of rape - Accused liable to be convicted.

16. Relying on the above decisions, the learned HCGP would contend that the accused with dishonest :

21. : intention of having intercourse with the prosecutrix by making false promise that he would marry her, had intercourse several times, due to which, victim delivered a male child by name Bharatesh and has committed offence of cheating. Even though it cannot be said that the act of accused is forcible sexual intercourse and Section 375 of IPC does not attract, but the Trial Court has rightly convicted the accused for the offence punishable under Section 417 of IPC. The same does not call for any interference of this Court. Hence, on all these grounds, he seeks for dismissal of the appeal.

17. In the context of the contention as taken by learned counsel for the appellant and counter made by learned HCGP for the respondent - State, it is relevant to refer to the evidence of PW.3 being the victim. It is her evidence that PW.4 is her younger sister, PW.5 is her mother, PW.6 is her brother. Her brother PW.6 - Satish is a dance master and the accused used to come to him for learning dance. He also used to come to her house frequently and thereafter, intimacy developed between the :

22. : accused and the victim. The accused had asked her to marry him and he also used to stay during night time the house of victim. It is stated in her evidence that on 6.9.2003, accused - Shankar, at the time of celebration of first marriage anniversary of PW.6, the accused had attended the function and at night stayed in the house of the victim and asked to her to have intercourse. Prior to that, he also insisted for intercourse but she had refused. But on 6.9.2003, the accused stayed in the house of the victim at night time and was sleeping in another room. At 1.00 a.m. in the midnight, accused came to her room and slept with her and she resisted. But the accused on the pretext of promising her to marry, committed

sexual intercourse with her. Even though she resisted but on the promise made by him to marry her, she accepted for intercourse. Thereafter, several times there was sexual intercourse between the accused and the prosecutrix. Due to that, the prosecutrix became pregnant and she told the same to her mother - PW.5 and then to the accused. But thereafter, the accused stopped coming to her house. The prosecutrix thereafter delivered a male :

23. : child and the same was made known to the accused. But he refused to marry her and told that he is not responsible for birth of the child. In this regard, the prosecutrix having come to know that the accused has cheated her, lodged a complaint as per Ex.P2.

18. In the cross-examination of PW.3, nothing much was revealed to impeach the credibility of evidence of PW.3. She denied the suggestion put by the defence counsel that one Umesh who is the son of prosecutrix's uncle is responsible for birth of child. But nothing contrary was revealed so as to disbelieve the evidence of PW.3. Therefore, the trial Court had rightly held that from the evidence of PW.3, the accused by inducing the prosecutrix to marry her had sexual intercourse and was responsible for birth of a male child.

19. PW.4 - Kum.Kavitha is the younger sister of prosecutrix and she has stated about the act committed by the accused and he cheating her sister PW.3 - prosecutrix stating that he is not responsible for the birth of the child. The evidence of this witness is corroborated :

24. : with the evidence of PW.3. She has stated that accused used to come to the house of prosecutrix and some times used to stay there. She has stated that on 26.8.2003 there was first marriage anniversary of his brother Satish and on that day for the first time the accused stayed during night time in the house of prosecutrix and that night itself had sexual intercourse with the prosecutrix. The trial Court has rightly appreciated this evidence and held that there is no contradiction, omission or improvement during the course of cross-examination of this witness.

20. PW.5 - Smt.Kamala is the mother of PW.3 - prosecutrix and she has deposed on the same lines as that of PW.3 and PW.4. She has denied the suggestion that one Umesh was responsible for birth of male child to PW.3 but she stated that Umesh is son of her sister and the relationship between the prosecutrix and Umesh is brother and sister.

21. PW.6 - Satish is the brother of PW.3. He has stated that he was conducting dance classes and accused :

25. : used to come to his class for learning dance. Thereafter, friendship developed between them and the accused also used to stay during night time on some occasions. Thereafter, PW.6 came to know that PW.3 became pregnant due to the physical contact with the accused. But in the cross-examination he has deposed that he has not stated about the contradictions as per Ex.D1 that he is a dance master and was giving training of dance.

22. PW.7 is the Doctor who examined PW.3. He has stated that PW.3 was produced by the police with a history of rape on her and her age was about 16 to 20 years and had experienced intercourse. He has issued certificate as per Ex.P4 that prosecutrix has experienced intercourse and has given birth to a child. Ex.P5 is report of the child.

23. PW.9 is the uncle of the prosecutrix and he is a hearsay witness about the act committed by the accused. In his evidence he has stated that himself and PW.6 Satish went to the house of the uncle of the accused and negotiation took place between them as to not lodge any :

26. : complaint and to settle the matter amicably. But thereafter, they have not come to the house of prosecutrix. Therefore, the complaint was lodged and he has given his statement accordingly.

24. PW.11 is a Sanitary Inspector of Mangalore Mahanagara Palike, Mangalore who registered the birth of Child Bharatesh and issued Birth Certificate as per Ex.P10. He has stated that the child name is Bharatesh and mother name is Shashikala and father name is Shankar- the accused.

25. In view of the discussion made above, and having gone through the evidence on the part of the prosecution, the question is whether the prosecution has proved beyond reasonable doubt that the accused on a false promise of marrying had intercourse with the prosecutrix due to which, she delivered a male child Bharatesh and accused refused to marry her. It is contended by appellants counsel mainly relying on Ex.D6 - the DNA report which states that the appellant is not the biological father of the child but whereas prosecutrix - :

27. : PW.3 is the biological mother of the child. But the trial Court has disbelieved the DNA test on the ground that the scientific officer was examined as Court witness had not verified whether any of the parties who had undergone the DNA test were subjected to blood transfusion immediately prior to the collection of their blood samples. The trial Court erred in recording conviction solely based on the evidence of prosecutrix - PW.3, her sister - PW.4, her mother - PW.5 and her brother - PW.6. In this context, the issue involved is whether the accused is biological father of child - Bharatesh or not. The allegation of prosecution is that accused used to frequently visit the house of prosecutrix and on giving false promise of marrying her had physical relation with the prosecutrix. Even though the prosecutrix initially resisted, however, thereafter gave consent relying upon the false promise and had sexual intercourse several times, due to which a male child was born. Even in the birth certificate as per Ex.P10 issued by PW.11 the father of the child is shown as Shankar who is the accused. :

28. :

26. After completion of examination of accused under Section 313 of Cr.PC, the accused had filed an application under Section 45 of Evidence Act praying to send the blood samples of PW.3 - prosecutrix, the child Bharatesh and the accused for DNA test for expert opinion to verify as to whether the accused is biological father of the child or not. The application came to be allowed on 11.12.2007, the blood samples were collected on FTA card and were sent for DNA test to FSL laboratory, Bangalore. The report was received on 19.6.2009 and marked as Ex.D6. After perusal of DNA report, summons was issued to Scientific Officer to know about the procedure adopted from the stage of taking blood samples and till

the stage of preparation of report. The Scientific Officer was examined as Court witness.

27. The blood samples of accused, prosecutrix and child Bharathesh was taken on FTA card, it was not collected in liquid form, but collected on FTA card on 19.8.2008 and thereafter, it was made dry and sent to FSL Laboratory, Bangalore and the same was received on :

29. :

24. 10.2008 by receptionist of FSL laboratory. The Scientific officer who conducted DNA test had not collected the blood sample. As per his evidence, the DNA test was conducted on 11.5.2009 and on same day it was completed. The report was prepared by him on 2.6.2009. Further, he has stated that blood samples were received by the head of Department and was given code numbers and were sent to Scientific Officer and after furnishing report they were decoded. As per the DNA test, it was found that PW.3 is biological mother of child Bharathesh, but accused is not the biological father.

28. The trial Court while giving an opinion on Ex.D6 DNA report has observed that the Scientific Officer should have known whether the blood sample was collected in a right procedure and before taking blood samples from these persons, whether any of them have undergone blood transfusion few days prior to giving blood sample. Because, the resultant test may not give correct opinion. If there is any possibility of blood transfusion being done prior to few days, then there would have been chances of :

30. : contamination of blood, since the genes are inherited through blood and from other cells. The genes are distinct from every race. If two bloods from different races are added together, then there is mixture of Genes and accurate result may not be possible. But in the instant case, the Scientific Officer had not confirmed whether blood transfusion took place prior to collection of blood samples.

29. Further, it is the evidence of the Scientific Officer that, if any person touches his finger to FTA card on the blood sample collected, then it is not possible to

arrive at definite conclusion. The blood sample was collected on FTA card in the court hall of Magistrate at Mangalore. The Mangalore has humidity weather and if the FTA card is kept in the room in a humidity weather, then the blood sample collected becomes disintegrated and develops fungus and bacteria which may be rendered useless. Further, it is stated that on 24.10.2008, the FTA cards were received in the receptionist counter of the FSL Laboratory Bangalore and the same were handed over for :

31. : DNA examination on 11.5.2009 to the Scientific Officer. In between these periods in whose custody the FTA Cards were there was not known. He states that for about 6 months the FTA card pertaining to this case were under the custody of the Head of the Department. Having recorded all these aspects, the trial Court had come to the conclusion that in the procedure as stated above there would have been chances of manipulation of blood sample and therefore, the DNA report is not trustworthy. It is further observed that it is well settled that expert opinion must always be received with great caution. The logic behind in not treating the opinion as conclusive proof is that the evidence of expert is always weak and it should be viewed with caution due to the fact that human memories and knowledge are limited and imperfect. If the conclusions of the experts are unsatisfactory, the court is not bound to accept it. Ultimately, the decision has to be made by the Judge by weighing the expert opinion, as the experts give evidence but they cannot decide the issue. :

32. :

30. In the instant case, the evidence of victim and other material witnesses are in direct conflict with the scientific evidence. But the evidence of prosecutrix and other material witnesses are unimpeachable in the instant case. Therefore, the direct evidence should be preferred and the evidence of scientific officer cannot nullify the evidence of the prosecutrix. The opinion is advisory in nature and not binding upon the court, wherein the Court has to form its own opinion considering the material data and the opinion on the technical aspects rendered by the experts, which is rightly done by the trial Court in the instant case by not accepting the DNA report as Ex.P6 and so also, the evidence of scientific officer.

31. Further, the trial Court while acquitting the accused for the offence punishable under Section 376 of IPC has observed that the prosecutrix was major and 18 years old and had consented for sexual intercourse. The accused and prosecutrix had sexual intercourse several times due to which a male child was born. Complaint was lodged on failure of accused to marry her. But the consent :

33. : cannot be said to be given under a misconception of fact. For determining whether consent is given by the prosecutrix was voluntary or under a misconception of fact, there is no straight jacket formula and each case has to be decided considering the evidence and surrounding circumstances of that case. In the instant case, the prosecutrix is said to be more than 18 years old. From the evidence of the prosecutrix and other material witness, the sexual intercourse is committed by the accused with the consent of prosecutrix. She has stated in her evidence that after the first intercourse, the accused has committed intercourse for about 8 times based on the pretext that accused would marry her and accordingly, she had given consent. The victim is grown up and adult person having knowledge about consequence of intercourse. Therefore, the trial Court held that the act of the accused is not forcible one and hence, Section 375 of IPC does not attract. The act of accused does not come under the category of rape and held that he is not liable for conviction on the charge under Section 376 of IPC. I do not find any justifiable ground to interfere with the finding :

34. : of the trial Court in this regard. The victim had consented for sexual intercourse in consequence of misconception of fact arising from the promise of accused.

32. On perusal of the evidence of PW.3, the victim, PW.4, sister, PW.5, mother and PW.6, brother of the victim, there is no reason for this Court to discard their evidence. PW.11 who is the official of Mangalore Mahanagara Palike, Mangalore has stated that child Bharatesh was registered in Birth register and accordingly, Ex.P10 - birth certificate has been issued and the fathers name of the child is shown as Shankar who is the accused. The trial Court has arrived at a conclusion that the accused has committed breach of trust that the prosecutrix had in him, especially he invaded her person, by indulging in sexual intercourse with her, in

order to appease his lust, all the time knowing that he would not marry her. He committed an act of fraud leading her to believe that he would marry her. He was indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. He made a false promise to her :

35. : and he never aimed to marry her as a result, the victim has given birth to a male child - Bharatesh.

33. On re-appreciation of the entire evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused by giving false promise to prosecutrix to marry her and on such false promise he had a physical relation with her, even though she initially resisted, she consented for sexual intercourse relying upon false promise that he will marry her and as a result the prosecutrix had given birth to a child. The trial Court has rightly held that the act of the accused amounts to cheating and the same comes under the definition of cheating as stated in Section 415 of IPC and convicted for the offence punishable under Section 417 of IPC. I do not find any illegality or infirmity committed by the trial Court to interfere with the impugned judgment.

34. The accused with dishonest intention of having intercourse with the victim by making false promise that he would marry her had intercourse several times and :

36. : resultantly, a male child - Bharatesh has born. Now the child is under the care and custody of his mother - PW.3. The trial Court has sentenced the accused to undergo RI for one year and to pay a fine amount of Rs.50,000/- by considering the future interest of victim and child. In default to pay the fine amount, the accused was sentenced to undergo SI for two months.

35. But in the instant case, the accused is convicted for the offence under Section 417 of IPC and the same has been confirmed by this court. But whatever the observation made in this appeal, it cannot come in the way of paternity of the child to recourse of law. But the maximum punishment to be imposed for the offence punishable under Section 417 of IPC is imprisonment which may extend to one year, or with fine, or with both. However, in the pecuniary facts and circumstances of the present case, the order of sentence passed by the trial Court requires

modification. The accused is said to have been in judicial custody for a period of 13 days during the course of trial and also even after apprehending him. :

37. : Therefore, it will be in the interest of justice, if the period of 13 days of sentence which the accused has undergone, shall be termed as service of sentence and in addition to payment of fine of Rs.50,000/- as imposed by the trial Court, the accused shall be liable to pay another sum of Rs.50,000/-. The total amount of Rs.1,00,000/- shall be deposited by the appellant/accused as contemplated under Section 357A of Cr.P.C. under the victim compensation scheme as wherein if the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation. Keeping in view Section 357A of Cr.PC, it is required to modify the impugned judgment and order of conviction and sentence of the trial Court by directing the appellant/accused to pay fine amount of Rs.50,000/- in addition to fine of Rs.50,000/- as imposed by the trial Court. The entire fine amount shall be paid to the victim - PW.3, in accordance :

38. : with law. In terms of the aforesaid reasons and findings, I proceed to pass the following:

ORDER

Appeal filed by the appellant/accused is hereby allowed in part. The judgment of conviction and order of sentence rendered by the trial Court in S.C.No.78/2005 dated 23.04.2010 is hereby modified as under: The judgment and order of conviction held by the trial Court convicting the appellant/accused for the offence punishable under Section 417 of IPC is hereby confirmed, but the order of sentence is modified to the extent that appellant/accused is said to be in judicial custody for a period of 13 days. The said period shall be termed as service of sentence, which would be suffice to meet the ends of justice. Further, the accused shall pay fine of Rs.50,000/- in addition to the fine amount of Rs.50,000/- imposed by the trial Court for the offence under Section 417 of IPC. In default to pay fine amount, he shall undergo Simple Imprisonment for a period of three months, but

that amount shall be termed as :

39. : compensation and the same shall be recovered from him and disbursed to the victim - complainant - PW3. The total fine amount of Rs.1,00,000/- shall be deposited before the trial court in SC.No.78/2005 within a period of two months from the date of receipt of the copy of this judgment and shall be paid to the victim - PW.3 - Shashikala on proper identification. If any fine amount is already deposited before this Court, the same shall be transmitted to the trial Court in S.C.No.78/2005 for disbursement of the same to the victim - PW.3 - Shashikala, who is entitled in all a sum of Rs.1,00,000/- as compensation, as contemplated under Sec.357(A) of Cr.PC. Sd/- JUDGE KS/DKB

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