

G.Balamurugan Vs. the State Represented By

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Court : Chennai

Decided On : Dec-11-2014

Judge : R.S.Ramanathan

Appellant : G.Balamurugan

Respondent : The State Represented By

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED: 11.12.2014 CORAM THE HONOURABLE Ms.JUSTICE R.MALA Criminal Appeal (Md.No.199 of 2011 G.Balamurugan ..Appellant /A1 Vs The State represented by The Inspector of Police, All Women Police Station Tiruchendur, Thoothukudi District..Respondent Prayer: Criminal appeal filed under Section 374 of Cr.P.C.to set aside the judgment and conviction dated 04.07.2011 passed by the Additional Sessions Judge, Fast Track Court No.1, Thoothukudi in S.C.No.68 of 2011.

!For appellant : Mr.G.Marimuthu ^For Respondent : Mr.S.Prabha, G.A.(Crl.

Side) Judgment Reserved : 08.12.2014 Judgment pronounced : 11.12.2014 :

JUDGMENT

The Criminal Appeal is directed against the judgment of conviction and sentence passed against the appellant/A1 for the offence under Section 376 of I.P.C., dated 04.07.2011 rendered in S.C.No.68 of 2011 by the Additional Sessions Judge, Fast Track Court No.1, Thoothukudi, wherein, the appellant/A1 was convicted and

sentenced to undergo seven years rigorous imprisonment and to pay compensation of Rs.50,000/- to the prosecutrix/P.W.1 under Section 357(3) of Cr.P.C.in default to undergo one year rigorous imprisonment.

2.The case of prosecution briefly is as follows: i) P.W.1 Muthuselvi was residing along with her mother, P.W.2 in Subramaniapuram 2nd Street at Kovilpatti.

During the time of occurrence, she was working as NuRs.in Padma Prabha Hospital, Kovilpatti.

A1, who is the appellant herein is known to her.

A2 and A3 are his parents.

One Mariammal, who is the sister of A1 and P.W.1 went for police selection and A1 accompanied them.

When they gone for physical examination, the said Mariammal introduced A1 to P.W.1 and they exchanged their phone numbers and they used to talk through phone.

After sometime, A1 decided to marry P.W.1 and had gone for duty.

On 02.02.2009, A1 returned home and had gone to the house of P.W.1 and taken her to Tiruchendur with the permission of her mother/P.W.2.

At 09.15 a.m., A1 took her to Moorthy Mani Iyer Lodge and stayed in room No.108, where, without P.W.1's consent, A1 forcibly had intercouRs.with her and told that he would not cheat her and they returned home and A1 used to see her at hospital often.

On 09.02.2009 also, A1 took P.W.1 for the Church festival to Puliampatti and on 15.02.2009, she left his house.

On 17.02.2009, A1 came to her house and told her mother that since he would get a job for P.W.1 asked a sum of Rs.50,000/- for expenses.

Her mother also gave Rs.50,000/-.

After receiving the same, there was no phone call from A1 and when she met A1 in his house and questioned him as to why he had not contacted her, he replied that he would not marry her because his parents are demanding Rs.5 lakhs for marriage.

Thereafter, she was unable to meet A1 and hence, she went to Kovilpatti police station and gave a complaint Ex.P1.

(ii)P.W.12 Rajapandi, Head Constable, Kovilpatti All Women Police Station had received Ex.P1 and registered a case in crime No.1 of 2009 for the offences under Sections 417 of I.P.c.and Section 4 of Tamil Nadu Prohibition of Women Harassment Act and prepared Ex.P3, fiRs.information report.

Since the place of occurrence would come within the jurisdiction of Tiruchendur, he sent the same to the All Women Police Station, Tiruchendur.

(iii)P.W.15 Sona Vimala Rani, Sub Inspector of Police, received Ex.P3 and again, he registered a case in crime No.2 of 2009 for the same offence and prepared Ex.P8, fiRs.information report.

She gave requisition Ex.P9 to send the victim for medical examination and the Judicial Magistrate sent her for medical examination under Ex.P6.

(iv)On 11.03.2009, P.W.14 Dr.Sumathy examined P.W.1, where P.W.1 has stated that she had sexual intercouRs.with known person on 02.02.2009 in the lodge and till 10.02.2009 she had intercouRs.with him and thereafter, he cheated her.

After examining P.W.1, she issued Ex.P7 A.R.Copy.

(v)P.W.15, Sona Vimala Rani, Sub Inspector of Police visited the place of occurrence and examined the witnesses and on 07.02.2010 arrested A1 and produced him before the Court along with requisition Ex.P10 to sent him for medical examination.

(vi)On 10.02.2010, the accused was produced at Government Hospital, Tiruchendur for medical examination under Ex.P4, letter of the learned Judicial Magistrate, Tiruchendur and P.W.13 Dr.Pertline Rose examined him and issued

Ex.P5, A.R.Copy stating that there is no reason to say that the accused is impotent.

(vii)P.W.14 Mr.N.Rajarmani, Inspector of Police, took up the case for further investigation and examined the witnesses and recorded their statements and after due completion of investigation, he filed charge sheet for the offence under Section 376 of I.P.C.and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act against A1 and for the offence under Section 4 of Dowry Prohibition Act against A2 and A3 on 13.03.2010.

3.The learned trial Judge, after following the procedures, framed necessary charges against the accused.

Since the accused denied the same in toto and pleaded not guilty, to prove the charges, P.Ws.1 to 16 were examined and Exs.P.1 to 10 were marked on the side of the prosecution.

On completion of the examination of witnesses on the side of the prosecution, the accused was questioned under Section 313 of Cr.P.C., as to the incriminating circumstances found in the evidence of the prosecution witnesses and he denied them as false.

No witness was examined on the side of the defence.

4.On consideration of the evidence on record, the learned Additional Sessions Judge, Fast Track Court No.1, Thoothukudi found A1 not guilty for the offences under Section 417 of I.P.C.and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act and found A2 and A3 not guilty for the offences under Section 4 of Dowry Prohibition Act and acquitted them, However, she found A1 guilty for the offence under Section 376 of I.P.C and convicted and sentenced him as stated above.

Aggrieved over the judgment of conviction and sentence, the present appeal has been preferred.

5.Challenging the said conviction and sentence passed by the trial Court under Section 376 of I.P.C, the learned counsel for the appellant would submit that the prosecutrix is a lady, aged about 22 years and she was working as NuRs.and she is a worldly wise person and she was consenting for having sexual intercours.with the appellant and hence, the offence under Section 376 of I.P.C.has not been made out.

To substantiate his argument, he relied upon the decisions of the Apex Court in State of H.P.versus Mango Ram reported in 2000 Supreme Court Cases (Cri) 1331 and Uday V.

State of Karnataka reported in (2003) 4 Supreme Court Cases 46 and K.P.Thimmappa Gowda V.

State of Karnataka reported in 2011-2-L.W.(Cri.) 31 and Kaini Rajan versus State of Kerala reported in (2013) 3 Supreme Court Cases (Cri) 858.

6.He further submitted that P.W.2 is the mother of P.W.1 and no mother will send her unmarried daughter along with unknown male person and hence, the conduct of P.Ws.1 and 2 would show that they had given consent for sexual intercourse.

He further submitted that P.Ws.3 to 8 were turned hostile and hence, he prayed for setting aside the judgment of conviction and sentence and acquitting the appellant.

7.Resisting the same, the learned Government Advocate (criminal side) would submit that the character of the victim girl/prosecutrix is immaterial and to substantiate her argument, she relied upon the decision of Apex Court, consisting of three Judges reported in 1990 AIR538and submit that merely because P.W.2, who is the mother of P.W.1 has permitted to go along with the appellant is not a ground that he has given voluntary consent for sexual intercourse.

8.She would further submit that since the appellant is an army man, who has given promise to marry her, P.W.1 thought it that the promise is valid and P.W.1 and the accused are belonging to same community and there is no hurdle to marry him and hence, the accused intended to marry her and made false promise of marriage only to induce prosecutrix to give consent, which amount to rape and

hence, she prayed for dismissal of the appeal.

9.Considering the rival submissions made by both sides and on perusal of the typed sets of papers would show that the trial Court has framed charge against A1 for the offence under Sections 417, 376 of I.P.C.and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act, he was convicted and sentenced only for the offence under Section 376 of I.P.C.10,Now, the point to be decided is as to whether the conviction passed by the trial Court for the offence under Section 376 of I.P.C.is sustainable or not?.

To prove the charge for the offence under Section 376 of I.P.C.there is no eye witness.

But, on the side of prosecution, P.Ws.3 to 8 were examined to prove that P.W.2 has parted a sum of Rs.50,000/- to the appellant and also P.W.1 has taken by the appellant to his house for the festival during the period between 09.12.2009 to 15.12.2009.

But, those P.Ws.3 to 8 were turned hostile.

Hence, the evidence of P.Ws.3 to 8 will not assist neither prosecution nor defence.

Now, the point to be decided is as to whether the evidence of P.W.1 is reliable or not?.11.It is true, P.W.1 was 22 years old lady at the time of occurrence.

P.W.9 Ramachandran was examined to show that on 02.02.2009, the accused booked a room at Moorthy Mani Iyer hotel and he produced Ex.P2 ledger of the hotel, wherein the name of the accused has been mentioned.

But, the A1/appellant herein has pleaded alibi stating that during that period, he was working at Army.

But, to prove the same, he has not filed any scrap of paper and he has not denied that the signature in Ex.P2 is not belonging to him.

Hence, the evidence of P.W.1 is corroborated by the evidence of P.W.1, since P.W.9 has deposed that Balamurugan, who is the appellant herein was

accompanying one girl and there is no reason or discarding her evidence and the same is reliable.

12.The learned counsel appearing for the petitioner/appellant would mainly focussing with P.W.1/prosecutrix was 22 years old and she was willing and participating in that action and hence, the offence under Section 376 of I.P.C.is not made out.

Now, it is appropriate to consider the decision relied on by him in K.P.Thimmappa Gowda V.

State of Karnataka reported in 2011-2-L.W.(Crl.) 31, wherein, it was held that the prosecutrix had sex with the appellant with her consent and hence there was no offence made out under Section 376 of I.P.C., because she was above 16 years.It is appropriate to incorporate paragraph No.13 of the decision, which reads as follows: "13.In the present case, the facts are that Rathnamma herself stated in her evidence that she had sex with the appellant on several occasions.

It is also an admitted fact that the FIR against the appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over 8 months in lodging the FIR.

The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time.

On these facts a view is reasonably possible that Rathnamma had sex with the appellant with her consent and hence there was no offence under Section 376 IPC because sex with a woman above 16 years of age with her consent is not rape."

But, the above citation is not applicable to the facts of the present case.

Because, here, P.W.1 and appellant's sister Mariammal have gone for police selection and when they had gone for physical examination, A1 accompanied them and at that time, A1's sister introduced A1 to P.W.1 and then, they have acquainted with each other and then and there, he visited the house of P.W.1.

13.According to the prosecution P.W.1 had sex with the appellant on 02.02.2009.

But, she has given the complaint as soon as, the appellant refused to marry her.

It is pertinent to note that both P.W.1 and the appellant are belonging to the same community and the appellant was working in Army and hence, believing his words and promise to marry her, P.W.1 has consented for sex.

14.The learned counsel appearing for the appellant would rely upon the decision Kaini Rajan versus State of Kerala reported in (2013) 3 Supreme Court Cases (Cri) 858 and wherein, it was held that "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.

It is appropriate to incorporate the relevant portion in paragraph No.12 of the said decision, which reads as follows: "12.....Section 90 IPC refers to the expression 'consent'.

Section 90, though, does not define 'consent', but describes what is not consent.

"Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent.

Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

But, here, there is no evidence to show that P.W.1 has voluntarily participated.

Considering the evidence of P.W.1, she has deposed that believing the words of the appellant and since they are belonging to the same community and he has visited her house and having good talking terms with her mother and the sister of the appellant was also visiting her house, she has given consent for sex and at that date of giving consent for sex also, she has not suspected him that he would not marry her and hence, the above citation is not applicable to the facts of the present case.

15.The learned counsel appearing for the appellant would also rely upon the decision in Uday V.

State of Karnataka reported in (2003) 4 Supreme Court Cases 46 wherein, it was held that two conditions must be fulfilled for the application of Section 90 I.P.C.Firstly, it must be shown that the consent was given under a misconception of fact.

Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.

Considering the said citation along with the facts of the present case, it is clear that P.W.1, the prosecutrix believing the words of the appellant, since they are belonging to the same community and they are friends and there would be no problem for performing their marriage and since A1 is working in Army, has given consent for sex on the basis of misconception.

16.From a minute reading of Section 90, I.P.C., which explains as to what cannot be regarded as consent for the purpose of Indian Penal Code, it becomes clear that consent given under fear of injury, or under a misconception of fact, is not a consent at all.

It is, however, worth noticing that giving of consent under fear of injury or misconception of fact is not sufficient to hold that no consent existed unless it is further established that the wrongdoer knew, or had reason to believe, that the consent given was in consequence of such fear or misconception.

The fact ORS.set out in the fiRs.part of Section 90, namely, that the consent given by a person under fear of injury or under misconception of fact is not consent are from the point of view of the victim, whereas the fact ORS.set out in the second part of Section 90, namely, that the person doing the act know, or has reason to believe, that consent was given in consequence of such fear or misconception are corresponding provisions from the point of view of the accused.

Thus, the second part of Section 90 lays emphasis on the knowledge or reasonable belief of the person, who obtains consent, that the consent given by the victim is in consequence of fear of injury or misconception of fact.

What is, however, of paramount importance to note is that the existence of the twin requirements of Section 90 must be cumulatively satisfied in order to enable a Court to hold that no consent in law existed at the relevant time.

In other words, when these two conditions precedent are co-existent in a case, it can be safely held that no consent, as envisaged under the Indian Penal Code, existed.

Such a finding can be reached by examining as to whether the person, giving consent, had given the same under fear of injury or misconception of fact and, further, whether the offender knew, or had reason to believe, that but for fear or misconception, consent would not have been given.

17. In the decision in *Kaini Rajan versus State of Kerala* reported in (2013) 3 Supreme Court Cases (Cri) 858, the Apex Court has held that if the accused never intended to marry her and made promise of marriage only to induce prosecutrix to give consent, sexual act committed by the accused pursuant to such consent would constitute rape.

It is appropriate to incorporate paragraph No.14 of the said decision, which reads as follows: "14. This Court examined the scope of Section 375 IPC in a case where the facts have some resemblance with the one on 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: (SCCp.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].."

In the facts of that case, this Court held, that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused.

The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the fiRs.information report.

The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act."

18.While considering the said case along with the present case, it is clear that both are belonging to same community and A1 had visited the house of P.W.1 and he was having good talking terms with P.W.2, who is the mother of P.W.1 and hence, without any intention to marry P.W.1, A1 made promise to marry her only to induce the prosecutrix to give consent for sex and hence, the said consent would constitute rape.

Therefore, I am of the view that believing the words of the appellant, who is an Army man, P.W.1 herself has given consent and thereafter, the appellant refused to marry her, which amount to rape.

19.The learned counsel appearing for the appellant would mainly focussing the conduct of P.Ws.1 and 2 stating that P.W.1 was 22 years old lady and she is a NuRs.by profession and knowing the consequences, P.W.1 herself has given consent for sex and further submitted that no mother will permit her unmarried daughter to go along with unknown male person to Tiruchendur and also to the house of the appellant from 09.02.2009 to 15.02.2009, which shows they have given consent for sex and hence, the offence under Section 376 is not made out.

20.At this juncture, this Court would consider the decision reported in 1990 AIR538 wherein, the Apex Court has held that the character of reputation of victim is not relevant in awarding sentence.

It is appropriate to incorporate the following portion: "We have neither characterised the victim, Suman Rani as woman of questionable character and easy virtue nor made any reference to her character or reputation in any part of our judgment but used the expression "conduct" in the lexi-graphical meaning for the limited purpose of showing as to how Suman Rani had behaved or conducted herself in not telling any one for about 5 days about the sexual assault perpetrated on her till she was examined on 28.03.1984 by the Sub-Inspector of Police (PW-20) in connection with the complaint given by Ram Lal (PW-14) on 22.3.1984 against Ravi Shanker.

In this connection, we make it further clear that we have not used the word 'conduct' with reference to the character or reputation of the victim-Suman Rani.

Before parting with this matter, we would like to ex-press that this Court is second to none in upholding the decency and dignity of woman-hood and we have not expred any view in our judgment that character, reputation or status of a raped victim is a relevant factor for consideration by the Court while awarding the sentence to a rapist."

21.As per the evidence of P.W.2, the appellant has called P.W.2 as his elder sister and hence, he would marry only the daughter of P.W.1 and hence, P.W.2 had permitted P.W.1 to go along with the appellant to Tiruchendur and to his house for the festival during 09.02.2009 to 15.02.2009, which shows that the appellant is aware of his misconception.

Therefore, I am of the view that the said consent is not free one and it was given on the basis of misconception and the offence under Section 376 of I.P.C has been made out and the trial Court has correctly held that the appellant is guilty for the offence under Section 376 of I.P.C.and I do not find any reason for interfering with the findings of the trial Court and the conviction of the trial Court is liable to be confirmed.

22.In respect of the quantum of sentence is concerned, I am of the view that the sentence imposed by the trial Court against the appellant is fair and proper and it is not excessive and hence, the same is liable to be confirmed and the criminal appeal is liable to be dismissed.

23.In fine, The Criminal Appeal is dismissed.

The judgment and conviction dated 04.07.2011 passed by the Additional Sessions Judge, Fast Track Court No.1, Thoothukudi in S.C.No.68 of 2011 is hereby confirmed.

The bail bonds, if any executed by the appellant/accused, shall stand cancelled.

The learned trial Judge is directed to secure the appellant/A1 and send him to undergo the remaining period of sentence.

11.12.2014 Index : Yes/No website: Yes/No Arul To 1.The Inspector of Police, All Women Police Station Tiruchendur, Thoothukudi District.

2.The Additional Sessions Judge, Fast Track Court No.1, Thoothukudi.

3.The Public prosecutor, Madurai Bench of Madras High Court, Madurai.

R.MALA, J.

Arul Pre-Delivery Judgment made in CrI.A.(MD)No.199 of 2011 11.12.2014
.12.2014

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