

Emarajan Vs. The State

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Court : Chennai

Decided On : Mar-12-2015

Judge : M.Sathyannarayanan

Appellant : Emarajan

Respondent : The State

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

12. 03.2015 CORAM THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN CrI.A.(MD)NO.335 of 2011 Emarajan .. Appellant Vs. The State Rep. by Inspector of Police V.K.Puram Police Station, Tirunelveli District. (Crime No.6 of 2006 on the file of All Women Police Station, Ambasamudram) .. Respondent (Amended as per order dated 09.01.2012 made in M.P.No.1 of 2012) Prayer: Criminal Revision Petition filed under Section 374 Cr.P.C., against the judgment dated 11.11.2011 made in S.C.No.506 of 2007 on the file of the Mahila Court, Tirunelveli. !For Petitioner :: Mr.D.Srinivasaraghavan ^For Respondent :: Mr.C.Ramesh Additional Public Prosecutor :

JUDGMENT

The appellant is the sole accused, in S.C.No.506 of 2007 on the file of Mahila Court, Tirunelveli and he stood charged and tried for the commission of offences under Sections 376 and 417 IPC. The trial Court vide judgment dated 11.11.2011

has convicted him for the commission of the said offences and imposed the following sentence: Offence under Section 376 Ten years RI, fine of Rs.10,000/- with default sentence of one year rigorous Imprisonment. Section 417 One year Rigorous Imprisonment The sentences were ordered to be run concurrently. The trial Court has also ordered set off under Section 428 Cr.P.C. The accused aggrieved by the conviction and sentence recorded by the trial Court has filed this appeal.

2. The facts leading to the filing of this appeal, narrated in brief, are as follows: The victim girl/P.W.1 is the daughter of P.Ws.2 and 3. P.W.4 is the brother of P.W.2 and P.W.5 is the cousin brother. The accused belong to the same community as that of P.W.1 and is also distantly related to her. Nearby the house of P.Ws.2 and 3, the house of aunt/junior mother of the appellant/accused is located and he used to come often to that house. 2.1. P.W.1/victim has studied up to 9th standard and was employed in a Tailoring shop and that at the relevant point of time in the year 2006, she was aged about 17 years. The appellant used to have conversation with P.W.1/victim, while she is going for her job and the said acquaintance continued for about one year. The appellant has also promised to marry her. 2.2. On 14.03.2006, when P.W.1 was alone in her house at about 2.00 p.m., the appellant came to her house and made a promise to marry her and had a forceful physical relationship with her without consent. P.W.1, after two or three months, came to know that she became pregnant and informs the said fact to the appellant, who told that if she revealed the fact of her pregnancy to anybody, he will not marry her and on account of the same, P.W.1/victim did not inform anybody. About six months thereafter, P.W.1/victim exhibited the sign of pregnancy and therefore, her parents, namely, P.Ws.2 and 3, asked her and she informed the above said fact. P.W.1 was also taken to a Doctor, who, on examination, has told the parents that P.W.1 is in family way. The parents of P.W.1 asked her as to the reasons for her pregnancy and she told that the appellant/accused is the cause for it and he had a physical relationship on the pretext of marrying. P.W.2, the father of P.W.1, in turn has informed the said fact to his brother P.W.4 and his cousin brother P.W.5 and both of them went to the appellant and asked him to marry P.W.1 and he has informed that after getting the consent of his parents, he will marry her. Though two months had lapsed, no response was forthcoming and when the

appellant/accused was approached, he told him that his parents has refused consent and therefore, he cannot marry P.W.1. It was further stated by the appellant/accused that the conduct and character of P.W.1 is also not good and she had relationship with many others. 2.3. The parents of P.W.1 having found that mediatory talks has not yielded any fruitful results, along with P.W.1 went to All Women Police Station, Ambasamudram on 09.11.2006 and lodged a complaint under Ex.P1 against the appellant/accused. 2.4. P.W.15, the Sub Inspector of Police, attached to the said police station, on receipt of Ex.P1 complaint, took it on file and registered a case in Crime No.6 of 2006 for the commission of offences under Section 366A of the Indian Penal Code. 2.5. Thereafter she searched for the accused and effected his arrest on 10.11.2006. She has also examined P.Ws.2 and 3 and recorded their statements and on 10.11.2006, at about 8.45 p.m., in the presence of P.W.6 and another, prepared the observation mahazar and rough sketch marked as Exs.P2 and P18 respectively. On 02.12.2006, P.W.15 examined P.Ws.11 and 13 and recorded their statements and having found that instead of registering a case for the commission of offence under Section 376 IPC, a case has been registered under Section 366(A) IPC, P.W.15 altered the sections after obtaining opinion from the Assistant Public Prosecutor. P.W.16 also made arrangements for medical examination of P.W.1/victim as well as the appellant/accused. 2.6. P.W.7, Doctor Subbulakshmi, has examined the victim and issued Ex.P4 Accident Register stating that she is pregnant. The Radiologist has also examined the victim girl and also gave a age certificate marked as Ex.P8 opining that P.W.1 is above 18 years and below 20 years. Similarly, in respect of the appellant/accused also, the opinion was given in Ex.P.10 that he is above 21 years of age. Ex.P12 potency certificate was also issued opining that the appellant/accused is potent. 2.7. P.W.15 also sent a requisition for conducting DNA test under Ex.P20 and after getting the orders of the Magistrate, P.W.1/victim as well as the appellant/accused were subjected to medical test by obtaining requisition letter. P.W.12, the Deputy Director of Forensic Lab, Chennai, after conducting the prescribed test, has issued a certificate under Ex.P16 opining that the male child Raja (date of birth 18.11.2006) was born to the appellant/accused and P.W.1/victim. 2.8. P.W.16 as well as P.W.17 continued the investigation and P.W.17, after completion of investigation, has filed the charge sheet on 15.08.2007

charging the accused for the commission of offences under Sections 376 and 417 IPC to the Court of Judicial Magistrate, Ambasamudram, who took up on file in P.R.C.No.35 of 2007. The committal Court has furnished the appellant/accused with copies of documents under Section 207 of Cr.P.C. and having found that the case is exclusively tried by the Sessions Court committed the case to the Mahila Court, Tirunelveli, who took it on file in S.C.No.506 of 2007 and issued summons to the appellant/accused and on his appearance, framed charges for the commission of offences under Sections 376 and 417 IPC and questioned him and he pleaded not guilty to the charges framed against him.

3. The prosecution, in order to sustain their case, examined P.Ws.1 to 17, marked Exs.P1 to P20 and also marked M.Os.1 and 2. The appellant/accused was questioned under Section 313(1)(b) of Cr.P.C. with regard to the incriminating circumstances made out against him in the evidence rendered by the prosecution and he denied it as false. On behalf of the appellant/accused, no oral and documentary evidence was let in and no exhibits were marked.

4. The trial Court, on consideration of oral and documentary evidence and other materials, found him guilty for the commission of offences under Sections 376 and 417 IPC and imposed the sentence of imprisonment as stated above.

5. This Court, while entertaining this appeal and suspending the sentence of imprisonment in M.P.No.1 of 2011, has passed an order on 22.12.2011, directing the appellant/accused to deposit a sum of Rs.75,000/-, without prejudice to the claim of both parties, to the credit of Crl.A.(MD) No.335 of 2011 before this Court with a direction that it will be invested in the Indian Bank, High Court Branch, Madurai, till the child attains majority and the accrued interest shall be drawn once in three months by the guardian of the child. It is represented by the learned counsel for the appellant/accused that the conditional order passed by this Court has been complied with.

6. The learned counsel for the appellant/accused would submit that admittedly, the victim girl, at the time of alleged occurrence, was aged about 17 years and it is also the case of the prosecution that both belong to very same community and in fact, the appellant/accused is also distantly related to her. P.W.1 has also studied

up to 9th standard and was employed in a Tailoring shop and she knows the consequences of the physical relationship and on account of deep love and passion for the appellant/accused, voluntarily had a physical relationship with him and hence, it cannot be construed as cheating. It is the further submission of the learned counsel for the appellant/accused that the physical relationship with an unmarried girl under the pretext of marriage would not attract the ingredients of the offence as defined under Section 415 of IPC and consequently the imposition of punishment under Section 417 of IPC by the trial Court, on the face of it, is unsustainable and has also drawn the attention of this Court to the testimonies of witnesses as well as the documentary evidences.

7. The learned counsel for the appellant/accused would submit that the ingredients of the offence under Sections 376 and 417 IPC have not been made out and that the trial Court has committed a grave error in recording the conviction in both sections.

8. The learned counsel for the appellant/accused has also placed reliance upon the following judgments: (i) 2003 SCC CrI 775 [UDAY V. STATE OF KARNATAKA]. (ii) AIR 2011 SC2564[K.P.THIMMAPPA GOWDA V. STAE OF KARNATAKA]. (iii) 2005 CrI.LJ3162[CALCUTTA]. [MD.MAHASIN SK. V. SAYEDA KHATUN BIBI AND ANOTHER].

9. Per contra, Mr.C.Ramesh, learned Additional Public Prosecutor, would contend that the appellant/accused was distantly related to P.W.1/victim and under the guise of visiting his junior mother's house, which lies adjacent to her house, developed acquaintance, which went on for about one year and under the pretext of marrying her, had a physical relationship with her many times, which ultimately resulted in pregnancy and the parents of victim/P.W.1 became aware of the same and they deputed P.Ws.4 and 5 to amicably solve the issue and though initially it was represented by the appellant/accused that after getting consent from his parents, he will marry P.W.1, later on recite and started accusing P.W.1/victim of infidelity and it exhibits the conduct of the appellant/accused that he has practised deception right from inception. It is the further submission of the learned Additional Public Prosecutor that once the victim on account of the physical relationship with

the appellant/accused became pregnant, the ingredients of offence under Section 415 of IPC have been made out and the trial Court on a proper appreciation of the materials available before it in the form of oral and documentary evidences has rightly convicted him for the commission of offences under Sections 376 and 417 IPC and while considering the finding rendered by the said Court, it may not be interfered with by this Court in exercise of its appellate jurisdiction and prays for dismissal of this appeal.

10. In response to the submission made by the learned Additional Public Prosecutor, the learned counsel for the appellant/accused, on instructions, would submit that apart from a sum of Rs.75,000/-, which has been deposited by the appellant/accused in pursuant to the interim order passed by this Court, while suspending the sentence of imprisonment, the appellant/accused is also willing to deposit a further sum of Rs.25,000/- and the sentence of imprisonment may be converted into one of fine and the fine amount, in turn, may be directed to be paid by way of compensation to the minor boy.

11. It is further submitted by the learned counsel for the appellant/accused that P.W.1 subsequently got married to a another man and also begot two children and the boy born out of the physical relationship between her and the appellant/accused was given in adoption to a wealthy Muslim parents and he is being brought up by them and the said fact may also be taken into consideration.

12. This Court has carefully considered the submissions made by the learned counsel for the appellant and the learned Additional Public Prosecutor and also perused the oral and documentary evidences and other materials and also the original records.

13. The appellant was charged for the commission of offences under Sections 376 and 417 IPC and the trial Court vide impugned judgment has convicted and sentenced him as stated above.

14. It is relevant to consider the decisions relied on by the learned counsel for the appellant/accused.

15. In 2003 SCC (Cri) 775, the facts of the case would disclose that P.W.1/prosecutrix was aged about 19 years and the appellant/accused under the pretext of marrying her has obtained her consent by practising fraud and deception and she also became pregnant. The trial Court has convicted the appellant/accused under Section 376 of IPC and the High Court has also upheld the sentence and reduced the period of sentence. The Hon'ble Supreme Court of India has elaborately considered the scope of Sections 375 and 90 of IPC and observed as follows: ?25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. 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. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In

such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances, it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.?. Ultimately, the Hon'ble Supreme Court has allowed the appeal filed by the appellant by setting aside the sentence imposed on him under Section 376 IPC.

16. In AIR 2011 SC2564 the Hon'ble Supreme Court of India found that the victim was aged about 18 years and the appellant therein had physical relationship on the pretext of marrying her and on the facts of the case found that the victim had a physical relationship with the appellant and the physical relationship between the appellant and the victim therein was a consensual one and no offence under Section 376 IPC has been made out.

17. In 2005 Cri.L.J.3162, the High Court of Calcutta in paragraph No.8 observed as follows: ?.8.The evidence which were adduced during trial and the circumstances reveal that victim was a major girl and definitely a girl of above 16 years of age. She had full consent in sexual intercourse with the petitioner and she continued such act with the petitioner for few months till she became pregnant. The victim did not tell the matter to anybody and did not report anything to neighbours and did not lodge any general diary or FIR at police station alleging that the petitioner committed sexual intercourse with her against her wishes. Her father came to know about incident when the petitioner drove out the victim from his house and evidence reveals that by this time she was already three months pregnant. The evidence clearly reveals that the victim even did not report to her parents about pregnancy during initial stages. Considering the evidence I am of

the opinion that in the instant case the victim being a full grown lady voluntarily consented to have sexual intercourse with the petitioner. The decisions cited by the learned advocate for petitioner are quite apposite in the instant case. In Hari Majhi (1990 LJ650 (Cal) (supra) the accused had frequent sexual intercourse with a girl above 16 years for more than a year before she conceived. It was held by this Court that even if it is assumed that she agreed to sexual intercourse with the accused on account of promise of the marriage, the charge under Section 417 could not be substantiated in the absence of any evidence to show that the said representation by the accused was false to the knowledge of the accused at the time it was made. This Court further held that where the charge is of cheating, as in this case rests upon a representation, which is false and certain future event, it must be shown by the prosecution that the representation is false to the knowledge of the accused when it was made. It will be of no consequence to show that in fact the representation has ultimately turned out to be untrue. Accordingly, this Court set aside the conviction in the appeal.?

18. The Calcutta High Court has also taken into consideration the decision reported in Uday vs. State of Karnataka (cited supra) and Jayanti Rani Panda vs. State of West Bengal reported in 1984 Cri L.J.

1535 and held that there was no misconception of the fact in the case on hand and the victim was a consenting party and her conduct was nothing but an act of promiscuity on her part and therefore, the conviction of the appellant under Section 417 IPC is bad in law and set aside the conviction and acquitted him.

19. The evidence available on record, more particularly that of P.W.1, would disclose that the love affair between P.W.1/victim and the appellant/accused was going for about one year and during the period, the appellant/accused had written very many love letters and though she claimed that she handed over the love letters to the Investigating Officer, the Investigating Officer, who was examined as P.W.17, has denied that fact. She would further stated that she was also aware that prior to the marriage having physical relationship is a wrong act and though her menstruation stopped for two or three months, she did not inform her parents. She has denied the fact that she was having relationship with many persons and

that is why she has belatedly lodged the complaint.

20. P.W.7, who examined P.W.1/victim would state that since the victim was pregnant, she cannot ascertain whether she was raped or not and her examination has disclosed the fact that there was no evidence regarding the physical relationship.

21. P.W.8, who issued the birth certificate for the boy born out of the said relationship, has spoken about the issuance of the birth register marked as Ex.P.16.

22. P.W.9, who have examined P.W.1/victim as well as the appellant/accused has issued the age certificate, has spoken about the fact that the victim girl was aged above 18 years and below 20 years.

23. P.W.12, who conducted DNA test, has stated that the boy has born out of the relationship between P.W.1/victim and the appellant/accused.

24. P.W.17, who conducted the investigation, in his cross examination, has deposed that even after the alleged rape on 14.03.2006, as spoken to by P.W.1/victim, she and the appellant/accused had physical relationship very many times and denied the fact that earlier complaints have been suppressed.

25. Materials collected by the prosecution and the testimonies of witnesses would disclose the fact that admittedly, P.W.1/victim was aged about 17 years and thus, she has stated that she was raped on 14.03.2006 by the appellant/accused and the evidence in that regard is very lacking. Even as per the testimony of P.W.1, even after the alleged rape on 14.03.2006, she has continued to have physical relationship with him and in fact, in the cross examination, has admitted that it is wrong to have a physical relationship prior to marriage. It is also pertinent to point out at this juncture that she has studied up to 9th standard and also undergone a Tailoring course and at the relevant point of time was employed in a Tailoring shop and therefore, it cannot be said that being a grown up girl, she was not aware of the consequences of having a physical relationship with an opposite sex.

26. P.W.7, who medically examined the victim, has also opined that there was no evidence of physical relationship. Therefore, this Court is of the view that the physical relationship between the appellant/accused and P.W.1/victim was consensual one and hence, the ingredients of offence under Section 375 IPC have not been made out and hence, the appellant/accused is entitled to be acquitted under Section 376 IPC.

27. The appellant/accused was also convicted for the commission of offence under Section 417 IPC. The scope of Section 417 IPC has been considered in the judgment rendered by the Calcutta High Court reported in 2005 CrI.L J3462 which in turn placed reliance upon Uday vs. State of Karnataka, [2003 SCC775 cited supra in the decision rendered by the Hon'ble Supreme Court of India. The Hon'ble Supreme Court of India observed that the victim, thus, freely exercised a choice between resistance and assent and she must have known the consequences of the fact, particularly, when she was conscious of the fact that their marriage may not take place at all on account of caste consideration and on the facts of the case found that the victim freely, voluntarily and consciously consented to have physical relationship with the appellant and consequently, her consent was not in consequence of any misconception of fact.

28. The Hon'ble Supreme Court of India on the facts of the case also found that there is no evidence to prove conclusively that the appellant never intended to marry the victim. Though perhaps, he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. The Hon'ble Supreme Court also taken note of the fact that the victim girl belongs to Backward community, whereas the accused belong to a higher caste. On account of the caste consideration also the marriage between them was not possible.

29. In the case on hand, the facts projected would disclose that P.W.1/victim as well as the appellant/accused was also distantly related to her. The parents of P.W.1/victim on being aware of the fact of relationship and pregnancy of their daughter, through P.Ws.4 and 5 tried to mediate and though initially, it was represented by the appellant/accused as per their testimony that after getting the

consent of his parents, he would marry her, later on retracted and in fact started accusing her of infidelity/having relationship with very many persons and a suggestion was also put to P.W.1, while she was in box, she denied it. The result of DNA test marked as Ex.P16 coupled with the evidence of P.W.12 would disclose that the parents of the boy, who born out of the said physical relationship, are P.W.1/victim and the appellant/accused.

30. No doubt, both of them are aware of the consequence of having physical relationship and this Court, having taken note of the behaviour and act on the part of the appellant that in spite of the mediatory efforts, he refused to marry her by suggesting infidelity, which appears to be an afterthought, is of the view that the appellant is guilty of the commission of the offence under Section 415 of IPC and consequently liable to be convicted under Section 417 IPC and the trial Court on the basis of the oral and documentary evidences has rightly convicted him for the commission of offence under Section 417 IPC.

31. At this juncture, the learned counsel for the appellant would submit that this Court may take note of the fact of deposit of Rs.75,000/- in compliance of the interim order passed by this Court, while suspending the sentence of imprisonment and instead of sending the appellant to prison, impose fine on the appellant/accused and it may be paid as a compensation to the boy, who born out of the said physical relationship.

32. This Court heard the submissions of the learned Additional Public Prosecutor also.

33. This Court, taking note of the fact that P.W.1 subsequently got married to another man and begotten children and the appellant/accused was also incarcerated for nearly 81 days in judicial custody and it is also brought to the knowledge of the Court that the boy was also subsequently given in adoption to a wealthy Muslim parents and he is under proper care and custody, is of the view that the sentence of imprisonment of one year awarded by the trial Court requires modification and instead the sentence of fine and the fine amount to be paid as compensation to the minor boy, would meet the ends of justice.

34. In the result, the criminal appeal is partly allowed and the conviction of the appellant/accused under Section 376 IPC is set aside and the conviction of the appellant under Section 417 IPC recorded by the trial Court vide impugned judgment dated 11.11.2011 is confirmed. The appellant/accused is imposed with a fine of Rs.1,00,000/- (Rupees one lakh only), in default, shall undergo rigorous imprisonment for six months. A sum of Rs.75,000/- deposited by the appellant/accused in compliance of the conditional order dated 22.12.2011 made in M.P.No.1 of 2011, is to be treated as fine and apart from the said sum, the appellant/accused shall also pay further sum of Rs.25,000/- (Rupees twenty five thousand only) by way of fine and it shall be deposited to the credit of this criminal appeal No.335 of 2011 within a period of one week from today, before the Indian Bank, High Court Branch, Madurai. Call on 19.03.2015 for 'reporting compliance'. 12.03.2015 Index :Yes/No Internet:Yes Note to Registry: The Registry is directed to communicate the operative portion of the judgment to the Manager, Indian Bank High Court Branch, Madurai, and also issue a copy of the operative portion of this order to the learned counsel for the appellant on 16.03.2015. RR To 1.The Mahila Court, Tirunelveli. 2.The Inspector of Police V.K.Puram Police Station, Tirunelveli District. 3.The Additional Public Prosecutor, Madurai Bench of Madras High Court, Madurai. M.SATHYANARAYANAN,J.

RR CrI.A.(MD)NO.335 of 2011 12.03.2015

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