

“REPORTABLE”

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NO.601 OF 2008

Karthi @ Karthick

... Appellant

Versus

State Rep. by Inspector of Police, Tamil Nadu

... Respondent

J U D G M E N T

Jagdish Singh Khehar, J.

1. The appellant, Karthi @ Karthick was convicted for the offences under Sections 376 and 417 of the Indian penal Code, 1860 by the Assistant Sessions Judge, Virudhunagar in Sessions Case No.119 of 2004 by an order dated 30.11.2004. The aforesaid conviction was affirmed by the Additional District and Sessions Judge (Fast Track Court), Virudhunagar, in Criminal Appeal No.2 of 2005, by an order dated 1.6.2005. The appellant's Revision Petition (Criminal Revision Case No.439 of 2005) was dismissed by the Madurai Bench of the Madras High Court on 18.12.2006. The appellant has approached this Court to assail the orders passed by the Trial Court, the appellate Court and the Revisional Court.

2. The accusation in the instant controversy was levelled, first of all, by the prosecutrix Poomari (PW1). At the time of occurrence, she was

aged between 18 to 20 years. She was then a resident of Achampatti. The prosecutrix Poomari (PW1) had pointed an accusing finger, at the accused-appellant Karthick. The accused appellant was aged above 20 years at the time of occurrence. He was also a resident of Achampatti. The accused-appellant Karthick, besides being a neighbour of the prosecutrix Poomari (the prosecutrix Poomari (PW1)) also belonged to the same caste as the prosecutrix.

3. From the factual position emerging from the record of this case, it appears that the prosecutrix Poomari (PW1) had lost her mother in early childhood. At the relevant time, therefore, she was living with the family of her brother Manikannan (PW2) and sister-in-law Pitchumani (PW3), (wife of Manikannan, PW2). The father of the prosecutrix Poomari (PW1), i.e., Muthukaruppa Thevar (PW4) was then, also residing in the same house.

4. The accusation against Karthick, was made on 10.10.2003. The initiation of the series of occurrences, leading to the filing of the complaint, had allegedly commenced six months prior thereto. According to the statement of the prosecutrix Poomari (PW1), the accused-appellant Karthick used to generally tease her. He also used to ask her to marry him. On the first date of occurrence, the prosecutrix Poomari (PW1) was alone in the house. The other family members had gone to the temple. The accused-appellant Karthick, finding her alone, entered her house. At that juncture, she was allegedly asleep. The accused-appellant Karthick had allegedly requested the prosecutrix

Poomari (PW1) to allow him to have sexual intercourse with her. The prosecutrix allegedly refused to consent. She claims to have told the appellant, that sexual intercourse could only be had after marriage. Yet, he forced himself on her, after he had gagged her mouth with his right hand. The accused-appellant Karthick, then allegedly committed to the prosecutrix Poomari (PW1), that he would marry her. Consequent upon her refusal to have sexual intercourse with him, the accused-appellant Karthick allegedly gagged her mouth to prevent her from raising an alarm. He then, had sexual intercourse with her. He told her not to reveal the incident to anyone, on the assurance, that he would marry her. He had allegedly promised her marriage, by placing his hand on her head. Believing the promise made by the accused-appellant Karthick, the prosecutrix Poomari (PW1) did not reveal the first occurrence, to anyone.

5. After the first occurrence, the acknowledged factual position is, that the accused-appellant Karthick and the prosecutrix Poomari (PW1) were repeatedly engaged in consensual sex at different places. During the entire interregnum, according to the prosecutrix, the accused-appellant Karthick swore, that he would marry her.

6. On 5.10.2003, the prosecutrix Poomari had gone to Murugan temple, Kariapatti in the company of the accused-appellant Karthick. At the temple, she again requested Karthick to marry her. He, however, refused to marry her. Consequent upon the refusal, the prosecutrix Poomari (PW1) allegedly divulge the entire factual position to her

brother Manikannan (PW2), and other family members. Manikannan (PW2), and her father Muthukaruppa Thevar (PW4) decided to get the matter sorted out through the village elders. They narrated the relationship between the prosecutrix Poomari and the accused-appellant Karthick, to a number of village elders including Veerachamy (PW5), Ramasamy (PW6), Ayyavoo (PW7) and Nagesh (PW8).

7. The village elders then summoned the accused-appellant Karthick. For settling the dispute, a panchayat was held. The panchayat made efforts to persuade the accused-appellant Karthick to marry the prosecutrix Poomari. The accused-appellant Karthick, however, refused to marry Poomari (PW1). On the refusal of the accused-appellant Karthick to marry the prosecutrix, the village elders advised her to make a complaint to the police. The prosecutrix Poomari (PW1), thereupon, lodged a report on 10.10.2003 at 8.00 a.m., with the Inspector of Police, Kariapatti.

8. The accused-appellant Karthick surrendered before the Judicial Magistrate No.II, Virudhunagar on 5.11.2003.

9. On completion of investigation, a charge-sheet was filed before the Judicial Magistrate No.II, Virudhunagar. Since charges levelled against the accused-appellant Karthick related to offences triable by a Court of Sessions, the matter was committed to the Principal District and Sessions Court, Virudhunagar at Srivilliputtur. On committal, Sessions Case No.119 of 2004 was placed before the Assistant Sessions Judge, Virudhunagar for trial.

10. During the course of the trial, 16 witnesses were examined by the prosecution, and 12 exhibits were placed on the record of the case. The statement of the accused appellant Karthick was then recorded under Section 313 of the Code of Criminal Procedure. The accused appellant did not lead any evidence in his defence, even though he was afforded an opportunity to do so.

11. With the assistance of learned counsel for the rival parties, we have gone through the judgments, which are subject matter of challenge at the hands of the accused-appellant Karthick. We have also been taken through the statements of certain witnesses specially the statement of the prosecutrix Poomari (PW1), and that of Dr. K.P.Santhakumari (PW14), i.e., the doctor who subjected the prosecutrix Poomari (PW1) to medical examination. We may, therefore, summarise the sum and substance of the evidence recorded at the behest of the prosecution before the Trial Court.

(i) The prosecutrix Poomari (PW1) fully reiterated the factual position recorded by her in her complaint dated 10.10.2003. The statement of the prosecutrix Poomari (PW1) was fully supported by her brother Manikannan (PW2) and her father Muthukaruppa (PW4). Despite lengthy cross-examination, the testimony of the aforesaid witnesses could not be shaken.

(ii) On an ancillary issue connected with the culpability of the accused-appellant Karthick, the prosecution had examined four village elders of Alagapuri, namely, Veerachamy (PW5), Ramasamy (PW6),

Ayyavoo (PW7) and Nagesh (PW8). All of the aforesaid witnesses supported the prosecution version, by reiterating the convening of a panchayat where the accused-appellant Karthick was summoned. They affirmed the fact that the accused-appellant Karthick had refused to marry the prosecutrix Poomari (PW1), when he had appeared before them. The instant aspect of the matter leads to one interesting inference, namely, that the elders of the village were convinced, that in view of the relationship between the prosecutrix Poomari (PW1) and the accused-appellant Karthick, they ought to get married, and it is therefore, that the accused-appellant Karthick was asked by the panchayat, to marry the prosecutrix Poomari (PW1). But he refused to do so. Otherwise, there would have been no question of the panchayat asking the accused-appellant Karthick to marry the prosecutrix Poomari (PW1). Since the accused-appellant Karthick did not agree to the proposal of the elders of the village, they recommended the prosecutrix Poomari (PW1) to make a complaint to the police. There is nothing incongruous or discordant in the statements of Veerachamy (PW5), Ramasamy (PW6), Ayyavoo (PW7) or Nagesh (PW8). None was pointed out during the course of hearing. Thus, viewed, there can be no doubt that the proceedings during the holding of the panchayat would constitute strong circumstantial evidence for drawing an inference in the facts of this case.

(iii) There is another set of relevant witnesses, as well. These witnesses are allegedly friends of the accused-appellant Karthick,

namely, Chandran (PW9) and Ilangovan (PW10). Chandran (PW9) deposed, that he had seen the prosecutrix Poomari (PW1) and the accused-appellant Karthick at the Murugan temple. During this meeting with the prosecutrix Poomari (and the accused-appellant Karthick), the prosecutrix had told Chandran (PW9) that the accused-appellant Karthick who had earlier promised to marry her had now refused to do so, just preceding their meeting at the temple. The statement of Ilangovan (PW10) was to the same effect. Ilangovan (PW10) affirmed having seen both the accused-appellant Karthick and the prosecutrix Poomari (PW1) together on a couple of occasions. He also deposed, that he had met them at the Murugan temple. **At the temple**, he was told by the prosecutrix Poomari (PW1), that the accused-appellant Karthick, had refused to marry her. In his statement, he acknowledged that she had also informed him of having had a physical relationship with the accused-appellant Karthick, on account of the accused-appellant having promised to marry her. Both Chandran (PW9) and Ilangovan (PW10) had denied the suggestion put to them during the course of their cross-examination, that they were deposing falsely. The statements of Chandran (PW9) and Ilangovan (PW10), who are friends of the accused-appellant Karthick further show, that they were aware of the relationship between the prosecutrix Poomari and karthick, and that, the accused-appellant Karthick had retracted from his promise to marry her, at the Murugan temple.

12. Three sets of statements, the first comprising of the prosecutrix Poomari (PW1), her brother Manikannan (PW2) and her father Muthukaruppa Thevar (PW4), read with the statements of the elders of the village, namely Veerachamy (PW5), Ramasamy (PW6), Ayyavoo (PW7) and Nagesh (PW8), when examined in conjunction with the statements of two friends of the accused-appellant Karthick, Chandran (PW9) and Ilangovan (PW10), leave no room for any doubt that the accused-appellant Karthick in the first instance had unwilling sexual relationship with the prosecutrix Poomari (PW1). Even though she had protested and repulsed his physical advances by telling him that this would be possible only after their marriage. Yet, he forced himself on her, after gagging her mouth with his right hand. After having had sexual intercourse with the prosecutrix Poomari, her when she was all alone in her house, he told her not to reveal the incident to anyone by assuring her, that he would marry her. He also promised to marry her, by placing his hand on her head. The relationship between the prosecutrix Poomari (PW1) and the accused-appellant Karthick is supported by the circumstantial evidence of the elders of the family of the prosecutrix. The elders of the family had then approached the village elders, with a request to amicably resolve the issue. Despite the asking of the elders of the village, the accused-appellant Karthick declined to marry the prosecutrix Poomari (PW1). The version of the prosecutrix Poomari (PW1), is also independently affirmed from the statements of Chandran (PW9) and Ilangovan (PW10) who deposed in

connection with the occurrence at Murugan temple, during which the accused-appellant Karthick, for the first time refused to marry the prosecutrix Poomari (PW1). It is in the background of the aforesaid factual position, that we shall endeavour to determine the submissions at the behest of the accused-appellant Karthick.

13. First and foremost, the learned counsel for the appellant placed reliance on the judgment rendered in *Uday vs. State of Karnataka*, (2003) 4 SCC 46. Relying on the aforesaid judgment, learned counsel for the appellant invited our attention to the following conclusions drawn therein :

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

Besides the aforesaid, learned counsel for the appellant also placed reliance on the decision rendered in *Zinder Ali Sheikh vs. State of West Bengal & Anr.*, (2009) 3 SCC 761. From the instant judgment learned counsel placed reliance on the following observations :

“14. There is no effective Cross-Examination to this witness. One question was asked about her clinical and physical examination. It was suggested firstly that she had suffered injuries on her private parts and person. The witness, however, stated that there was no bleeding injury, meaning thereby, that the injuries were insignificant considering that she was medically examined after about 6 months. Such admission is meaningless. Her version regarding rape, however, has gone unchallenged. She was asked about the workplace and the boys being there, however, non-disclosure to the boys would only be a natural behaviour and cannot lead us to the conclusion that she had consented for the sexual intercourse. There was no reason for the poor girl to falsely implicate the accused. There is no suggestion of any love-affair with the accused also. Her version that she was raped by the accused, goes totally unchallenged. Her version that she was forcibly caught and a napkin was put inside her mouth before the accused had committed rape on her, was a little exaggerated, but it does not demolish her version that she was raped by the accused.

15. PW-2, Moshar SK, in his deposition, had spoken about the Chandmoni and her father, telling him that Chandmoni was raped by the accused. He had also spoken about the village meeting, where, it was decided that the accused should marry Chandmoni. Again, there is no Cross-Examination of this witness. Of course, this witness had stated that he had not made any statement to the Police, as he was not interrogated.

16. Another witness PW-3 Tajem SK (Mallick) also spoke about the village meeting, which was held at the instance of Markam Ali SK, father of the prosecuterix. He also claimed that he was not interrogated by the Police. In his Cross-examination itself, it has come that there were about 200-250 persons present in the village meeting, where, it was decided that the accused was guilty.

Based on the observations made by this Court in the aforesaid judgments, it was the vehement contention of the learned counsel for the appellant, that each case wherein the allegation of rape is based on the procuring of consent for sexual intercourse by deceit, has to be determined individually on the basis of the peculiarities of the case

being handled. We shall, therefore, endeavour to determine the issue in hand on the aforesaid parameters.

14. The factual submission advanced at the hands of the learned counsel for the appellant was that the prosecutrix Poomari (PW1) was a consenting party to the sexual relationship which the accused-appellant Karthick had with her. That may be so at a subsequent stage, yet it is not possible for us to accept the instant submission advanced at the hands of the learned counsel for the appellant for his exculpation. The facts as they unfold from the statement of the prosecutrix Poomari (PW1) are, that even before the first act of sexual intercourse, the accused-appellant Karthick used to tease her. He also used to tell her, that he wished to marry her. The fact that he had sexual intercourse with her, when the prosecutrix Poomari (PW1) was all alone in her house, is not disputed. The prosecutrix Poomari (PW1) has confirmed in her deposition, that at the time of the first sexual intercourse with her at her house, the accused-appellant Karthick had gagged her mouth with his right hand. He had promised to marry her, by placing his hand on her head, after having ravaged her. The subsequent acts of sexual intercourse, were actions of actively cheating her, by giving her the impression that he would marry her. The occurrence at the Murugan temple, is of significant importance. At the temple, for the first time the accused-appellant Karthick told the prosecutrix Poomari (PW1), that he would not marry her. The instant factual position has been confirmed by Chandran (PW9) and Ilangovan (PW10). Despite lengthy cross-

examination, the accused-appellant has not been able to create any dent in the testimony of the prosecutrix Poomari (PW1). In the aforesaid view of the matter, we confirm the concurrent determination of the courts below, that the accused-appellant Karthick committed deceit with the prosecutrix Poomari (PW1) by promising to marry her. On the strength of the said deception, in the first instance persuaded her not to disclose the occurrence to anyone, and thereafter, repeatedly had sexual intercourse with her. Therefore, in the facts and circumstances of this case, it is not possible for us to accept the contention advanced on behalf of the accused-appellant Karthick, that sexual intercourse by the accused-appellant Karthick with the prosecutrix Poomari was consensual. Obtaining consent by exercising deceit, cannot be legitimate defence to exculpate an accused.

15. The second contention advanced at the hands of the learned counsel for the appellant was, that the accused-appellant Karthick had not given any promise to the prosecutrix Poomari (PW1), that he would marry her. From all the reasons referred to by us, while dealing with the first contention advanced by learned counsel for the appellant, it is not possible for us to accept the instant contention as well. However, in addition to the factual position referred to while dealing with the first contention, there is something further that needs to be recorded. It is necessary to notice, that in the first instance when the prosecutrix Poomari (PW1) disclosed the matter of deception and sexual intercourse to her family, the matter was taken to the village elders.

Four village elders have appeared before the Trial Court and recorded their statements. Each one of them affirmed, that they had required the accused-appellant Karthick to agree to marry the prosecutrix Poomari (PW1) on account of his physical relationship with her. Only on denial to accede to their request, on their suggestion, the matter was reported to the police. The instant aspect of the matter fully demolishes the projection made by the accused-appellant Karthick, while recording of his statement under Section 313 of the Code of Criminal Procedure. During his aforesaid statement, he had expressly alleged, that it was for the purpose of forcing the accused-appellant to shell out an exorbitant sum of money to the prosecutrix Poomari (PW1) and her family members, that the instant accusation had been levelled against him. Actually from the statements of Veerachamy (PW5), Ramasamy (PW6), Ayyavoo (PW7) and Nagesh (PW8), it clearly emerges that the intention of the prosecutrix Poomari (PW1) and her brother Manikannan (PW2), as also her father, Muthukaruppa Thevar (PW4) was, that he should marry her. The desire of the family, that the accused-appellant should marry the prosecutrix was based on the undisputed factual position, that Karthick had had sexual intercourse with Poomari repeatedly. No such suggestion was shown to have been made to the concerned prosecution witnesses. This was only an afterthought. It is, therefore, not possible for us to accept the plea canvassed at the hands of the learned counsel for the appellant, that the accused appellant had not

made any promise to the prosecutrix Poomari (PW1), that he would marry her.

16. The last contention advanced at the hands of the learned counsel for the appellant was, that the first occurrence of sexual intercourse commenced six months prior to the date when the complaint was made to the Police (on 10.10.2003). It was, therefore, the contention of the learned counsel for the appellant, that same should be treated as an afterthought. It was pointed out, that the registration of a case by the prosecutrix Poomari (PW1) was no more than a scheme to falsely accuse and harm the accused-appellant. It was submitted, that even a day's delay in registering a complaint has vital repercussions. It was also pointed out, that delay in the instant case, had obvitated any positive finding on the basis of a medical examination of the prosecutrix Poomari (PW1). It is, therefore, the vehement contention of the learned counsel for the appellant, that delay in registering the complaint with the police in the facts and circumstances of this case, should be accepted as sufficient to infuse a sense of doubt in the prosecution story.

17. Having examined the contention advanced at the hands of the learned counsel for the appellant, we are of the view that there has been no delay whatsoever at the hands of the prosecutrix Poomari (PW1). As long as commitment of marriage subsisted, the relationship between the parties could not be described as constituting the offence of rape under Section 376 of the Indian penal Code. It is only after the accused-appellant Karthick declined to marry the prosecutrix Poomari

(PW1), that a different dimension came to be attached to the physical relationship, which had legitimately continued over the past six months. Things changed when the accused-appellant declined to marry the prosecutrix. After the promised alliance was declined, the prosecutrix without any delay disclosed the entire episode to her immediate family. Without any further delay, the brother and father of the Poomari (PW1) approached the village elders. The village elders immediately summoned the accused-appellant Karthick by holding a panchayat. The village elders made all efforts to settle the issue amicably. The family, as is usual in such matters, wished to settle the matter amicably by persuading the accused-appellant to view the matter realistically. It is only on the refusal of the accused-appellant Karthick, to marry the prosecutrix Poomari (PW1), that the question of making a criminal complaint arose. After the meetings of the panchayat, wherein the accused-appellant declined to marry the prosecutrix Poomari (PW1), without any further delay, the prosecutrix Poomari (PW1) reported the matter to the police on 10.10.2003. In the above view of the matter, in the peculiar facts of this case, it is not possible for us to hold, that any doubt can be said to have been created in the version of the prosecution, merely on account of delay in the registration of the first information report.

18. No other submission, besides those noticed hereinabove, was advanced at the hands of the learned counsel for the appellant. For the

reasons recorded hereinabove, we find no merit in this appeal. The same is accordingly dismissed.

19. The accused-appellant Karthick was ordered to be released on bail by this Court vide order dated 4.4.2008. He shall now be taken into custody, to serve the remaining part of the sentence.

.....J.
(P. Sathasivam)

.....J.
(Jagdish Singh Khehar)

New Delhi;
July 1, 2013.



JUDGMENT