



Crl.A.(MD).No.394 of 2016

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated : 03.09.2024

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CORAM:

THE HON'BLE MR JUSTICE G.ILANGO VAN

Crl.A.(MD).No.394 of 2016

K.Prabhu

... Appellant/Accused No.1

Vs.

State through Inspector of Police,
A.W.P.S.Manamadurai,
Sivagangai District.
In Crime No.5 of 2012.

... Respondent/Complainant

Prayer: Criminal Appeal has been preferred under Section 374 (2) Cr.P.C.,
to call for the records in S.C.No.138 of 2015 on the file of the Fast Track
Mahila Court, Sivagangai and set aside the conviction and sentence passed
against this appellants on 28.09.2016.

For Appellant : Mr.V.Lakshmanan

For Respondent : Mr.Sakthi Kumar
Government Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal has been filed by the appellant against the
Judgment passed in S.C.No.138 of 2015, dated 28.09.2016, by the learned
Fast Track Mahila Judge, Sivagangai.



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Crl.A.(MD).No.394 of 2016



2.The case of the prosecution:-

The defacto complainant lodged a complaint before the respondent police stating that she was working as nurse in a private hospital for about three years. When she was travelling to the work place, the accused become her friend and in the course of time, he started to speak with her, promising to marry. She accepted the love proposal and for about two years, they were moving closely. Some one year prior to the complaint, she was taken by the accused to his house and compelled her for physical relationship, which was not accepted by her. But, promising to marry, he had sexual intercourse with her. But, later, when she demanded marriage, he told her that after completing his Education and getting job, he will marry her. By believing the above said reason, she waited for a long time. But, she was scolded by her parents. Hence, she went to the house of the accused. But, there she was not treated properly, abused, ill-treated and assaulted, they tried to strangulate her. Hence, the complaint. On the basis of the above said complaint, the case was registered in Cr.No.5 of 2012. After completing the investigation, final report was filed before the trial Court and the same was taken cognizance in S.C.No.138 of 2015. After completing the formalities the following charges were framed against the accused.



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Crl.A.(MD).No.394 of 2016



3.Charge against the accused person:-

The following charges were framed after securing the presence of the accused.

(i) For about one year prior i.e., on 18.10.2012, the defacto complainant and the accused were in love and on the false promise of marriage, she was subjected to repeated sexual intercourse and thereby, the accused committed offence under Section 376 r/w. 90 IPC.

(ii) On 26.01.2012, Accused Nos.2 and 3 abused the defacto complainant, criminally intimidated her and thereby, they committed offence under Section 506(ii) IPC.

(iii) All the accused joint together, made assault upon the defacto complainant and abused her, thereby, they committed offences punishable under Section 4 of the TNPWH Act.

The accused namely, the appellant herein denied the charges and claim to be tried.

4.In pursuance of the above said plea, the trial before the trial Court commenced and on the side of the prosecution to bring down guilt of the accused, 16 witnesses were examined, 10 documents were marked. On the side of the accused, none was examined.



WEB COPY

Crl.A.(MD).No.394 of 2016



5.The case of the prosecution as narrated through the

evidence:-

5.1.PW1, the defacto complainant belongs to Muniyandipuram. She completed nursing course and working in Vadamalaiyan Hospital, Madurai from 2009. She used to travel in a bus from her Village to the Hospital. The accused was introduced by her friend's brother. In the course of time, he made a love proposal, which was accepted by her. He promised to marry after completing his education. In the year 2012, he has completed his B.Ed., Course. The love affair was also brought to the notice of her parents. On a particular date, she was taken to his house and compelled her to have physical contact. In spite of her refusal, she was convinced stating that it is nothing wrong, since he is going to marry her. Believing his words, she also consented. But, later she demanded marriage. Her parents started searching alliance for her. On 18.01.2012 the accused came to her house and proposed marriage. But, the parents asked the first accused to bring his parents. But, later none turned up. On January 26th she went to his house. In the midway, she was assaulted by the first accused and that assault was continued in another day also stating that she is making unnecessary trouble in his house. After that he denied the contact. So she went to his parental home and made a demand of marriage. At that time also his parents abused



her and criminally intimidated. They approached Thirupuvanam Police Station. But, the police did not receive the complaint. So she lodged the complaint before All Women Police Station, Manamadurai. Enquiry was conducted by the police station. But, the first accused refused to accept her stating that he never known to her. Later, the first accused demanded withdrawal of the complaint. She demanded marriage. Even marriage was arranged in the police station itself, the second accused made objection and criminally intimidated. Later only the case was registered.

5.2.The complaint given by PW1 was received by PW12, who was working as Sub Inspector of Police in All Women Police Station, Manamadurai on 18.02.2012 at about 06.00 p.m., in Crime No.5 of 2012 under Sections 415, 417, 506(ii) of IPC and Section 4 of TNPWH Act.

5.3.Further investigation was undertaken by PW16, the then Inspector of Police, All Women Police Station, Manamadurai and filed alteration report to the Court, recording the statement of witnesses. She made arrangements to sent the victim girl for medical examination. She visited the place of occurrence, prepared observation mahazar and sketch and recorded the statement of the witnesses and victim. After completing the investigating process filed the final report against the accused under Sections 415, 417, 506(ii), 376 of IPC and Section 4 of TNPWH Act.

5.4.PW2 is the sister of PW1. She corroborated PW1 with regard



to the love affair and the enquiry made by them with the accused and assault, etc. facts.

5.5.PW3 is the father of PW1. He also corroborated the evidence of PW1 love affair and subsequent occurrence. PW7 Ramasamy has corroborated PW1 with regard to the enquiry made by her and the demand.

5.6.PW8 has spoken about the first accused rapping PW1 in the chambers. PW10 is the Medical Officer attached to Government Medical College Hospital, Sivagangai. He conducted potential test for the accused and issued certificate as he is capable of perform the sexual activity.

5.7.PW13 is the Medical Officer attached to the very same Medical College hospital and she examined PW1 the victim girl. During her examination, she found that there is no symptom for sexual intercourse in the recent time. But, she was capable to perform sexual activity her hymen was not found intact.

6.After examination of all the witnesses are over, the accused were subjected to Section 313 Cr.P.C proceedings. They denied the facts narrated by the prosecution witnesses. Even though they were granted time to examine defence witnesses, none was examined on their side and no document was marked.



7. At the conclusion of the trial process, the trial Court found the appellant/first accused guilty for the offences under Section 417 of IPC, convicted and sentenced him to undergo one year rigorous imprisonment and imposed fine of Rs.10,000/-, in default three months simple imprisonment. Set off under Section 428 Cr.P.C. was also ordered. The trial court acquitted all the accused persons from the charges framed under Sections 376 r/w 90 of IPC, 506(ii) of IPC and Section 4 of TNPWH Act.

8. Against the judgment of conviction and sentence the accused is before this Court by way of this appeal.

9. Heard both sides.

10. As narrated in the preamble portion of the judgment, it is nothing but love affair between matured persons. PW1 was very matured and capable of understanding the worldly affairs in the natural course of things. So it is not denied by her. What she says is that promising marry, she was subjected to sexual intercourse forcibly by the appellant herein. But, later he breached that promise, went back and refused. She took every possible steps. First she brought it to the notice of the parents. They refused. Later, it was brought to the notice of a Mediator. He also mediated. In spite



of all those things, the first accused never moved and continued his indifferent attitude. So because of his indifferent attitude only, she was compelled to lodge a complaint, upon which this case has been registered.

11.Apparently, the origin of affair between them goes against her averments in the complaint under Ex.P1. She has narrated very long story during the evidence before the trial Court. But, it is seen that in the course of time both became lovers. It is not disputed by the appellant also. Whether there was any intention on the part of the appellant herein to subject the PW1 to sexual intercourse under the false promise of marriage is the only point to be considered. But, it was not the charge before the trial Court as mentioned above. Only three charges were framed under Sections 376 r/w 90, 506(ii) of IPC and Section 4 of TNPWH Act. But, on going through the entire evidence on record, The trial Court came to the conclusion that the above said charges are not proved. Against which, there is no cross appeal either by the PW1 or by the State. So that portion of the finding stands final. So we need not go into the finding once again in this appeal, to find out whether there is real physical contact between them.

12.Now coming back to the issue of convicting and sentencing the appellant under Section 417 of IPC. Whether it is legal is the only point to



be considered, leave alone the facts. For that issue the counsel for the appellant relied upon the judgment of the honourable supreme court made in the case of *Shamnsaheb M.Multtani Vs. State of Karnataka* reported in *AIR 2001 SC 921* and another judgment of Rajasthan High Court in the case of *Anil Kumar and another Vs. State of Rajasthan* reported in *1992 CRL.LJ 3637*, wherein it has been held that on the question of legality of conviction and sentence under Section 417 IPC, when there is no specific charge.

13.Now we will go to the judgment of the Honourable Supreme Court, wherein, the problem arises in this way. Originally, the accused were charged under Section 302 and 498(A) IPC. But the trial Court found that both the charges are not proved. But, conviction was rendered under Section 304 (B) alternatively. That was called in question. It was contended before the Honourable Supreme Court, where it recorded a finding that the accused has committed offence punishable under Section 304(B) of IPC, he was not informed as the proposed conviction. Second is that he was not called upon to enter into defence for that particular alternative charge. The Honourable Supreme Court invoked section 464(1) Cr.P.C. Sections 221 and Section 222 of Cr.P.C. are the provisions, which are available to the criminal Court to convict an accused for the offences, which is not included in the charge.



WEB COPY



Crl.A.(MD).No.394 of 2016

Paragraphs 13, 14, 15 and 16 are relevant for our discussion.

“13.Be that as it may. The question raised before us is whether in a case where prosecution failed to prove the charge under Section 302 IPC, but on the facts the ingredients of section 304-B have winched to the fore, can the court convict him of that offence in the absence of the said offence being included in the charge.

14.Sections 221 and 222 of the Code are the two provisions dealing with the power of a criminal court to convict the accused of an offence which is not included in the charge. The primary condition for application of section 221 of the Code is that the court should have felt doubt, at the time of framing the charge, as to which of the several acts (which may be proved) will constitute the offence on account of the nature of the acts or series of acts alleged against the accused. In such a case the section permits to convict the accused of the offence of which he is shown to have committed though he was not charged with it. But in the nature of the acts alleged by the prosecution in this case there was absolutely no scope for any doubt regarding the offence under Section 302 IPC, at least at the time of framing the charge.

15.Section 222(1) of the Code deals with a case “when a person is charged with an offence



WEB COPY



Crl.A.(MD).No.394 of 2016

consisting of several particulars. The Section permits the court to convict the accused of the minor offence, though he was not charged with it. Sub-section (2) deals with a similar, but slightly different, situation. When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence although he is not charged with it.”

16.What is meant by a minor offence for the purpose of Section 222 of the Code? Although the said expression is not defined in the Code it can be discerned from the context that the test of minor offence is not merely that the prescribed punishment is less than the major offence. The two illustrations provided in the section would bring the above point home well. Only if the two offences are cognate offences, wherein the main ingredients are common, the one punishable among them with a lesser sentence can be regarded as minor offence vis-à-vis the other offence.”

So one of the preliminary condition is that the offence under conviction must be a minor offence of the major offence. Here absolutely Section 376 and 417 are not cognate offences. Both are operating in different fields and ingredients are also different. So Section 417 IPC cannot be called as minor offence of offence under Section 376 IPC.



14. Now next question is whether there is any mis-carriage of Justice or failure of Justice caused to the appellant herein for the omission to frame charge under Section 417 IPC. That was also considered and answered by the Honourable Supreme Court in the above said judgment.

Paragraphs 21 to 24 of the above said Judgement are relevant.

“21. The crux of the matter is this: Would there be occasion for a failure of justice by adopting such a course as to convict an accused of the offence under Section 304B IPC when all the ingredients necessary for the said offence have come out in evidence, although he was not charged with the said offence? In this context a reference to Section 464(1) of the Code is apposite:

“No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.” (emphasis supplied)

22. In other words, a conviction would be valid even if there is any omission or irregularity in the charge, provided it did not occasion a failure of justice.

23. We often hear about failure of justice and quite often the submission in a criminal court is



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Crl.A.(MD).No.394 of 2016

accentuated with the said expression. Perhaps it is too pliable or facile an expression which could be fitted in any situation of a case. The expression failure of justice would appear, sometimes, as an etymological chameleon (The simile is borrowed from Lord Diplock in Town Investments Ltd. vs. Department of the Environment {1977(1) All England Report 813}. The criminal court, particularly the superior court should make a close examination to ascertain whether there was really a failure of justice or whether it is only a camouflage.

24. One of the cardinal principles of natural justice is that no man should be condemned without being heard, (Audi alterum partem). But the law reports are replete with instances of courts hesitating to approve the contention that failure of justice had occasioned merely because a person was not heard on a particular aspect. However, if the aspect is of such a nature that non-explanation of it has contributed to penalising an individual, the court should say that since he was not given the opportunity to explain that aspect there was failure of justice on account of non-compliance with the principle of natural justice.”

15. Here perusal of the Judgment of the trial Court does not even



remotely incurred that the proposal to convict the accused under Section 417 IPC was intimated to him. The trial Court has recorded a finding of fact with regard to the reason for the refusal or breach of promise on the part of the accused. Para 22 is devoted on that issue.

“ஆக அ.சா.1 டம் எதிரியோடு கொண்ட தொடர்பின் காரணமாக உடலுறவு கொள்ள விளைந்தாரா என்பதை பார்க்கும் போது அ.சா.1 ஆனவர் டம் எதிரியோடு அவருடைய வீட்டில் உடலுறவு கொண்ட பின்னர் தொடர்ந்து உடலுறவு கொண்டார் என்பதாகவே அ.சா.ஆ.1 புகார் சாராம்சத்தை பரிசீலிக்க எடுத்துக் கொள்ள வேண்டியதாகிறது. அடுத்தபடியாக டம் எதிரியானவர் அ.சா.1 உடன் தொடர்பு ஏற்பட்ட காலத்திலேயே அ.சா.1ஐ திருமணம் செய்ய எண்ணம் இல்லாமல் இருந்தாரா என்பதை பரிசீலிக்க டம் எதிரியுடைய நடவடிக்கைகள் அ.சா.1 முதல் 4 வரையான சாட்சியத்தின் வாயிலாக இவர் அ.சா.1ஐ திருமணம் செய்யும் எண்ணத்தோடு செயல்பட்டு வந்துள்ளார் என்பதாக தான் எடுத்துக்கொள்ள வேண்டியதாகிறது மட்டுமின்றி அ.சா.1 தனது சாட்சியத்தில்

"எதிரி திருமணம் செய்ய தயாராக இருந்தும் அப்போது டம் எதிரியின் தந்தை திருமணம் செய்தால் உன்னையும் வெட்டிக் கொள்வேன், அந்த பெண்ணையும் வெட்டிக் கொள்வேன் என்று சொன்னார்."

என்று சாட்சியம் அளித்துள்ளார். ஆக இந்த திருமணம் டம் எதிரியுடைய பெற்றோர்களின் தடையின் காரணமாக டம் எதிரியால் செயல்படுத்த முடியவில்லை என்பதாக எடுத்துக் கொள்ள வேண்டியதாகிறது. ஆக டம் எதிரி திருமணம் செய்து கொள்வதாக ஒப்புக் கொண்டு



பின்னிட்டு திருமணம் செய்யாமல் போனது அவர் கொடுத்த ஒரு வாக்குறுதி மீறலே ஆகும். ஆக மேற்சொன்ன காரணங்களினால் இ.த.ச பிரிவு 90ஐ உள்ளடக்கிய Misconception of Fact என்ற நிலைப்பாட்டில் அ.சா.1 ஆனவர் 1ம் எதிரியோடு உடலுறவு கொண்டார் என்பதாக எடுத்துக் கொள்ள இயலாது. எனவே எதிரி மீதான இ.த.ச பிரிவு 376 உ/இ 90ன் கீழான குற்றச்சாட்டு நிரூபிக்கப்படவில்லை என்று முடிவு காணப்படுகிறது."

16.But against its finding para 23 runs as follows;

"23.இந்த நிலையில் பரிசீலிக்க அ.சா.1 ஆனவர் 1ம் எதிரி கொடுத்த வாக்குறுதியின் காரணமாக நம்பி உடலுறவு கொண்டுள்ளது தெரிய வருகிறது. அதன் காரணமாக 1ம் எதிரியிடம் அ.சா.1 கற்பினை இழக்க நேரிட்டதாக கண்டு கொள்ள முடிகிறது. 1ம் எதிரி ஆண்மைத்தன்மையற்றவர் என்பதாக சொல்லும் அளவுக்கு சாத்தியக் கூறுகள் இல்லை என்றும், உடலுறவு கொள்ள அவர் தகுதியானவர் என்றும், அவாரது ஆண் உறுப்பு சாதாரண நிலையில் 7 செ.மீ நீளமும், விரைப்புத் தன்மையுடன் 13 செ.மீ நீளமும் இருந்ததாகவும், அ.சா.10 மருத்துவர் அ.சா.ஆ.3 சான்று வழங்கியுள்ளது மறுக்கப்படாத சங்கதி. அ.சா.13 அ.சா.1ஐ பரிசோதித்த மருத்துவர். அ.சா.1 உடலுறவுக்கு தகுதியானவர் என்றும், சமீபத்தில் உடலுறவு கொண்டற்கான தடயம் எதுவும் இல்லை என்றும், கன்னித்திரை முழுமையாக இருக்கவில்லை என்றும், சான்று அளித்துள்ளார். அந்த சான்று காலம் தாழ்த்தி பெறப்பட்டாலும் 1ம் எதிரிக்கும் அ.சா.1க்கும் உள்ள தொடர்பின் காரணமாக கன்னித்திரை முழுமையானதாக இல்லை என்பதாக எடுத்துக்



Crl.A.(MD).No.394 of 2016

கொள்ள வேண்டியதாகிறது. ஆக தன்னுடைய கன்னித்தன்மையை அவர் இவ்வாறான ஒரு திருமண ஆசை காட்டி டம் எதிரி சொன்ன காரணத்தினால் இழந்திருப்பதாக முடிவு காண வேண்டியதாகிறது. இந்த நிலையில் தீர்ப்பாதாரம் 2012 (2) Law Weekly Criminal Page 1014ல்

மாண்புமிகு நீதியரசர் S.Nagamuthu, J.

"On such false promise to marry, the person to whom such promise was made should have done or omitted to do something that he would not have done or omitted to do but for the deception."

என்று முடிவு கண்டுள்ளதும்

மேலும் தீர்ப்பாதாரம் 2007(2) MLJ Criminal Page 616 ல் மாண்புமிகு நீதியரசர்

A.C.Arumugaperumal Adityan, J.

Kumar

... Appellant

Vs.

State rep. by Inspector of Police,

All Women Police Station,

Perambalur

... Respondent

என்ற வழக்கில்

"Under the pretext of marriage, the accused had deceived the prosecutrix and subjected her to sexual intercourse with him and after she became pregnant he betrayed her, his act would clearly attract the offence of cheating."

என்று முடிவு கண்டுள்ளதும், அதனை கவனத்தில் கொண்டு பரிசீலிக்க டம் எதிரியானவர் அ.சா.ஐ ஏமாற்றி விட்டதாக தெரிய வரும் நிலையில் இ.த.ச. பிரிவு 417 உட்கறுகளை ஈர்ப்பதாக கண்டு கொள்ள முடிகிறது. ஆனால் எதிரி மீது இ.த.ச. பிரிவு 417ன் கீழான குற்றச்சாட்டு வனையப்படவில்லை. ஆனால் இக்குற்றச்சாட்டானது இ.த.ச. பிரிவு 376 உ/இ



Crl.A.(MD).No.394 of 2016

90ன் கீழாக குற்றச்சாட்டுக்கு ஒரு குறைந்த
குற்றச்சாட்டாகவே கருத இயலும். மட்டுமின்றி

தீர்பாதாரம் 2009 (2) Law Weekly Criminal Page 1094

மாண்புமிகு நீதியரசர் T.Sudanthiram, J.

Porchezian ... Appellant/Accused

Vs.

State represented by The Inspector

of Police, P-4, Basin Brige Police Station,

Chennai

... Respondent/Complainant

என்ற வழக்கில்

"P.W.1 herself had been a consenting party - Since the accused had promised in the name of God that he would marry her and subsequently, though the mother of the accused also promised to arrange the marriage of the accused with P.W.1 and the marriage did not take place, being dejected, P.W.1 also consumed poison and made an attempt to commit suicide – In the said circumstances, the accused is found guilty, for an offence under Section 417 IPC, though no specific charge is framed against him. என்று முடிவு கண்டுள்ளதாக கவனத்தில் கொள்ளும் பொழுது இ.த.ச. பிரிவு 417ன் கீழ் குற்றம் வனையாவிட்டாலும் 1ம் எதிரியை அப்பிரிவின் கீழ் குற்றவாளி என தீர்மானிக்கலாம் என்று முடிவு காணப்படுகிறது."

17.In para 22 the trial Court has stated that only because of the trouble made by the second accused, marriage could not be conducted between the parties. Having found so, it is not fair on the part of the trial Court, to record contra finding in para 23. Since, both the conclusions run quite contrary to each other, naturally failure on Justice was occasioned.



WEB COPY

Crl.A.(MD).No.394 of 2016



18.Now coming back to the conclusion under Section 417 IPC, even factually the charge will not lie. Because right from the beginning, there was promising by the appellant herein to marry PW1. But, there was a delay on his part. But, ultimately, he consented for marriage and even in the police station itself, they proposed to conduct marriage as mentioned above. But trouble came in the form of the second accused. So the finding of the trial Court that by employing deceptive means, PW1 was subjected to repeated sexual intercourse is not correct on record.

19.The learned counsel for the appellant would rely upon the Judgment of the Honourable Supreme Court of India, made in the case of ***Tilak Raj Vs. State of Himachal Pradesh*** reported in ***2016 (1) Crimes 16 (SC)***. Para 21 of the judgment is extracted for better understanding the ingredients.

“21.As far as conviction of the appellant under Sections 417 and 506 part I of IPC is concerned, a close scrutiny of evidence of the prosecutrix (PW 2) along with other prosecution witnesses is done by this Court. Section 417 of IPC prescribes punishment for the offence of Cheating as defined under Section 415 of IPC. Section 415 of IPC reads



thus:

*“415. **Cheating.**—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”. Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.”*

The ingredients required to constitute the offence of Cheating have been discussed by this Court in the case of Ram Jas v.State of U.P.[1] as under:

- “(i) there should be fraudulent or dishonest inducement of a person by deceiving him;*
- (ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or*
- (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he*



WEB COPY

Crl.A.(MD).No.394 of 2016



were not so deceived; and

(iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.”

A careful reading of evidence on record clearly shows that there is no evidence against the appellant from which it can be conclusively inferred by this Court that there was any fraudulent or dishonest inducement of the prosecutrix by the appellant to constitute an offence under Section 415 of IPC. For conviction of the Appellant for above said offence, it is important that all the necessary ingredients constituting an offence under the said Section must be proved beyond reasonable doubt. In the instant case, the appellant cannot be convicted for the offence of cheating punishable under Section 417 of IPC as the prosecution has failed to prove all ingredients of the said offence beyond reasonable doubt.”

20. In the light of the above said settlement of law, now we will decide that 417 IPC is not attracted. On the sole ground, the Judgment of conviction and sentence passed upon the appellant under Section 417 IPC is requires to be set aside. Accordingly, set aside. This Criminal Appeal is



Crl.A.(MD).No.394 of 2016

allowed. Appellant is acquitted of the offence invoked by the trial court.

Fine amount if any shall be refunded to the appellant.

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03.09.2024

NCC: Yes/No

Index: Yes/No

Internet: Yes/No

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To

- 1.The Sessions Judge, Mahalir Neethimandam, Fast Track Mahila Court,
Sivagangai.
- 2.The Inspector of Police,
A.W.P.S.Manamadurai,
Sivagangai District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



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Crl.A.(MD).No.394 of 2016

G.ILANGOVAN, J

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CrI.A.(MD).No.394 of 2016

03.09.2024