

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

TUESDAY, THE 29TH DAY OF SEPTEMBER 2015/7TH ASWINA, 1937

Cr1.MC.No. 6536 of 2014 ()

CRIME NO. 1208/2013 OF MUNAMBOM POLICE STATION, ERNAKULAM

PETITIONER/ACCUSED:

SREEJITH AGED 30 YEARS
S/O. THANKAPPAN, ARUKKATT VEEDU, MUNAMBAM KARA
KUZHUPILLY VILLAGE, ERNAKULAM DISTRICT.

BY ADV. SRI.K.S.RAJEEV (ALUVA)

RESPONDENTS/COMPLAINANT:

1. STATE OF KERALA
THROUGH SUB-INSPECTOR OF POLICE
MUNAMBAM POLICE REPRESENTED BY P.P HIGH COURT
OF KERALA - 682 031.

2. SINI, AGED 30 YEARS
D/O. ANTONEY, VALIYAPARAMBIL HOUSE, NAYARAMBALAM KARA
NARAYAMBALAM VILLAGE, ERNAKULAM DISTRICT - 682 509.

R2 BY ADV. KUM.D.MINI RAJAN

R1 BY ADV. PUBLIC PROSECUTOR: SMT. M G LISHA

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON 14-09-2015, THE
COURT ON 29.09.2015 PASSED THE FOLLOWING:

APPENDIX

PETITIONER(S) ' EXHIBITS:

ANNEXURE A - CERTIFIED COPY OF FINAL REPORT DT. 28.2.14.

ANNEXURE B - CERTIFIED COPY OF IN MP NO. 2162/14 DT. 16.10.14.

ANNEXURE C - COPY OF THE EXTRACT OF MALAYALA MANORAMA NEWSPAPER DT.
20.2.13.

RESPONDENT(S) ' EXHIBITS:NIL

True Copy /

P.A to Judge

SUNIL THOMAS, J.

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Crl.M.C.No.6536 of 2014
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Dated this the 29th day of September, 2015

ORDER

This Crl.M.C is filed under Section 482 of the Cr.P.C to quash Annexure-B order, Annexure-A final report and all further proceedings in S.C.No.639 of 2014 arising from Crime No.1208 of 2013 of Munambam Police Station.

2. The facts as discernible from the statement given to the police by the de facto complainant is that in 2011 May, the accused had offered to marry the de facto complainant and they had physical relationship at his house. Subsequently, in the 9th month of 2012, the accused took her to one resort at Athirampilly and had physical relationship. This was repeated at another place in a Cherai resort. The complainant alleged that she was coerced to enter into physical relationship under a false promise to marry. It is also stated in the complaint that in the resort at Athirampilly, they had given a wrong address under the instructions of the accused, not to reveal the identity. On the basis of the complaint lodged by her, crime was registered and after recording the statement of 14 witnesses, a final report was laid on 23.10.2013. The allegation in the final charge is that to cheat the victim, to make an unlawful gain and further to

sexually exploit the de facto complainant, accused had offered to marry her and had physical relationship with her. Subsequently, he had retracted from the promise. The allegation was that it was only a false promise to her and that he was not serious in the matrimonial relationship.

3. Alleging that the allegations made by the de facto complainant are false and that, the complaint lodged by her do not reveal any of the offence, much less an offence punishable under Section 376 IPC and that the continuance of proceedings will only amount to an abuse of process of Court, the accused had sought for quashing the proceedings. While the matter was pending before the committal court, the accused had filed an application seeking a direction to the investigating officer to conduct a DNA test of the accused, de facto complainant and her child. By Annexure-B order, the learned magistrate dismissed the application. This is also assailed in this Crl.M.C.

4. Heard both sides and examined the records.

5. Evidently, a complaint was lodged pursuant to which the police have investigated and after questioning 14 witnesses, final report has been filed. The specific allegation in the final charge is that a false promise was made with an intention to cheat the victim,

to make an unlawful gain and thereby, sexually exploited the victim. There is an allegation that the promise made by him to marry the girl was without any basis.

6. It is pertinent to note that the petitioner has approached the Court immediately after laying of final report. Hence, it is to be considered whether prima facie, from the facts disclosed, ingredients of the offence worth trial is made out. In this regard, before analyzing the facts, the law as explained in various decisions relied on by either side shall be considered. The learned counsel relied on **Vijayan v. State of Kerala {(2008)14 SCC 763}**, and **Zindar Ali Sheikh {(2009) 3 SCC 761}** wherein the question of sexual relationship between two persons on a promise to marry was considered. The court on facts held that the allegation of procuring consent on a promise to marry to the complainant was not sustainable. The learned counsel herein further relied on the decision in **Prashant Bharti Vs. State (NCT of Delhi) ((2013) 9 Supreme Court Cases 293)**. In this case, the women made a complaint that the accused, who was known to her made a phone call inviting to a place and there, she was given a cold drink laced with intoxicating substance. It was alleged that when she felt

inebriated, misbehaved towards her and touched her body, inside a car. Investigation revealed that in fact appellant had not made any phone call to her and that during the relevant time she was talking to her friends. After 5 days, she filed a supplementary complaint alleging that appellant had been having physical relationship with her on a false promise to marry. However, investigation revealed that there was no material to prove the allegation, especially in the background of earlier false complaint, except her Section 164 Cr.P.C statement. In this background, considering the enormous evidence against the complainant, court quashed the proceedings.

7. The above case is not applicable to the present case. However, in the above decision, the Supreme Court relied on the decisions in earlier cases in **Uday Vs. State of Karnataka (2003) 4 SCC 46** and **Dileep Sing Vs. State of Bihar (2005)1 SCC 88**. In both cases, the Honourable Supreme Court considered the question of consent with reference to Sections 90 and 376 of the IPC. The Supreme Court held that a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90 of the IPC. This legal position was considered by a Division Bench of this Court in **Babu Vs. State of**

Kerala (2013(2) KLT 574). The legal position emerging in all the cases is that consent given by the prosecutrix to sexual inter course 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 misconception of fact within the meaning of the Code.

8. Though the Honourable Supreme Court again considered the entire issue in the background of all earlier judicial pronouncements in Dileep Singh's case and affirmed the law laid down in Uday's case as above, the Supreme Court added as a word of caution that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. It was held that if on facts, it was 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 Section 375 of the IPC.

9. Evidently as held above, in Uday's case also, the Honourable Supreme Court held that there is no straight jacket

formula for determining whether the consent given by prosecutrix to sexual intercourse was voluntary or whether given under a misconception of fact, and the surrounding circumstances will have to be examined in each case. In **Babu Vs. State of Kerala**, though there was a failure to marry, there was total lack of evidence that accused had a dishonest intention while extending promise to marry and thereby he wanted to deceive the victim. Further, there was evidence that even after the prosecutrix became pregnant, they continued to have sex, and Court held on facts that there was free will and the consent was voluntary.

10. Annexure-B application was filed at the committal stage. The court below has held that at that stage, the application was not sustainable. Accused has set up a case that the child borne out of the alleged relationship was not his child and that, he was trying to disprove it by defence evidence. It is to be noted that even though the de facto complainant had a specific case that the child was borne in the physical relationship with the accused, displacing that part alone, may not completely absolve any of the criminal liability, since the complainant has a specific case that on the basis of a false promise, there were several instances of physical relationship. In the light of that factual legal aspect, the decision of this Court in

Divine Providence Founding Home, Idukki Vs. Raju Gopi and Anr. (2014(3) KHC 298) relied on by the learned counsel for accused may not be of much consequence.

11. Yet another contention taken by the learned counsel for the accused was that the de facto complainant had already married and consequently, she was well aware of the fact that there was no chance for a remarriage during the subsistence of the present marriage. To substantiate this contention, learned counsel relied on the decision in **Panchu Ram Vs. State of Rajasthan and Anr. (2014 KHC 3166)** wherein the Court held that during the victim's subsisting marriage with another, having a physical relationship with another for a long period, indicated that she was aware of the nature of the consequence of the relation with the accused and hence, the criminal complaint was not sustainable. In this case, the facts do not indicate that a legally subsisting marriage was there. In the wound certificate, there is an indication that the victim had married about 8 years back and got divorced after 3 to 4 months. In the reported decision of Rajasthan High Court, there were definite evidence of a subsisting marriage and the facts proved that the case set up by the de facto complainant was false. Hence, the decision in

that case will not help the accused.

12. In the light of the above findings, I find that the question as to whether the accused has committed an offence is a matter to be established in evidence and at the present stage, it cannot be said that a criminal complaint is without any basis at all and the continuance of it will amount to abuse of process of Court.

In the result, Crl.M.C. is dismissed. However, it is made clear that the accused may seek his remedies with respect to the relief sought in Annexure B or to which if applied, may be considered by the Trial Court at the appropriate stage and the Court may decide it untrammelled by any of the observations made above.

Sd/-
SUNIL THOMAS
Judge

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