

BAIL SLIP

The Petitioner/Accused namely Pawan Kumar S/o.Nandagopal was directed to be released on bail as per order of this Hon'ble Court dated 23/02/2016 made in Crl MP 2041 of 2016 in Criminal Revision Case 306/2016 on the file of this Hon'ble Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2019

CORAM

THE HONOURABLE MR. JUSTICE A.D.JAGADISH CHANDIRA
Crl.R.C.No.306 of 2016

Pawan Kumar ... Petitioner/Appellant /
Single Accused
Vs

State Rep.by Inspector of Police,
All Women Police Station, Vellore,
Vellore District.
(Crime No.16/2012). ... Respondent/Respondent/
Complainant

PRAYER: This Criminal Revision Case is filed under Sections 397 and 401 Cr.P.C., against the judgment of sentence passed by the learned Principal District and Sessions Judge, Vellore, Vellore District in Crl.A.No.38/2014 dated 17.06.2015 and confirming the Judgment of sentence passed by the learned Judicial Magistrate, No.IV, Vellore, Vellore District in C.C.No.202/2012 dated 17.04.2014 and set aside the Judgment dated 17.06.2015.

For Petitioner : Mr.M.Machavatharan
For Respondent : Mr.M.Mohamed Riyaz
Additional Public Prosecutor

O R D E R

This Revision Case has been filed challenging the judgment passed by the learned Principal District and Sessions Judge, Vellore, Vellore District in Crl.A.No.38 of 2014, dated 17.06.2015 and confirming the Judgment of Conviction and Sentence passed by the learned Judicial Magistrate, No.IV, Vellore, Vellore District in C.C.No.202 of 2012 dated 17.04.2014, thereby, the petitioner/accused was convicted for the offence under Section 417 of IPC and sentenced to undergo R.I., for six months and also to pay a fine of Rs.2,000/- in default to undergo S.I., for two months.

2. The case of the prosecution is that the petitioner and the de-facto complainant namely, Saranya were lovers from the year 2005 and that the petitioner had told the de-facto

complainant that he will marry her. Since the petitioner was jobless, he had postponed the marriage and from the year 2005, the petitioner and the de-facto complainant were living as husband and wife. On 15.12.2005, around 7.00 p.m., while the petitioner and the de-facto complainant were talking with each other at the upstairs of the house of one Rajendran, the petitioner promised her that he will not marry anybody except her and asked her for sexual intercourse. Initially, the de-facto complainant refused, later she believing the words of the petitioner that he would marry her, had consented to have sexual intercourse. Thereafter, they continued to have sexual intercourse several times. On 23.12.2010, around 7.00 p.m., while the petitioner and the de-facto complainant were in the upstairs of the petitioner's uncle Rajendran's house, the petitioner photographed her naked with his new cellphone. When questioned, he said that he will see her while she is not with him. When the de-facto complainant tried to erase it, he refused and told her it is only for him, to see the clipping and keep it without erasing it. Till 10.03.2012, the petitioner was talking with the de-facto complainant. But, later, he remained silent and avoided to see her. On 02.05.2012, when the de-facto complainant went for an interview at Chennai by 9.30 p.m., the petitioner had kept a CD on the seat of the TVS moped parked in front of the house of the de-facto complainant. The mother of the de-facto complainant PW2 played the CD., and later broken the CD. On 06.05.2012, when the de-facto complainant asked the petitioner as to why he had kept the CD., in her house and also questioned him when he is going to marry her, the petitioner had abused her with filthy words and criminally intimidated to do away her and her family members. On the complaint preferred by the de-facto complainant, Saranya before the Sub-Inspector of Police All Women Cell, a case was registered against the petitioner for the offences under Sections 417, 294(b) and 506 (i) of IPC. After completion of investigation, final report was filed for offences under Sections 417, 294(b) and 506(i) of IPC and it was taken on file in C.C.No.202 of 2012 on the file of Judicial Magistrate No.IV, Vellore. The petitioner was questioned for the offences under Sections 417, 294(b) and 506 (i) of IPC. Since he denied the same, he was put on trial.

3. On the side of the prosecution, PW1 to PW8 were examined and through them documents Exs.P1 to P6 were marked. On the side of the petitioner, no oral or documentary evidence was let in. When questioned under Section 313 (1)(b) of Cr.P.C., the petitioner had denied the charges thereafter, hearing both sides, the learned Judicial Magistrate, Vellore, acquitted the petitioner for offences Under Sections 294(b) and 506(i) IPC and found the petitioner guilty for the offence under Section 417 of

I.P.C and convicted him under Section 417 of IPC as stated above. As against the same, the petitioner had preferred a Criminal Appeal in Crl.A.No.38 of 2014, before the Principal District Sessions Judge, vellore and the Appellate Court dismissed the said appeal on 17.06.2015 and confirmed the conviction and sentence passed by the trial Court. Against which, the present criminal revision has been filed.

4. The learned counsel appearing for the petitioner would submit that even assuming the entire evidence of the prosecutrix to be true, it is only a conscious decision on the part of the prosecutrix to enter into physical relationship with the petitioner knowing fully well the nature and consequences of the act which she was indulging in and at no point of time, the petitioner had made any promise to the prosecutrix that he would marry her and at no point of time had created misconception as to his intention to marry her. It is clearly a case where the prosecutrix had admitted that she had agreed to have sexual intercourse on account of her love and affection with the accused and not on the misconception created by the accused as to his intention to marry her. He would further submit that the trial Court as well as the Appellate Court had wrongly interpreting the evidence and law had committed illegality in convicting the petitioner/accused. In support of his contention the learned counsel for the petitioner would rely on the judgment of the Hon'ble Apex Court in Dr.Dhuruvaram Muralidhar Sonar v. State of Maharashtra & Others reported in 2019 Crl.J 1169.

5. The learned Additional Public Prosecutor would submit that the petitioner/accused was having physical relationship with the de-facto complainant from the year 2005 and thereafter, he refused to marry her in the year 2012.

6. This Court has carefully and consciously gone through the records and the evidence of the witnesses more particularly, the evidence of P.W.1, which is important in this case. Now while analysing the evidence of PW1/de-facto complainant, it is her case that she and the petitioner were neighbours for long time and that during the year 2005, she was studying 12th standard and that the petitioner/accused was studying final year under graduate and that they were friends and they used to go for movies and hotels. During that time she had proposed to the petitioner/accused that she was love with him and that she had the intention to marry him. At that time, the petitioner/accused had told her that she was a small girl and that he will not marry her and later, during the year 2005, they had once again gone to cinema and that she fell in love with the accused and

she had opted for a sexual intercourse and she had offered herself and thereafter, they had sexual intercourse for several times and that she became pregnant during the month of August 2005 and that she herself aborted with the help of a known doctor. After some time, the petitioner had developed friendship with her neighbour Lakshmi and thereby the defacto complainant had sent anonymous letters to the uncle of the petitioner and also to the house of Lakshmi. Since there was no response in their house, she had brought the brother of her friend Suvadhini to her house from Chennai. Thereafter, the petitioner had left to Bangalore. In between there were several quarrels and later she had met the petitioner on a day and the petitioner had recorded their intimate moments in a video. There was relationship till 2010 and thereafter, the petitioner's parents had moved away to another place. During 2012, the petitioner had saying that his parents were away had called her and that she stayed with him for one week. Later the petitioner left to Bangalore and there was no connection between them. Later during May 2012 there was a quarrel and that the petitioner had abused her and threatened her and later threatened her father, thereby warranting her to give a complaint.

7. In the above backdrop of this case, what is to be seen is i) whether the accused had made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts or that whether the prosecutrix has agreed to have sexual intercourse on account of her love and passion for the accused and not solely on the account of the misconception created by the accused. ii) Whether the Courts below have properly analysis the evidence to hold the accused guilty for the offence under Section 417 of IPC. In this regard it is opposite to refer to the judgment of the Hon'ble Supreme Court in Dr.Dhruvaram Muralidhar Sonar vs. State of Maharashtra & Others, reported in 2019 CrI. J 1169, which reads as follows:

'18. In Deepak Gulati v. State of Haryana, (2013) 7 SCC 675, the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long

time, and when he finally arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be levelled against the accused.

19. Recently, this Court, in Shivashankar @ Shiva v. State of Karnataka & Anr., in Criminal Appeal No.504 of 2018, disposed of on 6th April, 2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under:-

"In the facts and circumstances of the present case, it is difficult to sustain the charges levelled against the appellant who may have possibly, made a false promise of marriage to the complainant.

It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had malafide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any malafide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.'

8. Though, at the stage of revision, this Court cannot go through and analyse the evidence as a Court of second appeal, this Court has to come to a conclusion, whether the finding of the Courts below, to convict the petitioner is based on proper analysis and whether the Courts below are right in convicting the accused. Taking into consideration the above evidence, it is the admitted case that the prosecutrix had agreed to have sexual intercourse on account of her love and passion for the accused and not solely on the account of the misconception created by the accused. It is a case that where the P.W.1/de-facto complainant and the accused were having consensual relationship from the year 2005, which had continued for 7 years till 2012. The prosecutrix being a matured lady was well aware of her having continuation relationship with the accused. Further, it is the admitted case that they had opted for a sexual intercourse for several times and that she became pregnant during the month of August 2005 and that she herself had aborted the pregnancy with the help of a known Doctor.

9. In the opinion of this Court, the Courts below erred in finding the accused guilty for the offence under Section 417 of

IPC. In view of the same, the criminal revision petition stands allowed and the conviction and sentence passed by the Courts below are set aside. Fine amount if any paid shall be returned to the petitioner/accused.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

ssn/ssi/skn

To:

1. The Principal District and Sessions Judge,
Vellore, Vellore District.
2. The Judicial Magistrate No.IV,
Vellore, Vellore District.
3. The Chief Judicial Magistrate Vellore
4. The Inspector of Police,
All Women Police Station,
Vellore, Vellore District.
5. The Public Prosecutor,
High Court, Chennai.

+1 to Mr.E.Kannadasan Advocate sr80780/19

Cr1.R.C.No.306 of 2016

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