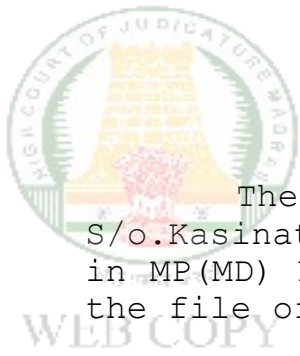




**BAIL SLIP**

The Appellant/Accused viz., Chinnadurai @ Mundan, S/o.Kasinathan was released on bail as per the order of this Court in MP(MD) No.2/2010 in CRL A(MD) No.123 of 2010 dated 23.04.2010 on the file of this Court.

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT  
DATED: 07.08.2019  
CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

Crl.A.(MD)No.123 of 2010

Chinnadurai @ Mundan

... Appellant/Accused

Vs.

State rep. By,  
The Inspector of Police,  
All Women Police Station,  
Srivaigundam,  
Tuticorin District.  
(Crime No.8 of 2005)

... Respondent/Complainant

**Prayer:** Criminal Appeal is filed under Section 374 of Cr.P.C., to call for the records and set aside the conviction and sentence imposed by the learned Additional District and Sessions Judge/Fast Track Court No.1, Tuticorin, in S.C.No.159 of 2006, dated 13.06.2007.

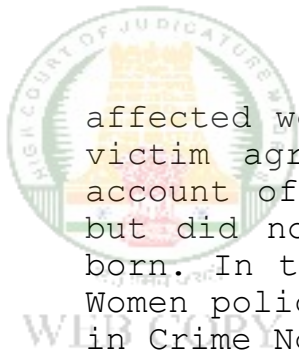
For Appellant : Mr.V.Kathirvelu,  
Senior Counsel,  
for Mr.B.Anandan.

For Respondent : Mr.A.Robinson,  
Government Advocate (Crl. Side).

**JUDGMENT**

The appellant was convicted for the offence under Sections 417 and 376(1) of I.P.C., and sentenced to undergo three months Rigorous Imprisonment and seven years Rigorous Imprisonment and levied with a fine of Rs.1,000/- vide Judgment dated 13.06.2007 in S.C.No.159 of 2006 on the file of the learned Additional District and Sessions Judge/Fast Track Court No.1, Thoothukudi.

2. The case of the prosecution is that the appellant gave a false promise to marry the victim/P.W.1. The victim was a Polio  
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affected woman. Believing the assurance given by the appellant, the victim agreed to have sexual intercourse with the appellant. On account of physical intimacy between the two, the victim conceived but did not complete the full term and an aborted girl child was born. In this regard, the victim lodged Ex.P.1 complaint before All Women police station, Srivaikundam. Ex.P.23 First Information Report in Crime No.8 of 2006 was registered. Investigation was taken up and after completion of all the formalities, final report came to be laid before the Judicial Magistrate, Srivaikundam, for the offence under Sections 417, 376(1) and 506(ii) of I.P.C., and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act. Cognizance of the offences was taken and the case was committed to the Sessions Court in P.R.C.No.8 of 2006. The case was made over to the Additional District and Sessions Judge/Fast Track Court No.1, Thoothukudi in S.C. No.159 of 2006. Charges were framed against the appellant under the aforesaid provisions. The appellant pleaded not guilty and claimed to be tried.

3. The prosecution examined as many as 15 witnesses and marked Ex.P.1 to Ex.P.32. On the side of the accused, no evidence was adduced. The learned trial Judge after a detailed consideration of the evidence on record came to the conclusion that the appellant was guilty of the offences under Sections 417 and 376(1) of I.P.C., and sentenced him as mentioned above. Questioning the same, this Criminal appeal came to be filed.

4. Heard the learned counsel on either side.

5. The learned Senior counsel appearing for the appellant submitted that having regard to the evidence on record, he would not challenge the finding of guilt and that he would only plead leniency to be shown in the matter of punishment. It is true that the defence of the appellant before the trial Court was that P.W.1 had consensual relationship with him and that therefore that it would not constitute the offence of rape. It was further contended before the Court below that the charges under Section 417 and 376(1) of I.P.C. may not go together. But then, having regard to the recent decision of the Hon'ble Supreme Court reported in (2019) AIR SC 1857 (Anurag Soni Vs. State of Chhattishgarh), the law on the point is fairly crystallized.

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the Accused who have the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the Accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the Indian Penal Code and, in such a case, such a



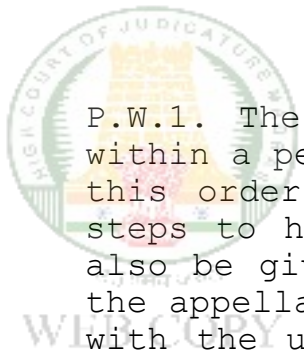
can be said to have committed the rape as defined under Section 375 of the Indian Penal Code and can be convicted for the offence under Section 376 of the Indian Penal Code."

6. Applying the law laid down by the Hon'ble Supreme Court, it is seen that the appellant and the victim were neighbours. The victim was a physically challenged person, as both her legs were affected by Polio attack. The victim had clearly stated that she consented for physical intimacy with the appellant, as she believed his assurance that he would marry her. The lack of *bona fides* of the appellant is evident from the fact that in the cross examination he went to the existence of denying that he was not responsible for the pregnancy of the victim and since the victim had relationship with some other persons, she conceived. That necessitated taking D.N.A. test and it ultimately turned out that it was the appellant who was responsible for the conception of the victim. In other words, the prosecution established beyond reasonable doubt that the appellant was the biological father of the aborted child born to the victim. In the face of this unimpeachable testimony, this Court can safely come to the conclusion that the learned trial Judge rightly found out the accused guilty of the offence under Section 376(1) of I.P.C. That is why the learned Senior counsel submitted that having regard to the evidence on record, he would not challenge the finding of guilt. Instead his focus was more on modifying and reducing the sentence against the appellant.

7. The occurrence had taken place in the year 2005. Section 376 of I.P.C., had not undergone any amendment then. Therefore, the case on hand will have to be decided based on the pre-amendment position. Under the pre-amendment statutory position, the Court was empowered to impose the sentence of imprisonment for a term less than seven years for adequate and special reasons to be mentioned in the Judgment.

8. In the case on hand, the appellant was in prison for three years and three months. He had not contracted any marriage so far. The learned Senior counsel would point out that the appellant is a coolie worker who is taking care of his aged aunt and his sister. The appellant is willing to deposit a sum of Rs.50,000/- (Rupees Fifty Thousand only) to the credit of S.C.No.159 of 2006 on the file of the learned Additional District and Sessions Judge/Fast Track Court No.1, Thoothukudi, along with a letter of abject apology to P.W.1.

9. Taking note of the mitigating facts and circumstances, even while confirming the conviction imposed on the appellant, the sentence of imprisonment imposed on the appellant is modified and reduced to the period already undergone by him. The appellant shall in his affidavit of apology convey his sense of remorse for having



P.W.1. The appellant shall deposit the said amount of Rs.50,000/- within a period of eight weeks from the date of receipt of a copy of this order. On such deposit, the learned trial Judge shall take steps to have the same disbursed to the victim. The victim shall also be given a copy of the affidavit of apology to be executed by the appellant. If any failure on the part of the appellant to comply with the undertaking now given before this Court, the Judgment of the Court below shall stand automatically restored.

10. With this modification in the matter of sentence, the Criminal Appeal stands partly allowed. No costs.

Sd/-  
Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

pmu

To:

1. THE ADDITIONAL DISTRICT AND SESSIONS JUDGE/  
FAST TRACK COURT NO.1, TUTICORIN.
- 2.-DO- THROUGH THE PRINCIPAL SESSIONS JUDGE,  
TUTICORIN.
- 3.THE JUDICIAL MAGISTRATE,  
SRIVAIGUNDAM.
- 4.-DO- THROUGH THE CHIEF JUDICIAL MAGISTRATE,  
TUTICORIN.
- 5.THE SUPERINTENDENT,  
CENTRAL PRISON, PALAYAMKOTTAI.
- 6.THE INSPECTOR OF POLICE,  
ALL WOMEN POLICE STATION,  
SRIVAIGUNDAM, TUTICORIN DISTRICT.
- 7 THE ADDITIONAL PUBLIC PROSECUTOR,  
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

COPY TO:

THE SECTION OFFICER,  
CRIMINAL SECTION,  
MADRAS HIGH COURT-MADURAI BENCH,  
MADURAI. (2 copies)

+1 CC to M/s.B.ANANDAN, Advocate ( SR-80505[F] dated 08/08/2019 )

Crl.A.(MD)No.123 of 2010

07.08.2019

JM/18.10.2019/4P/11C

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