



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

(Criminal Jurisdiction)

Date on which reserved : 28/08/2019

Date on which pronounced : 30/08/2019

PRESENT

The Hon`ble Mr.Justice P.RAJAMANICKAM

CRL OP(MD) . No.8768 of 2019

V.Devakumar

... Petitioner/1st Accused

Vs

State represented by
The Inspector of Police,
All Women Police Station,
Thallakulam, Madurai.
Crime No.18/2019.

... Respondent/Complainant

For Petitioner : Mr.V.S.Kishok Kumar Advocate
M/s.P.P.Alwin Balan, Advocate.
For Respondent : Mrs.M.Anantha Devi,
Government Advocate (Crl.Side)
For Intervenor : Mr.A.S.Vaigunth Advocate

PETITION FOR ANTICIPATORY BAIL Under Sec.438 of Cr.P.C

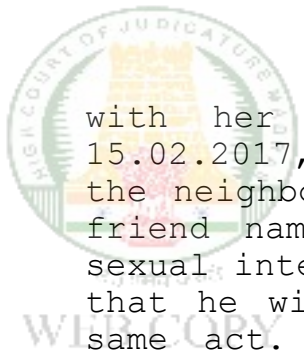
PRAYER :-

For Anticipatory Bail in Crime No.18 of 2019 on the file of the respondent police.

ORDER : The Court Made the following order :-

The petitioner/accused No.1, who apprehends arrest at the hands of the respondent police for the offences punishable under Sections 417 and 376 of IPC in Crime No.18 of 2019, seeks anticipatory bail.

2.The case of the prosecution is that the petitioner herein and the defacto complainant were collegemates at Government Law College, Madurai and known to each other from the year 2016 and both of them loved each other. The defacto complainant was staying in a rented house situated at Surveyor colony, Aavin Nagar, Madurai along



with her friend Rajalakshmi and studied in the college. On 15.02.2017, the petitioner came to the aforesaid house by saying to the neighbours that he is the brother of the defacto complainant's friend namely Rajalakshmi. Subsequently, on 17.02.2017, he had sexual intercourse with the defacto complainant by giving a promise that he will marry her and thereafter also, he had continued the same act. Thereafter, the defacto complainant had shifted her residence to Othakadai from 17.10.2017 onwards. There, she was staying along with her friends namely Rajalakshmi, Vijayalakshmi and Keerthana and continued her studies. There also, the petitioner came and had sexual intercourse with the defacto complainant on several occasions. After graduating in Law, both of them enrolled as advocates and practising before this Court from the year 2018. That being so, the petitioner had informed the defacto complainant that he talked with his parents about their marriage and they also enquired about her caste and religion and thereafter, the petitioner's father Vijaya Natarajan (A-2) visited the house of the defacto complainant and enquired about their status etc., and also demanded huge dowry and for that, the defacto complainant's father not agreed and hence, A-2 told them that he will not marry the defacto complainant to his son (A-1). On 25.04.2019, the petitioner met the defacto complainant in a hotel, which is opposite to the District Court, Madurai and stated that marriage has been fixed for him with one Preethika and for that, the defacto complainant asked him what about their marriage and at that time also, the petitioner informed her that he will get consent from his father. On 06.05.2019, the petitioner informed the defacto complainant that his father has not agreed for their marriage and hence, he cannot marry her. Thereafter, the defacto complainant lodged a complaint before the respondent Police on 27.05.2019 and based on the said complaint, the respondent Police has registered a case in Cr.No.18 of 2019 under Sections 417 and 376 I.P.C against the petitioner herein and his father.

3.The father of the petitioner herein (A-2) has moved an anticipatory bail application in Crl.M.P.No.2052 of 2019 on the file of the Sessions Court, Madurai, in which, the learned Sessions Judge, Madurai has granted anticipatory bail to him. The petitioner herein also filed anticipatory bail applications before the Sessions Judge, Madurai in Cr.M.P.Nos.487, 2197 and 2307/2019, but the learned Sessions Judge, Madurai has dismissed all those applications. Hence, the petitioner herein has filed the present application before this Court seeking anticipatory bail.

4.The learned counsel appearing for the petitioner has submitted that it is true that the petitioner herein and the defacto complainant loved each other, when they were studying in the Government Law College, Madurai. But, he denied the allegation that the petitioner had sexual intercourse with the defacto complainant. He also denied the allegation that the petitioner gave false promise to the complainant that he will marry her. He further



submitted that the alleged sexual intercourse is a concocted story for claiming sympathy from the Court. He further submitted that since the petitioner also loved the defacto complainant, he informed his wish to marry the defacto complainant to his parents. Accordingly, they went to the house of the defacto complainant on 13.04.2017 for marriage proposal, but they got dissatisfied due to mismatch of their horoscope and other sentiments and thus, expressed their unwillingness for marriage to the parents of the defacto complainant and the matter ended up. Subsequently, the parents of the petitioner arranged his marriage with one A.Preethika and fixed the betrothal on 06.06.2019 and the marriage on 25.08.2019 at Dwaraka Palace, Madurai. When all the arrangements have been made for marriage with the said Preethika, on 23.05.2019, the defacto complainant gave a false complaint before the respondent Police with an intention to wreck vengeance on the petitioner.

5.The learned counsel for the petitioner further submitted that the petitioner has stated in para No.3 of the petition that he informed his wish to marry the defacto complainant to his parents and accordingly, his parents went to the house of the defacto complainant on 13.04.2017, but they got dissatisfied due to mismatch of their horoscope and other sentiments and thus, expressed their unwillingness for marriage to the parents of the defacto complainant and the matter ended up and the said averments have not been denied by the intervenor/defacto complainant in her petition and it shows that she has admitted the aforesaid averments as true. He further submitted that since on 13.04.2017 itself, the parents of the petitioner expressed their unwillingness, the allegation made in the F.I.R that on 17.10.2017, the petitioner had sexual intercourse with the defacto complainant could not be true.

6.The learned counsel for the petitioner further submitted that the petitioner is an advocate and the defacto complainant is also an advocate and as such, she knows consequences of the physical relationship. He further submitted that even assuming that the allegations made in the F.I.R are taken as true on the face value, the provisions of Sections 417 and 376 I.P.C will not attract. He further submitted that since the defacto complainant is a Law Graduate and she cannot claim that she gave consent, due to the misconception of fact and at the most, it can be termed as consensual sex. He further submitted that the petitioner is hailing from an orthodox family and if he is enlarged on anticipatory bail, he will co-operate for investigation and the custodial interrogation is not at all required and therefore, he prayed to grant anticipatory bail to the petitioner.

7.In support of the aforesaid contentions, the learned counsel for the petitioner has relied upon the following decisions:-

i) **Nasir Vs State of Kerala (Crl.M.C.No.7763 of 2018) on the file of the High Court of Kerala at Ernakulam, dated 18.01.2019.**
<https://hccvces.eports.tn.in/hccvces/>



ii) **Sanal Vs State of Kerala (Bail Appl. No.6223 of 2018) on the file of the High Court of Kerala at Ernakulam, dated 07.03.2019.**

iii) **Re:Samar Mondal Vs State of Calcutta (Anticipatory Bail Appln.No.C.R.M.5228 of 2019 on the file of the High Court of Calcutta, dated 19.06.2019.**

iv) **Deepak Gulati Vs State of Haryana [2013] 7 SCC 675**

v) **Dr.Dhruvaram Murlidhar Sonar Vs State of Maharashtra & Others, (2018) SCC Online SC 3100.**

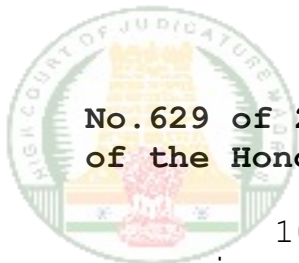
vi) **Promod Suryabhan Pawar Vs. The State of Maharashtra & another, (Criminal Appeal No.1165 of 2019, arising out of S.L.P. (Crl).No.2712 of 2019), dated 21.08.2019.**

8.Per contra, the learned counsel for the intervenor/defacto complainant has submitted that in the F.I.R, the defacto complainant has categorically stated that the petitioner had sexual intercourse with her by giving a promise that he will marry her and he further submitted that the medical report also would show that the defacto complainant already had sexual intercourse. He further submitted that the petitioner has admitted in his petition that both of them loved each other and also he informed his wish to his parents and accordingly, his parents went to the house of the defacto complainant for talking about marriage proposal, but he has stated that due to mismatch of horoscope and other sentiments, the marriage proposal was dropped and the aforesaid fact itself would show that from the very beginning, the petitioner had acted with an intention not to marry the defacto complainant. If really, the petitioner had an intention to marry her, he should not have cited the reason that horoscope is not matching. Further, it is his duty to convince his parents to marry the defacto complainant. He further submitted that the petitioner is a highly influenced person and if he is released on anticipatory bail, he would tamper the witnesses. He further submitted that since the allegations made against the petitioner are serious in nature, the custodial interrogation is absolutely necessary and therefore, he strongly opposed this petition.

9.In support of the aforesaid contentions, the learned counsel for the intervenor/defacto complainant relied upon the following decisions:

i) **Karthi @ Karthick Vs State, rep. By Inspector of Police (2013) 12 SCC 710.**

ii) **Anurag Soni Vs State of Chhattisgarh (Criminal Appeal**



No.629 of 2019 arising out of SLP (Criminal) No.618/2019) on the file of the Honourable Supreme Court, dated 09.04.2019.

10.The learned Government Advocate (Crl.Side) who is appearing for the respondent has adopted the arguments advanced by the learned counsel for the intervenor/defacto complainant. She further submitted that for investigation purpose, the custodial interrogation of the petitioner is absolutely necessary. She further submitted that the petitioner herein has filed three anticipatory bail applications before the Sessions Court, Madurai and those applications were dismissed and therefore, she strongly opposed to grant anticipatory bail to the petitioner.

11.In **Dr.Dhruvaram Murlidhar Sonar Vs State of Maharashtra & Others**, (cited supra), in para No.20, the Honourable Supreme Court has observed as follows:

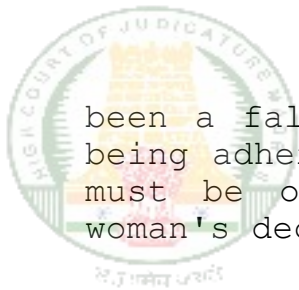
"20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls 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 mala fide 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."

12.In **Promod Suryabhan Pawar Vs. The State of Maharashtra & another**, (cited supra), the Honourable Supreme Court in para No. 18, has observed as follows:

"18 To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have



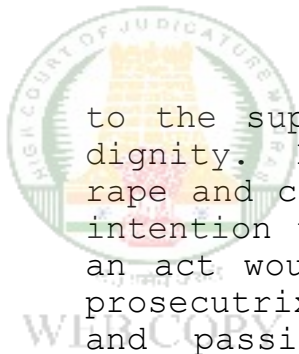
been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

13. In **Anurag Soni Vs State of Chhattisgarh** (cited supra), the Honourable Supreme Court in para No. 15 has observed as follows:

"15. Now, so far as the submission on behalf of the accused appellant that the accused had marriage with Priyanka Soni on 10.06.2013 and even the prosecutrix has also married and, therefore, the accused may not be convicted is concerned, the same cannot be accepted. The prosecution has been successful by leading cogent evidence that from the very inspection the accused had no intention to marry the victim and that he had mala fide motives and had made false promise only to satisfy the lust. But for the false promise by the accused to marry the prosecutrix, the prosecutrix would not have given the consent to have the physical relationship. It was a clear case of cheating and deception.

As observed hereinabove, the consent given by the prosecutrix was on misconception of fact. Such incidents are on increase nowadays. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity. Therefore, merely because the accused had married with another lady and/or even the prosecutrix has subsequently married, is no ground not to convict the appellant accused for the offence punishable under Section 376 of the IPC. The appellant accused must face the consequences of the crime committed by him."

14. From the aforesaid decisions, it is clear that rape is the most morally and physically reprehensible crime in the society, as assault on the body, mind and privacy of the victim. While the murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow



to the supreme honour of a woman and offends both her esteem and dignity. It is also clear that there is a clear distinction between rape and consensual sex. If the accused made 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 misrepresentation made to her by the accused.

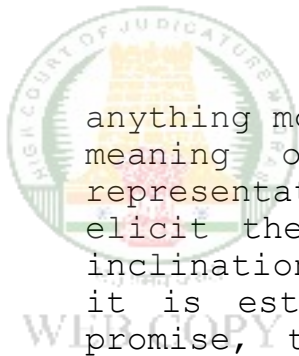
15. After referring to the case-law on the subject, the Honourable Supreme Court in **Uday Vs. State of Karnataka, (2003) 4 SCC 46**, in para No.21 observed as follows:-

"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 straitjacket 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."

16. From the aforesaid decision, it is clear that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under a misconception of fact. It is also clear whether the consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under misconception of fact depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion.

17. After referring to **Uday's** Case (cited supra), the Hon'ble Supreme Court in **Pradeep Kumar @ Pradeep Kumar Varma Vs. State of Bihar and another (2007) 2 MLJ (Cr1) 1413 (SC)** in para-20, observed as follows:-

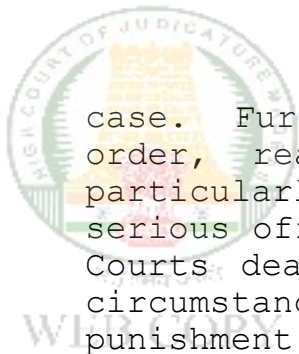
"20. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without



anything more will not give rise to misconception of fact within the meaning of **Section 90**, it needs to be clarified 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. If on the facts it is 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** clause second. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda s case (supra) which was approvingly referred to in Uday's case (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end - unless the court can be assured that from the very inception the accused never really intended to marry her. (emphasis supplied). In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case (vide passage quoted supra). By making the solitary observation that a false promise is not a fact within the meaning of **the Code**, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."

18.From the aforesaid decision, it is clear that a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of section 90. It is also clear that if on the facts, it is 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 extensively given by the victim will be of no avail to the accused to exculpate him from the ambit of **Section 375 I.P.C.**

19.Since this is the anticipatory bail application, it would be relevant to refer to the decision in **Gajanand Agrawal Vs State of Orissa and another (2007) 2 MLJ (Cri) 227 (SC)**, wherein, the Honourable Supreme Court has held that in dealing with bail applications, Court should not discuss merits of the evidence in the



case. Further, it was held that there is a need to indicate in the order, reasons for prima facie why bail was being granted particularly where an accused was charged of having committed a serious offence. Further, it was held that it was necessary for the Courts dealing with application for bail to consider among other circumstances the nature of the accusation and the severity of the punishment in case of conviction and the nature of the supporting evidence etc., Therefore, while dealing with the anticipatory bail/bail applications, this Court cannot discuss with regard to the merits of the case and it has to see only the seriousness of the allegations made against the accused and gravity of the offence.

20. In this case, a perusal of the F.I.R would show that there are serious allegations made against the petitioner herein. In the F.I.R, it is stated that on 17.02.2017, the petitioner had sexual intercourse with the defacto complainant by saying that he will marry her. Further, it is stated that the petitioner made a request with the defacto complainant that until he gets permission from his parents, not to disclose the aforesaid occurrence with any one and also he got promise from her to that effect. Further, it is stated that subsequently also the petitioner had sexual intercourse with the defacto complainant on several occasions.

21. In **Karthi @ Karthick Vs State, rep. By Inspector of Police** (cited supra), the Hon'ble Supreme Court has held that the statement made by the prosecutrix that since the accused persuaded her not to disclose the occurrence to any one and thereafter repeatedly had sexual intercourse with her had taken as one of the circumstances for not accepting the contention advanced on behalf of the accused that sexual intercourse by the accused with the prosecutrix was consensual.

22. It is true that in the intervening application, the defacto complainant has not denied the averment made by the petitioner in his petition that on 13.04.2017 itself, his parents have expressed their unwillingness for marriage to the parents of the defacto complainant and the matter ended up, but the said ground cannot be taken as that she has admitted the aforesaid allegations, because she has not been impleaded as respondent. If she has been impleaded as respondent, she would have filed a counter denying the allegations made in the petition. After knowing the fact that the petitioner is moving anticipatory bail application, she voluntarily filed intervenor application. Hence, she may not know the allegations made in the anticipatory bail application. Therefore, merely because the defacto complainant has not denied the aforesaid allegations in her intervening application, it cannot be presumed that she has admitted those allegations.

23. Taking into consideration of the aforesaid facts and also considering the gravity of the offence said to have been committed by the petitioner and also the submission made by the



learned Government Advocate (Crl.Side) that custodial interrogation of the petitioner is absolutely necessary, this Court is of the view that the petitioner has not made out a case for getting anticipatory bail.

24.In i)**Nasir Vs State of Kerala** (cited supra), ii)**Sanal Vs State of Kerala** (cited supra) and iii)**Re:Samar Mondal Vs State of Calcutta** (cited supra), taking into consideration of the facts and circumstances of the particular cases, it was held that custodial interrogation of the petitioner/ accused was not necessary. But, in this case, considering the allegations made against the petitioner, this Court is of the view that the custodial interrogation of the petitioner may be necessary. Therefore, the aforesaid decisions will not help the petitioner's case.

25.For the aforesaid reasons, this Court is of the view that the petitioner is not entitled for getting anticipatory bail. Hence, this petition is liable to be dismissed.

26.Accordingly, this petition is dismissed.

sd/-
30/08/2019

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Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

TO

1.THE INSPECTOR OF POLICE,
ALL WOMEN POLICE STATION,
THALLAKULAM, MADURAI.

2.THE ADDITIONAL PUBLIC PROSECUTOR
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

+1. CC to Mr.P.P.ALWIN BALAN Advocate SR.No.14721
+1. CC to Mr.A.S.VAIGUNTH Advocate SR.No.14521

ORDER
IN
CRL OP(MD) No.8768 of 2019
Date :30/08/2019

TK/JC/SAR.1/05.09.2019/10P/5C