

IN THE HIGH COURT OF JUDICATURE AT MADRAS
DATED: 01.07.2020
CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

CRL.O.P.No.9813 of 2020
and Crl.MP.No.4321 of 2020

Dr.S.Aswin
S/o. Dr.Sankar,
33/22, Vasuki Street,
Ganapathy Nagar,
Villapuram,
Madurai -12

... Petitioner

Vs.

1. The State rep by
The Inspector of Police,
All Women Police Station,
Salem Town.
Cr.No.13 of 2019.

2. S.Mahathi Begam
D/o.Siraj,
No.70, New Avadi Road,
Kilpauk,
Chennai.

.... Respondents

PRAYER: Criminal Original Petition filed under Section 482 of Cr.P.C. praying to call for the records pertaining to Crime No.13 of 2019 on the file of the All Women Police Station, Salem Town and quash the same.

For Petitioner : Mr.V.Ayyadurai
For Mr.D.Rajagopal

For Respondents
For R1 : Mr.M.Mohamed Riyaz
Additional Public Prosecutor.

O R D E R

This petition has been filed to quash the F.I.R. in Crime No.13 of 2019 on the file of the first respondent police registered for offences under Sections 376, 420, 506(2) and 294 (b) of IPC, as against the petitioner.

2. The crux of the allegations in the FIR is that the second respondent/defacto complainant is studying final year MBBS degree course in Vinayaga Mission Kirubanantha Variyar Medical College, Salem. She joined in the said course in the year 2015. While being so, the first accused viz., the petitioner herein joined for his post graduation MS (Ortho) in the same college. The defacto complainant and the petitioner have become friends through face book and thereafter both of them fell in love. He promised to marry her since his mother was died in the year 2017, out of her sickness. Initially the defacto complainant refused to accept the love proposal from the first accused. Later she fell in love with the forced used by the first accused. Thereafter, when the first accused was stayed at G.G complex, Salem, on 23.07.2017, on the pretext of marriage, the petitioner had sexual intercourse with the defacto complainant herein. Thereafter on various occasion he had sexual intercourse on the same pretext of marriage with the defacto complainant.

2.1. While being so, after completion of post graduation, the petitioner went to his native place, since his father is also a Doctor and he is running a clinic at Madurai. Again on 21.06.2019, the first accused came to Salem and he came to understand that the mother of the defacto complainant was out of station and as such again on the pretext of marriage, he had sexual intercourse with the defacto complainant till 24.06.2019. He also promised that he would marry the defacto complainant after getting consent from his father viz., the second accused. Thereafter the petitioner went to Madurai and both the accused had made arrangement to get marry with some other girl with the first accused. After knowing the fact, the defacto complainant informed to her parents and requested the accused persons to get marry the defacto complainant. Immediately, they refused to marry the defacto complainant, since the accused persons and the defacto complainant are belonging to different religion and it is absolutely not possible to marry the defacto complainant. Therefore, the defacto complainant was constrained to lodge a complaint before the Kondalampatti Police Station, Salem on 21.07.2019. On receipt of the same the defacto complainant was issued C.S.R.No.783 of 2019.

2.2. Thereafter on 23.07.2019, enquiry was conducted between the accused persons and the defacto complainant's family. During the enquiry, the accused persons assured that the first accused will marry the defacto complainant and also they assured that they will conduct engagement on 10.11.2019. In fact, they also executed an undertaking deed dated 24.07.2019 before the said Police Station. Thereafter, the defacto

complainant came to understand that the accused persons acted against their undertaking. Thereafter on 06.08.2019, the accused persons informed that there is absolutely not possible to get marry the defacto complainant with the first accused and they refused to marry the defacto complainant. Therefore, again on 06.08.2019, the defacto complainant lodged complaint. Even then the concerned Police official did not take any action on the complaint lodged by the defacto complainant. Therefore the defacto complainant lodged private complaint before the learned Judicial Magistrate, (Additional Mahila Court), Salem and same has been taken on file in C.M.P.No.2740 of 2019. Thereafter, the learned Magistrate by an order dated 12.09.2012, directed the first respondent police to register FIR on the complaint lodged by the defacto complainant. As directed by the learned Judicial Magistrate, (Additional Mahila Court) Salem, in C.M.P.No.2740 of 2019 dated 12.09.2012, the first respondent registered FIR in Crime No.13 of 2019 for the offences under Sections 376, 420, 506(2) and 294(b) of IPC, in which the petitioner is arrayed as A1.

3. Mr.V.Ayyadurai, learned Senior Counsel appearing for the petitioner would submit that the offences imposed as against the petitioner will not attract any of the ingredients of the offence as such the FIR cannot be stand further. He further submitted that the present complaint is the second complaint for the very same issue and in fact, in the first complaint there was absolutely no allegations about the sexual intercourse by the first accused on the pretext of false marriage with the defacto complainant. When the first complaint is very much pending, without even mentioning the earlier complaint, the defacto complainant filed the present private complaint and sought for direction under Section 156(3) of Cr.P.C. The learned Magistrate without considering the above fact mechanically directed the first respondent to register the case.

3.1. Even according to the case of the defacto complainant, when she fell in love with the petitioner, she believed that the petitioner will marry her and she had given consent for the sexual intercourse with the first accused and it would not attract the offence under 376 of IPC, since the defacto complainant was never threatened nor coerced to have sexual intercourse with the petitioner herein. In fact, the defacto complainant aged about 21 years and with full knowledge she had physical relationship with the petitioner herein. Insofar as the offence under Section 420 of IPC, there is no cheating or dishonestly or inducement in delivery of property. Therefore the ingredients of the offence under Section 420 of IPC would not attract as against the petitioner herein.

3.2. The alleged undertaking deed executed by the petitioner dated 24.07.2019, is illegal and the same was obtained before the Police officials under coercion. Even as per the undertaking deed dated 24.07.2019, the accused persons had undertaken to arrange for engagement on 10.11.2019 with the defacto complainant and even before the expiry of the said date, the defacto complainant lodged the present private complaint. Therefore, no offence is made out as against the petitioner as alleged by the defacto complainant. In support of his contention, he relied upon the following judgements :-

(i) 2003(4) SCC 46 - Uday Vs. State of Karnataka

(ii) CrI.A.No. 57812012 dated 13.01.2017 -

Ratheesh vs. State of Kerala

(iii) 2019 (9) SCC 608 - Pramod Suryabhan Pawar vs State of Maharashtra and another.

(iv) CrI.O.P.(MD)No.10623 of 2017 dated 29.11.2019 - Sam Asir

Ayyavoo Vs. The State and anr.

Accordingly, he prayed to quash the FIR in Crime No.13 of 2019 on the file of the first respondent.

4. Per contra, the learned Additional Public Prosecutor appearing for the first respondent submitted that on the pretext of false promise of marriage by the petitioner herein, the defacto complainant consented to have sexual intercourse. Therefore, the prosecutrix agreed to have sex on account of her love and also on the promise made by the accused and as such the petitioner had committed the offence under Section 376 of IPC. After lodging the complaint by the defacto complainant, the petitioner and his father was called for enquiry and in the enquiry both the family members were appeared and the petitioner executed a deed of undertaking to marry the defacto complainant. Further he assured in the undertaking deed that he will arrange for engagement on 10.11.2019. While being so, on 06.08.2019 the petitioner and his father refused to arrange engagement between defacto complainant and the first accused and also threatened the defacto complainant with dire consequences. Therefore, the offences under Sections 294(b) and 506(ii) of IPC are attracted as against the accused persons. When the same was questioned by the defacto complainant's family members, they were also abused with filthy language. Therefore all the offences under Sections 376, 420, 294(b) and 506(ii) of IPC are attracted as against the accused person. He also relied upon the judgement of the Hon'ble Supreme Court of India, dated 09.04.2019 in CrI.A.629 of 2019 in the case of Anurag Soni Vs State of Chhattisgarh and contended that the judgement relied upon the learned Senior Counsel appearing for the petitioner reported in 2019 (9) SCC 608 in the case of Pramod Suryabhan Pawar vs State of Maharashtra and

another also referred and held in favour of the prosecutrix.

5. Heard Mr.V.Ayyadurai, learned Senior Counsel appearing for the petitioner and Mr.M.Mohamed Riyaz, learned Additional Public Prosecutor appearing for the first respondent.

6. There are totally two accused in this case, in which, the petitioner is arrayed as A1. While the defacto complainant/second respondent herein studying her MBBS course in Vinayaga Mission Medical College, Salem, the petitioner was also doing his post graduation in M.S (Ortho) in the same college. Both were fell in love and the petitioner promised that he would marry the defacto complainant. On the pretext of marriage, the defacto complainant consented for sexual intercourse with the petitioner. On various occasion, on the pretext of marriage, the petitioner had sexual intercourse with the defacto complainant. After completion of post graduation, the petitioner left the defacto complainant and his father arranged marriage for the petitioner with some other girl. After coming to understand the fact, the defacto complainant informed about her love affair to her parents and requested the petitioner and his father to marry the defacto complainant. But they denied the love affair and also refused to marry the defacto complainant, showing the reason that both were belonged to different religion.

7. Therefore, the defacto complainant was constrained to lodged the complaint before the Commissioner of Police, Salem. On receipt of the same, she was issued C.S.R.783 of 2019 and the enquiry was conducted between both the families. On enquiry, the petitioner and his father assured that the petitioner will marry the defacto complainant and to that extent, he also executed a deed of undertaking dated 24.07.2019, thereby he had undertaken that he will arrange engagement to be held on 10.11.2019, between the petitioner and the defacto complainant. Thereafter, the petitioner and his father refused to arrange any engagement and also refused to marry the defacto complainant. When it was questioned by the defacto complainant and her family members, they were threatened and abused with filthy language by the petitioner and his father.

8. The learned Senior Counsel appearing for the petitioner contended that the defacto complainant is a well grown girl and in fact she is studying MBBS Course and as such she knew the consequences of having sexual intercourse. He also submitted that the consented sexual intercourse would not attract the offence under Section 376 of IPC. In support of his contention, the learned Senior Counsel relied upon the judgement of the Hon'ble Supreme Court of India reported 2019 (9) SCC 608

in the case of Pramod Suryabhan Pawar vs State of Maharashtra and another which reads as follows :-

"21. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 IPC has occurred."

9. He also relied upon the judgment reported in (2003) 4 SCC 46 in the case of Uday Vs. State of Karnataka which reads 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.

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23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant then he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and

consciously consented to having sexual intercourse with the appellant and her consent was not in consequence of any misconception of fact."

In the above cases the Hon'ble Supreme Court of India held that the consent given by the prosecutrix to have sexual intercourse with the person with whom deeply love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. Further held that prosecutrix was a well grown-up girl and she was aware of the fact that both were belonged to different caste and the marriage was not possible. The prosecutrix has sufficient intelligence to understand the significance and moral quality of the act she was consenting to. Further held that the prosecutrix freely, voluntarily and consciously consented to having sexual intercourse with the person and her consent was not in consequence of any misconception of fact.

10. Both the above cases are held in difference set of facts and circumstances. Whereas in the case on hand, it is arising out of completely different set of facts, since the defacto complainant and the petitioner fell in love. Though the defacto complainant belonged to Muslim Community, the petitioner assured that he will get consent from his father to marry her. In fact, both the petitioner and his father appeared on the enquiry and the petitioner herein executed a deed of undertaking to marry the defacto complainant. Therefore it is clear that the consent was obtained by the petitioner on misconception of fact and it amounts to rape. Therefore, none of the aforesaid decisions shall be applicable to the facts in the case on hand. Even in the case of Uday Vs. State of Karnataka, the Hon'ble Supreme Court of India held 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 giving under a misconception of fact. Therefore, the above cases cited by the learned Senior Counsel appearing for the petitioner shall not be applicable to the case on hand.

11. The learned Additional Public Prosecutor relied upon the judgement dated 09.04.2019 passed in CrI.A.No.629 of 2019, in which the Hon'ble Supreme Court of India held as follows :-

"14. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had a physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per Section 90 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC. Though, in Section 313 statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable. The prosecutrix, in the present case, was an educated girl studying in B.Pharmacy. Therefore, it is not believable that despite having knowledge that that appellant's marriage is fixed with another lady - Priyanka Soni, she and her family members would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the

appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant accused. Even considering Section 114A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed hereinabove, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under Section 376 of the IPC.

In the above case, the Hon'ble Supreme Court of India held that from the very beginning the accused never intended to marry the prosecutrix and he gave false promise to the prosecutrix to marry her and on such false promise he had a physical relationship with the prosecutrix. The prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact.

12. In the case on hand, from the very beginning, the petitioner knew that the defacto complainant belonged to different religion viz., Muslim and not possible for getting

permission from his father. After having sexual intercourse on various occasion, the petitioner stated that his father is not agreed to marry the defacto complainant, since she belonged to different religion. Therefore, only on the pretext of false marriage to the defacto complainant to marry her, and on such false promise, the petitioner had sexual intercourse with her on various occasions. Therefore, the consent of the defacto complainant can be said to be consent on misconception of fact. Therefore, the said consent shall not be a excuse to the petitioner from the charge of rape and offence under Section 376 of IPC.

13. That apart there are specific allegations as against the petitioner to attract the offences, which has to be investigated in deapth. Further the FIR is not an encyclopedia and it need not contain all facts and it cannot be quashed in the threshold and it amounts to killing of new born child. This Court finds that the FIR discloses prima facie commission of cognizable offence and as such this Court cannot interfere with the investigation. The investigating machinery has to step into investigate, grab and unearth the crime in accordance with the procedures prescribed in the Code.

14. It is relevant to rely upon the judgment of the Hon'ble Supreme Court of India passed in CrI.A.No.255 of 2019 dated 12.02.2019 in the case of Sau. Kamal Shivaji Pokarnekar vs. the State of Maharashtra & ors., as follows:-

"4. The only point that arises for our consideration in this case is whether the High Court was right in setting aside the order by which process was issued. It is settled law that the Magistrate, at the stage of taking cognizance and summoning, is required to apply his judicial mind only with a view to taking cognizance of the offence, or in other words, to find out whether a prima facie case has been made out for summoning the accused persons. The learned Magistrate is not required to evaluate the merits of the material or evidence in support of the complaint, because the Magistrate must not undertake the exercise to find out whether the materials would lead to a conviction or not.

5. Quashing the criminal proceedings is called for only in a case where the complaint does not disclose any offence, or is frivolous, vexatious, or oppressive.

If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same. It is not necessary that a meticulous analysis of the case should be done before the Trial to find out whether the case would end in conviction or acquittal. If it appears on a reading of the complaint and consideration of the allegations therein, in the light of the statement made on oath that the ingredients of the offence are disclosed, there would be no justification for the High Court to interfere.

.....
9. Having heard the learned Senior Counsel and examined the material on record, we are of the considered view that the High Court ought not to have set aside the order passed by the Trial Court issuing summons to the Respondents. A perusal of the complaint discloses that prima facie, offences that are alleged against the Respondents. The correctness or otherwise of the said allegations has to be decided only in the Trial. At the initial stage of issuance of process it is not open to the Courts to stifle the proceedings by entering into the merits of the contentions made on behalf of the accused. Criminal complaints cannot be quashed only on the ground that the allegations made therein appear to be of a civil nature. If the ingredients of the offence alleged against the accused are prima facie made out in the complaint, the criminal proceeding shall not be interdicted."

15. In view of the above discussion, this Court is not inclined to quash the First Information Report. Accordingly, this Criminal Original Petition stands dismissed. However, considering the crime is of the year 2019, the first respondent is directed to complete the investigation in Crime No.13 of 2019 and file a final report within a period of twelve weeks from the date of receipt of copy of this Order, before the jurisdiction

Magistrate, if not already filed. Consequently, connected miscellaneous petition is closed.

-s/d-
Assistant Registrar

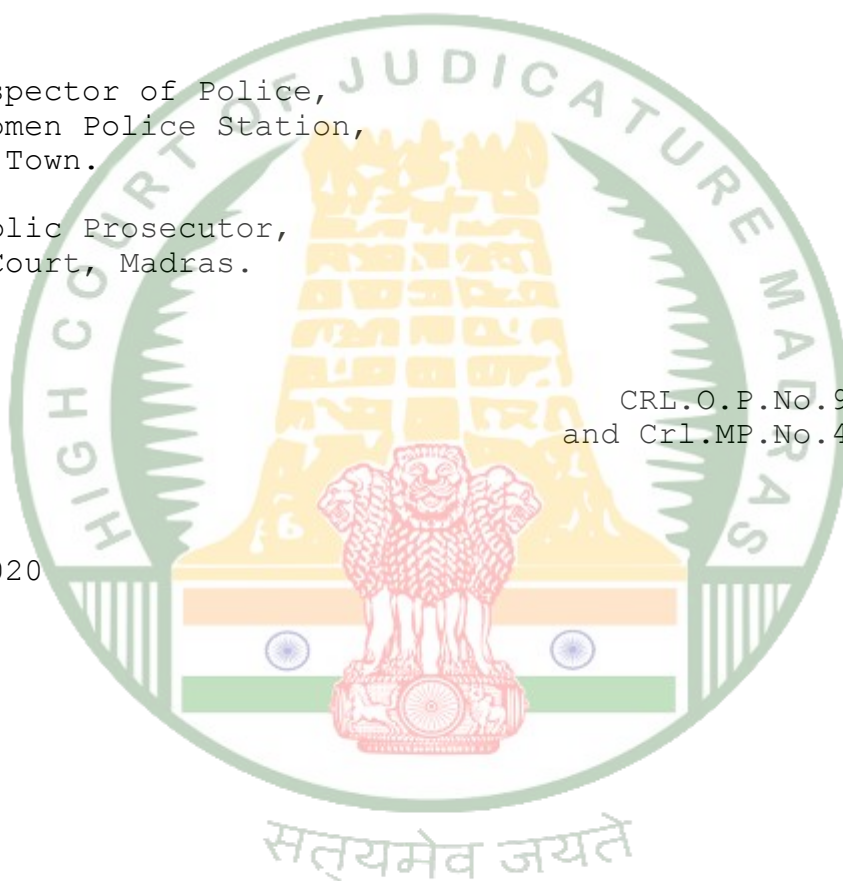
True Copy
Sub-Assistant Registrar

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To

1. The Inspector of Police,
All Women Police Station,
Salem Town.
2. The Public Prosecutor,
High Court, Madras.

CRL.O.P.No.9813 of 2020
and CrI.MP.No.4321 of 2020

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