



BAIL SLIP

The Appellant/accused namely Jayaseelan, S/o.Munusamy, was directed to be released on bail in and by the order of this court dated 21.03.2016 and made in CRL.M.P.No.610 of 2016 in CRL.A.No.45 of 2016.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 26.10.2021

PRONOUNCED ON : 22.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRL.A.NO.45 OF 2016

Jayaseelan

... Appellant/Accused

Vs.

The State represented by
The Inspector of Police,
All Women Police Station,
Chengam,
Tiruvannamalai District.
(Crime No.6 of 2013).

... Respondent/Complainant

Prayer: This Criminal Appeal has been filed under Section 374(2) of Cr.P.C., against the order of conviction and sentence made in S.C.No.28 of 2014 by the Sessions and Mahila Fast Track Court, Tiruvannamalai, dated 07.01.2016.

For Petitioner : Mr.S.Kumara Devan

For Respondent : Mr.S.Vinoth Kumar
Public Prosecutor

JUDGMENT

The convicted sole accused is the appellant herein.

2.This Criminal Appeal is filed against the order of conviction and sentence made in S.C.No.28 of 2014, by the



Sessions and Mahila Fast Track Court, Tiruvannamalai, dated 07.01.2016.

3. Brief facts of the case:

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(a). The respondent police had registered a case in Crime No. 6 of 2013 against the appellant/accused and his parents for the alleged offence under Sections 376, 294(b) and 506(i) of IPC and filed a charge sheet in PRC.No.1 of 2014. The said case has been committed to learned Sessions Judge, Fast Track Mahila Court, Tiruvannamalai, and it was taken on file in S.C.No.28 of 2014.

(b). During the course of trial, on behalf of the prosecution PW1 to PW14 were examined and Exs.P1 to P7 were marked. On behalf of the appellant/accused Ex.D1 was marked.

(c). After the elaborate trial the learned Sessions Judge, Fast Track Mahila Court, by her Judgment dated 07.01.2016, has acquitted A2 & A3 (parents of the accused) for the alleged offence under Sections 376, 294(b) & 506(i) of IPC and convicted the appellant/accused alone for the alleged offences under Section 376 of IPC and imposed sentence for ten years rigorous imprisonment and to pay a fine of Rs.5,000/- in default to undergo six months rigorous imprisonment.

(d). Aggrieved against the said order of conviction and sentence, the appellant/accused has preferred the present Criminal Appeal.

4. Heard both the respective learned counsels and perused the materials placed on record.

5. The learned counsel for the appellant would contend that

(1). there is an inordinate delay of seven days in filing FIR;

(2). the version of PW1 in the witness box is different from the statement made in FIR; new statement of facts were spoken to by PW1 in the witness box and hence, the evidence of PW1 ought to have been rejected;

(3). it is only with consent of the prosecuterix the accused had intercourse and relied upon Ex.D1/reference slip given by PW8/Doctor for referring PW1 for further medical examination for the sexual assault, therein, it is mentioned that the accused and PW1 had sexual intercourse for more than 100 times and hence, the learned counsel for the appellant/accused could contend that it is consent and not a rape as denied under



Section 375 of IPC. He would further contend that the prosecuterix/PW1 known the consequences of the physical relationship and hence, she was continue to have physical relationship for more than 100 times.

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(4).As per the statement of PW1 and PW2/Mother of PW1, the appellant's father has refused to perform the marriage of PW1 with the appellant/accused and hence, the prosecuterix made allegation against the parents of the appellant/accused alone and not against the appellant/accused.

6.Further, the learned counsel for the appellant/accused relied upon the following decisions:

(i)Crl.A.No.1443 of 2018 - Dr.Dhruvaram Muralidhar Sonar Vs. The State of Maharashtra;

(ii)2021 LW (Crl) 95 - Ramesh Vs. State represented by All Women Police Station, Panruti, Cuddalore.

7(a).On a perusal of the records, it is seen that the respondent police had filed a charge sheet against A1 along with his parents A2 & A3 for the alleged offence under Sections 376, 294(b), 506(i) of IPC. After the trial, the learned Sessions Judge, Fast Track Mahila Court, has acquitted A2 & A3 (parents of A1) from those charges and also acquitted the accused only for the charge under Sections 294(b) and 506(i) of IPC and laid the conviction against the appellant/accused for the offence under Section 376 of IPC only and imposed the sentence as stated supra.

7(b).To prove the charge, on the side of the prosecution PW1 to PW14 were examined and Exs.P1 to P7 were marked; on behalf of the defence Ex.D1/reference slip given by PW8/Dr.Sasireka to PW1 on 25.10.2013 was marked.

7(c).PW1 is the prosecuterix, while PW2 & PW3 are the parents of PW1; PW4 is the grand-father of PW1; PW5 is one of the relative, who had accompanied with PW1 for filing complaint; PW6 is the Panchayat President, who could depose regarding holding of the Panchayat in connection with the complaint made by PW1, PW2, PW3 against the appellant/accused regarding the marriage of PW1 with the accused and on failure of the same, a complaint has been given under Ex.P1; PW7 is the police constable, who took PW1 for medical examination; PW8/Dr.Sasireka had issued Ex.P2/Accident Registrar and Ex.P3/Medical Certificate issued to PW1 for sexual offence; PW10/Dr.Naranayana Moorthy, had conducted the medical examination of the accused and had issued medical certificate by stating that there is nothing to suggest that the accused is impotent. In Ex.P2/Accident Register copy issued for the victim girl, it is



mentioned as follows:

(i) கடைசியாக 2 வாரத்திற்கு முன் உடலுறவு கொண்டதாகவும் கூறினார். மேலும் எல்லா முறையும் தனது விருப்பத்துடன் நடந்ததாக கூறினார். தன்னை பலமுறை கடித்ததாகவும் தீக்குச்சியால் காயப்படுத்தியதாக கூறினார்.

In Ex.P3/Medical Certificate issued to PW1 for sexual offence after medical examination, it is recorded as under:

General Examination:

(i) Gait Normal

(ii). Intoxication No

(iii). Marks of Violence bite marks about 4x5 over right side of angle of mandible 3 x 2 cm over right side neck, 4 x 5 cm over left side neck, 3 x 2 cm over left side face, 4 x 5 cm over right side breast, 0.5 x 0.5 cm Scar (black colour) over upper quadrant of (L) breast seen.

Brest-Injuries as Mentioned.

As per OG opinion from Thiruvannamalai GH.PIN 20004013000208923 O/E P/s OS circular p/v Cx Ut AV NL line OS Circular No e/o Instrumental MTP seen

Opinion:

1) வாதியானவர் கன்னிதிரை கிழிந்து உள்ளதால் - Vagina admit 2 fingers freely - கன்னித் தன்மை இழந்திருக்கலாம்.

2) மேலும் கருவி கருகலைப்ப, செய்த தடையம் இல்லை.

and opined that there is no sign of instrumental MTP (medical termination of pregnancy) seen.

PW9/Dr.Alamelu had issued Ex.P6, wherein, it is observed as under:

Final Opinion

As per urologist opinion, according to History and Physical examination there is no evidence to suggest that the patient is impotent.

8. After hearing the submissions made by the learned counsels and also the citations referred thereto, whether PW1 is completely changed her version as against FIR and new facts have been stated before the Court as contended by the learned counsel for the appellant at the preliminary level.

9. PW1 has given Ex.P1/complaint and at the time of the complaint she was 19 years and age of the prosecuterix was remains unchallenged. In the cross-examination, PW1 could deposed that her date of birth is 17.03.1994 and Ex.P1/Complaint was lodged on 21.10.2013 and CSR was issued by the police in CSR.No.195 of 2013 and on 25.10.2013 Ex.P7/FIR was registered, it is one and half year prior to 25.10.2013.



10. The learned counsel for the appellant/accused would contend that there is a delay of seven days in filing complaint before the police and hence, according to him the delay is fatal to the prosecution. In the matters of delay in preferring the complaint, the same is not per se fatal, however, it is to be explained by the prosecution. Admittedly, in the matter of sexual assault, there will be some reservation by the parents of the prosecuterix to lodge a complaint regarding the future life of the victim girl. In the instant case, the social background and the civil status of the parties has to be gone in. Considering the entirety of the circumstances and also taking note of the strata of the society to which PW1 belongs, I find that the delay has been properly explained by parents of the prosecuterix viz., PW2 & PW3. Besides PW6/Panchayat president has also spoken that in the Panchayat held between the accused party and the prosecuterix party for the solemnization of marriage, there was some delay and thereafter, since the accused party has not come for honour words, as instructed, PW3/father of PW1 (prosecuterix) had to lodge a complaint, assumes significance. Accordingly, I find that the delay has been properly explained by the prosecuterix and hence, the said delay is held to be not fatal to the prosecution.

11. Whether the version of PW1/victim girl is reliable and trustworthy.

12. The learned counsel for the appellant/accused as stated supra would contend that the version of PW1 suffers of omission amounting to contradiction besides improvement in the nature of embellishment amounting the material contraction of vital factors and therefore, he would contend that the consent was free consent and the victim is aged 19 years and above and therefore, it is not a rape but only a consensual sex.

13. From the medical evidence of the doctors viz., PW8/Sasireka, PW9/Alamelu & PW10/Narayana Moorthy coupled with the documentary evidence of Exs.P2, P3, P4 & P5 for PW1 and Ex.P6 issued for the accused goes to show that PW1 is found to have sexual intercourse as per the evidence of Dr.PW8/Sasireka and PW9/Alamelu and the accused is the man of potency.

14. Whether the sexual intercourse between the accused and PW1 is consent by false promise or misrepresentation of the fact or whether it is consensual sex as contended by the learned counsel for the appellant.

15. As per Ex.P4/Medical Certificate issued to PW1, there is no evidence of instrumental medical termination of pregnancy and hence, it is to be examined whether there was any physical



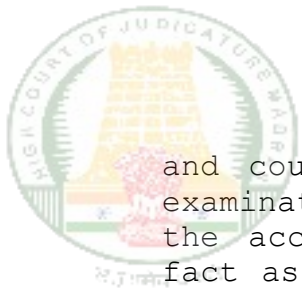
relationship between the accused and PW1 and whether such a physical relationship was out of the consent of PW1 or on voluntary consent of PW1 or the consent has been obtained by the false promise or misrepresentation of fact or against her will.

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16. Though, there is some improvement in the evidence of PW1, however the version of PW1 does not run contrary to the contents of Ex.P1/complaint. Few words have been spoken to by PW1 in the witness box with regard to the act of the accused on the private part of her body. However, on a close scrutiny and scanning of Ex.P1/complaint and evidence of PW1 in the witness box, I find that it is her specific case that on multiple occasions the accused had represented his love for her in sweet words and by saying so he has seduced her to have sexual intercourse on his words of marriage in future time and those words are found to be natural in Ex.P1/complaint as well as in the version of PW1 from the witness box. Hence, de-horse certain improvements as pointed out by the learned counsel for the appellant/accused, in the chief examination of PW1, I find that it is in addition to the words and the manner of the approach adopted by the accused in seducing PW1 at the age of 17 on promise to marry and hence, neither certain omissions in the version of PW1 nor certain improvements made by PW1 in the witness box, which are not running contrary to her basic case that accused has advance his love by mesmerising words whereby, he made submissions that he will marry PW1 in future date and thereby, seduced her to have sexual intercourse and by basing so such a promise of words, she had submitted her body to him.

17. It remains to be stated that when the accused/appellant come forward with a plea of voluntary consent by PW1 it is for them to establish either through the cross examination or some other manner as established by law. The evidence of PW1 as discussed supra goes to show that in view of the mesmerising words made by the accused/appellant in advancing his love and on a specific statement that in future he will marry her, has made her to submit for the sex. Hence, I find that it is not voluntarily sex by PW1, consequently the physical relationship had by the accused with PW1 can neither be termed as consensual sex by consent nor her consent was not taken in view of the misrepresentation of the fact.

18(a). Thus, based upon the above discussions, this Court finds that the statement under Ex.P1/complaint, PW1 specifically averred about the mesmerising words made by the accused and on the words so made by the accused she was taken to the level of confidence that the accused will marry, with that in mind the accused had physical relationship on multiple terms and thus, I find that version of PW1 as could be seen from Ex.P1/complaint



and coupled with the statement made by herself in the cross-examination, goes to show that the physical relationship had by the accused is due to the outcome, misrepresentation of the fact as denied under Section 90 of the Evidence Act and certain omissions made by PW1 in the chief examination found to not on the vital factors in connection with the charge under Section 376 of IPC.

18(b). Besides, certain improvements as pointed out by the learned counsel for the appellant as extracted supra, it is only in addition to the above said essential ingredients touching upon the charge of 376 of IPC and not running contrary to the charge of 376 of IPC either in the form of consent or in the form of voluntarily for the sex and it also points out only to the fact that due to the misrepresentation of the factum of promise to marry made by the accused, PW1 could not submit herself to the mesmerising words and hence, the learned Sessions Judge has properly appreciated the evidence of PW1 and negatived the contention of the learned counsel for the appellant counsel and the similar finding rendered by the learned Sessions Judge, does not suffer from any irregularity or illegality, does not warrant interference at this appellant stage.

18(c). Hence, the version of PW1 is found to be reliable, duly corroborated by the medical evidence by the Doctors viz., PW8, PW9 & PW10 and Exs. P2 to P6 and further her consent for sex was only due to the misrepresentation of the fact.

19. In the decision reported in 2019 13 SCC (1) - Anuraj Soni Vs. State of Chhattisgarh, the Hon'ble Supreme Court has held as under:

"If it is established and proved that from the inception the accused who gave 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 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as denied under Section 375 of IPC and can be convicted for the offence under Section 376 of IPC.

The accused 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. The consent given by the prosecutrix was no 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 the Supreme 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 reduced 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, 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 had subsequently married, is no ground not to convict the appellant-accused for the offence punishable under Section 376 of IPC. The appellant-accused must face the consequences of the crime committed by him.

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 IPC."

20.Hence, I hold that the charge under Section 376 of IPC has been proved beyond reasonable doubt.

21.Yet another point that was raised by the learned counsel for the appellant is that the act committed by the accused is not rape as defined under Section 375 of IPC and it is only consensual sex and relied upon the decision reported in "Anuraj Soni Case" as cited supra, wherein, the Hon'ble supreme Court had held as follows:

“Even in Dhruvaram Murlidhar Sonar, upon which reliance has been placed by the learned counsel for the accused, in para 23, this Court has observed that there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complaint 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 latter falls within the ambit of cheating or deception, this Court observed and held



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as under: (SCC para 23)

"23. 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 the 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 IPC.""

22.The decision reported in 2021 LW (Cr1) 95 - Ramesh Vs. The State represented by its All Women Police Station, Panruti, Cuddalore District (Cr.No.19 of 2012) relied upon by the learned counsel for the appellant stands distinguishable on facts, wherein, Hon'ble brother Mr. Justice A.D.JAGADISH CHANDIRA, has held that "in this case, the evidence do not indicate that the promise by the appellant was false or that the prosecutrix engaged in sexual relations with appellant on the basis of promise on misconception".

23(a).On the contrary, in view of the discussions in the preceding paragraphs, the prosecution has let in positive evidence to establish the fact that the consent of prosecuterix had obtained by misconception of fact and the prosecution has clearly established that the promise of marriage was false from the beginning and it was given in bad faith and given with no intention of being adhered at the initial stage and the promise has immediate relevance to the victim of physical intercourse and therefore, the ratio laid down by the Hon'ble Apex Court in the case of Dr.Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra, as cited supra, wherein, the distinction has been made between the rape and consensual sex.

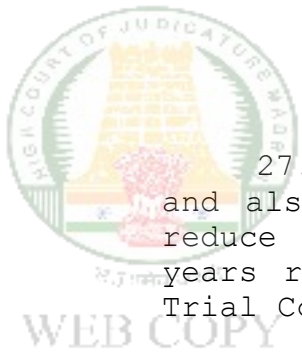


23(b). Here in the instant case in view of the co-gent evidence of PW1 coupled with the medical evidence of Doctors as discussed supra, this Court has given categorical finding in the proceedings paragraphs that the case in hand namely the act of the accused in having physical relationship with PW1 does not fall under the category of consensual sex.

24. It remains to be stated that the defence is unable to elicit any factor to give a contra indication that PW1 was aware of consequences of the concerned act. The evidence of PW2 and PW3 and the version of PW1 during the cross-examination suggest that the consent for sexual intercourse was only based upon misconception of fact of the accused and non-else.

25. Thus, this Court finds that as per the case of the prosecution the prosecutrix initially refused to have physical relationship but when the appellant allude her with promise of marry, had physical relationship and further, the prosecuterix called the accused number of times and asked him bout the marriage. However, the accused did not reply positively and the prosecutrix informed the incident to her family members when they found the accused inside the house of PW1 and the accused had expressed his unwillingness to marry and thus, on the evidence of PW1/prosecuterix, initially she did not gave her consent for physical relationship with the appellant/accused and as per the Section 114 (A) of the Indian Evidence Act, there is a presumption and the Court shall presume that she gave the consent for physical relationship with the accused only relied upon the promise made by the accused that he will marry her in future part of time. 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 prosecuterix and hence, this Court has no hesitation to come to the conclusion that the consent given by the prosecuterix was only on misconception of the fact and therefore, the same cannot said to be the consent so as to seclude the accused from the charge of rape as defined under Section 375 of IPC. And the Trial Court has rightly convicted the accused under Section 376 of IPC and hence, this Court held that the prosecution has proved charge under Section 376 of IPC beyond reasonable doubt. The suggestive case put forward by the defence that it was consensual sex, does not probablise to the preponderance of probability level. Accordingly, the learned Sessions Judge has rightly laid the conviction and hence, the conviction under Section 376 of IPC is hereby confirmed.

26. On the point of quantum of sentence both the parties are heard.



27. Taking into consideration of the evidence of PW1 & PW2 and also the act of the accused in entirety, I am inclined to reduce sentence period from ten rigorous imprisonment to seven years rigorous imprisonment and the fine amount awarded by the Trial Court is kept in tack.

28. In the result, this Criminal Appeal is partly allowed with regard to the sentence alone by reducing the sentence from 10 years rigorous imprisonment to 7 years rigorous imprisonment and fine amount kept in tack. Since the accused enlarged on bail pursuant to the order passed in CrI.M.P.No.610 of 2016, the Trial Court is required to issue necessary steps to commit the accused to undergo balance of period of sentence.

Sd/-

Assistant Registrar(CS-III)

//True Copy//

Sub Assistant Registrar

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To:

1. The Sessions and Mahila Fast Track Court,
Tiruvannamalai.
2. The Chief Judicial Magistrate,
Thiruvannamalai. [For Information]
3. The Inspector of Police,
All Women Police Station,
Chengam, Tiruvannamalai District.
4. The Inspector of Police,
Cheyyar Town Police Station,
Cheyyar.
5. The Superintendent
Central Prison, Vellore.
6. The Judicial Magistrate cum-District Munsif,
Chengam.
7. The Public Prosecutor,
High Court, Madras.

Copy To

The Section Officer,
Criminal Section,
High Court, Madras.

+1cc to M/s.S.Kumara Devan, Advocate, S.R.No.60113

CrI.A.No.45 of 2016

PMK(CO)

RLP(06/12/2021)