



BAIL SLIP

The Appellant/Accused namely Arulmozhi, S/o.Annamalai was directed to be released on bail in and by the order of this court dated 29.06.2017 and made in Crl.M.P.No.11427 of 2016 in Crl.Appeal No.742 of 2016 on the file of this court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 07.09.2021

PRONOUNCED ON : 24.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

Crl.A.No.742 of 2016

Arulmozhi ...Appellant/Single Accused

Vs.

The State represented by
The Inspector of Police,
Tiruvannamalai, All Women Police Station,
Thiruvannamalai,
Crime No.18 of 2012.

...Respondent/Complainant

Prayer: Criminal Appeal filed under Section 374(2) of Cr.P.C., against the impugned judgment of conviction dated 30.09.2016 rendered by Fast Track Court, Mahila Court, Thiruvannamalai, in S.C.No.131 of 2014.

For Appellant : Mr.V.Gopinath, Senior Advocate
for Mr.K.Balu

For Respondent : Mr.R.Vinoth Raja
Government Advocate

JUDGMENT

The convicted sole accused is the appellant herein.

2.This Criminal Appeal is preferred challenging the order of conviction and sentence passed in S.C.No.131 of 2014, dated 30.09.2016, whereby, the learned Mahila Judge, Fast Track Court, has convicted the accused for the offence under Section 376(1) of IPC and imposed sentence of ten years rigorous imprisonment



and to pay a fine of Rs.5,000/-, in default to undergo one year rigorous imprisonment.

3. Brief facts of the case:

(a). The respondent police filed charge sheet in Crime No.18 of 2012 for the offences under Sections 417 & 376(1) of IPC before the learned Judicial Magistrate No.II, Tiruvannamalai, and it was taken on file as PRC.No.17 of 2013 and thereafter, the case was committed to the Fast Track Mahila Court, Tiruvannamalai, in S.C.No.131 of 2014.

(b). During trial, to substantiate the case, on behalf of the prosecution, PW1 to PW17 were examined; Exs.P1 to P10 were marked and MO1 and MO2 were produced. On behalf of the defence, witnesses DW1 to DW4 were examined and Exs.D1 to D3 were marked.

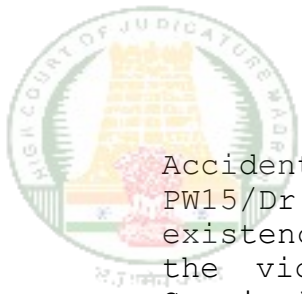
(c). On consideration of both oral and documentary evidence, the learned Sessions Judge, Fast Track Mahila Court, has found guilty against the accused for the offence under Section 376(1) of IPC alone and convicted and sentenced him under the said Section as stated supra. However, the learned Sessions Judge has found not guilty under Section 417 IPC and acquitted him from the said charge. Aggrieved against the same, the accused has preferred this Criminal Appeal before this Court.

4. Heard Mr.V.Gopinath, learned Senior Counsel, representing for Mr.K.Balu, counsel for the appellant/accused and Mr.R.Vinoth Raja, learned Government Advocate appearing for the respondent and perused the materials placed on record.

5. Mr.V.Gopinath, learned Senior Counsel appearing for the sole accused/appellant would contend that a false case has been foisted against the accused, since the accused was only in love with DW2 and not with PW1. PW1 is a poor lady and she is the friend of DW2. Taking advantage of the fact that DW1(Accused) is a rich man, a false case has been foisted to extract money. The learned senior counsel would draw my attention to the medical evidence of PW15/Dr.Usha Kalyani. PW1 has stated to P.W.15 that by consent, she had sex with known person. Further, stated that the alleged complaint even if it is taken on the positive side, could only be a consensual act of two adults and there is no offence as defined under Section 375 of IPC.

6. The learned Government Advocate made submissions in support of the Judgement of the Trial Court.

7. On a perusal of the records, it is seen that the victim was examined as PW1 and her mother was examined as PW2; PW3 is the brother of PW1; PW4 is the wife of PW3; PW5 is neighbour; PW6 and PW7 were turned hostile. PW8/Dr.Karthikeyan, had issued



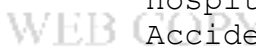
Accident Register for the victim on 02.09.2012 under Ex.P6, PW15/Dr.Usha Kalyani, had deposed regarding the fact coming into existence of Ex.P6/Accident Register recorded by Dr.Sinduja to the victim (since the said doctor has left the Government Service) and Ex.P7/Medical Examination of the victim girl by Dr.Sangeretha. PW10, PW11, PW12, PW13, PW14, PW16 and PW17 are the police witnesses, who could deposed regarding the discharge of their official duty in connection with receipt of Ex.P1/Statement given by PW1, Ex.P2/requisition given by PW1, preparation of Ex.P3/Observation Mahazar and Ex.P9/Rough Sketch, production of the accused and witnesses for the medical examination before the Doctor and filing of the final report, after completion of investigation.

8.Before the trial Court, the accused examined himself as DW1 and his lover namely, Neela was examined as DW2; independent witnesses were examined as DW3 and DW4. Copy of the FIR given by the mother of the accused against PW1 was marked as Ex.D1 along with call details and SMS sent from cell phone of PW1 to the cell phone of the accused. Photographs and Videos of DW2 in the company of DW1 & PW1 were marked as Exs.D2 & D3.

9.At the out set, in Ex.P1/Statement given by PW1/victim girl, dated 03.09.2013 subsequently, further investigation was dropped, in view of Ex.P10/requisition to drop further investigation given by PW1 on 21.09.2012 and thereafter, on requisition by PW1, under Ex.P2, dated 04.12.2012, again, investigation has been commenced. In the meanwhile, Ex.D1/FIR against DW1 & PW2 dated 06.10.(2014) was registered for the offences under Sections 294(b) and 506(i) IPC and Section 66(A) of the Information Technology Act, 2008.

10.The case of the prosecution, in brief, is that in the month of November, 2009, at 11.00 a.m., the accused/appellant went to the house of PW1/Dhanalakshmi and at that time, she was alone in her house and the accused told her that she is his wife and he is going to marry her and on promising to marry her, without her consent, the accused forcibly had sexual intercourse with her. Even after that also, on several occasions, the accused had sexual intercourse with her without her consent and finally, refused to marry her. Hence, the charge has been laid under Section 417 & 376(1) of IPC.

11.The case of the defence, in brief, is that the accused had love with DW2/Neela and PW1 is friend of DW2. DW2 belongs to Christian religion and the accused belongs to Hindu religion. So, there was some problem in connection with their marriage. The family of DW2 wants the accused to convert himself into Christian. So, the accused had not married DW2/Neela. In order to grab money from the accused and also with an intention to



12.As observed supra, initially, PW1 was admitted in hospital for allegedly taking Arali seeds (poison substance). Accident Registrar copy has been given by Dr.Sinduja, at the time of her admission, under Ex.P6, dated 02.09.2012, Statement of PW1 was recorded on 03.09.2012 under Ex.P1. As per the evidence of PW1 & PW2, further investigation were dropped and subsequently, requisition was given by PW1 under Ex.P2 for continuation on 04.12.2012. At the first instance, during the month of September, 2012, the accused and PW1 were subjected to the medical examination but, they were not willing to undergo medical examination as could be seen from the endorsement made on Exs.P4, P5, P10. As per the certificate issued by PW9/Dr.Ganesan, PW1 was not willing to undergo medical examination recorded by PW9 and issued report Ex.P5. Only after Ex.P2, dated 04.12.2012, PW1/victim again sent for medical examination on 11.12.2012 and Ex.P7 marked through PW15.

14(a).As per the version of PW1, she was working as a teacher at appellant's village at first floor of the house of the appellant at a Residential School runs for Nomadic Society Children. PW1 met the appellant/accused on 15.08.2009 at the first time. PW1 used to visit appellant/accused house, then by November, 2009, the mother of the accused fallen ill and she used to help her. On that November, 2009 itself, one day at 11.00a.m., the accused came to PW1's house, when she was alone, the appellant made promise to marry her as he liked her and had an intercourse and she was aged 21 during that time.

<https://hcservices.ecourts.gov.in/hcservices/>



per request of appellant, PW1 took post contraceptive medication and resulted in abortion. Further, the appellant took her to a Doctor, whose name could not be recalled, no name has been informed by prosecuterix and the said doctor has not been examined as witness and she was administered treatment with saline as an inpatient.

14(c).Further, PW1 heard that there was a proposal for marriage of appellant with one Malaimathi, who was working at office of Superintendent of Police and the said Malaimathi was also not examined as witnesses. Further, PW1, enquired this and it developed as quarrel. Further, PW1 acquired the help of her relative Sumathi, working at S.P. Office as Police and met the said Malaimathi. Strangely, that Sumathi also had not been examined as witness and PW1 informed that she is having recorded audio clip to confirm appellant is about to marry her and asked the said Malaimathi not to intervene in their way to getting married.

14(d).It is her further evidence that on 05.08.2012, the appellant enquired about contents of mobile and he snatched it and broke into pieces and the same has been placed as an explanation as to non production of such audio clip. Since, the appellant/accused refused to marry, PW1 at first instance met the appellant's mother and his mother, who refused to adhere the request. Later PW1 took assistance of PW2 by informing her that she loved the appellant. PW1 accompanied with PW2 and went to meet the mother of appellant, she refused to adhere that request. The appellant came to PW1's office on the next day and PW1 recorded a conversation and quarrel. Later, PW1 said to have been consumed poisonous seeds (Arali) near Girivalam Patha and admitted into hospital and informed appellant. In the result, the appellant and one Siva came to spot and taken her to Government Hospital, Tiruvannamalai and informed to PW3 and Ex.P6/AR Copy was recorded, wherein, statement of deceiving her with promise and rape never spelt out, and admittedly, PW1 was conscious assumes significance.

15.At this juncture it remains to be stated that Ex.P6/Accident Registrar copy was issued on 02.09.2012, Ex.P1/Statement recorded from the PW1 on 03.09.2012 and AR Copy/Ex.P6 issued by Dr.Sinduja was marked through PW15/Dr.Ushakalyani.

16.It is further case of the prosecution that after she gained senses, when PW2 & PW3 asked about details, she conveyed that the appellant had intercourse in the year 2009 November and then for three years. An intimation delivered to the police, in subsequent to AR entry, the statement was recorded under Ex.P1 by PW10/Mr.Alagesan, Special Sub Inspector of



Police, on 02.09.2012, which is the first statement before the police by PW1 and the same was marked Ex.P1/complaint. The respondent police has registered FIR in Crime No.18 of 2012 and AR copy was recorded by Dr.Sinduja, but she has not been examined as a witness. It is the further case that on 12.12.2012, the issue has been settled between the parties and PW1 has executed a letter to withdraw the accusation independently and a requisition for revival of investigation was given by PW1 on 04.12.2012.

17.The records reveals that in the meanwhile, it is seen that after compromise talks between the respective parties, the parents of the appellant/accused gave a complaint against PW1 and Advocate Sankar, Settu, for theft of Rs.1,00,000/- from their house. Having antagonised by of FIR against P.W.1 and two local advocates under Ex.D.1, PW1 had executed Ex.P2 dated 04.12.2012 to investigate the case further and produced the photographs in MO1 series taken at the of enrolment function of appellant as an advocate and a CD containing the talks between the appellant and PW1. After request for further investigation, under Ex.P2, she was sent to medical examination as per the referral of jurisdiction Magistrate and Ex.P7 dated 11.12.2012, Report on victim girl prepared by Assistant Surgent Mrs.Sangeetha, but she had not been examined as witness and PW15/Usha Kalyani deposed on records and her evidence is discussed infra admitted that there is no external injuries, no traces of spermatozoa particles and laboratory investigation turned negative. The Report clarifies that even hymen is not intact, there is no assertion about the abortion by the post contraceptive medicines or by DNC. Further, a specific query of possibility of abortion four months in prior from December 2012 also negated by the Medical Report. Further, the report dated 11.12.2012 reveals that the two fingers test resulted in penetration at Ease.

18.On a close scrutiny and scanning of the evidence of PW1, PW2, the entire case rests to prove the 'issue of consent' obtained by deceiving her by making a promise of marriage. PW2/mother of PW1 could deposed that PW1 was aware of incident of rape and subsequent intercourse occurred from 2009 to 2012 and it came to her knowledge (PW2) only on 02.09.2012, when PW1 regained her consciousness at Hospital as elicited in cross examination. During the examination of PW1 she reveals no such information about such intercourse and the evidence is silent and vacuum on that particular reception of knowledge of commission of alleged rape. PW3/brother of PW1 never spelt about the alleged intercourse upon the bad promise and he has just narrated a simple refusal of appellant to marry PW1.

19.Hence, from the evidence of PW1 with regard to the



incident of alleged rape during November 2009 she was totally silent for about three years and she has not disclosed the alleged sexual offence by the accused to any one. PW2, PW3 & PW4 (relatives) came to know about the alleged sexual intercourse between the accused and PW1 only after three years when the same was said to have been disclosed by PW1 on 02.09.2012 in the Government Hospital while taking treatment. It remains to be stated that in the statement of PW1 under Exs.P6 & P7, nothing was spelled out regarding the alleged promise made by the accused to get the consent which was said to have been obtained by deception assumes significance. As per Ex.P6/Accident Register copy dated 02.09.2012, PW15 admitted that no reason has been whispered for consuming alleged poison substance viz., Arali Seeds and it is her further evidence that nothing has been found in Ex.P6 that the person who PW1 loved has betrayed and sequences thereto PW1 had consumed the said seeds. There is no such whisper. She also deposed that there is no sign of consumption of Arali seeds on refusal to marry her. It is elicited further in her cross examination that PW1 has not whispered anything to the doctor that the sexual intercourse was against her willingness or against her consent and it is specifically stated by PW1 to the doctor at the time of the admission that "by consent she had sex" with the known person assumes significance.

20.Furthermore, it is relevant to state that at the earliest point of time during September 2012 when Dr.Sindhuja had examined PW1 and the accused, both said that they are not willing to undergo medical examination, as could be seen from the version of PW8 & PW9/doctor witnesses, who have recorded the unwillingness of both the appellant and the victim for medical examination. As could be seen from the endorsement made by the Doctor in Ex.P4 and Ex.P5, PW10/Alagesan, who is the Special Sub Inspector of Police has recorded the statement of the accused at the earliest point on 02.09.2012 and he in his cross examination has categorically admitted that PW1 has not gave any statement under Ex.P1/complaint that she came to know one Malaimathi is about to get marry with the accused and she contacted Malaimathi and conveyed her interest with the accused. No such statement has been given under Ex.P1/Complaint to PW10/Special Sub Inspector of Police. PW1 has not whispered anything under Ex.P1/complaint recorded by PW10 that the accused and one Advocate Siva took PW1/victim girl and admitted in the hospital on 02.09.2012 and hence, this Court finds that in view of the answer elicited in the cross-examination of PW10/Special Sub Inspector of Police, who had recorded Ex.P1/complaint at the earliest point of time, it appears that PW1 has not whispered anything regarding the incident alleged to have taken place with the one lady constable Malaimuthu and PW1 has not whispered anything regarding her admission in Government Hospital on



02.09.2012 was by the accused and hence, I find that the version of PW1 on these material facts are found to be at material contradiction with Ex.P1/complaint as admitted by PW10 (police witness).

WEB COPY

21.PW15/Dr.Usha kalyani as extracted supra admitted in the cross examination that PW1 has not stated anything with the Doctor about the alleged deceit promise at the time of recording of statement of AR copy on 02.09.2012. Further, she had admitted that intercourse between the parties was a "consented one" as recorded in the said Ex.P6, goes to show that the version of PW1 regarding the concerned act against her willingness, the accused had sexual intercourse, appears to be embellishment amounting to material contradiction on the material issue in connection with the charge under Section 376 of IPC.

22.Thus, on a combined reading of the discussions in the preceding paragraphs, the version of the PW1 in the witness box is found to be at material contradiction with Ex.P1/statement given at the earliest point of time. Subsequently, the parties are appears to have compromised and investigation was dropped.

23. Suggestive case of the defence:-

From the evidence of DW1, it is seen that DW2/mother of DW1 lodged a complaint and Ex.D1/FIR was registered in crime No.565 of 2014 on 06.10.2014 for the alleged offences under Sections 294(b), 506(i) of IPC and 66(A) of the Information Technology Act, 2018 and along with the history of the call sheet received from the cell phone of the accused and from the cell phone of PW1 and the complaint annexed with the SMS received from PW1 to the cell phone of the accused and print out was also enclosed. The SMS No. 64 assumes significance. The literal transaction of SMS.No.64 runs as under "Finally I want Rs.5,00,000/- cash; I will leave you. I will not disturb you finally I make it to you bring Rs.5,00,000/- you can live peacefully.

24.Thereafter, it appears that PW1 has given requisition under Ex.P2 for revival of the complaint for further investigation, dated 04.02.2012. Incidentally, it is the expiry of 90 days for filing the charge sheet in Ex.P1/complaint. On the above factual position, the accused stands charged by the trial Court for the offence under Section 376(1) of IPC.

25.In this occasion, it is necessary to refer the judgment of the Hon'ble Apex Court in the case of State of Haryana Vs. Ram Singh, wherein, it has been held as follows:-

'Incidentally be it noted that the evidence tendered by defence witnesses cannot always be



termed to be a tainted one - the defence witnesses are entitled to equal treatment and equal respect as that of the prosecution.''

26. Further, in the case of Anil Sharma Vs. State of Jharkhand LNIND reported in 2004 SC 590: 2004 (5) SCC 679: AIR 2004 SC 2294, the Hon'ble Apex Court in Paragraph No.15, has held as follows:-

'15. So far as the question as to whether equal treatment was being given to the evidence of prosecution and defence witnesses, is concerned, there can be no quarrel with the proposition in law".

27. Further, this Court finds that it is the case under Section 376(1) of IPC and the case of prosecution has to come up with two integral parts such as "against her will" and "without her consent". For these two reasons, essential precondition has to take aid from Section 90 of IPC, to draw an interference of presumption against the consent under Section 114-A of the Indian Evidence Act. In the case on hand, the prosecution has failed to establish that event of commission of rape itself committed by the appellant.

28. The evidence of PW1, forming the basis of prosecution, reveals that there is no specific time, place and date quoted by her and the case has been built up by saying that from the year of 2009 to 2012 for about three years there was casual encounters and the first incident identified as occurred by November, 2009 at her home, the appellant said to have been made the promise and had an intercourse with her. Ex.P7, medical statement recorded on 11.12.2012, reveals a contradictory statement that the prosecuterix alleged to have been raped by the appellant at "Kattabomman Street, Thiruvannamali.

29. On a perusal of Exs.P1 & P2/Statements of PW1 at different points of time namely 03.09.2012 & 04.12.2012 respectively, the contents therein appears to be run contra to each other and hence, they are found to be inter contradictory. Further, the prosecution has failed to prove the event of Rape itself, either that occurred on a day of November 2009 or the subsequent period. Further, the integral parts of "against her will" and "without her consent" has not been established. Both factors negative by PW1 herself in the evidence.

30. From the evidence of DW1 & DW2 coupled with the documentary evidence filed by the defence it is seen that PW1/prosecuterix aware of that the appellant was in love already and PW1 just intended to marry the appellant, the case



of rape advanced by her. The case of the prosecution with regard to the alleged incident of rape itself stands unproved and the question of consent by misconception becomes futile.

31.From the version of PW1, this Court finds that there is no seduction, at all to that effect. Even they would have fallen love, the youth blinding them futility of their relationship.

32.Admittedly after perusing the evidence of PW1, I find that there is a material contradiction between the contents in Ex.P1 and Ex.P2. The alleged source of information for PW1 regarding the marriage arranged between the accused and the another person, I find that the witnesses Sumathi and Malaimathi are found to be material witnesses and non production of the evidence of Sumathi and Malaimathi, found to be major blow in the case presented by PW1 and hence, I find that Ex.P2, as a result on a after thought and belated. Hence, the version of PW1 in connection with Ex.P2 appears to be surrounded with Sea of suspicion.

33.Mere delay in sexual offence is not fatal to the prosecution and it is pivotal that the delay has to be explained by the proper reason by the prosecution. In the instant case, the explanation offered by PW1/prosecutrix for delay in reporting the incident from 2009 to 02.09.2012 does not inspire the confidence of this Court. Further, initial complaint/Ex.P1 there was a delay of three months between the period 02.09.2012 to 04.12.2012. As observed earlier, the subsequent requisition of PW1 for revival of complaint under Ex.P2 appears to have been came into existence at the 90th day after the first FIR, it also cause a cloud over the version of PW1.

34.According to the version of PW1 she was having physical relationship with the accused since 2009 and for about three years she had physical relationship with the accused and also claimed that she got pregnancy twice and also aborted by using oral medicine. For three years she was not disclosed the relationship either physically or alleged rape to the parents and the same was disclosed by her when she was admitted in the Government Hospital. Though, she could state that she was admitted in the hospital by the accused and his friend, the evidence of the doctor found to be in contra to the said version of PW1. Furthermore, she has not whispered anything to the doctor about the alleged relationship between the parties or she has not disclosed that she has consumed the so called Arali seeds, since the accused was engaged with one Malaimathi and she has not whispered anything regarding as to why she consumed the said Arali Seeds as could be seen from the evidence of PW15/Dr.Ushakalyani. PW1's evidence runs contrary to the medical



examination of PW1 found different and inconsistent and the contradiction with the later part of the evidence and hence, I find that improvement made by PW1 destroys the main plank of the prosecution that there was a promise to marry after the first incident of rape subsequently, the accused and PW1 had physical relationship, it appears to be self contradictory. In view of the existence of material contradiction as discussed supra, coupled with documentary evidence of Ex.D1& Ex.D2 and also coupled with sequences of coming into existence of Ex.P2 and Ex.P8/medical evidence, I find that the suggestive case of the defence is more probable than the prosecution case.

38.PW1 fully aware that the appellant/accused is a married man and voluntarily and consciously consent to have sexual intercourse with him and there is nothing on record to show her consent was in consequence of any misconception of fact.

39. Hence, I find that both the accused and PW1 are fully matured adults, they know the consequences of what they are doing. Hence, in view of the material contradiction as elicited supra, I find that the version of PW1 does not pass the test of reliability and trustworthiness to support the charge under Section 376 of IPC. Further, the alleged factum of sexual intercourse and she was made pregnant and got aborted, has also not supported by medical evidence. Further, the version stated by PW1 in the witness box appears to be materially contradict with the other prosecution witnesses as could be seen from the discussions in the preceding paragraphs. Furthermore, from Exs.D1 & D2, SMS No.64 remains unchallenged during the examination of DW1 and also caused serious doubt as to the bonafidies of Ex.P2/letter for revival of investigation, it appears to be surrounded with sea of suspicious since it lacks bonafidies for re-opening the complaint.

40.Hence, I find that it is totally unsafe to rely on the version of PW1, it is bristle with infirmities and lacks credibility. Hence, this Court finds that the prosecution has not let in any positive evidence in support of the charge under Section 376 of IPC and consequently, failed to prove the case of the prosecution beyond reasonable doubt and by operation of law, the benefit of doubt goes to the accused.

41.Giving benefit of doubt, the accused is acquitted of the charge under Section 376 of IPC. Consequently, the conviction and sentence passed by the learned Sessions Judge for the offence under Section 376 of IPC are liable to be set aside. The trial Court has already acquitted the accused from the charge under Section 417 of IPC.



WEB COPY

42. In the result,

(i). The Criminal Appeal stands allowed.

(ii). The order of conviction and sentence passed in S.C.No.131 of 2014, by the learned Mahila Judge, Fast Track Mahila Court, Thiruvannamalai, dated 30.09.2016, are hereby set aside.

(iii). The appellant herein/accused is acquitted of the charges framed against him.

(iv). Bail bond executed by the accused stands cancelled and the fine amount paid, if any, is ordered to be returned to the accused.

Sd/-

Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

dua

To:

1. Mahila Judge,
Fast Track Court,
Thiruvannamalai.
2. The Inspector of Police,
All Women Police Station,
Thiruvannamalai.
3. The Public Prosecutor,
High Court, Madras.
4. The Judicial Magistrate,
Thiruvannamalai.
5. The Chief Judicial Magistrate,
Thiruvannamalai.
6. The Superintendent
Central Prison, Vellore.

Copy To

The Section Officer (Records)
Crl.Section, High Court, Madras.

+1cc to M/s.K.Balu, Advocate, S.R.No.61347

Crl.A.No.742 of 2016

KSM(CO)

RGA(08/12/2021)