



BAIL SLIP

The Appellant/Petitioner/Accused - 1 namely Vengateshwaran, S/o. Late Chinnasamy was directed to be released on bail as per the order of this Court dated 26.02.2020 made in CRL.M.P.No.672 of 2020 in CRL.A.No.436 of 2019 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 26.11.2021

CORAM

THE HON'BLE MR.JUSTICE A.D.JAGADISH CHANDIRA

CRIMINAL APPEAL NO.436 OF 2019

Vengateshwaran

... Appellant/Accused-1

vs.

The State represented by
Inspector of Police,
All Women Police Station,
Attur, Salem.

... Respondent/Complainant

Criminal Appeal filed under Section 374(2) of Criminal Procedure Code, to set aside the conviction and sentence imposed in S.C.No.133 of 2015, dated 11.06.2019 by the learned Mahila Court, Salem.

For Appellant : Mr.B.Ullasavelan for
Mr.A.Swaminathan

For Respondent : Mr.S.Sugendran
Government Advocate (Crl.Side)

JUDGMENT

The Appeal is filed against the convicting and sentence imposed in S.C.No.133 of 2015 by the learned Judge, Mahila Court, Salem.



2. Brief facts of the case as under:-

(i) On 15.07.2013, while P.W.10 was working as Sub-Inspector of Police in All Women Police Station, Attur, P.W.1/prosecutrix had given a complaint, Ex.P1 alleging that she was born on 19.10.1993 and had completed her education upto X standard and that about two years prior to the date of complaint, the first accused Venkateshwaran, the appellant herein, who is a neighbor, had induced her on the false promise of marrying her and committed rape on her in the corn fields and that thereafter, he had continued to have sexual intercourse with her on several occasion, due to which, she became five months pregnant and that he had taken her to a private hospital and caused abortion against her will and thereafter, he made arrangements to marry another girl and therefore, on 12.07.2013, P.W.1 along with her mother and some of her villagers had gone to the house of the accused and questioned him and at that time, A2 to A4 had abused her with filthy language and pulled her hair and assaulted her with hands and kicked her and also beat her with broom and further they also threatened to set her on fire. Therefore, on the advice of the villagers, she had given the complaint to the police.

(ii) P.W.10, Sub Inspector of Police received her complaint and registered the same in C.S.R.No.240 of 2013 and thereafter conducted preliminary enquiry and found that the incident had occurred on 23.07.2013 and registered a case in Crime No.12/2013 for offences punishable under Sections 417, 376, 313, 294(b), 323, 506 (ii) and 355 IPC and the F.I.R. is Ex.P.10. Thereafter, PW10 had sent the complaint, F.I.R. and other documents to Judicial Magistrate I, Attur and also forwarded the copies of the same to the superior officers.

(iii) Thereafter, since the Inspector of Police had gone on leave, PW10 had taken up the case for investigation. On 24.07.2013, at 10.00 a.m. she had gone to the place of occurrence and prepared the observation mahazar and rough sketch in the presence of PW3. The observation mahazar is Ex.P2 and the rough sketch is Ex.P11. PW10 had examined P.W.1, 2, 4 & 5 and recorded their statements and thereafter, she had sent P.W.1 the prosecutrix for medical examination with the medical memo through the Head Constable Selvarani and since the Doctor at Attur Government Hospital had directed the victim to be taken to Salem Government Hospital, PW10 had submitted a requisition to Judicial Magistrate I for conducting of medical examination. The requisition is Ex.P12.

(iv) On receipt of the requisition, Ex.P12 from the Inspector of Police, PW10, Judicial Magistrate I, Attur had issued letter, Ex.P6 to the Government Hospital for conducting



medical examination on PW1.

(v) On receipt of Ex.P6, the Doctor, PW8 had examined PW1 on 25.7.2013 and issued medical certificate, Ex.P7 and Age Certificate Ex.P8 and Reply for the queries of the Judicial Magistrate, Ex.P9.

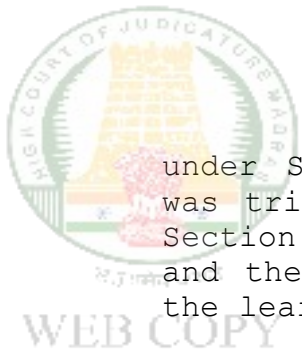
(vi) On 25.07.2013, the Inspector of Police PW12 had continued with the investigation of the case and enquired the witnesses and recorded their statements. She had taken the case for further investigation and once again examined the witnesses and recorded their statements. On 31.10.2013, she had submitted a requisition to Judicial Magistrate I, Attur in Ex.P16 for conducting potency/masculinity test on the first accused and based on the directions issued by Judicial Magistrate I, Attur, by letter dated 5.11.2013, Ex.P3, sent the accused for the test to the Government Hospital, Salem for conducting the potency/masculinity test on the first accused.

(vii) On receipt of Ex.P3, the Doctor, PW6 had conducted the potency/masculinity test on the first accused on 6.11.2013 and issued certificate Ex.P4 dated 6.11.2013 and Age Certificate, Ex.P5 dated 7.11.2013.

(viii) Subsequently, PW12 had also enquired Dr.Sangeetha, PW8, who had conducted medical examination on the victim girl, PW1 and recorded her statement. PW12 had also enquired Dr.Gokularamanan, PW6, who had conducted potency/masculinity test on the first accused and recorded his statement. On 6.11.2013, PW12 had completed the investigation and altered the FIR to one under Sections 417, 376, 313, 294(b), 323(b), 355 and 506(ii) IPC and the altered Report is Ex.P17. Thereafter, PW12 was transferred and hence, she had handed over the same to her successor.

(ix) Subsequently, the Inspector of Police, PW11, who took up the investigation, had given requisition to the Chief Judicial Magistrate, Salem for recording the statement of PW1 under Section 164 Cr.P.C and the requisition is Ex.P13. The direction of the Chief Judicial Magistrate to Judicial Magistrate II, Attur to record the statement of PW1 is Ex.P14 and PW1 was produced before Judicial Magistrate II, Attur and her statement was recorded and the same is Ex.P15. Thereafter, on completion of the investigation, PW11 had filed the charge sheet.

(x) The charge sheet was taken on file in P.R.C.No.11/2015 by Judicial Magistrate I, Attur and on appearance of the accused, copies of the papers were furnished to the accused



under Section 207 Cr.P.C and thereafter finding that the case was triable by the Court of Sessions, committed the case under Section 209 Cr.P.C. to the District and Sessions Court, Salem and the case was taken up in S.C.133 of 2015 and made over to the learned Trial Court for trial.

(xi) After committal, but, before Trial, the second accused died and thereby, charges against the the second accused got abated.

(xii) The Trial Court, based on the materials available on record, framed charges punishable for offence under Sections 417, 376 and 313 of IPC as against the first accused and for offence punishable under Sections 294(b), 323, 355 and 506(ii) of IPC as against the A2 to A4. When the accused were questioned, they denied the charges and pleaded not guilty and sought to be tried.

(xiii) On the side of the prosecution, PW1 to PW12 were examined and Ex.P1 to Ex.P17 were marked. No Material Object was cited and no evidence was let in on the side of the accused.

(xiv) The Trial Court, after perusing the materials on record and hearing the accused, while acquitting A3 and A4 from charge for offence under Sections 294(b), 323, 355 and 506(ii) IPC, found the first accused/appellant guilty under Sections 417, 376 and 313 IPC and sentenced him to undergo

(a) rigorous imprisonment for one year for offence under Section 417 IPC and to pay a fine of Rs.1000/- in default to undergo simple imprisonment for one month;

(b) rigorous imprisonment for seven years for offence under Section 376 IPC and to pay a fine of Rs.50,000/- in default to undergo simple imprisonment for six months;

(c) rigorous imprisonment for three years for offence under Section 313 IPC and to pay a fine of Rs.5000/- in default to undergo simple imprisonment for three months.

3. Assailing the judgment of conviction and sentence, the learned counsel for the appellant has made his submissions as under:-

(i) A clear case of consensual affair between two consenting adults has been projected as the case of rape. Admittedly, the accused/appellant and the prosecutrix are neighbours known to each other for a long time and the brother of the prosecutrix



and the appellant are friends and thereby there has been a relationship between them for a long time.

(ii) It is the case of the prosecutrix that she and the first accused were having affair for two years prior to the complaint and that once she had become pregnant by five months and the accused had taken her to a private hospital and caused abortion to her against her will. Whiles, the entire case of the prosecutrix is unbelievable that they had sexual intercourse on several occasion, however, no other independent witness was examined to prove that they were having relationship with each other.

(iii) The prosecution has not let in any evidence to prove that the consent of the prosecutrix was obtained under fraud or her consent was gathered by fear or misconception and taking into consideration the circumstances of this case, it cannot be termed as the case of rape. The accused can be convicted for rape if there is evidence that the intention of the accused was mala fide or that he had clandestine motive and the promise was made only for the purpose of satisfying his lust. 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. Further, 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.

(iv) The medical evidence also does not support the case of rape as alleged by the prosecutrix. Further, no medical evidence has been let in by the prosecution to prove that the victim became pregnant and that the petitioner had caused abortion against her will by taking her to a hospital at Attur.

(v) The case of the prosecutrix is unbelievable and filled with exaggeration and embellishment and the Trial Court, finding that the averments with regard to the incident on 12.07.2013 is false, had acquitted the other accused in respect of the charges framed against them whereas on the same set of evidence, had wrongly found the appellant guilty.

4. In support of his contention, the learned counsel for the appellant relied on the following decisions of the Apex Court:-

(i) Pramod Suryabhan Pawar Vs State of Maharashtra ((2019) 9 SCC 608)).

(ii) Dr.Dhruvaram Murlidhar Sonar Vs State of Maharashtra ((2019) 18 SCC 191).



5. Per contra, Mr.S.Sugendran, learned Government Advocate (Criminal Side) would submit that the prosecution, by cogent evidence, had proved the case of rape. He would further submit that the solitary evidence of the prosecutrix is sufficient to convict the accused for rape as the victim has cogently spoken about the promise made by the accused and on such false promise having sexual intercourse with her. However, he fairly conceded that no medical evidence has been let in by the prosecution to prove the charge under Section 313 IPC.

Further, he would submit that in this case, when the defacto complainant, on coming to know that arrangements were made by the family of the first accused for his marriage with some one else, she, along with her parents, had gone to the house of the first accused and an agreement was entered into between the parties pursuant to which, the complaint was given and it was registered as C.S.R and enquiry was conducted and during that time, the first accused and his family members had agreed for the marriage and there was also a settlement between the parties to conduct at marriage at Kodumudi, however, thereafter, the accused had approached the Court and obtained anticipatory bail and thereby they had cheated the victim. In support of his contention, the learned Counsel relied on the Judgment of the Apex Court in Anurag Soni Vs State of Chhattisgarh ((2019) 13 SCC 1).

6. The learned counsel for the appellant, in reply, submits that the case in Anurag Soni Vs State of Chhattisgarh (cited supra) will not be applicable to the facts of this case. he would submit that in that case, the accused was already engaged to one Priyanka Soni and during the relevant time, suppressing the engagement with Priyanka Soni, the accused was said to have, on the promise of marriage, had consensual intercourse with the prosecutrix therein. He would submit that even as per the prosecutrix, they were having relationship for a period of two years and even assuming that the consent was given under misconception and the misconception of fact is no consent in the eye of law, the misconception of fact has to be in proximity of occurrence and cannot be spread over a period of two years. He would also submit that in this case, the parents of the accused are said to have searched for a bride for the first accused and the prosecutrix is said to have gone to the house of the proposed bride and the accused and created a problem in the family and only thereafter, there had been a difference of opinion between the parties and further the relationship being spread over for a period of two years, the consent given by the prosecutrix was conscious and it was an informed choice made by her after due deliberation and that even as per her evidence, on several occasion, both of them had met each other several times in the very late night hours in open and public places viz.,



corn fields and bathrooms. The learned counsel for the appellant would submit that it is only an improvement during trial and nothing had been stated about the agreement or settlement between the parties either in the statement given to the police or in the 164 Statement recorded before the learned Magistrate. He further submitted that no specific question had been put to the accused with regard to the settlement between the parties and the refusal of the family members for marriage after obtaining the anticipatory bail.

7. Heard the learned counsel appearing for the parties.

8. Before discussing the evidence in this case, it is relevant to refer to the judgments relied on by the learned counsel for the appellant.

9. In Pramod Suryabhan Pawar Vs State of Maharashtra ((2019) 9 SCC 608)), the Apex Court has held as under:-

"14 In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In Anurag Soni v State of Chhattisgarh ((2019) 13 SCC 1), this Court held:

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who 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 the 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 defined under [Sections 375](#) of the IPC and can be convicted for the offence under [Section 376](#) of the IPC."

Similar observations were made by this Court in Deepak Gulati v State of Haryana (Deepak Gulati) ((2013) 7 SCC 675)



that from the very beginning, the accused had never really intended to marry her.”
(Emphasis supplied)

17. In *Uday v State of Karnataka* (2003) 4 SCC 46, the complainant was a college going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors:

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of [Section 90](#) IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other.



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It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married..."
(Emphasis supplied)

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."

10. In *Dr.Dhruvaram Murlidhar Sonar Vs State of Maharashtra* ((2019) 18 SCC 191), it has been held as under:-

" 15. [Section 375](#) defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the woman is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her 'will'" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

16. [Section 90](#) of the IPC defines "consent" known to



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be given under fear or misconception:-

"Section 90: Consent known to be given under fear or mis- conception.—A consent is not such a consent as it intended by any section of this Code, if the con- sent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception"

17. Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Con- sent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

18. In Uday v. State of Karnataka (2003) 4 SCC 46, this Court was considering a case where the prosecutrix, aged about 19 years, had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus:-

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the con- sent given by the prosecutrix to sexual inter- course 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 mis- conception 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 inter- course is voluntary,



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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.

.....

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 when 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."

19. In *Deelip Singh alias Dilip Kumar v. State of Bihar*, (2005) 1 SCC 88, the Court framed the following two questions relating to consent:-



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(1) Is it a case of passive submission in the face of psycho- logical pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in?

(2) Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her"?

In this case, the girl lodged a complaint with the police stating that she and the accused were neighbours and they fell in love with each other. One day in February, 1988, the accused forcibly raped her and later consoled her by saying that he would marry her. She succumbed to the entreaties of the accused to have sexual relations with him, on account of the promise made by him to marry her, and therefore continued to have sex on several occasions. After she be- came pregnant, she revealed the matter to her parents. Even there- after, the intimacy continued to the knowledge of the parents and other relations who were under the impression that the accused would marry the girl, but the accused avoided marrying her and his father took him out of the village to thwart the bid to marry. The efforts made by the father of the girl to establish the marital tie failed. Therefore, she was constrained to file the complaint after waiting for some time.

20. With this factual background, the Court held that the girl had taken a conscious decision, after active application of mind to the events that had transpired. It was further held that at best, it is a case of breach of promise to marry rather than a case of false promise to marry, for which the accused is prima facie accountable for damages under civil law. It was held thus:-

"35. The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant



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reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that "later on", the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday case at para 24 come to the aid of the appellant".

21. In [Deepak Gulati v. State of Haryana](#), (2013) 7 SCC 675, the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had



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clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be leveled against the accused.

22. Recently, this Court, in [Shivashankar @ Shiva v. State of Karnataka & Anr.](#), disposed of on 6 th April, 2018 (2019) 18 SCC 204, has observed that it is difficult to hold that sexual inter- course in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under:-

"4. In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

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 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

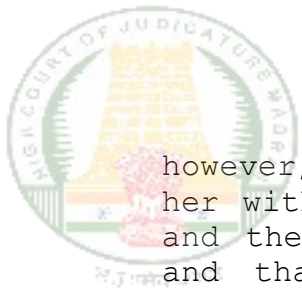


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be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under [Section 376](#) of the IPC."

11. Now analyzing the evidence of this case in consonance with the judgments referred to above, it is seen that PW1, the prosecutrix had deposed that she was born on 19.10.1993 and she had completed her education upto X standard and that the accused are neighbours and that her elder brother and the accused are friends. She further deposed that the accused had got phone number from the parents and called the prosecutrix one day during the year 2010 and she had attended the phone and informed him that if it is known to her parents, they would shout at her, however, the accused had continued to call her and tell her that he was in love with her and he would marry her. She had further deposed that they were conversing over phone for several months and that he had called her to come alone and told her that if she does not come, he would visit her house and thereafter she had gone to the corn fields and that he had promised to marry her and had sexual intercourse with her against her will and the incident had happened during the year 2010.

12. It is further evidence of PW1 that thereafter, they had been repeatedly having sexual intercourse and that she got conceived and she had informed the same to the accused and that he had got her pills and that even after taking those pills she didn't get aborted and thereafter she was 5 months pregnant and that thereafter when the parents had gone out of station, she had gone along with the first accused/appellant in motorcycle to a private hospital in Attur where abortion was caused to her and that later it came to be known to her parents and they questioned her and assaulted her and she went to the extent of death and later, when she came to know that the parents of the accused were searching for a bride for him, she had gone to the house of the first accused and questioned him and thereafter she had gone to the house of the proposed bride and informed her about their relationship to her and thereupon the marriage of the first accused was stopped. It is her further evidence that the proposed bride's parents had asked the parents of the accused to bring the accused and the parents of the accused had bluffed that he had gone out of station. PW1 has further deposed that she had fallen on the feet of the parents of the accused and requested them to get her married to the first accused, however, they had refused to arrange for the marriage. It is her further evidence that she had gone to the house of the first accused and questioned his parents and his brother,



however, they had driven her out of their their house by abusing her with filthy words and assaulted her by hands and broomstick and thereafter, she had taken the panchayatdars of the village and that they had also requested the parents of the first accused to get the first accused married with her and only when they refused agree for the marriage, she had gone to the police station. It is her further evidence that the incident had happened on 12.07.2013 and she had given the complaint on 15.07.2013.

13. A perusal of the evidence of PW2, mother of the prosecutrix it is clear that she had deposed that her daughter had studied upto tenth standard and thereafter, she had stopped going school and was staying at home and she was 23 years old by then and that the accused are known to her. It is her further evidence that after stopping her schooling, PW1 used to rear cattle and that she and her husband used to go for work in the morning itself and her son used to go for driving job. She further deposed that taking advantage of the loneliness of her daughter, the accused had developed relationship with her and raped her on the promise to marry her. She further deposed that the incident had happened during 2010 and that her daughter had become pregnant, however, they were not aware of it and when they had gone to Thirupathi, the first accused had taken her daughter to a hospital in the nearby town and had caused abortion to her and thereafter he had been continuing his relationship with her daughter for 3 years and after some time, he had decided to marry some other girl and on coming to know of that, her daughter had gone to the house of the first accused and questioned him and that the first accused along with his mother and other relatives abused her filthy words and assaulted her with hands and broomstick and thereafter, she had gone along with Panchayat President and Vice President of the Village to the house of the accused and during that time, the accused had absconded and the panchayatdars had informed her that the accused would not listen to them and thereby they had asked her to give complaint to the police and only thereafter, they had given the police complaint.

14. P.W.3 is the witness to the observation mahazar. P.W.4, father of the prosecutrix, had deposed that the accused had raped his daughter in the corn fields and that her daughter had become pregnant and that he came to know that from the nearby field owners and thereafter, he along with his daughter, wife, President and Vice President of the Village had gone to the house of the first accused them and threatened to do away them. He further deposed that the second accused, father of the accused had agreed for the marriage and the mother and step mother of the first accused, respectively accused 3 & 4 did not



agree for the marriage. He continued that later, the father of the first accused had come to him and fixed the date of marriage and later the younger brother and father of the first accused had demanded 20 sovereigns of jewels, bike and other house hold articles and thereafter, marriage date was fixed and later the accused had not agreed for marriage.

15. PW5, the President of the Village, had not supported the case of the prosecution. PW6, Doctor, who conducted potency test of the first accused, deposed that he had examined and given his opinion that there is nothing to suggest that the accused is impotent and he had also opined that the accused is about 32 years. The directions given by the learned Magistrate for conducting medical examination is marked as Ex.P.3, the opinion of potency is marked as Ex.P4 and the certificate of age is marked as Ex.P5.

16. PW7, who has been examined to speak about the relationship between the first accused and the prosecutrix, had not supported the case of prosecution.

17. PW8, the Doctor, who conducted medical examination of the prosecutrix, had deposed that she had examined the prosecutrix on 25.07.2013 and the prosecutrix had informed her that she was in love with the first accused for three years and that during 2011, two years prior to the examination, she had sexual intercourse with the first accused for several times and that she had become pregnant during 2011 and she had conducted abortion in a private hospital at Attur. PW8 further deposed that the prosecutrix had told the Doctor that thereafter, she had sexual intercourse with the first accused for several times and they had used contraceptives during that time. The Doctor had deposed that no external injuries were found on on the victim and there was no symptoms of the victim having undergone abortion two years ago and thereafter based on the directions of the learned Magistrate, she had conducted examination and given the certificate of her age. Based on the x-ray, she had deposed that the prosecutrix was about 18 years and below 20 years. She had further deposed that if abortion is done, the symptoms will be available only for 49 to 55 days and that she had further deposed that in respect of the abortion reported by her, she had advised to approach the Doctor who had performed the abortion. The direction given by the learned Magistrate was marked as Ex.P6, the medical certificate was marked as Ex.A7 and the age certificate was marked as Ex.A8. The reply giving answers in respect of the questions raised by the learned Judicial Magistrate was marked as Ex.P9.

18. P.W.9 is a hearsay witness. He has spoken that the



accused and the victim are neighbours and he came to know about the affair between them from others and that he heard about the arrangement of marriage between the first accused and the prosecutrix and cancellation of the same and he does not know anything else about that.

19. P.W.10, Sub Inspector of Police, had deposed that on 15.07.2013, when she was the Sub Inspector of Police in the respondent police station, the victim had given a complaint and that she had registered the same in C.S.R.No.240/2013 and thereafter, she had enquired and on finding that the averments in the complaint were true, registered a case in Crime No.12/2013. The FIR was marked as Ex.P10. Thereafter, she had sent the original FIR and complaint to the learned Judicial Magistrate-I, Attur and forwarded copies to the higher officials and handed over a copy of the FIR to the Inspector of Police and thereafter, since the Inspector of Police had gone on leave, she had taken up the investigation on the direction of the higher officials and that on 24.07.2013, she had gone to the place of occurrence at 10.00 a.m and prepared the observation mahazar Ex.P2 in the presence of witnesses Paramasivam (PW3) and Venkatesan and she had also prepared rough sketch, marked as Ex.P11 and thereafter, she had enquired the witnesses Sathya (PW1), Maheswari (PW2), Ramachandran (PW4), Kaliyan (PW5), Dharmar, Paramasivam (PW3) and Venkatesan and recorded their statements and thereafter, she had sent the victim for medical examination and since the Doctor at Attur Government Hospital had advised to take the victim to the Government Hospital, Salem Hospital, she had obtained orders from the learned Judicial Magistrate I, Attur and subjected the victim for medical examination. The request letter was marked as Ex.P12.

20. On cross examination, PW10 had deposed that she did not enquire with regard to the hospital where the abortion was performed and that she had deposed that the victim did not inform her about the hospital, where the abortion was performed. She had further deposed that since the Inspector of Police had taken over charge, she had handed over the file to her.

21. P.W.11, Inspector of Police who had taken charge after P.W.12. She had deposed that P.W.12 alone completed the investigation and since she had not obtained the opinion from the ADPP, Salem and not recorded the victim's statement under Section 164 Cr.P.C., she had requested the learned Judicial Magistrate for recording the 164 statement of the victim, based on which the 164 statement was recorded from the victim on 02.09.2014. The request for recording the statement is marked as Ex.P13, the proceedings were marked as Ex.P14 and the 164 statement is Ex.P15. Thereafter, PW11 had filed the final report.



22. P.W.12 had deposed that she had taken up the investigation on 25.07.2013 and examined the witnesses Sathya, Maheswari, Kaliyan, Dharmar and Paramasivam. Since they reiterated their version before the Sub-Inspector of Police, she had not recorded their statements and thereafter, she had examined the witnesses Manikandan, Muthulakshmi, Kumar and recorded their statements and thereafter, she had obtained medical certificate from the victim and on 31.10.2013 obtained orders from the Court to subject the accused for medical examination. The request letter is Ex.P16. Thereafter, she had sent the accused for medical examination and later she had examined the Doctor, who had conducted the medical examination on the victim as well as the accused and recorded their statements.

23. On 06.11.2013, PW12, after completing the investigation filed the alteration report for the offence under Sections 417, 376 313, 294(b), 323(b), 355 and 506 (ii) IPC. The alteration report was marked as Ex.P17. In cross examination, she had deposed that she did not conduct any investigation with regard to the private hospital where the abortion was performed to the victim. She had further deposed that she had not obtained any report with regard to the corn fields from the Village Administrative Officer.

24. Taking into consideration the above judgments, the evidence of the victim has to be carefully analysed in this case. It is the case of the victim that she and the first accused are neighbours and that the first accused is the friend for her brother. It is her further case that their relationship started over phone call and that the first accused had told her that she loves her and he would marry her and they were continuing their relationship for four months and later he had called her to come alone and on his invitation, she had gone to the corn fields, where he had promised her to marry her and subsequently, he had intercourse with her forcibly in the corn fields and that the incident had happened during the year 2010 and thereafter they continued their relationship and they had been repeatedly indulging in physical affairs due to which she had conceived and that she had informed it to the accused and that he had given tablets for abortion and thereafter she was 5 months pregnant and that after sometime her mother and father had gone out of station and when nobody was at home the accused had called her to perform abortion and that she had accompanied him to a private hospital, Attur in the motor cycle and performed abortion to her and later her parents had come back to home and came to know about the abortion and that her parents had scolded her and assaulted her and that she went to the extent of ending her life.



25. However, in cross examination, PW1 had stated that even after the abortion, they had continued to have physical relationship with each other and she had further stated that the physical affair between them had happened at several places including the corn fields, near well and during the day times in the corn fields and that when she had gone to rear cattle, at the house of the friend of the accused and in their own house when her mother and father had gone out. Further, she had deposed that during the day time, the accused used to come her house and during the night times, they used to go to the fields.

26. Though in the complaint, PW1 had stated that she along with her family members had gone to the house of the accused seeking justice, in the cross examination, she had stated that she alone had gone to the house of the accused. She had further stated that after the abortion, her parents had searched for a bride groom for her in several places. She was also aware that the parents of the accused were searching for a bride for him. She had further deposed that the relationship between her and the first accused was known to Muthulakshmi, Kumar and Manikandan and they had questioned the first accused as to when he is going to marry her and he had told them that he would redeem the mortgaged land by settling the loan and then he would marry her.

27. Admittedly, the prosecutrix is a matured adult and she knows about the consequences. It is her evidence that she was having affair with the accused for more than two years and that she became five months pregnant and later without the knowledge of her parents she had accompanied the accused to a private hospital to perform abortion. However, no legal evidence had been let in by the prosecution to prove the fact of conception and performing abortion. There is a clear distinction between rape and consensual sex. The Courts in such cases, much carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to satisfy his lust, as the later falls within the ambit of cheating or deception. There is a distinction between mere breach of promise and not fulfilling a false promise at a later point of time. If the accused had given promise with the sole intention to seduce the prosecutrix to satisfy his lust, such an act would definitely amount to rape.

28. In this case, from the evidence on record, it is clear that the prosecutrix had agreed to have physical relationship with the first accused on account of love and passion affection for the first accused and not on account of misconception created by the first accused. The consensual relationship between the parties would not constitute an offence under



Section 376 IPC.

29. No doubt, the decision in Anurag Soni will not be applicable to the facts of this case. In that case, the accused Anurag Soni, was to marry another girl Priyanka Soni, however, he continued to have relationship with the prosecutrix on the promise that he would marry the prosecutrix and the Apex Court, on the facts of the particular case, found that the accused had given false promise to deceive the prosecutrix and the consent given by the prosecutrix was on misconception of facts and thereby held the accused guilty. The facts and circumstances of this case are different from that of Anurag Soni case.

30. Further, the averments with regard to the promise to marry are also not proved by the prosecution beyond all reasonable doubts. The Trial Court, without properly analyzing the evidence on record, had convicted the accused. The accused is entitled to have the benefit of doubt.

31. In the result, the Criminal Appeal stands allowed. The appellant/first accused stands acquitted of all charges and he is set at liberty. Fine amount, if any, paid shall be returned. The bail bond executed shall stand cancelled.

Sd/-

Assistant Registrar(CS-II)

//True Copy//

Sub Assistant Registrar

ham/ssk.

To

1. The Sessions Judge,
Mahila Court, Salem.
2. -do- through The Principal Sessions Judge,
Salem.
3. The Judicial Magistrate I, Attur.
4. -do- through The Chief Judicial Magistrate,
Salem.
5. The Inspector of Police,
All Women Police Station,
Attur, Salem.



6. The Superintendent,
Central Prison,
Salem.

7. The Public Prosecutor,
High Court of Madras.

Copy To

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

Criminal Appeal No.436 of 2019

VBM(CO)
RLP (22/12/2021)