



BAIL SLIP

The Appellant, namely Balasubramanian, S/o.Narayanan (Accused in S.C.No.48 of 2015 on the file of Sessions Judge, Mahila Needhimandram, Chennai) was released on Bail vide Order of this Court, dated 20/06/2017 and made in Crl.M.P.No.72 of 2017 in Crl.A.No.10 of 2017.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE OF RESERVING ORDER 16.09.2021	DATE OF PRONOUNCING ORDER 29.10.2021
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CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRL.A.NO.10 OF 2017

Balasubramanian

... Appellant/Accused

.Vs.

The State Rep. by
The Inspector of Police,
W 21 All Women Police Station,
Guindy, Chennai - 600 032.
(Crime No.3 of 2013)

... Respondent/Complainant

PRAYER:-

Criminal Appeal is filed under Section 374(ii) of Criminal Procedure Code, to set aside the conviction and sentence imposed upon the appellant herein by the learned Sessions Judge, (Mahila Needhimandram) Chennai in S.C.No.48 of 2015 dated 29.11.2016 and acquit the appellant herein.

For Appellant : Mr.R.Karthikeyan

For Respondent : Mr.R.Vinoth Raja
Government Advocate



J U D G M E N T

The matter is heard through "Video Conference".

WEB COPY

2. The convicted sole accused is the appellant herein.

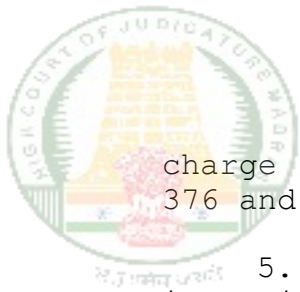
3. This criminal appeal is filed against the judgment passed by the learned Sessions Judge, Mahalir Neethimandram, Chennai, in S.C.No.48 of 2015, dated 29.11.2016, convicting him for the offence under Section 376 of I.P.C and sentenced to undergo Rigorous Imprisonment for seven years with a fine of Rs.10,000/-, in default, to undergo further period of three months rigorous imprisonment and he was also convicted for the offence under Section 417 of I.P.C and sentenced to undergo Rigorous Imprisonment for one year. The above sentences of imprisonment were ordered to run concurrently.

4. The respondent filed counter statement stating as under:

4(a) Complainant/Rajeswari is living at No.9/90, 8th Cross Street, New Colony, Chrompet, Chennai: complainant had given an advertisement for her marriage in OLXR.in Website: in the same Website, accused has also given an advertisement mentioning that he is a handicapped and caste and religion no bar: on seeing the said advertisement, Janarthanam, who is the younger brother of Rajeswari contacted the accused and told that due to Polio attack, his sister's right leg was affected: accused gave his phone number and told him to contact the complainant: complainant contacted the accused over phone and then they became closer.

4(b). On 11.05.2012 when the complainant and the accused met at the residence of the accused at No.12/111, Gandhi Nagar Main Road Extension, Ambal Nagar, Ekkatuthangal, accused stated that "மணந்தால் உன்னையே மணப்பேன்" (if married, will marry you only and none other) and promised her to arrange for their marriage.

4(c). Thereafter, on 23.06.2012 accused took the complainant to his room and enticed her by stating that he would marry her and had coitus with her: like this, the accused had coitus with the complainant for 4 times: because of that, the complainant became pregnant: when she informed about the same to the accused, he took her to Kumaran Hospital, Ashok Nagar, where her pregnancy was confirmed: as the accused told the complainant that he would marry her only if she terminate her pregnancy, she accepted and her pregnancy was terminated. Thereafter, for few days, the accused was in contact with the complainant, then, the accused rang up to the complainant and told that he would not marry her. After investigation, respondent police, has filed



charge sheet against the accused for the offence under Section 376 and 417 of IPC.

5. Based upon Ex.P1/complaint, Ex.P9/FIR was registered and investigation has been completed and case has been made over to Mahila Court for further proceedings as per law.

5(a). Based on the above materials, the Sessions Judge framed the charges for the offence under Sections 376 & 417 of IPC against the accused and the accused denied the same. In the trial, the Sessions Judge has held that both the charges are proved and accordingly, laid the conviction as stated supra and hence the appeal.

6. Heard the learned counsel for the appellant and the learned Government Advocate for the respondent.

7. The case of the prosecution in brief is that:

7(a) pursuant to matrimonial advertisement given by the accused, she contacted over phone and subsequently, they become friends and both are physically handicapped person. P.W.1/complainant suffers from Polio attack and accused also suffers from physical disability and while, she visited his room, he gave juice and after taking the same, she became unconscious and subsequently, she found that the accused had sexual intercourse with her while she was unconscious state. As the accused threatened that he had taken photographs and also promised to marry. Believing his words, she had consented for sex for more than 3 to 4 occasion and became pregnant. Subsequently, as the accused refused to marry, she gave Ex.P1-complaint.

8. The case of the defence is one of total denial. On the side of the prosecution, as many as 10 witnesses were examined as P.W.1 to P.W.10 and 14 documents were marked as Ex.P1 to Ex.P14.

9. Before the trial Court, the defacto complainant was examined as P.W.1, father and brother was examined as P.W.2 and P.W.3. The house owner of the accused is examined as P.W.4. Attestor of the observation mahazar/P.W.5 is turned hostile. P.W.6/Dr.Ganapriya, who had conducted pregnancy test on P.W.1 and confirmed her pregnancy and marked medical report of P.W.1 as Ex.P2. P.W.7/Dr.Hemalatha, who had issued Ex.P5/Accident register and also Ex.P6/Investigation of Sexual Offences Report and Ex.P7/Certificate of examination for the victim. P.W.9/Dr.Selvakumar, who had conducted potency test and issued Ex.P13/Certificate of examination for sexual offences. In respect of the accused had opined that there is nothing to



suggest that he is impotent and age of the accused is marked as Ex.P14.

10. The accused stands charged for the offence under Sections 376 and 417 IPC.

11. Whether the evidence of the prosecutrix/P.W.1 is reliable and trustworthy:

12. The complainant is examined as P.W.1, her evidence is to the effect that she has completed B.A., M.A., M.Phil., Diploma Cooperative and worked at CTS Company, MEPZ, Chrompet. She identified the accused and she further deposed that her parents were searching for matrimonial alliance for her. At the relevant point of time, the accused had given an advertisement through OLX.R.in Website that he wanted a Bride classifying that caste is no bar and handicapped person can also apply: having seen the same, her younger brother contacted the accused and the accused told him that she has to contact the accused directly. At that time, she had been to Madurai: when she contacted the accused, he told that he liked her and accepted to marry her: when she told that she is short and dark in colour and so he would not like her and ask him to refuse for the marriage: then, the accused told that "உன்னை கல்யாணம் செய்து கொள்ளப் போவது நான் தான், எப்படி இருந்தாலும் பரவாயில்லை, ஆதலால் உன்னை நான் கல்யாணம் செய்து கொள்கிறேன்" he told that he is working as a Credit Officer in TVS Company.

12(a) The further evidence of P.W.1 is that they were introduced themselves in the sister's residence of the accused at Chitiapakkam. Thereafter, the accused invited the victim and thereafter, he asked her to visit his Room at Ambal Nagar, Ekkatuthangal: usually, they used to take juice when they go outside: on 26.06.2012, she went to his room and he offered juice to her and after taking the same, she got fainted: she stayed there during that night: after she regained consciousness, her dress was found removed: when she enquired about the same, accused replied that it was nothing: thereafter, he called her to go for outing and when she refused to go along with him, he stated that he had taken photos of her and if she refused to accept his words, he would not marry her and by stating so, he had coitus with her 4/5 times.

12(b). It is the further evidence of P.W.1 that her menstruation period was postponed. So, she contacted the accused and informed him about the same and for which, the accused has instructed her to come to Chennai forthwith and on her arrival to Chennai, the accused took her to Kumaran Hospital at K.K.Nagar, where she underwent pregnancy test and the pregnancy test shown as "Positive" and on coming to know about the pregnancy of P.W.1, P.W.1 begged the accused to marry her.



However, the accused told her to terminate her pregnancy and then only, he would marry her, otherwise, he would upload her photos in the Internet. It is her evidence that though she was not willing to do so, due to the compulsion of the accused, she accepted for abortion and underwent medical terminancy of pregnancy as told by the accused. Thereafter, the accused shown differences in contacting her. So, P.W.1 contacted the elder sister and younger brother of the accused and explained the association and the relationship with the accused.

13. The sum and substance of the version of P.W.1 is on four folds.

13(a). The version of P.W.1 in the first part is related to the matrimonial advertisement given by the accused to invite brides and her introduction to the accused. The second part of her evidence is that when she went to the room of the accused, where she was offered juice to drink and after consumption of the same, she got fainted and thereafter, when she regained the conscious, she found that her dresses were removed and the accused had conveyed her that he had taken up photos and the accused told P.W.1 that if she refused to obey his words, he will upload the said photos in the Internet.

13(b). The third limb of the version of P.W.1 is that with regard to pregnancy and termination of pregnancy and the fourth limb of the prosecution is that the accused had sexual intercourse with P.W.1. While she was in unconscious stage, after drinking the juice, the accused alleged to have taken certain photos of her and her dresses were removed and on compulsion, force and coercion and without her consent, the accused had sexual intercourse at the first instance and the subsequent instances numbering four or five times due to the coercion imposed by the accused.

14. The place of occurrence, as projected by the prosecution, is the room of the accused. P.W.4, house owner, who could depose that the accused is residing in his premises on rent. P.W.1 specifically stated that she went to the room of the accused which is situated in the second floor.

15. Learned counsel for the appellant/accused would contend that since P.W.1 was suffered polio attack, she could not climb to second floor. This Court has given its due consideration for the said submission. It is pathetic to note that the prosecutrix even suffered polio attack and her legs were affected. From the evidence of P.W.1 and also the admission of P.W.4-house owner, it is clear that the accused is also physically challenged person. Accused goes to the second floor for more than three or four times, despite his disability. When



the accused also a physically challenged person, he is able to climb the stairs of the building and the same cannot be put against P.W.1 and hence, the learned Sessions Judge, on proper appreciation has held that it is possible for P.W.1 to climb the stairs to reach the room of the accused and hence, the said finding rendered by the learned Sessions Judge is hereby confirmed.

16. The second part of the version of private prosecutrix is that only after consumption of juice offered by the accused, she became unconscious and without her consent, the accused had sexual intercourse with her. There is no evidence to corroborate her version. It is no doubt true that it cannot be expected to get corroboration for the allegation of this nature.

17. The ancillary part of the averment is that she further alleged that she was criminally intimidated by the accused that he had taken photographs and videos of her when she was without any dress and if P.W.1 refused to obey his words, the said photographs will be loaded in the Internet and the accused will not marry her and by stating so, he had sexual intercourse with P.W.1 four to five times. On a close scanning and scrutiny of the evidence of P.W.1, it is not her evidence that she had seen any photographs or any videos self proclaimed statement of the accused as claimed by P.W.1 assumes significance. Had there been any photographs or videos as stated by the accused, he could have shown the same and put her to threat. Her evidence is not to that effect. Her evidence is a mere assertion by the accused that he had some photographs and he will upload the same in the Internet. Admittedly, no photographs or videos were seized by the police. P.W.8-Investigating Officer had categorically admitted that no photographs or videos, as claimed by P.W.1, were seized either from the accused or from his room. As stated supra, P.W.1 has not whispered that he had seen such photographs and the photographs as shown by the accused for further threatening, also assumes significance and hence, I find that this part of the evidence of P.W.1 with regard to the alleged photographs and alleged criminal intimidation to put P.W.1 for sexual intercourse appears to be vague side of the evidence of P.W.1.

18. The next part of the version of P.W.1 is to the effect that the accused had sexual intercourse with P.W.1 in a regular time and she was made to pregnant by the accused. The medical evidence of P.W.6-Doctor and P.W.7-Doctor goes to show that the accused had sexual intercourse with P.W.1 in regular time and due to which, she became pregnant.

19. With regard to the pregnancy, the prosecution examined P.W.6-Doctor Gnanapriya, who had issued Ex.P.2 medical report

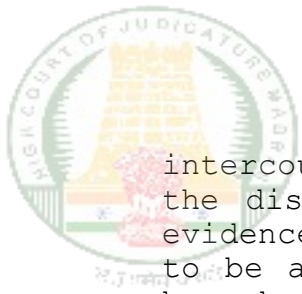


with respect of P.W.1-prosecutrix to show that P.W.1 was pregnant. P.W.7-Doctor Hemalatha, who had issued Ex.P.5-Accident Register and Ex.P.7-Certificate of examination for sexual offence in respect of the victim. On examination of her vagina, it admitted two fingers easily, hymen was torn and no injuries found.

20. The evidence of P.W.6-Dr.Gnana Priya is to the effect that on pregnancy test, P.W.1 was pregnant and connected O.P.Chit and test report were marked as Ex.P.2. P.W.7-Dr.Hemalatha had conducted the medical examination. As stated supra, her evidence is that the prosecutrix has told to P.W.7 that she had physical relationship so many times since 26.06.2012 and the prosecutrix also informed P.W.7 that she became pregnant and the same was terminated at K.K.Nagar Kumaran hospital in October 2012 and thereafter, she had continued to have sexual relationship with the accused. As stated supra, P.W.9, Dr.Selvakumar, after testing the accused, has issued Ex.P.13 and opined that there is nothing to suggest and the accused is impotent and the age certificate of the accused is Ex.P.14 and thus, this Court finds that the element of compulsion and coercion as spoken to P.W.1 appears to be artificial. However, the accused had sexual intercourse with P.W.1 with her consent and it is a consensual sexual act of both the adult. Reliance was placed on the judgment of this Court in (Sam Vs. State, rep. by Inspector of Police, All Women Police Station, Coimbatore) reported in 2017 (1) MWN (Cr.) 280 (DB).

21. Admittedly, the prosecutrix-P.W.1 is a literate lady and she was having sufficient education viz., graduation and post graduation and also pursuing PHD at the time of deposing before the Court. The accused is aged 35 years and the prosecutrix is aged 31 years. P.W.1 is a post graduate and she knows everything and having mental ability what is happening and her version viz., that his consent was not obtained at the first instance, as stated supra, is found not acceptable, since he has not given any complaint or not even disclosed the same.

22. Yet another point is that her statement before P.W.7-Doctor Hemalatha, at the earliest point of time, runs contrary to her evidence in the witness box and hence, I find that this part of the evidence at the first instance, that the accused had sexual intercourse against her consent runs contrary to the evidence and also found to be unbelievable. The prosecutrix is aged 31 years at the relevant point of time and she is having sufficient intellect and mental capacity to understand the consequences of her act. Further, she was well aware of the consequences of her consent to have sexual intercourse. Her evidence to P.W.7 goes to show that even after the medical termination of pregnancy on her own willing, she had sexual



intercourse with the accused many times and hence, in view of the discussions as stated supra, I find that this part of the evidence of P.W.1 as to the alleged coercion and force appears to be artificial and she being an adult much educated found to have been consented for the same and accordingly, in view of the discussion in the preceding paragraphs, this Court holds that the sexual act committed by the accused and P.W.1 is consensual act does not fall under the definition of Section 375 of IPC. Consequently, the conviction under Section 376 of IPC laid by the learned Sessions Judge is not sustainable in law.

23. On the charge of Section 417 IPC is concerned, learned counsel for the appellant/accused would contend that the accused was already in prison for more than seven months. On going through the evidence of P.W.1 and also taking note of the background of the accused as well as the victim, both are physically challenged persons, this Court finds that the accused though physically disabled to limited extent, appears to have mind of cheating by making misrepresentation at the initial stage so as to cheat P.W.1 to enjoy the sex on false promise to marry P.W.1 and by taking advantage of physical disability of the prosecutrix, had sexual intercourse with her on several times. From the evidence of P.W.1 coupled with the medical evidence of P.Ws.6 and 7-Doctors, it is clear that the pregnancy and subsequent termination of pregnancy have been proved by the prosecution. Furthermore, even after medical termination of pregnancy, it appears that the accused had sexual intercourse as could be seen from the evidence of P.W.7-Doctor, who had recorded the statement of P.W.1 at the earliest point of time. Thus, it appears from the evidence that on coming to know about the pregnancy and termination of pregnancy and even after having sexual intercourse with P.W.1, the accused had refused to marry her and thereby, the misrepresentation as to the promise even at the very first instance was present and the same was continued even after the various episodes of sexual relationship between the parties, as narrated supra, goes to show that the accused misrepresented and on false promise to marry her, the accused had sexual intercourse with P.W.1 and thereafter, cheated her and hence, I find that all the necessary ingredients for the charge under Section 417 IPC are made out.

24. In fine, in view of the discussions in the preceding paragraphs, I find that in view of the corroboration of medical evidence of P.W.6-Dr.Ganapriya coupled with Ex.P.2-medical report in respect of P.W.1 and P.W.7-Dr.Hemalatha coupled with Ex.P.7-certificate of examination for sexual offences in respect of the victim, I find that the prosecutrix is a consenting party and hence, the offence under Section 376 IPC is not made out. However, the offence under Section 417 IPC is made out by the prosecution.



25. Accordingly, the conviction and sentence imposed by the learned Sessions Judge under Section 376 IPC are set aside, while the conviction under Section 417 IPC is hereby upheld and the order of sentence passed by the learned Sessions Judge for one year Rigorous Imprisonment with fine amount of Rs.10,000/- is hereby confirmed.

26. Accordingly, this Criminal Appeal is partly allowed only in respect of conviction and sentence passed under Section 376 IPC and the appeal shall stand dismissed in respect of conviction and sentence passed under Section 417 IPC. The Trial Court is directed to secure the accused and make him undergo the remaining period of sentence.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

AT

To

1. The Sessions Judge,
(Mahila Needhimandram),
Chennai.
2. The Principal Sessions Judge,
Chennai.
3. The Superintendent,
Central Prison, Puzhal.
4. The Inspector of Police,
W 21 All Women Police Station,
Guindy, Chennai - 600 032.
5. The IX Metropolitan Magistrate,
Saidapet, Chennai.
6. The Chief Metropolitan Magistrate,
Chennai.
7. The District Collector,
Chennai.



8. The Director General of Police,
Mylapore, Chennai.

9. The Public Prosecutor,
High Court of Madras.

Copy To:-

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

+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.56149

CRL.A.NO.10 OF 2017

GJ(CO)
PBS/22/12/2021