



BAIL SLIP

The Appellant/Accused Sivakumar, Male/38 years, S/o. Dharmaraj, was directed to be released on bail order of this court dated 09.02.2016 and made in Crl.MP(MD).No. 1 of 2015, in Crl.A(MD). No. 340 of 2015

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.10.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Crl.A. (MD) No. 340 of 2015

Sivakumar : Appellant/Accused No.1
Vs.

State rep by its
The Inspector of Police,
All Women Police Station,
Cantonment,
Trichirappalli City.
(in Crime No.16 of 2010).

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to allow the appeal and set aside the judgment dated 02.11.2015 made in S.C.No.128 of 2014 on the file of the learned Sessions Judge, Mahila Court, Tiruchirappalli.

For Appellant : Mr.N.Anandakumar

For Respondent : Mr.E.Antony Sakaya Prabahar
Additional Public Prosecutor

JUDGMENT

The present Criminal Appeal is directed against the conviction and sentence, dated 02.11.2015, made in S.C.No.128 of 2014, on the file of the learned Sessions Judge, Mahila Court, Tiruchirappalli.

2. The appellant is the first accused in the above referred case. Along with two other accused he stood charged for the offences punishable under Sections 376 and 506(i) IPC.

3. After full-fledged trial, the learned Sessions Judge, Mahila Court, Tiruchirappalli, found the appellant/1st accused guilty for the offence punishable under Section 376 IPC and sentenced to undergo Rigorous Imprisonment for 10 years. Further, the trial Court acquitted the accused for the charge under Section 506(i) IPC.

4. Challenging the said conviction and sentence, the appellant/1st accused is before this Court, by way of filing the present Criminal Appeal.



5. The relevant facts of the case, which gave rise to filing of this appeal are necessary to be recapitulated for the disposal of this appeal:-

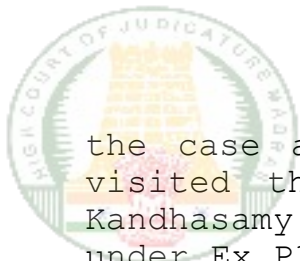
(i) P.W.1 is residing at K.K.Nagar, Trichirappalli. At the relevant point of time both the accused and P.W.1 were working at Max Newyork Insurance Company, and at the same time the victim girl was residing separately in an apartment at K.K.Nagar, Trichirappalli. The victim girl and the first accused were friends and then, they became lovers. The first accused promised to marry the victim. At a later point of time, after becoming lovers, the victim girl resigned her job and continued her studies. In such a situation, on 16.11.2008 the first accused came to the victim's house and told that he will marry her, further he compelled the victim for illicit intercourse. Subsequent to that, the first accused came often to the victim's house and gave a false promise that he will marry her and had a illicit intercourse for many times. In these sequence, the victim became sick and went to the doctor, wherein, the doctor examined her and told that she was pregnant.

(ii) Thereafter, the victim girl informed about her pregnancy to the first accused and for which he again made a promise to marry her. In the meantime, without informing her, the first accused shifted his residence to Thanjavur. On that occasion, the victim searched for the first accused's house and could not found out. Hence, she gave a complaint to All Women Police Station, Cantonment, Trichirappalli. During such time, the father of the victim (P.W.3) found out the cell phone number of the first accused and afterwards, through the mobile phone, he explained the situation to the first accused. In respect to the request made by P.W.3, the first accused did not oblige to marry the victim girl. When at the time, the parents of the victim girl (P.Ws.2 & 3) met the other accused Nos.2 & 3, who are the sister and sister's husband of the 1st accused, and explained the situation, they said that they did not know anything.

(iii) In the meantime, on 16.11.2009 the victim girl given birth to a female child and the same was informed to the first accused. Even after knowing the same, he did not take any care. However, after three months, P.W.1 took the new born baby to the accused's house, wherein, the second accused scolded the victim girl in filthy language and abused her. The third accused also in a drunken mood kicked the victim's mother. Hence, the victim girl gave a complaint again in All Women Police Station, Cantonment, Trichirappalli under Ex.P1.

(iv) On receipt of the said complaint, P.W.15-Alagammal, the then Sub-Inspector of Police, Cantonment Police Station, Trichirappalli, on 19.03.2010 around 8.30 a.m., registered a case against the accused in Cr.No.16 of 2010 under Sections 417 and 506

(i) IPC. The printed FIR was marked as Ex.P9. After registering



the case as above, she took up the same for investigation. She visited the scene of occurrence and in the presence of P.W.4-Kandhasamy and one Shanmugam, she prepared an Observation Mahazar under Ex.P11. She drew the Rough Sketch and the same was marked as Ex.P.10. She examined the witnesses and recorded their statements. On 20.03.2010 around 16.00 hours, she arrested the third accused and sent him to remand. After completing the investigation as above, she handed over the case records to P.W.16 for further investigation.

(v) P.W.16 Maragatham, the then Inspector of Police, All Women Police Station, Cantonment, Trichirappalli, on receipt of the case records, examined P.W.11- Hemachandran and one Somu and recorded their statements. In the said circumstances, since she got transferred, she handed over the case records to P.W.17 for further investigation.

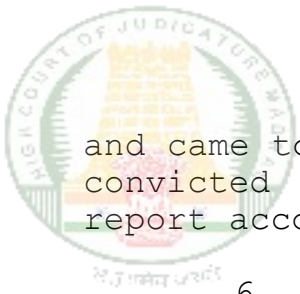
(vi) P.W.17-Vasanth, who is also the then Inspector of Police, All Women Police Station, Cantonment, Trichirappalli, after recording the statements from some witnesses, handed over the case records to P.W.18, for further investigation.

(vii) P.W.18-Chitra on receipt of the case records, came to know that the present appellant/1st accused surrendered before the Judicial Magistrate No.II, Trichirappalli. Hence, after knowing the same, she submitted an application before the learned Judicial Magistrate No.II, Trichirappalli under Ex.P12, wherein, she prayed to conduct medical examination in respect to the potency of the 1st accused, also she prays to conduct DNA test to the 1st accused, victim girl and the child born to the victim girl.

(viii) In turn, in view of the proceedings issued by the learned Magistrate, P.W.10-Dr.Ravikumar, attached to the Government Medical College Hospital, Trichirappalli on 08.03.2013 examined the first accused medically and issued the certificate under Ex.P4 stating that nothing to suggest that he is not capable of taking part in sexual intercourse. He has further collected the blood samples from the first accused, victim girl and the minor child for the purpose of DNA Test. The F.T.A.card in respect to the blood samples of P.W.1, 1st accused and the minor child, namely, Tharani were marked as Ex.P5, Ex.P.6 and Ex.P7 respectively.

(ix) After collecting the blood samples, P.W.12 Thilaga, the Assistant Director, Forensic Science Department, Chennai, examined the blood card and issued the certificate under Ex.P8, wherein, she states that the appellant/1st accused Sivakumar is the biological father of the minor child (Tharani).

(x) In continuation of investigation, P.W.19 Tmt.Sheela, took up the case records for investigation and collected the DNA report



and came to the conclusion that the appellant herein is liable to be convicted under Sections 376 and 506(i) IPC. She filed a final report accordingly.

6. From the above materials, the trial Court framed the charges against the present appellant under Sections 376 and 506(i) IPC, and framed the charges as against the other two accused under Section 506(i) IPC. All the accused denied the charges and opted for trial. Hence, they were put on trial.

7. During the time of trial, in order to prove their case, on the side of the prosecution, 19 witnesses were examined as P.W.1 to P.W.19 and 14 documents were marked as Ex.P1 to Ex.P14.

8. Out of the above said witnesses, P.W.1, who is the victim girl, speaks about the occurrence as alleged by the prosecution.

(ii) P.W.2-Vijayalakshmi and P.W.3-Shanmugam are the parents of P.W.1 spoken about the occurrence as during the relevant point of time, after knowing the occurrence, they searched the first accused and afterwards, when at the time, they approached all the accused, for arranging the marriage of P.W.1 with the first accused, they have not given any consent for the said proposal. It is the further evidence given by P.W.2 and P.W.3 that after registering the case when the matter is under investigation, P.W.1 had given birth to one female child.

(iii) P.W.4-Kandhasami, who is the resident of Sathiyamoorthi street, spoken about the investigation as, during the time of investigation, the police officer came to the house of P.W.1 and prepared an Observation Mahazar in his presence.

(iv) P.W.5-Sankar, P.W.7-Nalini, P.W.8-Paramasivam and P.W.9-Anbalagan are all alleged witnesses to know about the occurrence. Before the trial Court, either of them, had not given any evidence in support of the case of the prosecution and therefore, after getting leave from the trial Court, the learned Public Prosecutor treated them as hostile witnesses. In the evidence given by them before treating as hostile witnesses, none of the incriminating materials were available in respect of the alleged occurrence.

(v) P.W.6-Nadanasigamani, who is the Village President, has also not in support of the case of the prosecution.

(vi) P.W.10-Dr.Ravikumar spoken about the medical examination conducted on the first accused.

(vii) P.W.11-Hemachandran, who was working as an officer in Max Newyork Insurance Company, gave evidence as the first accused was working in his company for a period of 7 months.



(viii) P.W.12-Thilaga, the Assistant Director, Forensic Science Department, Chennai, spoken about the DNA examination and about the issuance of report.

(ix) P.W.13-Leela and P.W.14-Arumugam are the police constables, spoken about the production of victim girl and the first accused before the Doctor for conducting medical examination.

(x) P.W.15 to P.W.19 who are all the Police Officers, gave evidence in respect to the receipt of the complaint, investigation and about the filing of final report.

9. When the above incriminating materials were put to the accused under Section 313 Cr.P.C. the accused denied the same as false. However, he did not choose to examine any witness nor mark any document on his side.

10. Having considered the materials placed before him and after considering the arguments advanced by the counsels appearing on either side, the learned Trial Judge came to the conclusion that the appellant/1st accused is found guilty under Section 376 IPC, convicted and sentenced as stated supra. Being dissatisfied with the said conviction and sentence, the accused is before this Court with this appeal.

11. I have heard Mr.N.Anandakumar, learned counsel appearing for the appellant/1st accused and Mr.E.Antony Sahaya Prabakar, learned Additional Public Prosecutor appearing for the State, also perused the records carefully.

12. The learned counsel appearing for the appellant would contend that the evidence given by P.W.1 in respect to the offence of rape is having lot of contradictions. The whole evidence given by her reveals the fact that the alleged offence committed by the accused is consensual one and therefore, it cannot be said that the accused alone is responsible for the same. It is the further submission of the learned counsel for the appellant that during the pendency of appeal, the appellant/1st accused herein settled one housesite property in favour of the minor child. After making his submission as above, the learned counsel appearing for the appellant prayed to set aside the conviction and sentence and to allow the appeal.

13. Per contra, the learned Additional Public Prosecutor appearing for the respondent police would contend that in respect of the alleged offence, the evidence given by P.W.1 is very narrow and inspires the confidence of this Court. In the judgment rendered by the trial Court, the same has been elaborately discussed and therefore, interference of this Court in the findings arrived at by the trial Court does not require.



14. The rival submissions made by the learned counsels on either side are considered.

15. Here is the case, the evidence given by P.W.12, who is the Assistant Director, Forensic Science Department, is very narrow in respect of conducting DNA test to the accused, victim girl and the minor child. It is the evidence given by her that the present accused is the biological father of the minor child. In order to substantiate the said evidence, she has produced the DNA test report as Ex.P8.

16. In respect of evidentiary value of the DNA test report, in the case of **Nandilal Wasudeo Badwaik vs. Lata Nandilal Badwaik** reported in **2014 Cri.L.J. 1098 (1103) (SC) : 2014 (2) SCC 576**, our Hon'ble Apex Court has held that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the Court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. When there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the later must prevail over the former.

17. Further, in the case of **Kamti Devi Vs. Poshi Ram** reported in **AIR 2001 SC 2226 : 2001 (5) SCC 311**, our Hon'ble Apex Court has held that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the Legislature. The result of a genuine DNA test is said to be scientifically accurate.

18. Accordingly, the result of the DNA test raised a sufficient clue for accepting the case of the prosecution as the 1st accused is the biological father of the minor child.

19. Therefore, in the said circumstances, being the reason that the said child is born due to the result of sexual intercourse between the 1st accused and the victim girl, it is necessary to find out whether such act committed by the 1st accused is with the consent of victim girl/P.W.1 or not. In this regard, in the complaint given



the law in motion, P.W.1 has stated about the occurrence as, on 16.11.2008 when at the time, she was alone in her house, the 1st accused, came there and after made promise as he would marry her, compelled and commit a sexual intercourse. It is the further averment that the said act was continued regularly.

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20. In the complaint after narrating the incident as above, while at the time of giving evidence as P.W.1, she has stated the occurrence that the 1st accused and herself indulged in sexual activity regularly. Though in respect to the occurrence, the averments found in the complaint was corroborated through the evidence of P.W.1, she has not lodged a complaint immediately after the occurrence.

21. As per the case of the prosecution, the complaint has been received on 19.03.2010, whereas, the alleged occurrence had happened on 16.11.2008. Therefore, it is apparent that the complaint pertains to the case has been lodged by the P.W.1 with the delay of nearly 16 months. If really the accused committed sexual intercourse without the consent of P.W.1, it is for her to lodge a complaint immediately without any delay. Therefore, the sequence of events narrated by P.W.1 established the fact that the 1st accused made sexual intercourse with P.W.1 regularly. Being the grown up girl permitting the 1st accused to commit such type of offence regularly for 11 times shows that the allegation levelled against the 1st accused is a false one. The said act has been done by the 1st accused with the consent of P.W.1.

22. At this juncture, it is relevant to see the judgment of our Hon'ble Apex Court in **Uday vs. State of Karnataka** reported in **(2003) 4 Supreme Court Cases 46**. In the said case, our Hon'ble Apex Court has held as follows:-

"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. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it."

23. In fact, Indian Penal Code does not define consent in



positive terms. But, consent is explained by Section 90 which reads as 'consent given firstly under fear of injury and secondly under a misconception of fact is not consent at all'. These are the two grounds specified in Section 90 which are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in first part of Section 90 are from the point of view of the victim and second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person, who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent has given it under fear or misconception of fact.

24. In this case, it is the allegation against the 1st accused that after made a false promise to marry the P.W.1, he committed the offence.

25. In this regard, the learned counsel appearing for the appellant would contend that after the occurrence, the appellant/1st accused performed the marriage with P.W.1 and therefore, it cannot be said the consent obtained by the 1st accused is under misconception of fact. Now, on going through the said submission with the relevant records, it is the evidence given by P.W.1 that after the occurrence, in the year of 2009, the marriage between them was performed. It is the specific evidence given by her that after the occurrence, she filed a Habeas Corpus Petition before this Court, alleging that the appellant/1st accused is her husband. It is the further admission that in the voters identity card, the name of the 1st accused alone was mentioned as her husband. Therefore, after admitting about the marriage as above, now he gave evidence against the appellant that the accused after made false promise indulged in sexual activity. Thus, in view of the above, we cannot hold that the accused after made a false promise before P.W.1 committed this offence. Accordingly, in whole, the evidence given by P.W.1 appears that the alleged offence of rape is a consensual one and therefore, convicting the 1st accused under Section 376 IPC is not necessary and thereby, the judgment rendered by the trial Court is liable to be set aside.

26. Now, one another aspect, which is necessary to decide in this case that after the occurrence, P.W.1 gave birth to one minor child. Due to the act committed by P.W.1 and the 1st accused, the child born to them loses the status of legitimate child. Therefore, the real victim in the alleged occurrence is the child, who born to P.W.1 and the 1st accused. In otherwise, it cannot be



said that P.W.1 is the real victim. Therefore, the victim child has to be compensated by means of awarding a reasonable compensation. In this regard, it is the submission made by the learned counsel for the appellant that during the pendency of the appeal, the 1st accused settled one housesite property in favour of the child after appointing P.W.1 as guardian.

27. In order to substantiate the said contention, he has produced the copy of the settlement deed i.e., document No.2903 of 2021, on the file of the Sub-Registrar, Ponnamaravathi, dated 13.09.2021. Though the appellant settled the immovable property as above, the same did not affect the right of the minor child to initiate any other proceedings under Civil law. Accordingly, the victim child is entitled to initiate appropriate proceedings under Civil Law in subsequent days.

28. In fine, the light of the above discussions stated supra, the Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/1st accused, by the learned Sessions Judge, Mahila Court, Tiruchirapalli, in S.C.No.128 of 2014, dated 02.11.2015, is set aside and the appellant/1st accused is acquitted of all the charges. Bail bond, if any, executed by the 1st accused shall stand cancelled. The fine amount, if any, paid by him, shall be refunded to him.

Sd/-

Assistant Registrar (CS-III)

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/ /2021

Sub Assistant Registrar(CS)

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To:-

- 1.The Sessions Judge, Mahila Court,
Tiruchirapalli
- 2.The Inspector of Police,
All Women Police Station,
Cantonment,
Trichirappalli City.
- 3.The Section Officer, (2C)
Criminal Section,
Madurai Bench of Madras High Court,
Madurai.



+1 CC to M/s.N. ANANDAKUMAR, Advocate (SR-32741[F] dated 26/10/2021

Copy to

The Superintendent,
Central Prison, Trichy.

CrI.A(MD)No.340 of 2015
25.10.2021

DJ(CO)

KB(23.11.2021) 10P 7C