



Bail Slip

The Appellant/Accused No.1 namely Muthukumar (male) S/o Rathinam was released on Bail as per order of this Court dated 21/12/2015 made in Crl.MP(MD) 1/15 in Crl.A(MD)375/2015.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : **11.08.2021**

CORAM:

THE HONOURABLE MR.JUSTICE **R.PONGIAPPAN**

Crl.A(MD)No.375 of 2015

Muthukumar : Appellant/1st Accused
Vs.

The State through,
The Inspector of Police,
All Women Police Station,
Srivaikundam,
Thoothukudi District.
(Crime No.4 of 2011)

: Respondent/Complainant

PRAYER: The Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, against the conviction and sentence dated 30.11.2015, passed in S.C.No.110 of 2015, on the file of the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court) Thoothukudi.

For Appellant : Mr.M.S.Jeyakarthik

For Respondent : Mr.E.Antony Sahaya Prabahar
Government Advocate (Crl. side)

JUDGMENT

This present criminal appeal is directed against the conviction and sentence dated 30.11.2015, made in S.C.No.110 of 2015, on the file of the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court) Thoothukudi.

2.The appellant is the first accused. He stood charged for the offence under Sections 417, 376, 294(b) and 506(ii) of I.P.C. The accused denied all the charges and opted for trial. Therefore, he was put on trial on the charges.

3.After full-fledged trial, the learned Sessions Judge found the accused guilty under Section 417 of I.P.C and accordingly, convicted and sentenced to undergo one year simple imprisonment and to pay a fine of Rs.1,000/-, in default, to undergo six months simple imprisonment. In respect of other offences, the learned Sessions Judge acquitted him and also acquitted the other accused.



Challenging the conviction and sentence, the appellant/first accused is before this Court with the present Criminal Appeal.

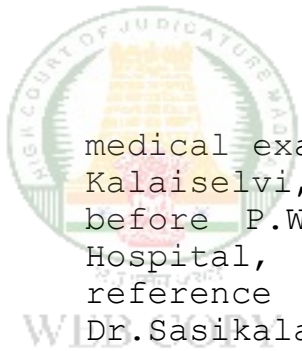
4. The case of the prosecution in brief is as follows:-

(i) PW1- victim girl is residing at Thoothukudi. She is known to the accused. Both the victim girl and the first accused fell in love with each other and the same is continued for the period of three years. The second accused (now acquitted) is the aunt of the first accused. The third accused (now acquitted) is the daughter of the second accused. On 05.09.2010 around 11.00 a.m when the first accused entered into the house of PW2, he found that PW1 was alone in the house and on seeing PW1, the first accused told to her that he would marry her and on such false promise, he sexually assaulted the PW1. After one week from the date of said incident, PW1 asked the accused to marry her, for which, accused refused to marry her.

(ii) Therefore, on 11.09.2010, P.W.1 went to Kurumbur Police Station and lodged a complaint under Ex.P.2. On receipt of the complaint, the police attached with Kurumbur Police Station made enquiry, in which, the first accused admitted the allegation levelled against him by P.W.1 and P.W.2. He requested three more months for marrying P.W.1. In respect of the enquiry, a Muchalika has been prepared and the same was attested by the mother of the victim girl, her uncle and the first accused. Thereafter, till the month of February 2011, the first accused did not fulfil his assurance, which was given before the Police Station. Hence, on 05.02.2011, P.W.1 alone went to the house of the first accused and asked him as to why he did not marry her even after three months. At that time, the other accused in this case [now acquitted] scolded her in filthy language and chased her away. Therefore, without any alternative, on 22.02.2011 P.W.1 lodged a complaint against the accused and the same has been marked before the trial Court as Ex.P.3.

(iii) On receipt of the said complaint, P.W.10 - Ravimathi, the then Sub-Inspector of Police, Nanguneri Police Station, registered a case against the accused in Crime No.4 of 2011 under Sections 294(b), 376 and 506(ii) I.P.C. The printed F.I.R. has been marked as Ex.P.9.

(iv) After registration of the case, P.W.12 - Sureshkumar, the then Inspector of Police, Srivaikuntam Police Station, took up the case for investigation and on the same day around 01.00 p.m., he visited the scene of occurrence, in the presence of P.W.4 - Aathiparasakthi and P.W.5 - Senthamarai Kannan, he prepared Observation Mahazar under Ex.P.4. He drew the Rough Sketch and the same has been marked as Ex.P.10. He asked the Women Sub-Inspector of Police to examine P.W.1. He sent a requisition to the learned Judicial Magistrate, Srivaikuntam, seeking permission to conduct



medical examination of the victim girl. Thereafter, through P.W.8 - Kalaiselvi, Police Constable, P.W.1 / victim girl had been produced before P.W.6 - Dr.Sasikala, who attached with Rajaji Government Hospital, Madurai, for medical examination. On 23.02.2011, vide reference [Ex.P.5] issued by the learned Judicial Magistrate, Dr.Sasikala examined the victim girl and opined as follows:-

''(i) The victim girl was conscious, oriented and the breast were normal;

(ii) There was no external injury and hymen was not intact and she was in periods.''

After examination, she issued an Accident Register copy under Ex.P.6.

(v) Similarly, P.W.12 sent a requisition to the learned Judicial Magistrate to conduct medical examination on the first accused. In the view of the said request, the learned Judicial Magistrate issued reference. Thereafter, P.W.7 - Dr.Kingston Xavier, the then Assistant Surgeon, E.S.I. Hospital, Karungal, Kanniyakumari District, on 23.02.2011 at 01.00 p.m., examined the first accused and issued a Certificate under Ex.P.8 stating that the first accused is a potent male.

(vi) In continuation of investigation, P.W.12 - Sureshkumar examined the witnesses and recorded the statements. Since he got transfer from the said post, his successor P.W.13 - Padmanabapillai, the then Inspector of Police, Srivaikuntam, conducted further investigation and filed final report against the accused alleging that they are liable to be convicted under Sections 417, 376, 294(b) and 506(ii) I.P.C.

5.From the above materials, the learned Sessions Judge [Fast Track Mahila Court], Thoothukudi, framed charges against the first accused for the offences under Sections 417, 376, 294(b) and 506(ii) I.P.C and against Accused Nos.2 and 3 under Sections 294(b) and 506 (ii) I.P.C. The accused denied the same as false and opted for trial. Hence, in order to prove their case, on the side of the prosecution, 13 witnesses have been examined as P.W.1 to P.W.13 and 10 documents were marked as Exs.P.1 to P.10.

(i) Out of the said witnesses, P.W.1 is the victim in the alleged occurrence. She speaks about the occurrence, particularly, in respect of love affairs having by her with the first accused and about the false promise made by the first accused. She further speaks about the sexual assault committed by the first accused and about lodging of complaints before the Police Station on 11.09.2010 and 22.02.2011.

(ii) P.W.2 - Petchiammal is the mother of the victim girl. She has stated that during the relevant point of time, she saw P.W.1 along with the first accused in abnormal position. She has further



stated about the attempt made by her for solemnisation of marriage between P.W.1 and the first accused and about the demand of dowry made by the other accused [now acquitted]. According to her, the first accused had breached his promise and refused to marry P.W.1. She has also stated that during the time of occurrence, the first accused assured to marry P.W.1 and thereafter, he did not comply with the same.

(iii) P.W.4 - Aathiparasakthi and P.W.5 - Senthamarai Kannan speak about the preparation of Observation Mahazar and Rough Sketch by the Investigation Officer.

(iv) P.W.6 - Dr.Sasikala speaks about the examination of victim girl / P.W.1. She claims that when she had examined the victim girl, the victim girl has stated before her as during the relevant point of time, she had sexual intercourse along with one known person in the month of September, 2010 on her own volition.

(v) P.W.7 - Dr.Kingston Xavier speaks about the examination of the accused.

(vi) P.W.8 - Kalaiselvi and P.W.9 - Muthukrishnan, who are the Police persons, speak about the production of the victim girl and the accused respectively, before the Doctors for medical examination.

(vii) P.W.10 - Ravimathi deposed before the trial Court as on 22.02.2011, she received a complaint from P.W.1 and registered the case against the accused.

(viii) P.W.11 - Mariappan, the then Sub-Inspector of Police, Thalavaipuram Police Station, claims that on 11.09.2010 P.W.1 appeared before him and lodged a complaint against the accused. He further states that during enquiry, the accused assured to marry P.W.1 within a period of three months and for which, a Muchalika has been executed and the same was attested by the mother of the victim girl, her uncle and the first accused.

(ix) P.W.12 - Sureshkumar, the then Inspector of Police, speaks about the process of investigation and about the filing of final report.

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

7.Having considered all the above, the learned Sessions Judge [Fast Track Mahila Court], Thoothukudi, found the first accused guilty for the offence under Section 417 of I.P.C. and sentenced him



as stated in Paragraph 3 of this judgment. However, the learned Sessions Judge [Fast Track Mahila Court], Thoothukudi, acquitted the first accused under Sections 376, 294(b) and 506(ii) I.P.C. and the other accused under Sections 294 (b) and 506 (ii) I.P.C.

WEB COPY 8. Aggrieved over the said conviction and sentence, the first accused is before this Court with this criminal appeal.

9. The first and foremost contention raised by the learned counsel appearing for the appellant is that the evidence given by the prosecution witnesses did not reveal the fact that at the time of occurrence, the first accused herein did not make a false promise, due to circumstantial occasion, he has not married the P.W.1. The trial Court without considering the said aspect wrongly came to the conclusion that the first accused was guilty under Section 417 I.P.C.

10. Per contra, the learned Government Advocate (Criminal side) appearing for the State contended that the assurance given by the first accused before P.W.11 - Mariappan was not complied with by him, therefore, the said breach of promise committed by the accused would amount to false promise and hence, the interference of this Court in the findings arrived at by the trial Court does not require.

11. By considering the said submissions with the relevant records, it is not in dispute that before registration of the case, on 11.09.2019 P.W.1 herein lodged a complaint before P.W.11 under Ex.P.1 and thereafter, on enquiry, the first accused gave a false promise saying that he would go to marry P.W.1 within three months. Subsequent to that, the same has not been fulfilled. Accordingly, the first accused breached the promise. In the said circumstance, it is necessary to find out whether the non-fulfilment of assurance given by the first accused would amount to false promise. In this regard, while at the time of giving evidence as P.W.2, the mother of the victim girl, has stated as follows:-

“1வது எதிரி திருமணம் செய்துகொள்வதாகத்தான் சொன்னார். ஆனால் 2, 3 எதிரிகள் சண்டை போட்டார்கள். அதனால் 1வது எதிரி கட்டமாட்டேன் என்று சொல்லிவிட்டார்.”

12. In the said circumstance, it would be relevant to see the judgment of this Court, **dated 04.06.2020, made in Crl.A.No.376 of 2020 [V.Kotteeswaran Vs. The State]**, wherein it has been held as follows:-

“16.

21.? There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent



involved was given after wholly understanding the nature and consequences of sexual indulgence. 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 misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. ? ''

Now, applying the ratio laid down in the above judgment herein also, in view of the evidence given by P.W.2 only the circumstance found around the first accused prevented him from marrying P.W.1. Therefore, it cannot be said that during the relevant point of time, the first accused made a false promise to P.W.1.

13.Yet another thing, which is necessary for deciding this appeal is that, while at the time of examining the victim girl, she told to the Doctor that on her own volition, she had sexual intercourse with known person nearly about 10 times. Further, in her cross-examination, P.W.1 had categorically stated that she on her own volition, had sexual intercourse with the first accused. Therefore, as rightly pointed out by the learned counsel appearing for the appellant, here is a case, the act committed by P.W.1 is consensual in nature.

14.In a case of **Md.Mahasin SK. Vs. Sayeda Khatun Bibi and another** reported in **2005 Cri.L.J. 3162**, the High Court of Calcutta has held as follows:-

''8. It was held by this Court that even if it is assumed that she agreed to sexual intercourse with the accused on account of promise of the marriage, the charge under Section 417 could not be substantiated in the absence of any evidence to show that the said representation by the accused was false to the knowledge of the accused at the time it was made. This Court further held that where the charge is of cheating, as in this case rests upon a representation, which is false and which relates not to a existing fact but to a certain future event, it must be shown by the prosecution that the representation is false to the knowledge of the accused when it was made. It will be of no consequence to show that in fact the representation has ultimately turned out to be untrue. Accordingly, this Court set aside the conviction in the appeal.

9. The facts of Rajkumar Mondal (1992 Cal Cri B. 267) (supra) was also similar and there the victim



was working as maid servant in the house of the appellant when the appellant committed sexual intercourse with her and when she disclosed that she would inform everybody about the incident the appellant assured to marry her but ultimately did not marry her. The learned trial Court held the accused guilty under Section 417 of I. P. C. and not guilty under Section 376 of I. P. C. In the appeal a Division Bench of this Court set aside the conviction observing that there was no ingredient of cheating."

Therefore, applying the principles reiterated in the above referred judgment to the present case on hand, herein also, after making assurance to marry P.W.1, the first accused did not marry her. Therefore, it cannot be held that the first accused is guilty for the offence under Section 417 I.P.C.

15. One another occasion, which raised a doubt in the prosecution case is that, only after lapse of four years, the complaint pertains to the occurrence, has been given by P.W.1. Though it was stated by P.W.1, as she became pregnant, in respect of proving the said fact, she has not produced any substantial evidence. Further, in respect of pregnancy, P.W.2, who is the mother of P.W.1, did not say as her daughter became conceived and thereafter, the same was aborted. The Medical Officer, who examined P.W.1, has also not stated about the resemblance of pregnancy found in the body of P.W.1. Thus, it is seen that the evidence of Prosecutrix is not clear and specific and the same is suffering from material inconsistencies and contradictions with the other evidence on record. The discrepancy in the evidence of the Prosecutrix is incompatible with credibility of her version and hence, her version has to be out rightly rejected. In the absence of any corroboration, the evidence of the Prosecutrix has to be rejected.

16. As far as the offence under Section 417 I.P.C. is concerned, in the complaint, the victim girl had stated that she and the first accused were working in the same Company and that they were having a close relationship with each other for a period of three years and that she was aged about 21 years and the first accused was aged about 26 years at the time of occurrence and due to the relationship, the appellant/first accused had stated to have told her that he would marry her and had sexual intercourse with several times.

17. On going through the entire evidence, no material was placed on record to show that the appellant / first accused either on the inducement or on false promise with dishonest intention cheated the victim girl and committed sexual intercourse with her. Hence, I am of the view that the evidence put forth by the prosecution witnesses does not attract the ingredients, which are necessary to convict the first accused under Section 417 I.P.C. The



trial Court without considering the same, convicted the first accused. Hence, the conviction and sentence imposed by the trial Court is liable to be set aside.

18. In the result, this Criminal Appeal is allowed and the conviction and sentence dated 30.11.2015, imposed in S.C.No.110 of 2015, by the learned Sessions Judge [Fast Track Mahila Court], Thoothukudi, is set aside and the appellant/first accused is acquitted from the charges. The fine amount, if any, paid by him shall be refunded to him. Bail bond, if any, executed by the appellant shall stand cancelled.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

cp/smn2

To

1. The Sessions Judge,
Mahalir Neethimandram (Fast Track Mahila Court),
Thoothukudi.
2. The Inspector of Police,
All Women Police Station,
Srivaikundam,
Thoothukudi District.
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
4. The Section Officer,
Criminal Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.M.S.JEYAKARTHIK, Advocate (SR-26103[F] dated 12/08/2021)

Cr1.A(MD)No.375 of 2015
11.08.2021

RD(26.08.2021) 8P 7C