

BAIL SLIP

The Appellant/Sole Accused Malaisamy, Male/26 years, S/o.Mottai Karuppan, was directed to be released on bail order of this Court dated 18.05.2016 and made in CrI.MP(MD).No.1 of 2015, in CrI.A(MD)No.376 of 2015

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 17.09.2021

Pronounced on : 06.10.2021

C O R A M

THE HON'BLE MR.JUSTICE R. PONGIAPPAN

Criminal Appeal (MD) No.376 of 2015

Malaisamy,
S/o.Mottaikaruppan

... Appellant/ Sole Accused

versus

State Represented by
The Inspector of Police,
Abiramam Police Station,
Ramanathapuram District.
(Crime No.73 of 2010)

... Respondent / Complainant

Criminal Appeal filed under Section 374(2) of the Code of Criminal Procedure, against the judgment dated 19.03.2015, passed in S.C.No.111 of 2008, on the file of the learned Additional Sessions Judge, Fast Track Mahila Court, Ramanathapuram.

For Appellant : Mr.K.R.Laxman
For Respondent : Mr.E.Antony Sahaya Prabahar
Government Advocate (CrI. Side)

JUDGMENT

The present appeal is directed against the conviction and sentence dated 19.03.2015, made in S.C.No.111 of 2008, on the file of the learned Sessions Judge [Fast Track Mahila Court], Ramanathapuram.

2.The appellant is the sole accused. He stood charged for the offence under Sections 376 and 417 I.P.C. and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002. After full-fledged trial, the trial Court came to the conclusion that the appellant is found guilty under Sections 417 and 376 I.P.C. In respect of the offence under Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002, the trial Court acquitted the accused. After concluding as above, for the offence under Section 417 I.P.C. the trial Court convicted the accused and sentenced him



to undergo rigorous imprisonment for one year. As far as the offence under Section 376 I.P.C. is concerned, the accused has been convicted and sentenced to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.25,000/-, in default, to undergo simple imprisonment for two years.

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

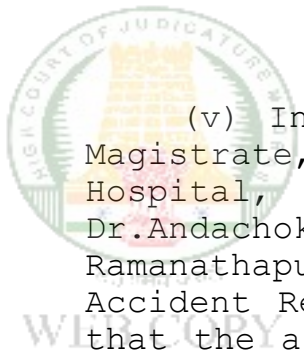
4.The case of the prosecution in brief is as follows:-

(i) P.W.1 is the victim girl. The accused is residing in the same Village, wherein P.W.1 was residing. Before the occurrence, over the period of one year, both of them fell in love with each other. During the relevant point of time, around 12 o'clock, in the midnight when P.W.1 was in her home, the accused came there and pull the hands of P.W.1 and afterwards, both of them were went to Tippas Oorani, wherein they indulged in the sexual intercourse. After the said occurrence, when at the time, P.W.1 was crying, the accused pacified her by saying that he would definitely marry her. Further, he instructed P.W.1 not to disclose the same to others. Thereafter, regularly both of them had sexual intercourse in the same place and as a result of which, she becomes pregnant. After she got pregnant, the accused refused to marry her. Hence, P.W.1 reported the occurrence to her parents.

(ii) Immediately, after knowing the occurrence, the parents of the victim girl approached the accused and his family members, wherein the accused refused to marry P.W.1 and ultimately, on 01.08.2010 around 05.15 p.m., P.W.1 lodged a complaint before the respondent Police under Ex.P.1.

(iii) On receipt of the said complaint, P.W.7 - Selvi, the then Sub-Inspector of Police, Abiramam Police Station, registered a case against the accused in Crime No.73 of 2010 under Sections 417 and 376 I.P.C. read with Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002. The printed F.I.R. is marked as Ex.P.4. After registration of the case, she handed over a copy of the F.I.R. to P.W.10 for further investigation.

(iv) P.W.10 - Thiru.Paulraj, the then Inspector of Police, Abiramam Police Station, on receipt of the said F.I.R., took up the same for investigation. He visited the scene of occurrence, wherein in the presence of witnesses, he prepared an Observation Mahazar [Ex.P.2]. He drew the Rough Sketch and the same was marked as Ex.P.12. He examined the witnesses and recorded their statements. On the same day around 21 hours, in Natham Bus Stand, he arrested the accused and sent him to remand. On 02.08.2010, he submitted an application before the learned Judicial Magistrate, praying to conduct medical examination to the victim girl as well as to the



(v) In turn, in view of the proceedings issued by the learned Magistrate, P.W.5 - Dr.Karuppasamy admitted the accused in the Hospital, for medical examination and afterwards, P.W.8 - Dr.Andachokalingam attached to the Government Hospital, Ramanathapuram, medically examined the accused and issued an Accident Register copy under Ex.P.5, stating as nothing to suggest that the accused is impotent, further, he has stated that there is no evidence for recent sexual intercourse. He issued a report under Ex.P.6 in this regard.

(vi) Similarly, P.W.6 - Dr.C.Kamarudin attached to Government Head Quarters Hospital, Ramanathapuram, on the same day around 07.45 p.m., examined the victim girl and issued a report under Ex.P.3 stating that the victim girl is a four months pregnant lady.

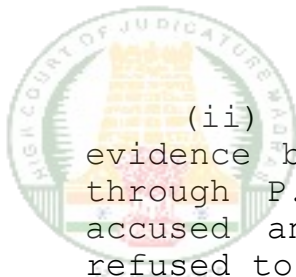
(vii) In the meantime, P.W.9 - Tmt.Mahalakshmi examined the blood samples and vaginal smear collected from the victim girl and issued a biological reports under Ex.P.7 and Ex.P.8, stating that no semen is detected.

(viii) However, P.W.1 gave birth to a male child and after giving birth to the said child, P.W.10 - Paulraj made arrangements for DNA test and the same has also been completed by P.W.9 after observing all the formalities, which are required to complete the DNA test. In this regard, P.W.9 issued a report under Ex.P.11 stating that the accused Malaisamy is the biological father of the minor male child.

(ix) Ultimately, P.W.10 concluded investigation and came to the conclusion that the accused is liable to be convicted under Sections 376, 417 I.P.C. and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002. He filed a final report accordingly.

5.From the above materials, the trial Court framed charges against the accused under Sections 376 and 417 I.P.C. and Section 4 of the Tamil Nadu Prohibition of Harassment of Women Act, 2002. The accused denied the charge and opted for trial. Hence, he was put on trial. In order to prove their case, on the side of the prosecution, 10 witnesses were examined as P.W.1 to P.W.10 and 12 documents were marked as Exs.P.1 to P.12.

(i) Out of the said witnesses, P.W.1, who is the victim girl, speaks about the occurrence as during the relevant point of time, she fell in love with the accused and on the day of occurrence, around 12 o'clock in the midnight, the accused came to her house and after pulling her hand, lifted her to Tippas Oorani, wherein both of them had sexual intercourse, further, the same was continued for several times, as a result of which, she becomes pregnant and when the same was informed to the accused, he refused to marry her.



(ii) P.W.2 - Mani Muthu is the father of P.W.1. He gave evidence before the trial Court as after knowing the occurrence, through P.W.1 along with the Village people, he approached the accused and requested to marry the victim girl, for which, he refused to marry her.

WEB COPY (iii) P.W.3 - Velusamy, who is the Sweeper working in Natham Panchayat, gave evidence as P.W.1 is his brother's daughter. He claims that during the relevant point of time, he saw P.W.1 along with the accused in the Oorani. However, due to enmity having by him with P.W.2, he has not informed the same immediately to P.W.2 and only on the occasion, when P.W.2 reported the same to him, he along with others went to the house of the accused and requested the accused to marry P.W.1.

(iv) P.W.4 - Kumaresan, who is the resident of the same Village, speaks about the preparation of Observation Mahazar [Ex.P.2] as on 01.08.2010 around 06.00 p.m., P.W.10 came and prepared an Observation Mahazar in the Oorani in his presence.

(v) P.W.5 - Karuppasamy and P.W.8 - Andachockalingam, who are the Doctors attached to the Government Hospital, Ramanathapuram, speak about the examination of the accused.

(vi) P.W.6 - Vahithabegam, who is also a Doctor by profession attached to the same Hospital, speaks about the medical examination conducted on the victim girl.

(vii) P.W.7 - Selvi, who is the Sub-Inspector of Police, gave evidence in respect of receipt of complaint and about the registration of the case.

(viii) P.W.9 - Tmt.Mahalakshmi, who is the Assistant Director, Forensic Science Department, Madurai, speaks about the examination of Vaginal Smear and blood samples collected from the victim girl. Further, she has stated about the DNA test conducted to the accused and to the new born child.

(ix) P.W.10 - Paulraj, who is the Inspector of Police, speaks about the investigation of the case and about the filing of final report.

6. When the above incriminating the 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 or mark any document on his side.

7. Having considered the materials placed before him and on considering the arguments advanced on either side, the learned Judge, Fast Track Mahila Court, Ramanathapuram, found the



accused guilty under Sections 417 and 376 I.P.C., convicted and sentenced him as stated in Paragraph 2 of this judgment.

8. Aggrieved over the said findings of the Court below, the appellant is before this Court with this Criminal Appeal.

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9. The learned counsel appearing for the appellant would contend that, previous to the alleged occurrence, both the victim girl and the accused fell in love with each other and the same had already been known to their parents. Further, the Prosecutrix being the relative of the accused, in the lonely area, both P.W.1 and the accused had regularly met and indulged in the sexual intercourse continuously for a period of six months and therefore, here it is a case, in which, it should be decided as P.W.1 is a consenting party to the alleged occurrence and therefore, it cannot be said that the accused has committed the offence punishable under Section 376 I.P.C.

10. Per contra, the learned Government Advocate (Criminal side) appearing for the respondent Police contended that the evidence given by the prosecution witnesses is sufficient to hold that the accused had committed the offences under Sections 417 and 376 I.P.C. and therefore, interference in the findings arrived at by the learned Sessions Judge does not require.

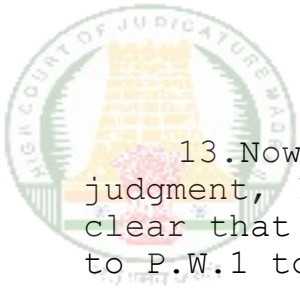
11. In support of his submissions, the learned counsel appearing for the appellant relied on the following judgments of this Court:-

(i) CrI.A.(MD)No.235 of 2016, dated 09.08.2021 [Madan @ Madankumar vs. State, Rep. by the Inspector of Police, All Women Police Station, Manamadurai, Sivagangai District]

(ii) CrI.A.No.718 of 2010, dated 09.07.2018 [Pappu @ Gnanasekaran vs. State, Rep. by the Inspector of Police, Pallavaram Police Station, Chennai]

(iii) CrI.A.(MD)No.335 of 2011, dated 12.03.2015 [Emarajan Vs. The State, Rep. by the Inspector of Police, V.K.Puram Police Station, Tirunelveli District]

12. Now, on going through the judgments rendered in CrI.A.No.718 of 2010, dated 09.07.2018 and CrI.A.(MD)No.235 of 2016, dated 09.08.2021, it seems that the same are not related to the case in respect of Section 376 I.P.C. On the other hand, in CrI.A.(MD)No.335 of 2011 [decided on 12.03.2015], this Court after holding that the physical relationship between the appellant/accused and P.W.1/victim was consensual one and thereby, the ingredients of offence under Section 375 I.P.C. would not be attracted and ultimately, acquitted the appellant/accused therein from the charge under Section 376 I.P.C.



13.Now, applying the ratio laid down in the above referred judgment, here it is a case, the evidence given by P.W.1 is very clear that during the time of occurrence, the accused gave assurance to P.W.1 to marry her.

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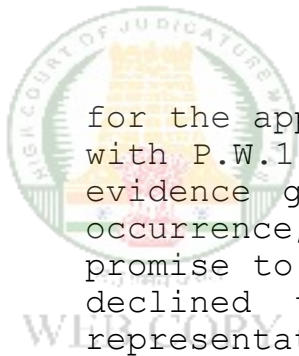
14.Though it was stated by P.W.1 that after made false promise to marry her, the accused indulged in sexual activities, in her cross-examination, she gave evidence as, due to love affairs, with her consent, the accused indulged in sexual activities. It is the further evidence given by P.W.1 that, the said activity was continued nearly for a period of six months. She has also stated that the said relationship having by her with the accused is known to her parents and to the Public, who are residing in the said Village. In support of the said evidence, P.W.3, who is the uncle of the victim girl, gave evidence as, he seen the victim girl in Tippas Oorani along with the accused.

15.Therefore, in the said circumstances, being a grown up girl, knowing the consequences, permitting the accused for a period of six months, submitted herself for sexual intercourse, would reveal the fact that she is a consenting party to the alleged offence committed by the accused.

16.In general, only in the circumstances, if the prosecution proved that the defendant knew that the woman did not want to have sexual intercourse or was reckless as to whether she wanted to or not, then, the accused should be guilty and in later case for reckless rape. If it was established that the accused might have genuinely believed that she did worst to even though he was mistaken in his belief, he would be found not guilty of any offence.

17.Accordingly, the facts and circumstances of the case now narrated by the prosecution shows that the alleged offence committed by the accused is consensual one and therefore, the accused need not be convicted under Section 376 I.P.C.

18.As far as the offence under Section 417 I.P.C. is concerned, the evidence given by the Scientific Expert and the report in respect of DNA Test confirm that the accused is the biological father of the minor child born to P.W.1. In this aspect, for convicting the accused under Section 417 I.P.C., the prosecution has to prove that during the time of occurrence, the accused intentionally induces P.W.1 so deceived to do anything, which she would not do and the said act causes or is likely to cause damage or



for the appellant is that, due to consensual sex made by the accused with P.W.1, a child was born to the victim girl. In otherwise, the evidence given by P.W.1 is very clear and narrow that after the occurrence, when at the time she was crying, the accused made a promise to marry her. When the pregnancy came to light, the accused declined to marry her, which shows that the accused made a representation deliberately with a view to elicit the assent of the victim girl without having the intention or inclination to marry her. The said act of the accused definitely comes within the purview of cheating. Therefore, I am of the considered opinion that the accused without any intention to marry her, had involved in sexual activities and afterwards, refused to marry her. Accordingly, he is liable to be convicted under Section 417 I.P.C.

19.However, before deciding whether the accused is guilty under the penal law or not, it is also necessary to decide the future of the minor child born to P.W.1. Due to the act committed by P.W.1 and the accused, the child born loses the status of legitimate child. Without committing any mistake, he was branded as bastard. Therefore, the real victim in the alleged occurrence is the child, who born to P.W.1 and the 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. Accordingly, this Criminal Appeal is partly allowed on the following terms:-

(i) The accused is found guilty under Section 417 I.P.C., convicted and sentenced to undergo one year rigorous imprisonment.

(ii) The accused is directed to deposit a sum of Rs.5,00,000/- to the credit of S.C.No.111 of 2008, on the file of the learned Sessions Judge, Fast Track Mahila Court, Ramanathapuram, for the minor child as compensation within a period of three months after undergoing the term of imprisonment. The learned Sessions Judge, Fast Track Mahila Court, Ramanathapuram, is directed to deposit the said amount in a Fixed Deposit in any of the Nationalized Banks in favour of the minor child, for a period of three years and renewable thereafter, till the minor attains majority. The mother of the minor child/P.W.1 is permitted to withdraw the interest accrued thereon once in three months directly from the Bank without filing any formal application before the trial Court and utilize the same for the welfare of the minor child.

(iii) Apart from the above, the victim child is also entitled to receive benefits from the accused under Civil Law.

(iv) Bail bond, if any, executed by the accused shall stand cancelled.



(v) The trial Court is directed to secure the accused and commit him to prison for undergoing the remaining period of sentence.

Sd/-

Assistant Registrar (CS-II)

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/ /2021

Sub Assistant Registrar(CS)

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To

- 1.The Sessions Judge,
Fast Track Mahila Court,
Ramanathapuram.
- 2.The Inspector of Police,
Abiramam Police Station,
Ramanathapuram District.
- 3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.
- 4.The Section Officer,
Criminal Section (Records),
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+1 CC to M/s.K.R.LAXMAN, Advocate (SR-31672[F] dated 07/10/2021)

judgment in
Criminal Appeal (MD) No.376 of 2015
06.10.2021

GC(12.10.2021) 8P 7C