



BAIL SLIP

The Petitioner/Appellant namely senthilkumar male was released on Bail as per order of this Court dated:22.04.2016 made in Cr1.MP (MD)nO.1775/2016 in Cr1.A(MD)No.63 of 2016.

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 17.08.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

Cr1.A. (MD)No.63 of 2016

Senthilkumar : Appellant/Accused No.1

Vs.

State rep. by
The Inspector of Police,
Masarpatti Police Station,
Thoothukudi District.
(Crime No.78/2014)

: Respondent/Complainant

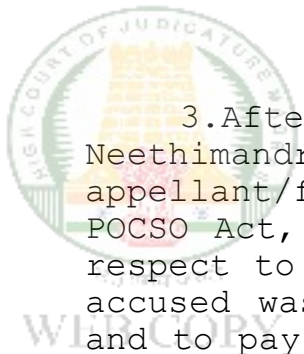
PRAYER: This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, to set aside the conviction and sentence dated 25.01.2016 made in S.C.No.35 of 2014 on the file of the Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi and acquit the appellant.

For Appellant : Mr.V.Kathirvelu
Senior Counsel
for Ms.M.Anbarasi
For Respondent : Mr.E.Antony Sahaya Prabahar
Government Advocate (crl.side)

JUDGMENT

This present criminal appeal is directed against the conviction and sentence dated 25.01.2016 passed in S.C.No.35 of 2014 on the file of the Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi.

2.The appellant is arrayed as first accused in the above referred case and his parents Krishnasami and Krishnammal are arrayed as Accused Nos.2 and 3 respectively in the same case. In the trial Court, against the first accused the learned Sessions Judge framed the charges under Section 4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred as "POCSO Act") and Section 506(i) of I.P.C. Similarly, against the accused Nos.2 and 3 (now acquitted) framed charge under Section 506(i) of I.P.C. All the accused denied the charges and opted for trial. Therefore, they were put on trial on the charges.



3.After full-fledged trial, the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi, found the appellant/first accused guilty for the offence under Section 4 of POCSO Act, 2012 and Section 506(i) of I.P.C. Consequentially, in respect to the offence Under Section 4 of POCSO Act 2012, the first accused was sentenced to undergo seven years rigorous imprisonment and to pay a fine of Rs.3,000/-, in default, to undergo one month rigorous imprisonment. Further in respect to the offence Under Section 506(i) of I.P.C, the first accused was convicted and sentenced to undergo one year rigorous imprisonment and to pay a fine of Rs.1,000/-, in default, to undergo one month rigorous imprisonment. As far as the accused Nos.2 and 3 are concerned, they were acquitted from all the charges. Challenging the said conviction and sentence, the appellant/first accused is before this Court with the present Criminal Appeal.

4.For the sake of convenience, the appellant hereinafter is called as accused.

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

(i) PW1-Murugalakshmi is residing at Ayanvadamalapuram. PW2-Mariammal is her mother and the accused herein is her uncle. During the relevant point of time, she was studying diploma in nursing. Her date of birth is 22.06.1997. On 31.05.2014 around 5.00 p.m when PW1 was alone in her house, the accused came there and started to chatting in respect to the other issue. During the time, the accused asked PW1 as whether any one was in the house, PW1 replied that there was no one in the house. Consequentially, after knowing the same, the accused invited PW1 to come behind the house by saying you should be given a gift. Thereafter, both of them went into hurt which is situated just behind to PW1's house and while such time, both were chatted in respect to the other issue, the accused pressed her breasts and after removing her clothes, inserted his male organ into her vagina and after seeing the same, she shouted and begged him not to do so. But in respect of obeying the request, the accused gagged her mouth and ultimately she fell down unconscious. At that time something white oozed from his penis. Further, the accused told to her that he is in love with her and that he would marry her.

(ii) Later she came to know that the accused was engaged to the girl belongs to Gangankulam of Kovilpatti and after knowing the same, she went to the accused house and asked him about the same. While at the time, PW1 questioning the attitude of the accused, the accused told to her that already he had enjoyed and so what is now at present and that he would not marry her. In this regard, she told him that due to the sexual assault committed, she became pregnant.

(iii) On 30.07.2014, she reported the matter to her parents and her parents asked the parents of the accused,

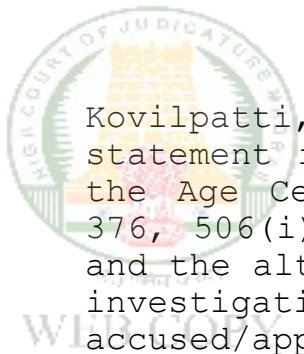


there was no response in respect to the marriage proposal made by the parents of PW1. Therefore, PW1 decided to commit suicide and consumed rat killer poison. PW6-Dr.Rajeswari and PW7-Dr.Balaji gave treatment to PW1 and further, they issued the Accident Register under Ex.P3 and Ex.P4. While at the time PW1 was taking treatment in the Hospital, PW9-Jeyakumar, the then Head Constable attached with Masarpatti Police Station recorded the statement from her and handed over the said statement to the Inspector of Police.

(iv) Later, after getting treatment, on 04.08.2014 around 20 hours PW1 lodged the complaint before PW12. In turn, PW12-Kiruba the then Inspector of Police, Masarpatti Police Station, registered a case in Crime No.78 of 2014 under Sections 417, 376, 506(i) and 306 r/w 511 of I.P.C. The printed FIR was marked as Ex.P9. The copy of the complaint given by PW1 dated 04.08.2014 was marked as Ex.P1. After registration of the case, PW12 had forwarded the First Information Report to PW13-the then Inspector of Police, Masarpatti Police Station, for investigation. In turn, after the receipt of the said FIR, PW13-Shunmugam took the same for investigation and on the same date around 22.30 hours visited the scene of occurrence and recorded the Statements from Suresh Raja and one Chinna Karuppasami. On the same date, he examined the witnesses Murugalakshmi, Mariammal and Ponnusamy and recorded their statements. He prepared the Observation Mahazar under Ex.P11 and Rough Sketch under Ex.P12.

(v) On 05.08.2014 around 10.00 a.m near to Ayanvadamalapuram, he arrested the accused and recorded the confession statement given by him. He sent the requisition to the learned Judicial Magistrate, Vilathikulam, to conduct medical examination to the victim girl as well as to the accused. In turn, upon receipt of the proceedings issued by the learned Judicial Magistrate, PW11-Dr.Sudha examined the victim girl and on such time, the victim girl reported the occurrence to the Doctor as "for the past 1 ½ years she had sexual intercourse with her lover". However, during the time of medical examination, PW-11 collected the vaginal smear of the victim girl and send the same for chemical examination. Thereafter, PW11 referred the PW1-victim girl to the Radiologist to find out the age of the victim girl. In turn, the Radiologist examined the victim girl and issued the age certificate as the age of the victim girl is above 18 years and below 19 years. She issued a report that PW1 is not a pregnant woman. In this regard, PW11- Dr.Sudha issued the Accident Register copy under Ex.P8.

(vi) In continuation of investigation, PW13 examined the Doctors and recorded their statements. He collected the Course Certificate pertains to PW1 from Sri S.Ramaswamy Naidu Memorial College in which the victim girl was studied. According to the Certificate issued by the College, the date of the birth of the victim girl is 22.06.1997. He submitted an application before learned Chief Judicial Magistrate for recording 164 Cr.P.C statement



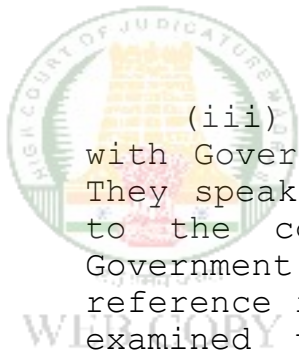
Kovilpatti, had recorded 164 Cr.P.C statement of the victim. The statement recorded from PW1 was marked as Ex.P7. After receiving the Age Certificate, PW13 altered the Sections of law i.e., 417, 376, 506(i), 306 r/w 511 of I.P.C into Section 4 of POCSO Act 2012 and the alteration report is marked as Ex.P14. After completing the investigation, he came to the positive conclusion that the accused/appellant is liable to be convicted under Section 4 of POCSO Act 2012 and 506(i) of IPC. Further he came to the conclusion that the parents of the accused (now acquitted) are liable to be convicted under Section 506(i) of IPC and filed a final report accordingly.

6. Based on the materials available on record, the learned Sessions Judge, Fast Track Mahila Court, Thoothukudi, framed the charges against the first accused for the offence under Section 4 of POCSO Act 2012 and Section 506(i) of IPC and against the accused Nos.2 and 3 for the offence under Section 506(i) of IPC. All the accused denied the charges and opted for trial. Therefore, all the accused were put on trial.

7. During the course of trial proceedings, in order to prove their case, on the side of the prosecution, as many as 13 witnesses were examined as PW1 to PW13 and 14 documents were exhibited as Ex.P1 to Ex.P14.

8. (i) Out of the above said witnesses, PW1-Murugalakshmi is the victim girl in this case. She speaks about the occurrence as during relevant point of time the accused herein committed penetrative sexual assault on her. She further states that before the occurrence, both of them having cordial relationship and regularly chat about other things. PW2-Mariamammal is the mother of victim girl. She speaks about the occurrence as after hearing the alleged occurrence, both herself and her husband met the second and third accused and made a request for settling the issue by way of solemnizing the marriage between the victim and the first accused and in the compromise talk, the accused 2 and 3 refused to accept the proposal made by them and thereby after knowing the same, PW1 consumed rat poison. Further, she stated that on 04.08.2014, both herself and the victim girl went to the Police Station and lodged a complaint.

(ii) PW3-Sundaram is the grandfather of PW1. He speaks about the occurrence as before the occurrence, both PW1 and the accused were having cordial relationship and the same was not objected by the family members of PW1. PW4-Dheivanai is the relative to the victim girl. She gave evidence in support of the evidence given by PW3. PW5-Perumal, who is working as Village Administration Officer, in Vemur Village claims that on 05.08.2014, in his presence, PW13 arrested the accused and recorded the confession statement from him, wherein he admitted the commission of



(iii) PW6-Rajeswari and PW7-Balaji are the Doctors attached with Government Hospital, Ettaiyapuram and Kovilpatti respectively. They speak about the treatment given to the victim girl in respect to the consumption of rat poison. PW8-Dr.Moses attached with Government Hospital, Kovilpatti, gave evidence as in view of the reference issued by the learned Judicial Magistrate, Vilathikulam, he examined the accused and issued the certificate under Ex.P5. According to him, the accused is a potent man.

(iv) PW9-Jeyakumar, who is working as Head Constable in Massarpatti Police Station, gave evidence as on 30.07.2014 after receipt of the information from the Government Hospital, Kovilpatti, he visited there and examined the victim girl, recorded the statement of PW1 and place the same before the Inspector of Police. PW10-Rajamahesh, the then learned Judicial Magistrate No.1, Kovilpatti, speaks about the recording of 164 Cr.P.C statement of the victim girl.

(v) PW11-Dr.Sudha attached to Government Hospital, Kovilpatti, speaks about the examination of victim girl and issuance of the certificate as the victim is not a pregnant lady. PW12-Kiruba and PW13-Shunmugam are the Police Officers. They speak about the receipt of complaint, examination of witnesses and about the filing of final report.

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

10. Having considered all the above, the learned Session Judge, Fast Track Mahila Court, Thoothukudi, came into the conclusion that the first accused herein is found guilty for the offence under Section 4 POCSO Act 2012 and Section 506(i) of I.P.C and sentenced him as stated in paragraph No.3 of this judgment. However, the learned Sessions Judge had acquitted the accused Nos.2 and 3 from the charge under Section 506(i) of IPC. Aggrieved over the said conviction and sentence, the appellant/first accused is before this Court with this appeal.

11. I have heard Mr.V.Kathirvel, learned Senior Counsel appearing for the appellant/accused and Mr.E.Antony Sahaya Prabahar, learned Government Advocate (crl.side) appearing for the State and also perused the records carefully.

12. The learned counsel appearing for the appellant challenges this appeal in two folds:-

(i) the age of the victim girl has not been proved in terms of settled law. During the time of occurrence, being the reason that



alleged offence committed by the accused is a consensual one and hence, Section 4 of POCSO Act 2012 is not attracted against the accused.

(ii) the evidence let in by the prosecution witnesses disclose the fact that prior to the occurrence both the accused and the victim girl were fell in love with each other and also they were under the impression to marry themselves. Accordingly, it should be decided as there is no false promise has been given by the accused prior to the alleged occurrence.

13.Per contra, the learned Government Advocate (crl.side) appearing for the respondent would contend that the evidence given by the Investigation Officer and the Certificate issued by the Authority would sufficient to hold that at the time of occurrence the victim girl has not completed the age of 18 years and due to the same the alleged offence committed by the accused would certainly attract Section 4 of the POCSO Act 2012. He would further contend that the evidence of PW1 would reveal the fact that only after making false promise and after knowing the fact that the victim girl is below 18 years, the accused herein committed penetrative sexual assault over PW1 and therefore, interference of this Court in the conviction and sentence awarded by the trial Court does not require.

14.I have considered the rival submissions made by the learned counsel appearing on either side.

15.In respect to the first submission, before the trial Court, the Course Certificate dated 26.08.2014 issued by the Principal of the College, in which the victim girl was studied, was marked as Ex.P13 through the investigation Officer. In this regard, initially, there is no explanation from the prosecution that why the said document has been marked in the absence of the author of the said document. However, in the said Certificate, the Principal of the College has stated that the date of birth of the victim girl is 22.06.1997. Further at the time of giving evidence as PW1, the victim girl gave evidence as her date of birth is 22.06.1997. In the said circumstances, it is not in dispute that the alleged occurrence had happened on 30.07.2014 and therefore, on the date of occurrence the victim girl has not completed the age of 18 years.

16.In otherwise, on considering the submission made by the learned counsel for the appellant in respect to the age of the victim girl, it would relevant to see the documents marked on the side of the prosecution. Initially, before the trial Court, the Accident Register dated 30.07.2014 issued at the time when PW1 got treatment for consumption of rat kill poison, was marked as Ex.P2, in the said document, it was stated that the age of the victim girl is 19 years. Further, when at the time the learned Judicial Magistrate recorded 164 Cr.P.C statement from the victim girl, she

years. More than that during the time when the victim girl was examined by the Doctor on 06.08.2014, it was stated by the Doctor as the victim girl was aged about 19 years. Apart from that the Radiologist who determine the age of the victim girl by taking X-ray issued the report as the age of the victim girl is above 18 years and below 19 years and therefore, on conjoint reading of the entire evidences given by the prosecution witnesses in respect to the age of the victim girl, it appears that two set of evidence are produced on the side of the prosecution. Meticulously, in the Certificate issued by the College Authority in respect to the date of birth, they have not referred any documents i.e., T.C, Birth Certificate. In fact, without any reference, they simply state that the date of birth of the victim girl is 22.06.1997.

17. Accordingly, in view of the above, I am of the opinion that before the trial Court, the prosecution has not proved the age of the victim girl as she has not completed the age of 18 years at the time of occurrence by producing the relevant documents. In otherwise, the relevant document produced on the side of the prosecution to show the age of the victim girl are all found against the case of the prosecution. Accordingly, those documents relied on by the prosecution confirm that the age of the victim girl at the time of occurrence is 19 years and therefore, the provisions under the POCSO Act is not attracted against the accused.

18. Now, on considering the second submission made by the learned counsel appearing for the appellant, it is true that while at the time of giving evidence as PW1, the victim girl in her chief examination, has narrated the specific occurrence had happened in the house. Further, she has stated that while at the time, the accused was indulging in sexual intercourse, he made promise that he would marry her. It is the case of the prosecution that after made such false promise, the accused herein did not comply the said promise by marrying the victim girl as such the alleged incident enraged by the accused.

19. On the other hand, it is the case of the appellant/accused that both the accused and PW1 was fell in love with each other and also when at the time, the accused made arrangements for marrying the victim girl, the family members of the victim girl alone refused to give permission for the marriage of PW1 with the accused. It is the further case of the accused that the alleged rape said to have been committed by the accused is consensual one.

20. Now, on considering the said submission with the relevant records, it seems that though the alleged occurrence had been narrated by PW1 in her chief- examination, in her cross-examination she has stated that prior to 1½ years from the date of occurrence, she fell in love with the accused, she regularly met the accused in Sundaram Aachi's house and the same was known to the said Sundaram Aachi. The evidence given by PW1 is clear that the accused herein



is her uncle and further, after the occurrence, she has not reported the same immediately either to her parents or before the police. It is the specific evidence given by the victim girl that the elder members of her family refused to give permission to marry the accused.

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21. Yet another evidence given by PW1 is that initially she did not want to file any case against the accused and she wanted to settle the issue amicably. Therefore, the said evidence given by PW1 is narrow and clear only the family members of PW1 after refusing permission to PW1 for marrying the accused, lodged this case. Therefore, in the said circumstance, it cannot be said that the accused is not willing to marry PW1 and thereby, it cannot be held that he made a false promise during the time of occurrence. Ultimately, the entire evidence given by PW1 reveals the fact that the entire occurrence had happened with her consent.

22. At this juncture, it is relevant to refer to the judgments relied on by the learned counsel for the appellant:-

(i) In **Deepak Gulati v. State of Haryana** reported in (2013) 7 SCC 675 in paragraphs 21 and 24, it was held as under:-

"21. Consent may be expressed or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused 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 latter falls within the ambit of cheating or deception. 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. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.



24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.

(ii).In **PramodSuryabhan Pawar v. State of Maharashtra and another** reported in (2019) 9 SCC 608 in paragraph 18, it was held as under:-

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.

(iii).In **Dr.Dhruvaram Murlidhar Sonar v. State of Maharastra and others** reported in (2019) 18 SCC 191 in paragraph 23, it was held as under:-

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 latter 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 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 IPC.

23.To summarize the judgments referred are all above ruled the situation that it is necessary to see whether the accused is having a mala fide intention at the time of making the false promise. Here it is the case, the evidence given by PW1 would appear that only the elder members of her family refused to give permission to perform the marriage between PW1 and the accused. In otherwise, it cannot be said that the accused willingly refused to marry PW1. Only after made refusal by the family members of PW1, the accused Nos.2 and 3 (now acquitted) made arrangements for marriage of accused with another girl. Therefore, the said act committed by the accused is not at their fault but only due to the fault committed by the family members of PW1. In such occasion, it cannot be said that the accused herein with mala fide intention made a false promise and committed the occurrence. Therefore, the said act committed is not within the purview of rape, but the Court below without understanding the evidence given by PW1 with correct perspective manner came to the conclusion that the accused found guilty under Section 4 of POCSO Act, 2012 and Section 506(i) of I.P.C

24.In the light of the above observations, I am of the considered opinion that the conviction and sentence passed by the trial Court is liable to be set aside. Accordingly, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/first accused, by the learned Sessions Judge, Mahalir Neethimandram (Fast Track Mahila Court), Thoothukudi in S.C.No.35 of 2014, dated 25.01.2016, is set aside and the appellant/first accused is acquitted of all the charges. The fine amount, if any, paid by him, shall be refunded to him.

Sd/-

Assistant Registrar (T&P)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



To:-

- 1.The Sessions Judge,
Mahalir Neethimandram (Fast Track Mahila Court),
Thoothukudi.
- 2.The Inspector of Police,
Masarpatti Police Station,
Thoothukudi 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.B.AZHAGESH, Advocate (SR-26591[F] dated 17/08/2021)

JUDGMENT MADE IN
Cr1.A. (MD)No.63 of 2016
17.08.2021

GC(23.09.2021) 11P 7C