



BAIL SLIP

The Appellant/Accused No.1 Mr.Muthukani, S/o. Balusamy was directed to be released on bail as per the order of this hon'ble Court in Crl.A.(MD).No. 1991 of 2016 in Crl.A.(Mo. 77 of 2016, dated 04.03.2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Order	Date of Pronouncing the Order
23.08.2021	06.09.2021

CORAM:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN
Crl.A.(MD)No.77 of 2016

Muthukani : Appellant/Accused No.1

Vs.

State by Inspector of Police,
All Women Police Station,
Kadambur Police Station,
Thoothukudi District
(Crime No.4 of 2014)

: Respondent/Complainant

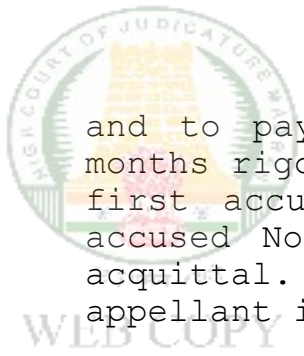
PRAYER: This Criminal Appeal is filed under Section 374(2) of the Code of Criminal Procedure, against the conviction and sentence passed by learned Sessions Judge, Mahila Court, Thoothukudi in S.C.No.35 of 2015, dated 23.02.2016.

For Appellant : Mr.R.Anand
for Mr.P.Samuelgunasingh
For Respondent : Mr.E.Antony Sahaya Prabahar,
Government Advocate (crl.side)

JUDGMENT

This present criminal appeal is directed against the conviction and sentence dated 23.02.2016 made in S.C.No.35 of 2015 on the file of the learned Sessions Judge, Mahila Court, Thoothukudi.

2.The appellant is arrayed as first accused and his parents are arrayed as accused Nos.2 and 3 (now acquitted) in the above referred case. They stood charged for the offence punishable under Sections 417, 376 and 506(i) of IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act. After full-fledged trial, the learned Sessions Judge, Mahila Court, Thoothukudi, came to the conclusion that the appellant is found guilty for the offence under Section 376 (1) of IPC and sentenced to undergo 10 years rigorous imprisonment



and to pay a fine of Rs.3,000/-, in default, to undergo three months rigorous imprisonment. For the remaining charges against the first accused and in respect to the charges framed against the accused Nos.2 and 3, the learned Trial Judge passed an order of acquittal. Challenging the said conviction and sentence, the appellant is before this Court with the present Criminal Appeal.

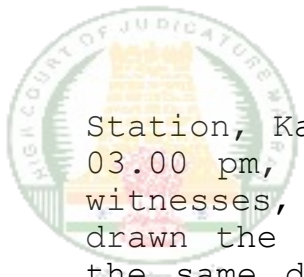
3.For the sake of convenience, the appellant hereinafter is called as accused.

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

(i) PW1-victim is a resident of Maruthanvazhvu. She is known to the accused. The accused herein is her aunt's son. She was married to one Jebamain in the year 2007 and as there was misunderstanding between them, she obtained divorce and she was living with her mother. Her mother is disabled woman and she does not have father. In the year 2013, after the celebration of Deepavali festival, when at the time PW1 was in Maniyachi Railway Station to catch the train, the accused came there and asked her mobile number, further, without getting any consent from PW1, the accused took PW1's mobile phone and made call to his mobile. Thereafter, the accused had regularly chat with PW1 by using the mobile phone. He met the PW1 in Coimbatore regularly.

(ii) In the month of December-2013, both PW1 and the accused had jointly came to their native place. One day, when PW1 was in village garden, the accused came there and wanted to speak about the marriage of PW1. Consequentially, after made assurance for marrying her, the accused compelled her to commit sexual intercourse with him. Though PW1 made resistance for the said act, she was unable to restrain the accused. During the time, when PW1 was crying, the accused made a promise that he is ready to marry her, after getting consent from his parents. The said occurrence was witnessed by one Selvi, who is PW1 aunt's daughter. After knowing the entire incident, she advised PW1 and the accused to make necessary arrangements for early marriage. Subsequent to that, in one another occasion, the accused requested PW1 to give the chain and got the same. Consequentially, when at the time PW1 requested for performing the marriage, the accused refused to marry PW1. Thereafter, PW1 told about the entire occurrence to her parents. Ultimately, she lodged the complaint under Ex.P1, before PW10.

(iii) PW10-Annalakshmi, the then Sub Inspector of Police, All Women Police Station, Kadambur, on 01.04.2014 around 13.30 hours, on receipt of the complaint given by PW1, registered the case against the accused in Crime No.4 of 2014 under Sections 417, 376, 294(b), 506(i) of IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act. The printed FIR was marked as Ex.P7. Then, she submitted the said FIR before PW-11 for investigation. PW11-Lakshmi Prabha, the then Inspector of Police, All Women Police



Station, Kadambur, on receipt of the said FIR on the same day around 03.00 pm, visited the scene of occurrence and in the presence of witnesses, she prepared an Observation Mahazar under Ex.P8. He drawn the Rough Sketch and the same has been marked as Ex.P9. On the same day around 17.15 hours in Maruthanvazhvu bus stand, she arrested the accused and sent for remand. She examined the witnesses and recorded their statements.

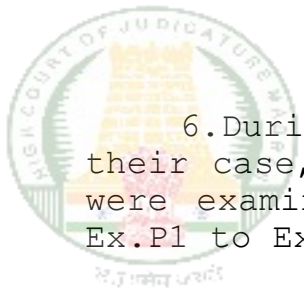
(iv) In continuation of Investigation, she submitted an application before the learned Judicial Magistrate, Kovilpatti, with request to send PW1 as well as the accused for medical examination. In turn, on receipt of the proceedings issued by the learned Judicial Magistrate, PW9-Dr.Latha examined the victim girl and during the time of examination, PW1 complained the occurrence as on 22.12.2013 around 10 a.m one known person, in Melaothakadai made sexual intercourse with her. On examination, she found the following symptoms:-

She was conscious and oriented, there were no external injuries, her external genitalia was normally developed, secondary sexual characters were seen, uterus was normal, hymen was ruptured. There was no recent sexual intercourse.

Thereafter, she collected the vaginal smear, urethral smear and cervical smear and sent the same for medical examination. In this regard, she issued the Accident Registrar under Ex.P6. Similarly, PW8-Dr.Arumugakani on receipt of the reference issued by the Court, examined the accused and after made examination, issued the certificate under Ex.P4 stating that there was no symptoms found to say that the accused was impotent.

(v) In continuation of investigation, since PW11 went on leave, PW13-Marisamy continued the investigation and examined the Doctor, who examined the victim girl and the accused. On 10.10.2014, he altered the Sections of law as 417, 376, 294(b), 406, 506(i) of IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act. The alteration report was marked as Ex.P10. Finally, after concluding the investigation, PW13 filed the final report against the accused and others as they are liable to be convicted under Sections 417, 376, 294(b), 406, 506(i) of IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Women Act.

5. Based on the materials available on record, the trial Court framed the charges for the offences under Sections 376, 417 of IPC against the appellant/accused. Further, the trial Court framed charges for the offence under Section 506(i) of I.P.C and Section 4 of Tamil Nadu Prohibition of harassment of Woman Act against 2 and 3 accused (now acquitted). All the accused denied the charges and opted for trial. Therefore, the accused were put on trial.



6. 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 10 documents were exhibited as Ex.P1 to Ex.P10.

7.(i) Out of the above said witnesses, PW1-the victim speaks about the occurrence as during the relevant point of time, after made assurance, the accused had sexual intercourse with her. PW2-Kandhasamy, who is the brother of PW1 claims that during the relevant point of time, he came to the knowledge that after made false promise, the accused had committed sexual intercourse with PW1. He further states that when at the time he and others requested the accused to marry PW1, the second and third accused (now acquitted) had assaulted PW1. In this regard, PW1 lodged the complaint before the office of the Superintendent of Police and then in enquiry, the accused had given undertaking letter to marry PW1.

(ii) PW3-Baskar is also the brother to PW1. He gave similar evidence in support of PW2. PW4-Selvi is also the relative to PW1. She claims that when at the time, she prepared to take bath in her garden, PW1 came from opposite direction and on enquiry, she told that she committed the mistake with the accused. PW5-Balasubramanian and PW6-Mohanraj are the alleged witnesses signed in the Observation Mahazar prepared by the investigation Officer. Before the trial Court, they do not say anything in support of the case of the prosecution.

(iii) PW7-Pappa deposed before the trial Court as after got divorce, PW1 fell in love with the accused and physically joined with him. PW8-Dr.Arumugagani attached with Government Hospital, Kovilpatti, speaks about the examination of the accused and about the issuance of certificate. PW9-Dr.Latha, attached with Government Hospital, Kovilpatti speaks about the examination of victim girl and about the issuance of certificate.

(iv) PW10-Annalakshmi, PW11-Lakshmi Prabha and PW13-Marisamy, who are the Police Officers speaks about the receipt of complaint from PW1, details of investigation and filing of the final report. PW12-N.Venkatesan, the then District Munsif cum Judicial Magistrate, Vilathikulam, speaks about the recording of 164 Cr.P.C statement from PW1.

8. 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 their side.

9. Having considered all the above, the learned Sessions Judge, Mahila Court, Thoothukudi, came to the conclusion that the appellant / first accused is guilty under Section 376 (1) of I.P.C and



sentenced as stated in paragraph No.2 of this judgment. Aggrieved by the said conviction and sentence, the appellant/accused is before this Court with this appeal.

10.I have heard Mr.R.Anand, learned counsel appearing for the appellant/first accused and Mr.E.Antony Sahaya Prabahar, learned Government Advocate (crl.side) appearing for the State and also perused the records carefully.

11.The learned counsel appearing for the appellant would contend that the whole evidence given by PW1 narrates the occurrence that the alleged offence committed by the accused, is consensual one. Further, the prosecutrix being a divorced woman aged about 31 years, after knowing her status, voluntarily participated in the alleged occurrence. Therefore, it cannot be stated that the alleged act committed by the accused as against her will. The Court below without considering the said aspect, convicted the appellant which needs interference.

12.Per contra, the learned Government Advocate (crl.side) appearing for the respondent would contend that the evidence given by PW1 narrates the fact that during the relevant point of time only after made false promise and after overreaching the resistance given by PW1, the accused sexually exploited her. Therefore, the act committed by the accused is within the ingredients, which are necessary to prove the offence under Section 376 of IPC and therefore, the interference of this Court in the finding arrived at by the trial Court, does not require.

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

14.In the case on hand, the facts projected by the prosecution would disclose that PW1/victim as well as the appellant/first accused are related to each other. The parents of PW1/victim being aware of relationship between PW1 and the accused, were trying to mediate and the same was failed. The testimony of PW1 would disclose as only the accused invited her to the garden for discussing about marriage. But, in the complaint given by PW1 before the Police, she has not stated about the said invitation as the accused invited her to the garden. Secondly, it is the version stated by PW1 that the alleged occurrence was witnessed by her aunt's daughter. In this area also, the same has not been stated neither in the complaint or in 164 Cr.P.C statement. Therefore, in respect to the first incident, PW1 gave contradictory evidence as the accused alone invited her and made sexual assault after giving false promise.

15.The materials collected by the prosecution and the testimony of the witness would disclose the fact that PW1/victim was aged



about 31 years. According to the case of the prosecution, she was raped on 22.12.2013 by the appellant/ accused, but the evidence in that regard is very lacking. As per the testimony of PW1, even after the alleged rape on 22.12.2013, she had continued the physical relationship voluntarily with him and in fact in the cross examination she has admitted that it is wrong to have physical relationship prior to the marriage. Though it was stated by the victim girl that on 22.12.2013 the accused committed the offence of rape, in respect to the said occurrence in his cross examination she has stated that only on her own volition, she involved with him in sexual activity and therefore, it cannot be said that being a grown up girl, she was not aware of the consequence of having a physical relationship with an opposite sex. In this occasion, it is relevant and useful to see the judgment of our Hon'ble Apex Court reported in 2003 SCC (Crl) 775 in the case of Uday Vs State of Karnataka, wherein it is observed as follows:-

"There is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. The tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. The Court must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them."

16. Here it is the case, before the occurrence the victim girl knows her status and she is a divorced woman. In general, in the villages, the people had not permitted the second marriage even in closure period. Knowing the said situation, she joined with the accused and developed the physical relationship. The specific evidence given by the victim is that when at the time the accused pressurized for committing the physical relationship, she has not made any objection. Further, the specific evidence given by PW1 is that only on her own volition, she has joined with the accused and thereafter, after alleged occurrence, she lodged the complaint with the delay of four months. More than that, in respect to the delay in lodging the complaint, she has not offered any explanation as to why the delay has been occurred.

17. The another one aspect which is necessary to find out in this case is that it is an admitted case that before lodging the present complaint one another complaint was lodged before the Office of the Superintendent of Police, which is also against the accused



in respect to the same act. The said complaint has not been produced before the Court. PW10, who is the Investigation Officer had admitted that she saw the said complaint. After admitting as above, non-mentioning the further action taken on the said complaint, would create the doubt whether the complaint was lodged against the accused for the specific occurrence narrated in the complaint or for some other reasons.

18.The admission made by the prosecutrix in respect to the voluntary involvement is also quite clear that the physical relationship happened between the accused and prosecutrix, is not against her will and the same is nothing but consensual one. Accordingly, I am of the opinion that the story projected by the prosecution is clear that the sexual activities happened between the prosecutrix and the accused is consensual one and therefore, the same does not attract the ingredients which are necessary to attract Section 376 of IPC. Without considering the said aspect, the trial Court convicted the appellant / first accused, which is erroneous one.

19.In fine, this Criminal Appeal is allowed and the conviction and sentence imposed on the appellant/first accused, by the learned Sessions Judge, Mahila Court, Thoothukudi, dated 23.02.2016, 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. Bail bond, if any, executed by the appellant shall stand cancelled.

Sd/-

Assistant Registrar (AE)

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/ /2021

Sub Assistant Registrar(CS)

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To:-

- 1.The Sessions Judge, Mahila Court, Thoothukudi,
- 2.The Inspector of Police,
All Women Police Station,
Kadambur Police Station,
Thoothukudi District
- 3.The Judicial Magistrate No.I Kovilpatti
- 4.do-thro The Chief Judicial Magistrate, Tuticorin.



5.do-thro The Principal Sessions judge,
Thoothukudi.

6.The Superintendent, Central Prison,
Palayamkottai.

7.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

8.The Section Officer, (2C)
Criminal Section records,
Madurai Bench of Madras High Court,
Madurai.

Crl.A. (MD) No.77 of 2016
06.09.2021

MA (CO)
KB (13.09.2021) 8P 10C