



BAIL SLIP IN CRL.A.NO.7 OF 2015

The Petitioner / Accused viz., Premkumar, S/o.Subramani was directed to be released on bail by order dated 23.06.2015 in Crl.M.P.1 of 2015 in Crl.A.No.7 of 2015 on the file of this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	15.12.2021
PRONOUNCED ON	27.01.2022

CORAM

THE HONOURABLE MS.JUSTICE R.N.MANJULA

CRL.A.NO.7 OF 2015

Prem Kumar

...Appellant / Accused

Vs

State represented by,
The Inspector of Police,
Puliyanthope Police Station,
Chennai.

...Respondent / Complainant

PRAYER : This Criminal Appeal is filed under Section 374 of Cr.P.C., against the judgement of the learned Sessions Judge, Mahila Court, Chennai dated 11.12.2014 in S.C.No.53 of 2013 and seeks to set aside the same.

For Appellant : Mr.R.Venkatesh

For Respondent : Mr.A.Gopinath
Government Advocate (Crl.Side)

JUDGMENT

This Criminal Appeal has been preferred challenging the judgment of the learned Sessions Judge, Mahila Court, Chennai, dated 11.12.2014 in S.C.No.53 of 2013.

2. The case of the prosecution is that the appellant/accused has seduced the victim by telling that he would marry her and he was in love with her. He persuaded the victim to have sexual intercourse with him and told her that only then the elders would arrange their marriage. During June 2011, the accused took



the victim to his friends house, he seduced her with false promise to marry her and then ravished her. At the time of committing the offence, the victim girl was 16 years old and she was a minor. When the victim compelled him to marry her, he refused; the victim reported about the occurrence to her mother. Thereafter, the mother of the victim went and met the mother of the accused and asked her to get her son married to her daughter and for which, the family of the accused refused.

3. On the complaint given by the victim herself, a case was registered on 24.06.2012 in Crime No.3 of 2012 before All Women Police Station, Pulianthope under Section 417 IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act. PW12, Vasanthi, Inspector of Police took up the case for investigation and enquired the accused and arrested him. Thereafter, she went to the place of occurrence and prepared the Observation Mahazar and Rough Sketch in presence of witnesses and the confession given by the accused was also recorded in the presence of witnesses. She also enquired the rest of the witnesses and sent the victim and accused for medical examination. She enquired Head Master of the School and in which the victim studied and got the proof for her date of birth. She also enquired the doctor who conducted the medical examination of the victim and the accused and got certificates. Chemical examination was done at the forensic lab on the swab taken during medical examination of the victim. So she enquired the Forensic expert and got the report in this connection. Thereafter, she altered the charges from 417 to 376 IPC. After completing the investigation, she filed the charge sheet against the accused for the offences under Section 376 IPC and Section 4 of Tamil Nadu Prohibition of Harassment of Woman Act.

4. After the case was taken on file in P.R.C.No.300 of 2012 by the X-Metropolitan Magistrate Court, Egmore, Chennai and copies were furnished to the accused. After completing the legal mandates, the case was committed to the learned Principal Sessions Judge, Chennai and later it was assigned to the file of the learned Sessions Judge, Mahila Court, Chennai for trial.

5. After finding sufficient materials on record, the learned Trial Judge framed the charges against the accused under Sections 376 and 417 of IPC and the accused was questioned. He pleaded innocence and claimed to be tried.

6. During the course of trial, on the side of the prosecution, 12 witnesses have been examined as PW1 to PW12 and 11 documents were marked as Exs.P1 to P11. On the side of accused, two witnesses were examined as DW1 and DW2 and no document was marked.



7. After concluding the trial, the learned trial Judge found the accused guilty for the offences under Sections 376 and 417 IPC and convicted and sentenced him as under:

Sl. Nos.	Conviction	Sentence
1	376 IPC	To undergo Rigorous Imprisonment for a period of Ten years and imposed a fine of Rs.10,000/-, in default, to undergo Simple Imprisonment for a period of Six months.
2	417 IPC	To undergo Rigorous Imprisonment for a period of One year and imposed a fine of Rs.5,000/-, in default, to undergo Simple Imprisonment for a period of Two months.

8. Aggrieved over that, the accused had preferred this appeal before this Court.

9. Heard the learned counsel for the appellant and the learned Government Advocate (Crl.Side) appearing for the respondent and perused the materials available on record.

10. The learned counsel for the appellant submitted that the victim was not 16 years at the time of occurrence and she was a major; even according to the date of birth which was stated as 04.08.1994 by the Head Master of a School, she was about 16 years at the time of occurrence; in the evidence, PW1 has alleged that she was subjected to sexual intercourse with the accused on several occasions; the accused has not committed any such offence; even if it is accepted that the accused had sexual intercourse with the victim, it would be only with her consent; so, the accused cannot be convicted under the offence of rape; since the victim intended to marry the accused and for which, the accused had refused and hence a false complaint has been given against the accused; the learned Trial Judge did not properly appreciated the evidence on record and convicted the accused and hence the judgment of the trial Court should be set aside.

11. The learned Government Advocate submitted that PW1, who is the victim has stated clearly in her evidence about the manner in which the accused approached her and influenced to have sexual intercourse with him; so the consent if any given by the victim cannot be considered as a consent out of free will; the learned Trial Judge has given due significance of the evidence of the victim and convicted the accused; hence, the appeal should be dismissed.



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12. Points for consideration:

'Whether the conviction and sentence of the appellant/accused for the offences under Sections 376 and 417 IPC, by the learned Sessions Judge, is fair and proper?'

13. The fact that the appellant and the victim are known to each other was not denied. In fact, the mother of the victim and the accused were friends. At some point of time, the mother of the victim had even left her at the house of the appellant/accused under the custody of his mother. The mother of the appellant, who was examined as DW1 has also admitted the same in her evidence. The victim who was examined as PW1 has stated in her evidence that while she was staying at the house of the appellant/accused, the accused told her that he was in love with her and influenced her to have sexual intercourse with him and he also assured her that he would marry her. According to the allegation made in the complaint, the first of such occurrence had occurred during the month of June 2011, at the house of the friend of the accused. But, the evidence of PW1 would reveal that similar such occurrence had happened repeatedly and totally four times. Only thereafter, the victim insisted the accused to marry her. Since the appellant/accused avoided her company and went indifferent, she conveyed about the occurrence to her mother. The mother of the victim went and told this to the mother of the accused and asked her to arrange marriage between the accused and victim. The family of the accused refused to do so.

14. Only thereafter, the victim has given Ex.P1 complaint. There is a delay of one year from the date of the first occurrence to the date in which the complaint was given. In the cases of sexual offences, the delay in lodging the FIR cannot be taken seriously because of the general inhibitive nature of the victim's family in giving the police complaint. It is believed that the victim of sexual offence will be facing social stigma. However, the delay cannot be viewed lightly in all cases and the facts and circumstances of each case should be evaluated individually in order to find out whether there is any valid reason for giving the complaint after a considerable delay.

15. In the case in hand, despite first occurrence is said to have happened in the year 2011, the complaint was given in the year 2012 only. According to PW1 and her mother PW3, they were prompted to give the complaint only because of the accused denied his involvement. When a girl is ravished by the accused on his undertaking to marry her, sometimes, the girl's family would chase the accused and request him to marry the victim. If the accused accepts to marry the victim, they leave the matter



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there. In this case, only when the accused refused to marry the victim, the family of the victim thought to give the complaint. That was obviously the reason for the delay in giving the complaint. This delay however cannot be the only reason to consider the complaint as a false one.

16. Since the victim of this case and the accused were living in the same house for the appellant/accused and the victim to develop a love relationship between themselves. The mother of the accused (DW1) has stated in her evidence that she would not be available all the time at home and during that time their children would be alone at home.

17. In the case in hand, PW1/victim has stated that during the month of June 2011, the accused took her to his friends house and ravished her. Before that, he convinced the victim that he would marry her. So it is a possible for a girl like victim to believe the words of her lover and to allow him to satiate his sexual desires. In sexual offences, the evidence of the victim assumes more significance. Since the sexual offence does not happen in presence of a third party, it is difficult to get any eye-witness or other witness to support the evidence of the victim. If the evidence of the victim is acceptable and found to be genuine, there is no harm in acting upon her sole evidence for the purpose of convicting the accused.

18. In the case in hand, the appellant/accused submitted that the victim was a consenting party. Whenever a person is charged for the offence of rape, the initial presumption under Section 114-A of the Evidence Act is that there is no consent. If the woman comes and tells before the Court that she did not give her consent, her evidence has to be accepted. However, the accused is not deprived to prove that the consent of the victim through rebuttal evidence. The victim was a young girl, who did not know the adverse side of the world, at the time of occurrence. She has stated in her evidence that she was made to give her consent by the accused only on his assurance that he would marry her.

19. Though it is claimed that the age of the victim was below 16 years at the time of occurrence, from the evidence of PW7/Head Master, it is seen that her date of birth is 04.08.1994. Since the first occurrence was taken place in the year June 2011, her age at that point of time would be 16 years and 10 months. So, it cannot be claimed by the prosecution that the victim was below 16 years at the time of occurrence. After the criminal law amendment Act, (13 of 2013), an offence of rape committed on a girl below 18 years of age with or without her consent is punishable under Section 376 IPC. After the advent of POCSO Act, such offences are punishable under the POCSO Act.



According to the relevant law which was then in force. If the rape is committed on a woman under 16 years of age, with or without her consent is an offence. Since the occurrence is said to have taken place in the year June 2011, in order to punish the accused, it has to be proved by the prosecution that the accused had raped the victim without her consent or the victim was below 16 years at the time of occurrence and hence, her consent was immaterial.

20. When the occurrence took place in the year June 2011, the victim girl was influenced due to seductive words of the accused that he would marry her. With the age of the victim at the time of first occurrence, it can be safely presumed that she could not have given an informed consent but blindly, believed the accused. In the case in hand, according to the evidence of PW1, the accused had repeated sexual intercourse with the victim on the same assurance that he would marry her. So, it is difficult to presume that the victim had given her consent out of mistake or under misconception of facts.

21. Had the complaint was given by the victim immediately after the first occurrence it can be safely held that the consent given by the victim is not a valid consent in the eye of law and it would come under the purview of Section 90 IPC. But, in the case in hand, the victim girl continued to give her consent despite knowing well that the accused did not marry her after the first occurrence, as per his assurance. Under such circumstances, it cannot be held that the victim had given her consent by mistake or misconception. Had the occurrence taken place after the criminal law amendment, the situation would have been quite different. Since no retrospective effect can be given for any penal provisions for the offence committed by the accused, this case has to be governed only under the law which was in force at the time of occurrence. Hence, the consent given by the victim happens to be a contentious issue in this case.

22. Since it was well within the knowledge of the victim that the accused continued to have sex with her without marrying her and the repeated occurrences spread across a period of one year, it has to be presumed that the consent of the victim is a valid one. It is true that the accused had taken advantage of her love towards him. But, the victim also had failed to exercise her freedom of choice before consenting to his repeated acts.

23. The learned counsel for the petitioner would attract the attention of this Court to the recent judgment of the Hon'ble Supreme Court held in Maheshwar Tigga v. The State of Jharkhand [(2020)10 SCC 108] in order to canvass his point that the victim had given her consent only out of conscious and deliberate



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choice. It is relevant to extract relevant paras as under:

'20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday (supra) are considered relevant:

'25. 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. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.'

24. The above proposition of law laid down on the point of consent is applicable to the facts of this case also. Though in unequivocal terms the evidence of sexual victim as to the facts of sexual act has to be accepted, the fact about consent has to be viewed in accordance with the facts and circumstances of each case. In this case, the victim of this case was in the habit of subjecting herself to the lustful desires of the accused by believing that he would marry her. At a later point of time, she got the alert that he would not marry her. But the victim was always at liberty to consider her repeated consents by foreseeing the impending danger. So the consent of the victim for the repeated sexual acts of the accused cannot be strictly viewed as invalid consent. The age of the victim is proved to be



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above 16 years and below 18 years at the time of occurrence and the criminal law amendment 2013 was not in force at the time of occurrence. In the circumstances surrounding the case, the accused cannot be held guilty for the offence under Section 376 IPC though it is true that he had repeated sexual intercourse with the victim.

25. The mother of the accused has stated in her evidence that the victim girl was left at her house for safety reasons. But, the accused who is that house-mate himself was dangerous to her safety and he took advantage of her vulnerability and had sexual intercourse with the victim by promising to marry her. The damage caused to the victim by the act of the accused is irreparable. The accused had dishonestly induced the victim to deliver her physical self to him. So, the act of the accused will come under the purview of the offence of cheating under Section 415 Cr.P.C., For better appreciation, Section 415 Cr.P.C., is extracted as under:

415. Cheating:

'Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to "cheat".

Explanation. A dishonest concealment of facts is deception within the meaning of this section.'

26. For committing the offence of cheating, the accused should be punished under Section 417 IPC. Apart from the evidence of the victim and her mother-PW3, the evidence of sister of the victim's mother-PW2, evidence of victim's aunt-PW4 and evidence of victim's sister-in-law, PW6 would also lend support to the offence of cheating committed by the accused. Neither the victim nor her family members had any motive against the accused to falsely implicate the accused by alleging that he had ravished her. In fact, the family of the victim and the accused were good friends and they had no enmity towards each other. The accused dis-owned his relationship with the victim and refused to marry her not because he was placed in certain circumstances beyond his control. He refused to marry her just because he had achieved his purpose on her. So the intention of the accused to cheat the victim from the inception of the occurrence is also established. It is correct that the accused was found guilty under Section 417 IPC, but not under Section 376 IPC. Since the learned trial Judge had found the accused



guilty for both the offences under Sections 376 and 417 IPC, I feel it requires suitable modification.

27. Though the accused had escaped from conviction for the offence under Section 376 IPC, due to technical ground that at the time of the occurrence the unamended criminal law was in force, the victim is still a victim of sexual offence. The victim is a daughter of her single mother, who was the only bread-winner of her family. They belong to lower strata of the society. This occurrence would have no doubt shattered their peace and inner harmony. Their social and economical situation is also not sound enough to meet a litigation of this kind without inhibition. Neither the family of the accused is affluent to pay compensation to the victim. Though the accused was acquitted under Section 376 IPC, as stated already the victim is still a victim of sexual offence and she has to be rehabilitated. Hence, I feel that the victim should be suitably compensated under the Victim Compensation Scheme. Though the trial is concluded, this appeal was pending all along and it is nothing but continuation of trial. Hence, the entitlement of compensation for the victim as per the victim compensation scheme for women victims/survivors of Sexual Assault will not be barred by any limitation. Hence, it is open to the victim or her family members either by themselves or through the respondent police to file appropriate application for getting compensation under the Victim Compensation Scheme.

28. In the result, This Criminal Appeal is Partly allowed and the judgment of the learned Sessions Judge, Mahila Court, Chennai dated 11.12.2014 in S.C.No.53 of 2013 is modified to the effect that the accused is found guilty for the offence under Section 417 IPC and he is convicted and sentenced to undergo Rigorous Imprisonment for a period of One year and imposed a fine of Rs.15,000/-, in default, to undergo Simple Imprisonment for a period of Two months . If the fine amount is already paid need not be paid again or the fine amount now imposed can be set off against the fine amount already paid. The accused is acquitted from the charge under Section 376 IPC.

29. The sentences of imprisonment already undergone by the accused shall be set off under Section 428 Cr.P.C., If the appellant/accused is on bail, the Trial Court is directed to issue Non-Bailable Warrant to secure the accused and send him to prison for undergoing the remaining period (if any) of the punishment.

Sd/-
Assistant Registrar (CS-IX)

// True Copy //

Sub Assistant Registrar

ssn



To

1.The Sessions Judge,
Mahila Court,
Chennai.

2.The Metropolitan Magistrate No.X,
Egmore, Chennai.

3.(do through) The Chief Metropolitan Magistrate,
Egmore, Chennai.

4.The Superintendent,
Central Prison,
Puzhal, Chennai.

5.The Secretary,
Finance Department,
Government of Tamil Nadu,
Fort St.George, Chennai-600 009.

6.The Director,
Social Welfare and Women Empowerment Department,
Secretariat, Chennai-600 009.

7.(i)The Inspector of Police,
Puliyanthope Police Station,
Chennai.

and

(ii)Copy to the Victim.
Kanimozhi,
No.603, Opposite to Nehruji Kalyana Mandabam,
Ayanavaram, Chennai-2.

8.The Public Prosecutor,
High Court of Madras,
Chennai.

+1cc to M/s.R.Venkatesh, Advocate Sr.No.4659

Cr1.A.No.7 of 2015

PMK(CO)
RVM(15/02/2022)