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Crl.A.No.239 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :21.06.2022

Pronounced on :28.06.2022

CORAM:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

Criminal Appeal No.239 of 2017

Mariyalio Amuthan

.. Appellant

/versus/

The Inspector of Police,
Arakandanallur Police Station,
Crime No.685 of 2011,
Villupuram District.

.. Respondent

Prayer: Criminal Appeal has been filed under Section 374(2) of Cr.P.C., to set aside the judgment passed against the appellant on 17.03.2017 in S.C.No.183 of 2013 on the file of the Sessions Judge, Mahalir Neethimandram(fast Track Court), Villupuram and acquit the appellant for the charges.

For Appellant :Mr.Ramamoorthy for
Mr.P.Pazhamalai

For Respondent :Mr.S.Udaya Kumar
Govt.Advocate (Crl.Side)



JUDGMENT

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On a complaint given by one Mahimai Arockiya Mary, daughter of Arockiya Dass, the respondent police registered case in Crime No.685 of 2011 under Sections 417, 376 IPC and Section 4 of Tamil Nadu Prevention of Women Harassment Act against Mariyalio Amuthan (appellant herein) and 5 others.

2. On completion of investigation, the respondent police filed final report. On the material relied on by the prosecution, the Principal District and Sessions Judge, Villupuram framed the following Charges:

Charge 1: (Against A-1)

A-1 (Mariyalio Amuthan), on the false promise to marry the defacto complainant, had sexual intercourse with her on 14//12/2011. Thereafter, he refused to marry her. Thereby, deceived her, which is an act punishable under Section **417 of IPC**.

Charge -2: (Against A-1)

A-1, in continuation of the above charge, by committing intercourse with the defacto complainant by force, had committed offence punishable under Section **376 of IPC**.



WEB COPY Charge -3: (Against A-1 to A-6)

In continuation of the above incident, on 14/12/2011 at about 7.00 p.m, when the defacto complainant and her mother came to the house of A-1 to seek redressal, A-1 to A-6 threatened to burn the defacto complainant and her mother alive pouring kerosene and kill them, thereby committed offence punishable under Section **506 (2) IPC**.

Charge -4: (A-2 to A-6)

In continuation of the above incident, A-2 to A-6 without provocation assaulted the defacto complainant and her mother with wooden logs and hands, thereby committed offence punishable under Section **352 IPC**.

Charge -5: (A-1 to A-6)

On the date and time mentioned above, A-1 to A-6 caused cruelty to the defacto complainant , thereby committed offence punishable under Section **4 of Tamil Nadu Prevention of Women Harassment Act**.

3. To substantiate the above charges, the prosecution examined 16 witnesses. Marked 16 documents and one material object. The third



accused (father of the first accused) had mounted the witness box and examined as DW-1.

4. The trial Court held that the first charge against the first accused for the offence under Section 417 IPC alone proved. The rest of the charges 2 to 5 held not proved. In the result, A-1 was sentenced to undergo one year Rigorous Imprisonment and to pay a fine of Rs.5,000/- in default ,3 months Rigorous Imprisonment. A-2 to A-6 were acquitted of all charges.

5. Aggrieved by the conviction and sentence, the instant Criminal Appeal is filed.

6. The case of the prosecution as spoken by PW-1[defacto complainant-Mahimai Arockia Mary] is that she and the first accused belongs to same village. The first accused is related to her cousin's husband. She used to meet him while attending the Church. During in the month of September, 2003, the first accused proposed his love to her. On 9th September, 2003, she accepted his proposal. When their love came to



the knowledge of the second accused, who is the mother of the first accused, the matter was mediated by Fr.John Edison. The first accused agreed to marry her and gave a written undertaking(Ex.P-1). The first accused assured to marry her after completion of her studies. After completion of her 12th Standard in the year 2008, she joined B.A. and the first accused got job in Indian Army. When he came on leave after training, she gave money to A-1, since he told her that he is yet to receive his salary. She transferred Rs.8000/- to his bank account. The first accused used to take her to Vellangani Temple frequently. Once when she and the first accused went to Vellangani along with her friends, her friends alone returned home. She and the first accused stayed back in Vellangani booked room in a hotel. A-1 forcible raped her and when she objected, he promised that he is going to marry her. At Vellangani Church in front of the Father, they exchanged ring and returned home. Thereafter, whenever A-1 came on leave, he used to have sex with her. Once A-1 came on leave, she went to his house to see him. His mother (A-2) stopped her at the street corner and scolded her and threatened her to leave her son free. During in the month of June 2011, the first accused came to her house and was cordial for one week. Thereafter, he stopped



contacting her, suspecting that he is hiding from her, she went to A-1 house and found A-1 was talking intimately with daughter of his aunty.

She gave police complaint (Ex.P-4) about the deceit of A-1 on 30/07/2011. To Aragandanallur Police, A-1 gave an undertaking letter that he will marry her. Believing his promise she accompanied him to Vellangani. The photographs taken are in CD marked as M.O-1. Later she found, A-1 frequenting going to his uncle's house and closely moving with Mahimai Linova (A-1 uncle's daughter). In this regard, she gave another complaint Ex.P-5 to the police.

7. The further deposition of PW-1 is, A-1 and A-6 are friends. One day, A-6 told her, A1 will not allow her to marry and A1 will blackmail the defacto complainant that he will commit suicide, if A-1 marry her (PW-1). She also heard A-4 advising A-1 to love PW-1 for time pass, but marry Mahimai Linova. When she enquired this with A-1, he gave his army identity card and a letter to Village Administrative Officer and promised to marry her on the next day and went. He was not traceable for days together. Later, on 14th December, 2011, when she was passing through A-1 house, she heard the voice of A-1. She went inside and



quarrelled with him for not contacting her. At that time, A-1 confined her in a room and raped. She came home and reported to her mother. Then she and mother went to A-1 house and questioned A-1's conduct. At that time, A-2 held her hair and bite her hand. A-3 hit her with wooden log on her shoulder and jaw. A-1's sister pushed her down. A-1's brother abused her in filthy words and told that his brother will not marry her. Therefore, she went to the police station and gave complaint on the next day.

8. The undertaking given by the accused (Ex.P-1); love letters written by the accused to PW-1 (Ex.P-2 series); bank challan (Ex.P-3) to show that PW-1 had transferred money to A-1; complaints given by PW-1 to police on various dates (Ex.P-4 to Ex.P-6) and Ex.P-10 (medical certificate of PW-1) are some of the documents strongly relied on by the prosecution for proof of the charges.

9. The third accused, to disprove the case of the defacto complainant that on 14/12/2011, she was assaulted by the accused persons at about 7.00 p.m, had mounted the witness box and examined as DW-1. He has deposed that, on 14/12/2011, his son (A-1) got married to Vinola at Chennai. The marriage certificate marked as Ex.D-1. On that



day, all his family members were at Chennai attending the marriage. He did not go for marriage, since he was affected with psoriasis. His family members returned home at about night 1.00 o' clock.

10. The trial Court, on considering the fact is that, the prosecution has not proved the alleged occurrence on 14/12/2011. Therefore, the charge of rape and assault found not proved. However, the trial Court, based on the love letters, undertaking deed and the oral evidence, held that A-1 guilty of offence under Section 417 IPC.

11. The learned counsel for the appellant pointing out that, the FIR and the charges are centered around the incident alleged to have occurred at the house of the accused on 14/12/2011 at about 7.00 p.m. The accused through DW-1 and Ex.D-1 had clearly established that they were not present at that place and time mentioned in the charges. Therefore, the embellished version of PW-1 in the deposition, which were not part of the charge, has rightly been disbelieved by the trial Court. However, the trial Court failed to appreciate that the charge against A-1 in respect of offence under Section 417 IPC is not made out and the evidence for prosecution is not sufficient to satisfy the ingredients of Section 417 IPC.



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12. In support of his submission, the learned counsel rely upon the following judgments:

(i)Muthukumar v. The State rep.by the Inspector of Police, All Women Police Station, Srivaikundam, Thoothukudi District in Crl.A.(MD) No.375 of 2015, dated 11/08/2021;

(ii)V.Kotteswaran v. The State, Represented by the Inspector of Police, Periyathachur Police Station, Villupuram District reported in [(2020) 2 LW (Crl.) 695];

(iii)Pramod Suryabhan Pawar v. State of Maharashtra and another reported in [(2019) 3 SCC (Cri) 903].

13. The genesis for all these decisions is ***Uday –vs- State of Karnataka [(2003) 4 SCC 46]***. The Hon’ble Supreme Court in ***Pramod Suryabhan Pawar case (cited supra)*** had discussed at length, when the consent of an adult women to be considered as given or obtained not after deliberation and by deceit, had at length discussed about the case laws, which is appropriate to extract below:-



14. In the present case, the “misconception of fact” alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni v. State of Chhattisgarh* [*Anurag Soni v. State of Chhattisgarh*, (2019) 13 SCC 1 : 2019 SCC OnLine SC 509] , this Court held : (SCC para 12)

“12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC.”

Similar observations were made by this Court in *Deepak Gulati v. State of Haryana* [*Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] (*Deepak Gulati*) : (SCC p. 682, para 21)

“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;”

15. In *Yedla Srinivasa Rao v. State of A.P.*, the accused forcibly established sexual relations with the complainant. When she asked the accused why he had spoiled her life, he promised to



marry her. On this premise, the accused repeatedly had sexual intercourse with the complainant. When the complainant became pregnant, the accused refused to marry her. When the matter was brought to the panchayat, the accused admitted to having had sexual intercourse with the complainant but subsequently absconded. Given this factual background, the Court observed:

“10.It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.”

16.Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the woman's “consent”. On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The “consent” of a woman under Section 375 is



vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act. In *Deepak Gulati* [*Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] this Court observed : (SCC pp. 682-84, paras 21 & 24)

“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.

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*



WEB COPY



Crl.A.No.239 of 2017

accused had never really intended to marry her.”
(emphasis supplied)

17. In *Uday v. State of Karnataka*, the complainant was a college-going student when the accused promised to marry her. In the complainant's statement, she admitted that she was aware that there would be significant opposition from both the complainant's and accused's families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The Court observed that in these circumstances the accused's promise to marry the complainant was not of immediate relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors: (SCC p. 58, para 25)

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. *Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant.* She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. *The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact.* On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the



prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. *They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love.* It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. 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.” (emphasis supplied)

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.”

14. On application of the above legal position laid by the Hon'ble Supreme Court to the factual matrix of the instant case in hand, we find that:

The accused and the defacto complainant knew each other for nearly 7 years. They were intimate since 2003, September. They have been meeting privately at various places and gone to distant places like Velangani and stayed together. Exchanged ring, took photographs together. The love letters Ex.P-2 series reveals their intimacy. The



undertaking letter Ex.P-1 dated 03/11/2008 apparently obtained from A-1 after the police complaint clearly show. that PW-1 had suspected that A-1, on joining Army may not marry her. The letters of A-1 indicate that he wanted to wait for 5 years. These letters do not indicate any sign of deception or any force to do an act, which will cause harm to the reputation or body of the complainant . In the said background, when the defacto complainant had come to know about the marriage of A-1 with one Mahimai Violina, the First Information Report lodged alleging that on 14/12/2011 at about 7.00 pm at the house of A-1 she was forcible raped by A-1 and the other accused attacked her. The said complaint is given on the next day. Whereas the defence theory that A-1 and others except A-3 were not at the place of occurrence but were at Chennai. On that day, A-1 got married to one Magimai Vinola at Jesus with Us Church, Royapuram, Chennai and the same was registered on the same day at Sub-Registrar Office at Royapuram.

15. Even if the evidence of DW-1 that all other accused returned home only mid past night at 1.00 'o' clock is not believed, the allegation of PW-1 that she was raped by A-1 on that day at his residence and other accused attacked her with wooden log and hands, does not appears to be



anywhere near truth. Therefore, while the trial Court rightly disbelieved the case of the prosecution regarding Sections 376 IPC and 352 IPC and held A-1 guilty of offence under Section 417 IPC.

16. The point under consideration is whether the ingredients to punish A-1 for offence under Section 417 of IPC is made out or not.

17. The deceitful intention required for Section 417 IPC must be from the inception. Further, the prosecution in addition should also prove that due to the said deceit, the person, who was asked to do or omit to do an act must have been suffered harm or injury to body or reputation.

18. In this case, Ex.P-1 letter of undertaking to marry the defacto complaint was given during the month of November 2008. Admittedly, A-1 has not married the defacto complainant[PW-1] and in fact, he has married one Mahimai Vinola on 14/12/2011. In between these three years, several events have taken place which were stated by PW-1 in her chief examination, but not in her complaint or in her previous statement recorded under Section 164 Cr.P.C.



19. A-1 despite promise to marry PW-1, had married somebody else. In the absence of any plausible explanation why he could not marry the PW-1, the trial Court held the accused guilty of offence under Section 417 IPC.

20. Section 417 of the Indian Penal Code reads as below:-

“S.417. Punishment of cheating:-

Whoever cheats shall be punished with imprisonment of either description of a term which may extend to one year, or with fine or with both.”

21. The case of the prosecution is that PW-1 and A-1 were in love since 2003. It is not the case of the prosecution that A-1 pretend to love PW-1 and deceived her. The affair started in the year 2003 and continued till A-1 joined Army in the year 2008. Till the date of executing Ex.P-1, there is no complaint that A-1 was a fake lover. There is no evidence to prove even thereafter A-1 fraudulently or dishonestly induced her to consent an act which she would not have given but for the promise or pretend to marry her and deceived PW-1. In fact, in the cross



examination of PW-2 (the mother of PW-1), she says that when she came to know the fact that her daughter is in love to A-1, she reprimanded her daughter. Her daughter attempted to commit suicide and fell into the irrigation well. She was rescued and given assurance that she will arrange for her marriage with A-1. This part of evidence goes to show that, when the accused and the defacto complainant were in love, the accused had no intention of deceive the defacto complainant at least till the time of executing Ex.P-1 or therebefore. Ex P-2 series disclose, he was in close intimate terms with PW-1. Probable, due to some misunderstanding surfaced between them at a later point of time might have triggered their separation. However, there is no evidence to infer that their intimacy was with pre-conceived intention of the accused to cheat the defacto complainant

22. In the absence of positive evidence about the dishonest intention to cheat, the reason for not marrying the defacto complainant after 5 years of the written promise by itself cannot be drawn as an act of dishonest intention from the inception.

23. For the above said reasons, this Court allows the Criminal



Crl.A.No.239 of 2017

Appeal. The judgement of conviction and sentence against the appellant passed by the trial Court viz., The Sessions Court, Magalir Neethi Mandran (Fast Track Court), Villupuram in S.C.No.183 of 2013, dated 17.03.2017 is set aside. Bail bond, if any executed by the appellant is cancelled. Fine amount paid, if any, by the appellant/accused, may be refunded to him.

24. In the result, this Criminal Appeal is allowed.

28.06.2022

Index:yes/no
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To:

1.The Sessions Judge, Magalir Neethi Mandram
(Fast Track Mahila Court), Villupuram.

2.The Inspector of Police,
Arakandanallur Police Station, Villupuram District.

Dr.G.JAYACHANDRAN,J.



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Crl.A.No.239 of 2017

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Delivery Judgment made in
Crl.A.No.239 of 2017

28.06.2022