



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
(Criminal Jurisdiction)

Date : 01/03/2022

PRESENT

WEB COPY

The Hon`ble Mr.Justice K.MURALI SHANKAR

CRL OP(MD). No.19597 of 2021

Rajkumar : Petitioner/Sole Accused

Vs

The State Rep. By,
The Inspector of Police,
All Women Police Station,
Tiruchendur,
Thoothukudi District.
(Crime No. 26/2021).

: Respondent/Complainant

For Petitioner : M/s. Anbarasu.S.R,
Advocate.

For Respondent : Mr.R.Sivakumar,
Government Advocate (Crl.Side)

PETITION FOR ANTICIPATORY BAIL Under Sec.438 of Cr.P.C

PRAYER :-

For Anticipatory Bail in Crime No. 26 of 2021 on the file of the respondent police.

ORDER : The Court made the following order :-

The petitioner/accused, who apprehends arrest at the hands of the respondent police for the offences

punishable under Sections 417 and 376 IPC, in Cr.No.26 of 2021, seeks anticipatory bail.

2.The case of the prosecution is that the petitioner and the defacto complainant are hailing from same village, that both of them developed love affairs from 01.07.2020, that the petitioner on the promise of marrying the defacto complainant, had physical relationship, that on 10.04.2021, at about 11.00 pm the petitioner came to the upstairs of the defacto complainant's house and promised to marry her and made her to believe the same, had physical relationship, that though the defacto complainant had refused, the petitioner has promised that the defacto complainant would be his wife and he would be her husband and that he would marry her after the marriage of his brother and had physical relationship several



times, that on 04.10.2021, the petitioner had physical relationship finally, that when the complainant had requested the petitioner to marry her as her family members came to know about their affairs, he told her not to worry and he won't cheat her, that subsequently the petitioner has refused to marry her and that therefore, the complainant was forced to lodge the complaint.

3. The petitioner's case is that he is an innocent and he is in no way connected with the alleged commission of offence, that he had no love affair or any sexual relationship with the defacto complainant as alleged by her and that the above complaint has been lodged at the instigation of the vested interest of the village.

4. The learned counsel for the petitioner would submit that perusal of the FIR would speak volume that no case under Section 376 IPC is made out, that there is no material to make any case against the petitioner under Section 376 IPC, that the reading of the FIR would only show that the sexual relationship alleged to have been taken place only by consent and it is only a consensual relationship and as such the ingredients of Section 376 IPC are not attracted, that both the petitioner and the defacto complainant attained their majority and the complainant is having her own intelligence to decide the consequences and that since the defacto complainant is only a willing partner, the question of rape does not arise at all.

5. The learned Government Advocate (Criminal Side) would submit that the defacto complainant in her statement under Section 164 Cr.P.C has reiterated the contentions raised in her complaint, that the defacto complainant has also stated that due to physical relationship, she became pregnant and that the petitioner alone had obtained tablets from the hospital and gave it to her and the same was aborted and that the petitioner had taken the mobile of the defacto complainant and deleted their intimate photos, except two and that since the defacto complainant is not a consenting party, the offence under Section 376 IPC gets attracted.

6. The learned counsel for the petitioner has relied on the decision of this Court in **S.Kumaresan Vs. State** reported in **2017 2 MLJ Cri) 175** and the decision of Honourable Supreme Court in **Uday Vs. State of Karnataka** reported in **2003 4 SCC 46**.

7. In the first decision, this Court after considering the various decisions of other High Courts and Supreme Court, has granted bail and the relevant passages are extracted hereunder.

(i) S.Kumaresan Vs. State [2017 2 MLJ (Cri) 175]

"36. Petitioner is 23 years old. The defacto complainant is two years older than him. She is well educated. The learned Government Advocate submitted that



there was no incriminating materials such as picture of the petitioner and the defacto complainant in a compromising position recorded in a Cellphone. She was fully aware of the consequences of the act viz., sexual intercourse. She knows the moral quality of the act to which she was engaged. In the facts and circumstances, her consent for physical contact cannot be said to be given on misconception of fact. The allegation of criminal intimidation has been made in the backdrop of her demand to him to marry her. Before the Court below it was mainly contended by the prosecution that her medical examination was not over. Now, it was over.

37. There is prima facie case in favour of the petitioner. We have taken this view for the limited purpose of his bail plea.

38. Petitioner is in jail for a considerable period. The statement of the victim girl, her parents and other material witnesses were recorded. Now he cannot tamper the witnesses nor hamper the investigation. He has fixed place of residence. He has no previous cases. He has no bad antecedents. It is quite unlikely that he will abscond if let out on bail."

8. In the second decision, the judgment was rendered by the Honourable Supreme Court in the Criminal Appeal, challenging the judgment of High Court of Karnataka, dismissing the criminal appeal and thereby confirming the judgment of conviction passed by the trial Court against the appellant for the offence under Section 376 IPC.

9. The learned counsel for the petitioner has quoted a portion of paragraph No.16, wherein the Honourable Supreme Court has quoted the judgment of Calcutta High Court and the same is extracted hereunder :

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continue to indulge in such activity until she becomes pregnant it is an act of



promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

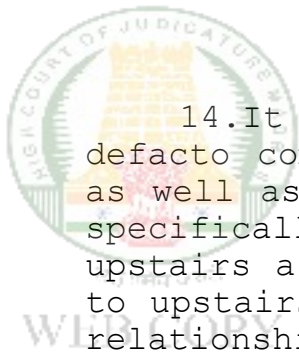
10.It is also necessary to refer the paragraph No.21 of the said judgment.

"It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, 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. It 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."

11.Moreover in the said judgment, the Honourable Supreme Court has specifically held that when the accused knows that he is giving a false promise, at the very inception, that he has no intention to marry her at all, however, the victim believed his promise be true and in that belief, she had consented for sexual intercourse, then she gave her consent only on misconception of fact and in those circumstances, it will amount to rape.

12.In the case on hand, admittedly, the petitioner is aged 24 years and the defacto complainant is aged 20 years at the relevant point of time. It is also not in dispute that the defacto complainant had studied upto 12th standard and thereafter, she is in home.

13.It is pertinent to mention that the defacto complainant as well as in the petitioner are the residents of a Village in Tiruchendur Taluk of Tuticorin District.



14.It is also not in dispute that the petitioner and the defacto complainant were on love, the complainant in her complaint as well as in her statement recorded under Section 164 Cr.P.C, has specifically alleged that the petitioner used to come to their upstairs after her parents went asleep, that on 10.04.2021, he came to upstairs at about 11.00 pm and without her consent, had physical relationship by compelling her.

15.As rightly pointed out by the learned Government Advocate (Criminal Side), in the statement under Section 164 Cr.P.C, she has specifically stated that she became pregnant and when the same was informed to the petitioner, he had pills from the hospital and gave it to her and after consuming the same, it was aborted.

16.Moreover, the complainant has further stated that after coming to know about their affairs, the parents of the complainant had directed the complainant to go along with the accused itself and sent her out of their home, that the petitioner had taken her to the garden land of his friend and they have stayed there for two days and that the petitioner had reiterated his promise that he would marry her after the marriage of her brother.

17.Considering the educational qualification and village background and age of the defacto complainant, whether she had voluntarily consented for physical relationship or she had consented only on misconception of believing the words of the petitioner, that he would marry her is a matter for investigation.

18.Considering the facts and circumstances of the case and also the seriousness and gravity of the charges levelled against the petitioner and that the investigation is pending, this Court is not inclined to grant anticipatory bail to the petitioner at this point of time.

19.Accordingly, the Criminal Original Petition is dismissed.

sd/-
01/03/2022

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/ /2022
Sub-Assistant Registrar (C.S.)
Madurai Bench of Madras High Court,
Madurai - 625 023.

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.



TO

1. THE INSPECTOR OF POLICE,
ALL WOMEN POLICE STATION,
TIRUCHENDUR,
THOOTHUKUDI DISTRICT.

2. THE ADDITIONAL PUBLIC PROSECUTOR,
MADURAI BENCH OF MADRAS HIGH COURT, MADURAI.

ORDER

IN

CRL OP(MD) No.19597 of 2021

Date :01/03/2022

USK/SBN/SAR-III/04.03.2022/6P/3C