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Crl.A.(MD).No.538 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.10.2024

DELIVERED ON : 06.01.2025

CORAM:

THE HON'BLE MR JUSTICE G.ILANGO VAN

Crl.A.(MD).No.538 of 2019

Yogesh

... Appellant/Accused No.1

Vs.

State represented by
Inspector of Police,
Fort All Women Police Station,
Trichy City.
(Crime No.13 of 2017)

... Respondent/Complainant

Prayer: Criminal Appeal has been preferred under Section 374 Cr.P.C., to set aside the Judgment passed by the Sessions Judge, Mahila Court, Trichy, in S.C.No.43 of 2018, dated 01.11.2019 and acquit the appellant herein.

For Appellant : Mr.R.Gandhi, Senior Counsel for
Mr.T.J.Ebenezer Charles

For Respondent : Mr.M.Sakthi Kumar
Government Advocate (Crl. Side)

J U D G M E N T

This Criminal Appeal has been filed by the appellant to set aside the Judgment passed by the Sessions Judge, Mahila Court, Trichy, in S.C.No.43 of 2018, dated 01.11.2019 and acquit the accused.



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2.The case of the prosecution in brief:

The accused persons and the defacto complainant are residing in the same village and in same street. They are used to go to relatives' functions. In this way they become know to each other. At one time, the first accused proposed love affair to the defacto complainant. The defacto complainant also accepted the same. The love continued for about four years. At one point of time, the first accused invited the defacto complainant to his house. Believing the words of the first accused, she went to his house. At that time, on false promise of marriage, he subjected her to forcible sexual intercourse. Thereafter, they had physical relationship for many times. Due to which, she became pregnant. When the same was known to the second accused, she admitted the defacto complainant in GVN Hospital and compelled her to abort the child. But, she refused. Thereafter, the first accused administered tablet. As a result of which, she aborted. Thereafter, they stayed in Coimbatore in her sister's house for some times and later in a Hostel. Again on false promise, the first accused had physical relationship with the victim girl. Due to which, she got pregnant for the second time and aborted. Thereafter, since the first accused refused to marry her, she gave a complaint. Based upon which, a case in Crime No.13 of 2017 was registered. After completing the investigation, final report was filed before the Committal Court for the offences punishable under Sections



417, 376 IPC r/w 315, 294(b), 506(i) IPC against 1st accused, 294(b), 315, 506(i) IPC against the second accused . Then it was committed to the trial Court and the same was taken cognizance in S.C.No.43 of 2018, on the file of the Sessions Judge, Mahila Court, Tiruchirappalli and the following charges were framed against the accused.

3.Charge against the accused person:-

On false promise of marriage, the first accused developed love affair with the defacto complainant and had physical contact with her for several times and thereafter, cheated her, refusing to perform marriage, thereby, he committed offence punishable under Section 417, 376 IPC r/w 315, 294(b), 506(i) IPC. The charges were read over and explained to all the accused and questioned for which they pleaded not guilty, hence trial was ordered and conducted.

4.In pursuance of the above said plea, the trial before the trial Court commenced and to prove the prosecution case, 18 witnesses have been examined on the side of the prosecution and 14 documents marked. On the side of the accused persons one witness was examined and two documents were marked. No material objects were marked.



5.The case of the prosecution as narrated through the evidence in:

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5.1.The victim, who is the PW1, was born on 19.05.1993. She was aged about 24 at the time of occurrence. On 09.02.2014, marriage of her sister was performed. At that time, she saw the first accused. After two days he proposed love with her. Later, she also started loving the first accused and that continued for about four years without any trouble. The above said fact was known to the first accused's family members. She used to visit the house of the first accused. On a particular day, the first accused asked her to come to his house. Believing his words, he went to his house. At that time there was no other persons. The first accused told her that he will marry her and promised to that effect. In spite of the resistance made by her the first accused committed forcible sexual assault upon the victim. It continued for about two or three times. The first accused consoled her stating that he will certainly marry her.

5.2.On 18.08.2016, she felt that she became pregnant. When that was informed to the first accused, he told that he will inform the same to the parents and for their response. On 19.08.2016, the second accused asked her to come to GVN Hospital. She went to the hospital. She underwent medical examination. At that time, she was told by the Medical Officer that she is pregnant. The second accused requested the Doctor to abort the child, since



the first accused and the victim may face difficulties in getting visa to go abroad. The Doctor advised her to think it further and come later. When that was objected by the victim, the second accused told that if the present situation is disclosed, the good relationship between the family members may be affected. She promised that within a period of three months the marriage will be performed with the first accused.

5.3.On 23.08.2016, again the first accused asked her to come to his house. She went to the house. At that time, he forcibly administered a tablet. After two days, she suffered severe bleeding and suffered abortion. Because of that she became mentally distressed. After that she went to her sister's house in Coimbatore. She informed her sister that she is in love with the first accused. Later, the first accused also joined with her in her sister's house and coming to know that a complaint was given by her father, they returned to the native place. Only at that time, the affair came to the knowledge of the father. The father objected and refused to take her to home. So she returned back to Coimbatore to her sister's house. Even in her sister's house, the first accused subjected the victim to sexual intercourse. After three days, they returned to Trichy and she was admitted in Sindu Ladies Hostel. In the Hostel Register, the first accused signed as husband. Later, again she felt pregnant. Again that was intimated to the first accused and the second accused. But, in this time, they changed their attitude,



insulted and criminally intimidated the victim. She lodged a complaint with Kottai Police Station on 11.03.2017.

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5.4. During the police enquiry, both side family members decided to solve the issue by amicable settlement. So she vacated the hostel and went to her parental home. Again she suffered bleeding and so her parents went to the first accused's house to inform the same. In that time, they were abused, ill-treated, insulted and criminally intimidated. Later, both parents decided to perform marriage within a period of three months. But, against the above said, the first accused issued a lawyer notice. So she lodged a complaint on 21.08.2017 with the Committal Court.

5.5. PW2 is the mother of PW1. She corroborated with PW1 with material particulars regarding the relationship between the PW1 and the first accused and further pregnancy, abortion issue, etc., facts.

5.6. PW3 is the father of PW1. He also corroborates with PW1. PW4 is the grandmother of PW1. PW5 is the cousin sister of PW1. They corroborated with PW1 with regard to the material particulars as stated above. PW7 is the brother of PW3. He witnessed the occurrence alleged to have been taken place when PW1 and others went to the house of the accused, wherein, they were insulted, abused, criminally intimidated.

5.7. PW8 is conducting the Ladies Hostel and stated that she admitted PW1 in her Hostel at the request made by the second accused.



PW9 is conducting a Finance Company called NRR Finance and he stated that the first accused pledged the gold Jewels weighing 1.900 grams for about Rs.2,000/-.

5.8.PW12 who was working as Medical Officer in Viswanathan Hospital, Trichy. She admitted PW1 for Medical examination on 28.04.2017. Medical Examination shown that PW1 was suffering pain for appendixes. So she was referred for surgery. PW12 also corroborated the evidence of PW11 regarding the medical examination and the references.

5.9.PW13 also corroborates PW11 and PW12 over the ailment of PW1. PW14, Medical Officer examined the first accused at the request made by the committal Court and on his examination he found that the first accused is capable of performing sexual activities.

5.10.PW15 is a scientific Assistant working in Regional Forensic Laboratory, Trichy, she examined the samples submitted to her and according to her, she found no sperms in the samples.

5.11.PW16 examined PW1 at the request made by the police officials on 02.10.2017 at about 2.10 p.m. On her examination, he has found that her hymen was torn. No external injuries were found and vaginal smear was taken for further examination.

5.12.PW17, registered the case in Crime No.13 of 2017 on the basis of the order passed by the Additional Mahila Court in Cr.M.P.No.7036



of 2017 under Section 156(3) Cr.P.C., took up the investigation, visited the place of occurrence, prepared observation Mahazar and sketch in the presence of witnesses. She recorded the statement of witnesses and the Medical Officers, who examined the victim girl. On 19.09.2017, she arrested the first accused at about 7.45 a.m. He was remanded to custody. She submitted a request to record the statement of the victim by the Judicial Magistrate. She made a request to the Medical Officer to examine the victim girl and the accused. After the examination were over she recorded the statement of the Medical Officers. After that she retired.

5.13. So the further investigation was taken up by PW18. She perused the records and again enquired the witnesses and they repeated the very same statement. After obtaining the Medical Certificate and the report from the Forensic Science Laboratory, by recording their statement completed the investigation and filed final report on 22.12.2017 for the offences punishable under Sections Sections 417, 376 IPC r/w 315, 294(b), 506(i) IPC against 1st accused, 294(b), 315, 506(i) IPC against the second accused.

6. After examination of all the witnesses are over, the accused were subjected to Section 313 Cr.P.C proceedings. They denied the facts narrated by the prosecution witnesses. On the side of defence one witness



was examined, and two documents were marked.

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7.At the conclusion of the trial process, the trial Court recorded finding of guilt against the first accused person and passed judgment of conviction on 01.11.2019 and sentenced to undergo 7 years rigorous imprisonment for the offence punishable under Section 376 of IPC and imposed fine of Rs.1,000/-, in default to undergo further one year of rigorous imprisonment and also sentenced to undergo one year rigorous imprisonment for the offence punishable under Section 417 of IPC. Set off also ordered. In respect of the other offences the first accused was acquitted. And the second accused was acquitted from all other charges. Against the above said judgment of conviction and sentence, the first accused preferred this appeal.

8.Heard both sides.

9.On the side of accused one Sivasamy was examined as DW1. He stated that on 21.05.2017 over the issue between the two families he conducted the settlement talk.



10.In the Panchayat the parents of both sides as well as relatives participated. In the Panchayat there was amicable settlement between the parties and they proposed to perform the marriage. The above said terms of settlement was reduced into writing under Ex.D2.

11.Before we enter into the main issue, the dates and events is required to be summarized briefly. So that it will give a good understanding.

- On 09.02.2014, first meeting between the first accused namely the appellant herein and PW1;
- On 11.02.2014, the appellant proposed love;
- Love affair continued for about four years;
- The first forcible rape committed;
- On 18.08.2016, PW1 felt pregnancy;
- On 23.08.2016, tablet was administered forcibly – First abortion;
- Around 23.02.2017, the appellant and PW1 went to Coimbatore and stayed in the house of PW5, the Cousin Sister;
- On the very same day, police complaint given by the PW3, the father of PW1;
- Till 28.02.2017, the forcible rape continued;
- Around 28.02.2017, PW1 was admitted in Ladies Hostel, Trichy;
- After five days, PW1, felt pregnancy. PW1 vacated the Hostel;



by the appellant, he went back. During the affairs, under the false promise of marriage, she was subjected to repeated sexual intercourse and repeated abortion.

13.Regarding the repeated abortion absolutely, there is no evidence on record. Medical evidence also does not support any tracing of repeated pregnancy and repeated abortion. In this context we will straight away go to the medical evidence produced by the prosecution. After registration of the case, at the request made by the Investigating Officer, PW16 subjected the victim girl namely PW1 to medical examination. At that time, she told the Medical Officer that with her consent for about three years, she was subjected to sexual intercourse for about 20 times. Absolutely, in her evidence nothing was suggested to the fact that PW1 was suffering from frequent pregnancy and abortion.

14.Even during the scanning no such traces were found. But traces were found for appendices, as per the evidence of the medical officers namely PW12 and PW13. So it *prima facie* shows that the above said allegation of pregnancy and abortion is not true and correct on records. This can also be confirmed through the evidence of DW1. He has stated in his evidence that PW1 has admitted before him that she never had sexual



intercourse with the first accused and became pregnant and aborted. So according to his evidence, PW1 has stated that because of her affection to the first accused, she has given a wrong information and requested the Panchayatars to perform marriage with the first accused. So this clarifies the position that PW1 was not pregnant twice and aborted twice.

15.Even on 02.10.2017, when she was subjected to medical examination by PW16 as mentioned above PW1 has informed the Medical Officer that it was a consensual Physical relationship. This was indicated by rupturing of hymen. So it stand established that it was physical affair between the appellant herein and PW1 which was consensual in nature.

16.Now, we will go to the main point. Whether the appellant herein subjected the PW1 to repeated sexual intercourse under the false promise of marriage.

17.Accused does not and did not deny the affair. But, according to him, in the course of time, the conduct of the victim girl changed bad and that was the main reason for him to break the relationship. This according to him is evident from the Advocate notice issued by him under Ex.D1. In the notice it has been stated by him that he was never in love with the PW1. But



only, PW1 compelled him. But the substance of Ex.D1 does indicate that he was also in love affair with PW1. But, for obvious reason, he has stated that he was never in love with PW1. But, from the substance as mentioned above, we can infer the indirect admission made by the accused over the love affair.

18.He went on to say that PW1 in course of time changed her conduct and had friendship with undesirable persons. That conduct was warned by him. But, in the meantime her parents started giving complaints. So this Advocate notice also does indicate that the appellant was not willing and consenting for any promise as indicated in Ex.D2. But, the evidence of DW1 clearly shows that both sides parents agreed to perform marriage. The appellant may be disturbed in view of the alleged conduct of PW1. Absolutely, no circumstances has been brought on record to discard the evidence of DW1. The efforts made by DW1 to settle the issue did not yield any positive result in view of the advocate notice under Ex.D1. As mentioned above after the advocate notice only, the complaint under Section 156(3) of Cr.P.C. was filed by PW1. After that case has been registered.

19.Now coming back to the question as to whether on the false promise of marriage the appellant subjected PW1 to sexual intercourse. But,



absolutely, no circumstances is brought on record to show that right from the beginning the appellant was indulging or intending to cheat PW1 and under the false promise subjected her to sexual intercourse. As mentioned above and as the evidence brought on record, the appellant was also willing party to marry PW1. Now, he changed his position and says something. But the very fact that PW1 was admitted by him in the Hostel managed by PW8, shows that the love affair was smooth and the appellant was willing to continue the relationship and marry PW1. This can be further verified from the evidence of PW5, the cousin sister of PW1. In her house only PW1 and the accused stayed for some times as indicated in the dates and events. She has stated in her evidence that PW1 came to her house on 23.02.2017 at about 08.00 p.m. and informed her about the love affair and after some time, the appellant also came to her house stayed there for two days.

20.Further, says that in the meantime, PW3 gave a police complaint. Police officials made an enquiry and in the enquiry PW1 refused to go along with her parents, but willing to go with the appellant. Again they returned to her house. She further says that second accused promised her through him that they will perform marriage between PW1 and the accused. Later only, PW1 was admitted in the hostel run by PW8. Nothing has been brought on record to discard her evidence. So this shows that the accused



was willing to marry PW1. So there was no intention on his part to breach the promise till trouble arose between them. But, absolutely, nothing has been brought on record by the appellant to show that the PW1 indulged in misconduct or misbehaviour. So I avoid further discussion since it may affect PW1's future. But, suffice to say that nothing has been brought on record about the misconduct.

21.In this context and in the facts and circumstances we will straight away go to the decision rendered by the Honourable Supreme Court in the case of ***Mahesh Damu Khare Vs State of Maharashtra and others*** reported in ***2024 INSC 897***, apart from the Judgment referred to by the appellant made by the Honourable Supreme Court in the case of ***Sonu alias Subhash Kumar Vs. State of Uttar Pradesh and another*** reported in ***(2021) 18 SCC 517***.

22.An elaborate discussion has been made touching upon, each aspects of this nature. Para 20 to 25 is extracted hereunder.

“20. Keeping this aspect in mind as to what amounts to consent with reference to Section 375 of the IPC, this Court has examined and considered in a number of cases that if the person acts with an active understanding of the circumstances, actions and



WEB COPY



Crl.A.(MD).No.538 of 2019

consequences of the act, it would indicate the presence of consent. It was observed in the case of Shambhu Kharwar v. State of Uttar Pradesh and Anr.4 as follows:-

“11. In Pramod Suryabhan Pawar v. State of Maharashtra (2019) 9 SCC 608, a two Judge Bench of this Court of which one 2022 SCC OnLine SC 1032 of us was a part (D.Y. Chandrachud J.), held in Sonu @ Subhash Kumar v. State of Uttar Pradesh (2021) 18 SCC 517, observed that:

“12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action... [...]

14. [...] 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... [...]



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



WEB COPY



Crl.A.(MD).No.538 of 2019

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. (emphasis supplied)

21. The complainant had taken the plea that the appellant had physical relationship with her against her consent by making a false promise that he would marry her. In this regard, it has to be considered whether making a false promise to marry amounts to an offence. If a false promise of marriage is made to a woman by a man, thus deceiving the woman leading her to engage in sexual relations, it may amount to misconception of fact, in which case the consent given by the woman may be vitiated. In this regard one may refer to the decision of this Court in *Niam Ahmed v. State (NCT of Delhi)*⁵, “20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause

- Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of



WEB COPY



Crl.A.(MD).No.538 of 2019

promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376.”

22. In our view, if a man is accused of having sexual relationship by making a false promise of marriage and if he is to be held criminally liable, any such physical relationship must be traceable directly to the false promise made and not qualified by other circumstances or consideration. A woman may have reasons to have physical relationship other than the promise of marriage made by the man, such as personal liking for the male partner without insisting upon formal marital ties.

Thus, in a situation where physical relationship is



WEB COPY



Crl.A.(MD).No.538 of 2019

maintained for a prolonged period knowingly by the woman, it cannot be said with certainty that the said physical relationship was purely because of the alleged promise made by the appellant to marry her. Thus, unless it can be shown that the physical relationship was purely because of the promise of marriage, thereby having a direct nexus with the physical relationship without being influenced by any other consideration, it cannot be said that there was vitiation of consent under misconception of fact.

23. It must also be clear that for a promise to be a false promise to amount to misconception of fact within the meaning of Section 90 of IPC, it must have been made from the very beginning with an intention to deceive the woman to persuade her to have a physical relationship. Therefore, if it is established that such consent was given under a misconception of fact, the said consent is vitiated and not a valid consent. In this regard we may refer to the case of “Deepak Gulati v. State of Haryana”⁶, in which it was held as follows:

“21. Consent may be express 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



WEB COPY



Crl.A.(MD).No.538 of 2019

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 (2013) 7 SCC 675 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.”



WEB COPY



Crl.A.(MD).No.538 of 2019

“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.”
(emphasis supplied)

24. It may be also noted that there may be occasions where a promise to marry was made initially but for various reasons, a person may not be able to keep the promise to marry. If such promise is not made from the very beginning with the ulterior motive to deceive her, it cannot be said to be a false promise to attract the penal



WEB COPY



Crl.A.(MD).No.538 of 2019

provisions of Section 375 IPC, punishable under Section 376 IPC.

25. In the present case, even assuming that the appellant had made the promise since 2008 when they met for the first time, the fact that they remained unmarried for a long period till 2017 without there being any protest or objection by the complainant, does not indicate the intention at the initial stage itself to make the promise falsely to marry the complainant. Making an allegation of non-fulfilment of promise to marry without undue delay by the promissee would, on the other hand, be an indicator of a false promise being made from the initial stage. In the present case, what is not in dispute is that the physical relationship between the appellant and the complainant continued for a long period of about a decade and as such it is difficult to infer that the appellant had made a false promise since the initial stage and continued to make false promises to marry her on the basis of which she also continued to have physical relationship with him.”

23.Among the above said extracted portion para No.24 squarely fix the case of the prosecution. This judgment mentioned above gives answer to the charges framed against the appellant.



Crl.A.(MD).No.538 of 2019

24. So for the reasons stated above, it is found that the judgment of conviction rendered by the trial Court requires interference, since reading of the judgment of the trial court does not show that it concentrated upon the above said legal Principles. It concluded the finding in para No.14, without addressing the above said legal aspect in proper perspective.

25. In view of the above, this criminal appeal stands allowed and Judgment of conviction and sentence dated 01.11.2019, rendered by the trial Court upon the first accused, who is the appellant herein, in S.C.No.43 of 2018, are hereby set aside and the appellant is acquitted from the charges framed against him in this case. The fine amount if any paid by the appellant, shall be refunded to him.

06.01.2025

NCC: Yes/No
Index: Yes/No
Internet: Yes/No
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To

1. The Sessions Judge, Mahila Court, Trichy.
2. The Inspector of Police,
Fort All Women Police Station,
Trichy City.
(Crime No.13 of 2017)
3. The Additional Public Prosecutor,
Madurai Bench of Madras High Court, Madurai.



WEB COPY



Crl.A.(MD).No.538 of 2019

G.ILANGOVA, J

TM

Crl.A.(MD).No.538 of 2019

06.01.2025