

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 29TH DAY OF MARCH 2022 / 8TH CHAITHRA, 1944

CRL.MC NO. 4933 OF 2021

SC 356/2021 OF ADDITIONAL SESSIONS COURT -II (SPECIAL
COURT), KOTTAYAM

Crime No.42/2021 of Vaikom Police Station

PETITIONER/ACCUSED:

SHAHUL SATHEESH
AGED 29 YEARS
S/O. SATHEESH, RESIDING AT POOVALLYIL HOUSE,
KUDAVECHOR P.O., VAIKOM, KOTTAYAM DISTRICT,
PIN-686144.
BY ADVS.
NIRMAL V NAIR
M.ANEESH
AJAI BABU

RESPONDENTS/STATE & DE FACTO COMPLAINANT:

- 1 STATE OF KERALA
REPRESENTED BY STATION HOUSE OFFICER, VAIKOM
POLICE STATION, VAIKOM, VAIKOM P.O., KOTTAYAM
DISTRICT, PIN-686141, REPRESENTED BY THE PUBLIC
PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM-
682031.
- 2 XXX
X

OTHER PRESENT:

SRI SANGEETHA RAJ - Public Prosecutor

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION
ON 29.03.2022, THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

ORDER

This Crl.M.C. has been filed to quash all further proceedings in S.C.No.356/2021 on the file of the Additional Sessions Court-II (Special), Kottayam.

2. The petitioner is the sole accused. He faces trial for the offences punishable under Sections 376(1) and 376(2)(n) of the IPC.

3. The prosecution case in short is that the petitioner after giving a false promise of marriage sexually assaulted the victim/the 2nd respondent on several occasions from 16.12.2020 to 29.12.2020.

4. I have heard Sri.Nirmal V.Nair, the learned counsel for the petitioner and Sri.Sangeetha Raj, the learned Public Prosecutor.

5. The learned counsel for the petitioner submitted that, even if the allegations in the First Information Statement together with all the materials collected during the investigation are taken at its face value they do not constitute the offences alleged against the petitioner.

6. I have gone through the FIS as well as the statement given by the victim under Section 164 of the Cr.P.C.

There is absolutely nothing to attract the basic ingredients of Section 376(1) or 376(2)(n) of the IPC.

7. A reading of the FIS and statement under Section 164 of the Cr.P.C. would show that the petitioner and the victim studied together and they were in love. In fact, they had decided to marry. But due to some reasons beyond their control they could not marry. Later on, the victim married another person and the alleged sexual acts with the petitioner were taken place during the subsistence of the marriage of the victim with the said person. A reading of both the statements of the victim would show that she got married on 5.7.2012 and in the year 2016 she again met the petitioner. Thereafter, they started their relationship again. It is specifically stated in the statement given by the petitioner under Section 164 of the Cr.P.C. that on 16.12.2020 the petitioner came to her house and told her that he still loves her and thereafter they engaged in sex. It is further stated that thereafter on five to six occasions they had sex after giving promise that the petitioner would marry her.

8. There is no case for the 2nd respondent that, the sex they had, was forcible one. But, according to her, she

consented for sex persuaded by the promise of marriage given by the petitioner. It is settled that, if a man retracts his promise to marry a woman, consensual sex they had would not constitute an offence of rape under Section 376 of the IPC unless it is established that the consent for such sexual act was obtained by him by giving false promise of marriage with no intention of being adhered to and that promise made was false to his knowledge. (see **Ranjith v. State of Kerala** [2022 (1) KLT 19]).

9. As stated already, it is a case where the victim who is a married woman voluntarily had sex with her former lover. She knew pretty well that she cannot enter into a lawful marriage with the petitioner. Recently, this Court in **Anilkumar v. State of Kerala** [2021 (1) KHC 435] has held that the promise alleged to have been made by the accused to a married woman that he would marry her is a promise which is not enforceable in law as it is against public policy in view of the mandatory provisions contained in Section 23 of the Indian Contract Act and such an unenforceable and illegal promise cannot be the basis for the prosecution to contend that, the

consent of the woman, who had sexual relationship with the accused, was obtained on the basis of misconception of fact as understood in Explanation 2 of Section 376 of the IPC and Section 90 of the IPC.

10. The Apex Court in **Deepak Gulati v. State of Haryana** [(2013) 7 SCC 675] and in **Dhruvaram Murlidhar Sonar (Dr.) v. State of Maharashtra** [AIR 2019 SC 327], drawing distinction between rape and consensual sex observed that 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. In drawing distinction between mere breach of a promise and not fulfilling a false promise, it was further observed that, if the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape and that if the accused had any mala fide intention or had clandestine motives, it is a clear case of rape.

11. As stated already, the sequence of events mentioned above would go to show that the sex the petitioner

and the victim had was purely consensual in nature. There is nothing on record to show that the petitioner had made a false promise only to satisfy his lust. No question of promise to marry arises inasmuch as the 2nd respondent is a married woman and she knew that a legal marriage with the petitioner was not possible under law. The offence of rape cannot be constituted on the basis of the allegations in the FIS and the statement under Section 164 of the Cr.P.C. as it is apparent that the consent was not given by her on the basis of any misconception.

In these circumstances, I am of the view that no purpose will be served in proceeding with the matter further. All further proceedings in S.C.No.356/2021 on the file of the Additional Sessions Court-II (Special), Kottayam stand hereby quashed. Crl.M.C. is, accordingly, allowed.

Sd/-

**DR.KAUSER EDAPPAGATH,
JUDGE**

skj

APPENDIX OF CRL.MC 4933/2021

PETITIONER'S ANNEXURES

- Annexure 1 A TRUE COPY OF THE FIR IN CRIME NO.42/2021 OF THE VAIKOM POLICE STATION.
- Annexure 2 A TRUE COPY OF THE FIS IN CRIME NO.42/2021 OF THE VAIKOM POLICE STATION.
- Annexure 3 A TRUE COPY OF THE STATEMENT DATED 12.1.2021 GIVEN BY THE 2ND RESPONDENT.
- Annexure 4 A TRUE COPY OF THE COMPLAINT DATED 7.1.2021 SUBMITTED BY THE 2ND RESPONDENT BEFORE THE DISTRICT POLICE CHIEF, KOTTAYAM.
- Annexure 5 A TRUE COPY OF THE 164 STATEMENT DATED 9.1.2021 GIVEN BY THE 2ND RESPONDENT.
- Annexure 6 A TRUE COPY OF O.P.NO.106/2021 ON THE FILES OF THE FAMILY COURT, ETTUMANOOR.
- Annexure 7 A TRUE COPY OF THE FINAL REPORT DATED 26.2.2021 IN CRIME NO.42/2021 SUBMITTED BY THE VAIKOM POLICE.
- Annexure 8 A TRUE COPY OF THE COMPLAINT DATED NIL SUBMITTED BY THE 2ND RESPONDENT BEFORE THE VANITHA POLICE STATION.
- Annexure 9 A TRUE COPY OF THE LETTER NO.82/TDR/VPS/21K DATED 19.3.2021 ISSUED BY THE PUBLIC INFORMATION OFFICER, VANITHA P.S., KOTTAYAM.
- Annexure 10 A TRUE COPY OF THE JUDGMENT DATED 30.10.2020 IN CRL.M.C.NO.9312/2019 ON THE FILES OF THIS COURT REPORTED IN 2021 (1) KHC 435.