

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

ANTICIPATORY BAIL APPLICATION NO.105 OF 2016

Mr.Tejas Udaykumar Sarvaiya ... Applicant

Vs.

The State of Maharashtra & Ors. ... Respondents

Mr.Rizwan G. Merchant with Mr.S.I. Wagh and Sandeep Bali for the
Applicant
Ms.Alpa Javeri, APP, for Respondent – State
Mr.Vikramsingh Parmar for Complainant

CORAM: **MRS.MRIDULA BHATKAR, J.**

DATE: **APRIL 7, 2016**

P.C.:

1. This is a case registered under sections 376, 420, 506, 504, 34 of the Indian Penal Code and also under section 67 of the Information Technology Act, 2000 at C.R. No.3 of 2016 at the instance of the prosecutrix on 2.1.2016 with Navghar police station, Mulund, Mumbai against the applicant-accused.

2. It is the case of the prosecutrix that she is working as a Senior Medical Surveyer at Airoli, Navi Mumbai. In the year 2014, she became friendly with the applicant-accused through her neighbour. He used to send SMSs and phone her. In December, 2014, he proposed to her which she accepted. Thereafter, he started demanding expensive gifts and

money from her and she fulfilled his demands. In January, 2015, he asked for sexual intercourse, however, she refused as they were not married. Then, he told her that he would not marry if she would not trust him and, therefore, without her free consent, he had sexual intercourse with her. It is her case that he took her photographs in a compromising position and also took her obscene photographs. He introduced her to his sister and mother. However, she realised that they did not like her. In March, 2015, there was a family meeting of mother of of the applicant and her parents and at that time, his mother proposed to her parents and told that after marriage of the elder sister of the applicant-accused, the marriage of the applicant-accused and the complainant would be performed. The applicant-accused and the complainant got engaged on 10.9.2015. In September, 2015, the applicant-accused and the complainant went to Surat and they stayed at the house of friend of the applicant-accused and thereafter they returned to Mumbai. During this period, he forced her to have sexual intercourse with him. In October, 2015, the complainant found that applicant-accused was chatting with his old friend who had proposed to the applicant earlier. It is her case that the applicant-accused has created two fake accounts by using her E-mail Id and password and he starting sending vulgar messages from one account to other account. Then, he used to take screenshot of such messages and then fight with her. They had fight on account of that one lady as the complainant

allegedly sent objectionable email. Thereafter, they fought and he informed that he did not want to marry her. Therefore, she complained.

3. The learned Counsel for the applicant-accused, the complainant as also the learned Prosecutor are present. The learned Counsel for the applicant-accused relied on the case of **Tilak Raj vs. State of Himachal Pradesh**¹.

4. Perused the FIR. Heard submissions of both the parties. It is a typical case of rape filed on the ground that there was a promise to marry and, therefore, sexual intercourse was forced on the girl and thereafter there was a break-up.

5. In the case of **Tilak Raj vs. State of Himachal Pradesh (supra)**, the prosecutrix was 40 years old and was in relationship with the accused. However, the accused was acquitted for the offence under section 376 of the Indian Penal Code against which the criminal appeal was filed by the State. The High Court upheld acquittal from the charge of rape but convicted the appellant for the offence under sections 417, 506 (1) of the Indian Penal Code and released him on P.R. Bond. Hence, the Special Leave Petition was filed before the Supreme Court. While dealing with the matter, the Supreme Court observed thus:

¹ 2016 SCC Online (SC) 11

“20. The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the Appellant seems to be consensual in nature. The trial court has rightly held thus:

“23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.

24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.

25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her testimony itself shows that the entire story of marriage has unfolded after 05.01.2010 when the accused was stated to have been summoned to the office of the Dy. S.P. Prior to 05.01.2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but her cross- examination shows that no doubt the two were in relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, come talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage.”

6. In the case of **Tilak Raj (supra)**, it was appeal. However, at this stage of anticipatory bail, the same view can be adopted. The prosecutrix

in the present case is 29 years old. She is a Doctor. According to her, the incident of sexual intercourse has taken place in January, 2015. Thus, she was 28 years old when, as per her case, her consent was fraudulently obtained under the promise of marriage. This Court, earlier in many cases, has taken a view that if a prosecutrix is a major and educated and unless special circumstances are made out, such allegations cannot be constitute ingredients of rape under section 376 of the Indian Penal Code. When a girl is major and educated, she is supposed to understand the consequences of giving consent for sexual intercourse to her fiancé.

7. The Courts come across cases wherein such allegations of consenting to sexual intercourse under the promise of marriage and after break-up, the said relationship is labelled as rape; regularly nearly everyday. It is necessary to make it clear again and again that it is not a rape which is defined under section 376 of the Indian Penal Code. It is settled position of law that a consent which is obtained by fraud or coercion, is not a consent. For example, if a woman is put to a threat of killing her family or causing injury to her and then agrees to have sexual intercourse, then, it is coercion. So also, if a man suppressing a fact of previous marriage, promises a woman to marry her, and then she agrees to have sexual intercourse with him, then that can be consent obtained by fraud. Thus, in such cases, though it is a consensual sexual intercourse, it is a rape under section 376 of the Indian Penal Code.

8. However, in a case where a woman is educated and major and no special circumstances are made out, then, if a man promises to marry and gets engaged and sexual relationship is established between the two and thereafter, refuses to marry, that cannot be said to be cheating or rape unless very special circumstances are made out. A woman cannot have sexual relationship with a man other than a husband is a fundamental moral principle that Indian women bear in mind. However, due to availability of opportunities and more interaction between men and women, so also as more methods of communication are easily used by men and women, the incidents of having sexual intercourse prior to marriage are not exceptional as the biological need of women also cannot be denied.

9. An act may not be moral but it is not illegal. Every society has its own set of morality, so each person inculcates his / her moral values. To compromise with those values or not is always a decision of that individual. Under these circumstances, it is expected that a woman has capacity to understand the consequences and her decision to have sexual relationship is to be considered as voluntary and conscious decision. To have temptation to get involved into such kind of relationship is not a fraud. If there is a break-up and the person refuses to marry, then, though it is unfortunate the frustration of break-up cannot be converted into offence of rape.

10. In the circumstances, the application is allowed on the following terms:

- i) In the event of arrest, the applicant-accused shall be released on bail upon furnishing P.R. Bond in the sum of Rs.10,000/- with one or two solvent sureties in the like amount;
- ii) The applicant-accused shall cooperate with the Investigating Officer and attend the concerned police station on 21st April, 2016 from 10am to 11am.

(MRIDULA BHATKAR, J.)