

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Crl. Misc. No. M-8834 of 2016

DATE OF DECISION: 15.03.2016

Shitij Gaur

.....Petitioner

Versus

State of Haryana

.....Respondent

BEFORE:- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

1. **Whether reporters of local newspaper may be allowed to see judgment? (Yes)**
2. **To be referred to reporters or not? (Yes)**
3. **Whether the judgment should be reported in the Digest? (Yes)**

Present:- Mr. Rakesh Nehra, Advocate
for the petitioner.

DAYA CHAUDHARY, J.

The present petition has been filed under Section 438 Cr.P.C. for grant of anticipatory bail to the petitioner in case FIR No. 12 dated 31.1.2016 registered under Sections 376/506 IPC at Women Police Station, District Gurgaon.

Learned counsel for the petitioner contends that the petitioner has falsely been implicated in this case, whereas, he was not involved. The petitioner is unmarried, whereas, the complainant is a divorcee and is having a 12 years old daughter as well. Both the parties were known to each other for the last few months. The complainant introduced herself as an unmarried girl to the petitioner with an ulterior motive and there was involvement of her family members also. Even in whatsapp messages, the complainant has shown herself to be an unmarried girl and the factum of

her earlier marriage was not told to the petitioner. Learned counsel also submits that both the parties were having liking for each other but no promise of marriage was ever made. Learned counsel has relied upon the judgments of Hon'ble the Apex Court in the case of **K.P. Thimmappa Gowda Vs. State of Karnataka** 2011 (14) SCC 475, **Tilak Raj Vs. State of Himachal Pradesh** 2016 (1) RCR (Criminal) 802, of this Court in **Ram Lubhaya Vs. State of Punjab** passed in Crl. Misc. No. M-14699 of 2014 on 26.5.2014, **Neeraj Kumar Vs. State of Haryana** passed in Crl. Misc. No. M-131 of 2016 on 10.3.2016, of Delhi High Court in **Vikul Bakshi Vs. The State (NCT of Delhi)** 2016 (1) JCC 54, **Rohit Chauhan Vs. State NCT of Delhi** 2014 (1) RCR (Criminal) 1030, **Nirmal Vaid Vs. State NCT of Delhi** 2014 (12) RCR (Criminal) 2406 and of Bombay High Court in **Mahesh Balkrishna Dandane Vs. State of Maharashtra** 2014 (4) Crimes 37, in support of his contentions.

Mr. Dinesh Arora, Advocate appears on behalf of the complainant and submits that the petitioner was well aware about the marriage of the complainant and her daughter from the earlier marriage. Not only promise for marriage was made but under the pretext of marriage, physical relations were also made with the complainant. The petitioner subsequently backed out from the marriage and offence under Section 376 IPC is made out as has been held by Hon'ble the Apex Court in the case of **State of U.P. Vs. Naushad** 2013 (16) SCC 651.

Heard the arguments advanced by learned counsel for the parties and have also gone through the allegations levelled in the FIR as well as other documents available on the file including the whatsapp messages exchanged between the parties.

Learned counsel for the petitioner has contended that the petitioner was ready to marry with the complainant but it was not told to the

petitioner that the complainant was earlier married and a daughter was also born from the said wedlock. It is also the argument of learned counsel that no promise to marry was ever made to the complainant.

It is apparent from the whatsapp messages exchanged between the parties that the petitioner was well aware about the earlier marriage of the complainant and the daughter from the earlier marriage. Now the question for consideration is with regard to the consent of the victim. Section 90 IPC defines consent known to be given under 'fear or misconception', which reads as under:-

"90. Consent known to be given under fear or misconception – A consent is not such consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception."

Section 376 IPC is also relevant in the present case, which reads as under:-

376. Punishment for rape.—

(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and

special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,—

(a) being a police officer commits rape—

(i) within the limits of the police station to which he is appointed; or

(ii) in the premises of any station house whether or not situated in the police station to which he is appointed; or

(iii) on a woman in his custody or in the custody of a police officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years

but which may be for life and shall also be liable to fine: Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years. Explanation 1.—Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section. Explanation 2.—“Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected woman or children or a widows’ home or by any other name, which is established and maintained for the reception and care of woman or children. Explanation 3.—“Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.]

It is apparent from the aforesaid Section that in case the consent is given by the victim under the misconception of the fact, it is vitiated. In the present case the accused had sexual intercourse with the prosecutrix by giving a false assurance of marriage but subsequently backed out from the same. From this, it is evident that the petitioner never intended to marry the complainant but he procured her consent only for having sexual intercourse with her. The act of the accused falls squarely under the definition of rape as he had sexual intercourse with the victim by obtaining her consent under a misconception of the fact as defined under Section 90 IPC. The alleged consent said to have been obtained by the accused was not voluntary consent and as such the accused indulged in

sexual intercourse with the prosecutrix by misconstruing to her his true intentions. Same view has been held by Hon'ble the Apex Court in the case of **Yedla Srinivas Rao Vs. State of A.P.**, 2006 (4) RCR (Criminal) 474, which reads as under:-

“10. It appears that the intention of the accused as per the testimony of PW1 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 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 persuaded 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.”

Further, in para 17 of the said judgment, Hon'ble the Apex Court has held as under:-

“In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by

the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law. This is more evident from the testimony of PW1 as well as PW6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her but he absconded despite the promise made before the Panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact by prosecutor that he would marry her.”

In the aforesaid judgment, it was held that in case the accused obtained consent of the prosecutrix fraudulently under a misconception of the fact then he will be held guilty for the offence of rape. Hon’ble the Apex Court in **Naushad’s case (supra)** has observed to the extent that a woman's body is not a man's plaything and he cannot take advantage of it in order to satisfy his lust and desires by fooling a woman into consenting to sexual intercourse simply because he wants to indulge in it. The accused in this case has committed the vile act of rape and deserves to be suitably punished for it.

A perusal of whatsapp messages exchanged between the parties would show that there is a reference about the earlier marriage and of daughter as well. Some of the whatsapp messages exchanged between the parties show that the petitioner was well aware about the daughter and earlier marriage, which are reproduced as under:-

“Kherr m teri khushi mein bahut khush aap mujhe itna pyar karte ho or mujhse ek bar milne k baad hi mere itna karib aa

gye ho ki bas mujhse hi shadi krna chahte ho or meri beti ko bhi apna mann lia or muhe shadi k liye 5-6 mahine ka time bhi de diya hai aap bahut achhe ho jo mujhe itna samjha hai.”

“Masti maar rhi ho apni beti kai saath”

“Chalo ab tum or pragya khana khalo or rest krlo mai kitchen mein jakar kuch khane ka dekhta hu love u jaan.”

“Fir aaj raat ko mere pass kbb aaoge yaad hai na aj mai bhai or mamaji se milaungi aapko neha bhi aayegi”

“Neha or pragya ke sath market jana hai or agar mai aai to pehle pragya ko mummy ke pass chhawla chhodna padega.”

Same issue was there before the Calcutta High Court, wherein, judgments of **Yedla's case (supra)** and **Uday Vs. State of Karnataka** AIR 2003 SC 1693 were relied upon. In that case the accused by giving assurance to marry her cohabitated and made physical relations with the victim but ultimately refused to marry. The issue therein was as to whether there was consent and whether the accused refused to marry or not after she conceived are within the domain of factual matrix of oral evidence of the victim and the witnesses concerned. It was also held that at pre trial stage while dealing with bail application under Section 438/439 Cr.P.C., the Court is to consider only the allegations in the FIR. It was further held that it was a very premature stage to hold that there was nothing to suggest that ‘such consent was obtained’ and by considering the argument of both the parties, it was found that it was not fit case to grant bail at that stage and application for grant of anticipatory bail was rejected.

In the present case also for granting anticipatory bail only the allegations are to be seen. The evidence will be seen during the trial and it cannot be said that consent was given voluntary and the petitioner was not

aware about the earlier marriage and daughter born out of the said wedlock. Even the whatsapp messages are also matter of evidence but prima facie after going through the messages exchanged between the parties, it appears that the petitioner was well about the earlier marriage and daughter. Simply saying that the concealment was there as the victim has projected herself to be unmarried, is contrary to the record available at this stage.

Accordingly, in view of facts as mentioned above and by considering the allegations in the FIR, no ground is made out to grant anticipatory bail to the petitioner and the petition being devoid of any merit is hereby dismissed.

March 15, 2016
pooja

(DAYA CHAUDHARY)
JUDGE