

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL REVISION APPLICATION NO. 305 OF 2004

Avinash @ Madhav S/o Goroba Kamble
Age 23 years, Occu. Agril.
R/o Yelnoor, Tq. Nilanga,
District – Latur.

... Appellant.
(Orig. Accused)

Versus

The State of Maharashtra
Through A.P.P.
Aurangabad High Court.

... Respondent

.....
Advocate for Applicant : Mr. Amol G. Vasmatkar h/f
Mr. Amit S. Deshpande
APP for Respondent-State : Mr. V.M. Kagne
.....

CORAM : V. K. JADHAV, J.
DATED : 4th APRIL, 2019

JUDGMENT :

1. The applicant/original accused has preferred this Criminal Revision Application against the judgment and order of conviction dated 30.04.2004 passed by learned Adhoc Additional Sessions Judge, Nilanga in Sessions Case No. 18 of 2003.

2. Brief facts giving rise to the present Criminal Revision Application are as follows:

a. The prosecutrix Begadbai Eknath Kamble is the resident of village Yelnoor. The applicant/accused is also residing in the same village. The residential house of the applicant/accused is situated adjacent to the house of the prosecutrix Begadbai. There was a love affair between the prosecutrix and the applicant/accused. The accused had promised the prosecutrix to marry her and thus developed sexual relations with her. The applicant/accused had committed sexual intercourse with the prosecutrix at many occasions at her house, in his house and also in the field. However, when parents of the prosecutrix came to know about the said relations, they fixed marriage of the prosecutrix with one Vijaykumar, a resident of Nilanga. At that time, the applicant/accused met the said Vijaykumar and disclosed to him about his relations with the prosecutrix and further, about his intention to perform marriage with her. In consequence thereof, marriage of the prosecutrix with said Vijaykumar had broken. Thus, the parents, the brother and the uncle of the prosecutrix insisted the applicant/accused to perform marriage with the prosecutrix Begadbai. The applicant/accused had also promised them of performing marriage with the prosecutrix Begadbai. However he

performed marriage with one Sonali @ Panchashila d/o Vishwanath Suryawanshi, resident of Jajanmugali on 24.05.2003.

b. The prosecutrix Begadbai has lodged complaint in writing before the P.S.O., Aurad-Shahajani Police Station. On the basis of her complaint, Crime No. 35 of 2003 came to be registered against the accused. The Investigating Officer has drawn *panchanama* by visiting the spot and also recorded statements of the witnesses. The Investigating Officer has sent the prosecutrix Begadbai to the Government Hospital, Ambulage for medical examination and also collected the medical certificate. During the course of investigation, the accused was also subjected to medical examination. The Investigating Officer has collected the birth date certificate of the prosecutrix and also collected the marriage certificate. After completion of investigation, the Investigating Officer has submitted the charge sheet before the Judicial Magistrate, First Class, Nilanga. In due course, the learned Magistrate has committed the case to the Sessions Court, Nilanga as the offence alleged to have been committed by the accused was exclusively triable by the Court of Sessions.

c. Learned Ad-hoc Additional Sessions Judge has framed charge against the applicant/accused for the offence punishable under Sections 376 and 417 of IPC. The contents of the charge were read over to the applicant/accused in vernacular. The applicant/accused has pleaded not guilty to the charge and claimed to be tried. The prosecution has examined in all ten witnesses to substantiate the charge levelled against the accused. The prosecution has also placed reliance upon the documents like school leaving certificate e.t.c. After completion of the prosecution evidence, statement of the accused under Section 313 of the Criminal Procedure Code, 1973 came to be recorded. The applicant/accused has examined defence witness, namely, Dhondabai Kamble (Exhibit 60), who happened to be his mother-in-law. The defence of the applicant/accused is of total denial and false implication with an intention to grab his property.

d. The learned Adhoc Additional Sessions Judge, Nilanga, by judgment and order dated 30.04.2004 in Sessions Case No. 18 of 2003, convicted the applicant/accused for the offence punishable under Section 417 of IPC and sentenced him to suffer simple imprisonment for 30 days and to pay fine of Rs.1,000/-, in default to suffer further simple imprisonment for 15 days. The learned

Judge of the trial court has also given set off to the applicant/accused since he was in custody from 20.08.2003 to 06.09.2003. The learned Adhoc Additional Sessions Judge, Nilanga has acquitted the applicant/accused of the offence punishable under Section 376 of IPC. Hence this Criminal Revision Application.

3. Learned counsel for the applicant submits that the prosecution has failed to prove that the applicant/accused had given promise to marry the prosecutrix and under that promise, developed sexual relations with her. Learned counsel submits that the trial court has acquitted the applicant/accused of the offence punishable under Section 376 of IPC and thus, the conviction of the applicant/accused under Section 417 of IPC is liable to be quashed and set aside. It further appears from the prosecution evidence that the prosecutrix, who was major, had consented to have sexual intercourse with the accused. Learned counsel submits that failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to misconception of fact at the inception of the act itself. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity, Section 90 of

IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on others, unless the court can be assured that from the very inception the accused never really intended to marry. Learned counsel submits that there is no evidence that right from the inception, the applicant/accused never intended to marry. On the other hand, parents of the prosecutrix were not ready for her marriage with the applicant/accused and in consequence thereof, marriage of the prosecutrix was fixed with one Vijaykumar. However, at the instance of the prosecutrix, the applicant/accused alleged to have broken the said marriage. It has come in the evidence of the prosecution witnesses that even thereafter, the applicant/accused had shown his willingness to perform marriage with the prosecutrix. It is not clear as to what happened thereafter and as to why the applicant/accused got married with another girl by name Sonali. Learned counsel submits that there is distinction between the mere breach of a promise and not fulfilling a false promise. There is no evidence in this case that the applicant/accused has given a false promise of marriage. Learned counsel submits that thus, conviction of the applicant/accused under Section 417 of IPC is liable to be quashed and set aside.

4. Learned counsel for the applicant/accused, in order to substantiate his submissions, placed reliance on the following cases:

1. ***Uday versus State of Karnataka***, reported in ***AIR 2003 SC 1639***.
2. ***Deepak Gulati versus State of Haryana***, reported in ***AIR 2013 SC 2071***.
3. ***Sudeep Lalit Prasad Upadhyay (Sharma) versus State of Maharashtra***, reported in ***2018 All M.R. (Cri.) 1869***.
4. ***Rajesh Bajaj versus State (N.C.T.) of Delhi***, reported in ***AIR 1999 SC 1216***.
5. ***Bharat Vishnuprasad Agrawal versus Girdhar Chiranjivalal Agrawal and Others***, reported in ***2017 All M.R. (Cri.) 1846***.

5. Learned APP has supported the judgment and order of conviction passed by the trial court. Learned APP submits that the evidence of the prosecutrix and the other prosecution evidence is consistent, reliable and trustworthy. There is enough evidence on record to prove that the applicant/accused has given a false promise of marriage to the prosecutrix, developed sexual relations with her and thus cheated her. The same is also evident from the

fact that the applicant/accused has performed marriage with one Sonali despite the promise of marriage already given to the prosecutrix. Thus, the prosecution has proved on the basis of the prosecution evidence and the circumstances that the applicant/accused never intended to marry the prosecutrix. The applicant/accused has thus committed offence of cheating. Learned Judge of the trial court has taken a lenient view and sentenced the applicant/accused only for 30 days simple imprisonment and to pay fine of Rs.1,000/-. In view of the same, no interference is required. The Criminal Revision Application is liable to be dismissed.

6. It appears from the prosecution evidence that the applicant accused had expressed love and promised to marry the prosecutrix on later date. As a result thereof, the prosecutrix had given consent to sexual intercourse. It appears from the submissions made by learned APP that the prosecutrix had given consent for sexual intercourse under misconception of fact i.e. promise to marry. It appears that learned APP has taken recourse to the provisions of Section 90 of IPC.

7. In the case of ***Uday versus State of Karnataka***, (supra), relied upon by learned counsel for the applicant, the Hon'ble Supreme Court in paragraph nos. 24 and 25 of the judgment, has made the following observations:

"24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of S. 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members

of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he

promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

8. In the case of ***Deepak Gulati versus State of Haryana*** (supra), relied upon by learned counsel for the applicant, in paragraph nos. 18 and 21, the Hon'ble Supreme Court has made the following observations:

"18. 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 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 for the accused, and not solely on account of mis-representation 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

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21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at 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."

9. In the instant case, there is no evidence to prove conclusively that the applicant/accused never intended to marry the prosecutrix. PW 3 Begadbai (the prosecutrix) in her examination-in-chief itself has stated that one neighbour Kashibai came to know about their sexual relations and she had also questioned the prosecutrix as well the applicant/accused. Thereafter, PW 3 Begadbai has further deposed that she herself and the applicant/accused replied to the said Kashibai that they are going to marry. She has further stated in her examination-in-chief itself that said Kashibai had informed about the same to the parents of prosecutrix and thereupon her parents had fixed her marriage with one Vijaykumar from Nilanga. Thus, she had requested the applicant/accused to intervene and to brake her marriage. Thereafter, PW 3 Begadbai has further stated in the examination-in-chief that the applicant/accused has broken her marriage with said Vijaykumar. The applicant/accused visited the said Vijaykumar and disclosed to him about their relations. In the result, her marriage with said Vijaykumar was broken. PW 3 Begadbai, in para 17 of her cross-examination, has admitted that her parents when came to know about their relations, had been to

the parents of the applicant/accused. At that time, the parents of the applicant/accused had assured to perform marriage of applicant/accused with PW 3 Begadbai within one year. There is no evidence that right from the inception the applicant/accused was intending to cheat PW 3 Begadbai. There is distinction between a mere breach of promise and a false promise. It appears that, the parents of PW 3 Begadbai had initially fixed her marriage with one Vijaykumar. Had there been the intention of the applicant/accused to cheat her, he would not have tried to break her marriage with said Vijaykumar. Thus, the reasons are not very clear as to what led the applicant/accused to perform marriage with one Sonali. Even PW 3 Begadbai has not deposed that the applicant had made false promise of marriage. Thus, there is no question that the consent was given under a misconception of fact.

10. In view of the above discussion and in the light of the ratio laid down by the Supreme Court in the aforesaid two cases, the conviction recorded by the trial court under Section 417 of IPC sentencing thereby the applicant/accused to suffer simple imprisonment for 30 days and to pay fine of Rs.1,000/-, in default to suffer further simple imprisonment for 15 days, is not

sustainable. The same is liable to be quashed and set aside. Hence, the following order:

ORDER

- I. Criminal revision application is hereby allowed.
- II. The impugned judgment and order dated 30.04.2004 passed by the learned Adhoc Additional Sessions Judge, Nilanga, in Sessions Case No. 18 of 2003 thereby convicting the applicant-accused for the offence punishable under section 417 of I.P.C. and sentencing him to suffer simple imprisonment for 30 days and to pay fine of Rs.1000/- i/d to suffer S.I. for 15 days, is hereby quashed and set aside.
- III. The applicant-accused Avinash @ Madhav s/o Goroba Kamble is hereby acquitted of the offence punishable under Section 417 of I.P.C. vide Sessions Case No. 18 of 2003. The fine amount, if paid, be refunded to the applicant-accused.
- IV. The criminal revision application is disposed of.

(V. K. JADHAV, J.)