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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CRL.REV.P. 1134/2019 & CRL.M.A. 39313/2019 &
CRL.M.A. 39314/2019**

ANAND KAUSHAL

..... Petitioner

versus

STATE (GOVT. OF NCT OF DELHI)

..... Respondent

Advocates who appeared in this case:

For the Petitioners: Mr Ramesh Gupta, Sr. Advocate with Mr Ghanshyam Sharma, Mr Ajay P. Tushir, Mr Shailendra Singh and Mr Mankaran Singh, Advocates.

For the Respondents: Ms Meenakshi Chauhan, APP for State with SI Sandeep Yadav, PS Vasant Kunj South.

Mr Pulkit Tyagi and Mr Sanju Gupta, Advocates for R-2.

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HON'BLE MR JUSTICE VIBHU BAKHRU

ORDER

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13.03.2020

VIBHU BAKHRU, J.

1. The petitioner has filed the present petition impugning an order dated 01.08.2019 passed by the learned ASJ (hereafter 'the impugned order'), whereby a charge of committing an offence under Section 376(2)(n) of the IPC was framed against the petitioner. The petitioner is being prosecuted pursuant to FIR No.263/2018, under Section 376 of

the IPC, registered with PS Vasant Kunj South.

The FIR

2. The said FIR was registered at the instance of Ms 'M' (name concealed to avoid ignominy). She had stated that at the material time, she was married but was living separately from her husband. They were in the process of seeking a divorce and the First Motion in their divorce petition had been allowed.

3. M stated that she was familiar with the petitioner since February, 2016 (that is prior to her marriage). She stated that after separation from her husband in November, 2016, the petitioner had started having frequent conversations with her and had become close to her. She stated that she had told him that she was not divorced as yet and, therefore, there would be no purpose in developing a relationship with him. However, he had expressed his love for her and had represented that he would marry her after she had secured a divorce from her husband. She alleged that he had stated that he would wait for her. She claimed that because of the love and affection shown by him, she believed him. And, a close relationship developed between them. She stated that in the month of February- March, 2017, the petitioner had taken her to Hotel Odean Continental and established physical relationship with her on the pretext that he would marry her after her divorce. She stated that thereafter, on various occasions, both of them visited several different hotels where they had established physical relationship. She stated that they engaged in sexual relations for the last time on 14.02.2018 at Aravalli Inn, Masoodpur, Vasant Kunj, New Delhi.

4. She stated that the matter with her husband was compromised and had agreed to secure a decree of divorce by mutual consent. Thereafter, she asked the petitioner to talk to his parents for their marriage. He informed her that he was going to his native village but had blocked her mobile number and had stopped receiving her calls. She stated that she went to the petitioner's native village on 19.02.2018, where his father told her the petitioner was missing and that their marriage could not take place, as both of them belonged to different castes.

5. This led M to file a complaint that the petitioner had raped her by obtaining consent in the guise of marrying her and had, thereafter, left her.

Statement under Section 164 of the Cr.P.C.

6. M's statement under Section 164 of the Cr.P.C. was recorded on 06.06.2018.

7. In her statement, M stated that she was married on 01.06.2016 and her husband used to reside at her parental home. She stated that in November, 2016, he had separated from her and their divorce proceedings were pending. The First Motion in their divorce petition was allowed in May, 2018. She stated that she knew the petitioner since the year, 2016, and he was aware of her problems. She stated that after November, 2016 she and the petitioner started to have conversations, mainly, regarding her husband. She stated that he had told her that he would be with her (support her) and after her divorce, marry her. She stated that they used to meet in various malls and they had stayed

together in various hotels on number of occasions. She also named some of the hotels where they had stayed. She claimed that when they had checked in a hotel for the first time, she had told him that that was not correct but he had shown immense love and affection to her and had promised that he would get married to her at any cost. She stated that on 6/7.02.2018, the petitioner had called his father on phone and she had also joined in by way of a conference call and had heard the conversation. She stated that the petitioner had talked to his father about her but his father had declined their suggestion of getting married. His father stated that they cannot get married as he had two daughters and their marriage would affect his daughters' prospects. She stated that she informed the petitioner's father that the petitioner and her were together since the past one year, however, his father told her to forget about the relationship since their marriage was not possible. She stated that even, thereafter, the petitioner had continued to meet her. She claimed that the petitioner told her that he would get married to her in the year, 2020 after the marriage of his sisters. She claimed that he asked her for a court marriage but she refused because her divorce had not come through. She claimed that the petitioner left for his native village in Uttar Pradesh and told her that he would try and convince his family. She stated that on 18.02.2018, he asked her to meet him at Lajpat Nagar at 7 'o' clock. She went there but the petitioner did not show up. Thereafter, he told her to go to his cousin's place and also started abusing her. She stated that she went to the petitioner's native village and reached there in the morning at 8:30/9:00. She stated that she told the petitioner's family about everything. She stated that his father

touched her feet (*uske papa ne mere pair pakad liye*) but he did not agree to their marriage. She stated that, thereafter, the petitioner blocked her mobile number and broke contact with her.

Disputes between M and her husband

8. The petitioner has also placed certain facts on record with reference to the previous marriage of M, which are relevant to the present case. The same are briefly stated hereafter.

9. On 14.09.2015, M had filed an FIR against Mr. Mohit Rawat, who she married subsequently. In the said FIR, she had alleged that Mr. Mohit Rawat promised to marry her, and on that basis, had established physical relations with her. She alleged that since the last six months, he had been beating her and had told her he did not want to get married to her. She alleged that he used to threaten her, beat her, strangle her and would also establish physical relations with her. She alleged that he would give her pills to avoid pregnancy and would threaten to not marry her.

10. On the basis of M's statement, FIR No. 1342/2015, under Sections 376/506 of the IPC, was registered with PS Tilak Nagar against Mohit Rawat. A charge sheet was filed and the said case was put up for hearing on 19.05.2016. On that day, Mr. Mohit Rawat made a statement before the Court that he was willing to marry the complainant (Ms M). On the basis of the said statement, the ASJ granted interim bail to Mohit Rawat for a period of fifteen days.

11. On 01.06.2016, marriage between M and Mohit Rawat was solemnized. On 15.10.2016, Mohit Rawat was acquitted in the case

(instituted pursuant to FIR No. 1342/2015) on the basis of the statement made by M.

12. Less than a year later, on 25.07.2017, M filed a petition under Section 125 of the Cr.PC against Mohit Rawat. In the petition, she alleged that after Mohit Rawat was acquitted, his behaviour had become abusive towards her and he did not give her any money and therefore, she was constrained to file a petition for her maintenance.

13. Thereafter, M and Mohit Rawat filed for divorce by mutual consent under Section 13(B)(1) of the Hindu Marriage Act, 1955. By the order dated 05.05.2018, the Court noted that the dispute between the parties had been settled vide an agreement dated 16.04.2018 and accepted the first motion of divorce filed by the parties. As per the agreement, M had agreed to receive a sum ₹4,00,000/- in full and final settlement of her claims. The first instalment of ₹2,00,000/- was paid to M on recording of M's statement in first motion of their divorce petition. On 14.09.2018, M's statement was recorded in the second motion and the second instalment of ₹2,00,000/- was paid to her. The second motion was accordingly allowed and the decree dissolving the marriage between Mohit Rawat and M was passed.

Reasons and conclusion

14. In the present case, the petitioner is charged of committing an offence punishable under Section 376(2)(n) of the Act. He is charged of "committing rape repeatedly on the same woman".

15. A bare perusal of the impugned order indicates that the Trial Court proceeded on an admitted position that Ms M was induced into

establishing physical relations with the petitioner on the basis of a false promise of marriage. Admittedly, the relationship between the petitioner and Ms M was consensual. Nonetheless, Ms M had filed the complaint claiming that her consent was vitiated as it was allegedly obtained by a false promise of marriage.

16. It was alleged that the petitioner and Ms M had established physical relationships on various dates between February, 2017 and 14.02.2018. Thus, it is admitted that the petitioner and Ms M had a longstanding intimate relationship even though Ms M was married at the relevant time. Notwithstanding the above, the trial court had proceeded on the basis that the fact that Ms M was not in a position to marry the petitioner, would not be relevant. This Court finds the aforesaid view manifestly erroneous.

17. In ***Pramod Suryabhan Pawar v. State of Maharashtra and Another: (2019) SCC online SC 1073***, the Supreme Court had observed as under:-

"14. 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.

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20. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was

not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. The "consent" of a woman under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act..."

18. The Supreme Court had also referred to various other decisions and summarized the legal position in the following words:-

"22. 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 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."

19. It is clear that in this case, there was no possibility of the petitioner and M getting married at the time when they had allegedly established physical relations. Thus, M's contention that her consent was involuntary and could not be construed as consent, as contemplated under Section 375 of IPC, cannot be accepted.

20. In *Prashant Bharti v. State (NCT of Delhi):(2013) 9 SCC 293*, the Supreme Court had considered a case where a woman who was married had alleged that she was induced into establishing physical relationship with the accused on the promise of marriage. The Supreme Court had repelled the said allegation as false, in view of the fact that the prosecutrix was married at the material time. The relevant extract of the said decision is set out below:-

"17. It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23-9-2008 reveals that the complainant/prosecutrix was married to Lalji Porwal on 14-6-2003. It also reveals that the aforesaid marriage subsisted till 23-9-2008, when the two divorced one another by mutual consent under Section 13-B of the Hindu Marriage Act. In her supplementary statement dated 21-2-2007, the complainant/prosecutrix accused Prashant Bharti of having had physical relations with her on 23-12-2006, 25-12-2006 and 1-1-2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant/prosecutrix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody

else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23-9-2008 produced before us by the complainant/prosecutrix herself is taken into consideration along with the factual position depicted in the supplementary statement dated 21-2-2007, it would clearly emerge that the complainant/prosecutrix was in a relationship of adultery on 23-12-2006, 25-12-2006 and 1-1-2007 with the appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satisfied that the assertion made by the complainant/prosecutrix, that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsified."

21. Section 375 IPC defines the offence of rape. Section 375 of the IPC is set out below-

“375. Rape.—A man is said to commit “rape” if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of

body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape

22. Being a penal statute the said section has to be construed strictly. Any of the acts as specified in section 375 IPC would constitute the offence if it is done against the will or without the consent of the woman concerned. Clearly, if such an act is with the consent of the woman involved, it would not constitute rape, unless such consent is obtained in the circumstances as specified under the second to sixth limb of section 375 IPC. That is, if the consent is obtained by putting her or any other person in whom she is interested under fear of death and/or hurt; if she consents believing the man to be her lawful husband when he is not and knows that she has consented to it under such false or erroneous belief; she is of unsound mind, inebriated or incapable of understanding the nature and consequences of what she is consenting to; and/or she is under the age of eighteen years.

23. The question whether a woman has consented or not, cannot be answered by applying section 14 of the Indian Contract Act, 1872. As an illustration, unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement would constitute coercion under section 15 of the Indian Contract Act, 1872 and thus vitiate free

consent. However, a consent of a woman secured by any such act of unlawfully detaining property or threatening to do so would not constitute rape.

24. The word ‘consent’ as used in section 375 IPC has to be understood in the normal sense and not on the anvil of principles of law of contract. Section 375 IPC also describes circumstances in which specified acts would be construed as rape notwithstanding that the woman involved has consented to such acts. The word ‘consent’ used in the description of such circumstances also indicates that it must be construed in normal sense and not in a restricted sense by applying the definition of ‘free consent’ under section 14 of the Indian Contract Act, 1872.

25. A woman’s consent cannot be readily accepted as invalid or vitiated on an allegation that it was secured in consideration of promises, which were found to be false. This is principally for a reason that intimate physical act must be assumed to be in consideration of love, attraction and affection and not for any other promises of material well being or social standing. Plainly, failure of a man to live up to those promises would not render a consensual intimate act as rape. Equally, a promise of marriage cannot be construed as a currency to secure a woman’s consent for sex. It is obvious that such consent would also be on account of mutual attraction and not merely because a man promises marriage.

26. However, there may be cases, where there is an element of exploitation coupled with deception and in a given moment or a

situation, a woman is compelled to consent, although she has no will to do so. In a social backdrop, where premarital sex is not socially acceptable, a woman who is otherwise reluctant to consent to it may in a given situation be exploited and compelled to consent on a false assurance that solemnization of marriage would immediately follow. Plainly, if it is found that the woman was placed in a vulnerable position and taken advantage of with false assurance of marriage; her consent may be considered to be non-est. However, it is essential that in the given moment (i) the woman was placed in a vulnerable position; (ii) her position was exploited to subdue her will; (iii) and her resistance was broken by a promise of marriage, which the man making it had no intention to fulfil. Such consent given at the moment may be vitiated. One of the test that must be applied, is whether the woman could in the given situation be reasonably expected to withhold her consent if averse to engaging in premarital sex.

27. Clearly, where a man and woman develop a relationship and engage consensual sexual acts over a period of time; the allegation that man has committed rape as he has declined to get married, is unsustainable. Plainly, it would be absurd to suggest that a man forfeits his right to have second thoughts regarding marriage, if he has engaged in premarital sex. It is equally unacceptable that every man who has engaged in premarital sex with a woman would be vulnerable to a charge of committing rape, if for any reason he does not wish to continue his relationship with the woman.

28. In this case M had filed an FIR against Mr. Mohit Rawat (who

she subsequently married) alleging he had established physical relations with her and had promised to marry her. Apparently, this was not an act committed in a moment but a relationship that had developed and endured for some time. This is evident from her allegation that for the six months preceding the registration of the FIR, Mr Rawat had been beating her and had told her he did not want to get married to her. She alleged that he used to threaten her, beat her, strangle her and would also establish physical relations with her. On the basis of her statement, FIR No. 1342/2015, under Sections 376/506 of the IPC, was registered with PS Tilak Nagar against Mohit Rawat. A charge sheet was filed against him. He was placed in custody and was granted bail only on making a statement that he was willing to get married to M. It is apparent that he did so to be released and avoid the prospect of a facing a protracted trial and a possible conviction. Obviously, the marriage did not last long. M settled her claims against Mr Rawat for a consideration of Rs. 5,00,000/- and they secured divorce by mutual consent.

29. It is not necessary to examine as to why M would insist on marrying Mr Rawat, who used to allegedly beat her and strangle her. However, it is important to consider whether she was in control of her life. According to M, in the meanwhile, she and the petitioner developed a close relationship. It is important to note that there is nothing on record, which would remotely suggest that M was in a vulnerable position, where she was compelled to consent to engage in sexual acts against her will. She used to live in her parental home and was free to visit any place and carry out her vocation. According to her she used to meet the petitioner in malls and other public areas. They used to

frequently check into hotels for physical intimacy.

30. There is no material whatsoever to indicate that M was exploited and her consent was secured against her will. It is important to note that her allegation is not about an incident or a moment where her consent was secured by a false promise of marriage but regarding her entire relationship which she had developed with the petitioner over a period of time.

31. Quite apart from the fact that she was not in a position to accept a promise of marriage; the allegations made by her in the FIR do not make out a case of offence of rape. Concededly M had engaged in consensual physical relationship with the petitioner on numerous occasions. They had voluntarily established a relationship that developed and endured over a period of time. In this backdrop, there is no scope of entertaining an allegation of commission of an offence under section 375 IPC. Merely, because the petitioner is not willing to get married to M does not change the nature of their consensual acts of physical intimacy to an offence of rape.

32. This Court has, in a number of cases, held that an allegation, that consensual sex is rape because the consent is vitiated as induced by a false promise of marriage is not sustainable, where the parties have continued to establish physical relations or cohabit over a protracted period of time.

33. Before concluding, it is also necessary to note that the charge framed indicates that the Trial Court had proceeded on the basis that the petitioner was married. This is erroneous as it is not the petitioner, but

Ms M who, was married at the material time.

34. In view of the above, the petition is allowed and the impugned order is set aside.

35. The pending applications are also disposed of.

VIBHU BAKHRU, J

MARCH 13, 2020

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