

HIGH COURT OF CHHATTISGARH, BILASPUR**CRR No. 704 of 2021**

- Badri Narayan Sahu S/o Girver Sahu Aged About 26 Years Resident Of Tenduwa, Nawapara, Police Station Saja, District Bemetara Chhattisgarh.

---- Applicant**Versus**

- State of Chhattisgarh Through The Station House Officer, Police Station Saja, District Bemetara Chhattisgarh.

---- Non-applicant

For Applicant	:	Shri Gautam Khetrapal, Advocate.
For Non-applicant/State	:	Shri Shreshta Gupta, P.L.

Hon'ble Shri Gautam Chourdiya, J**Order On Board****09/12/2021**

Heard on admission.

02. The revision is **admitted** for hearing.

03. With the consent of the parties, the revision is heard finally.

04. Challenge in this revision petition filed under Section 397/401 of CrPC is to the order dated 27.9.2021 passed by First Additional Sessions Judge (FTC), Bemetara in Sessions Case No.66/2021 framing charge under Section 376(2)(n) of IPC against the applicant.

05. Allegation against the present applicant is that for about 6-7 years prior to 1.3.2021 he had been making forcible sexual intercourse with the prosecutrix on the pretext of marriage and subsequently, he

refused to marry her and performed engagement with some other girl.

06. Learned counsel for the applicant submits that the impugned charge framing order is per se illegal. The FIR has been lodged with an inordinate delay on 13.3.2021 without any explanation. In fact, the physical relation between the applicant and the prosecutrix, who is a major lady of 28 years, was consensual which is evident from her statement recorded under Section 164 of CrPC. Therefore, in the given facts and circumstances of the case, it is evident that since inception there was no intention of the applicant not to marry the prosecutrix and as such, it cannot be said that the consent of the prosecutrix was obtained by misconception of fact as has been held by the Hon'ble Apex Court in catena of judgments. Even if the entire prosecution case is taken at its face value, no offence as charged is made out against the applicant. Therefore, the impugned order framing charge against the applicant under Section 376(2)(n) of IPC is liable to be set aside.

Reliance has been placed on the decisions in the matters of ***Pradeep Kumar Verma Vs. State of Bihar and another, AIR 2007 SCW 5532; Jamnalal alias Chimman Dhimar Vs. State of MP, 2002(2) MPLJ 169; Pramod Suryabhan Pawar Vs. State of Maharashtra and another, (2019) 9 SCC 608; Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra others, (2019) 18 SCC 191; and Maheshwar Tigga Vs. State of Jharkhand, (2020) 10 SCC 108.***

07. On the other hand, learned State counsel has supported the impugned order.

08. Heard learned counsel for the parties and perused the material available on record.

09. In the matter of ***Pramod Suryabhan Pawar*** (*supra*), the Hon'ble Supreme Court held that the appellant's failure in 2016 to fulfill his promise made in 2008 cannot be construed to mean that promise itself was false. Allegations in FIR indicate that complainant was aware that there existed obstacles to marrying appellant since 2008 and that she and appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, complainant traveled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. Allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if facts set out in complainant's statements are accepted in totality, no offence under Section 375 IPC has occurred. With these observations, the judgment and order of the High Court was set aside and the FIR against the appellant was quashed. The Hon'ble Supreme Court while dealing with Section 90 of IPC pertaining to consent under misconception of fact, held as under:

“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.

The “consent” of a woman with respect of 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 proposition 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.”

10. In the matter of ***Dr. Dhruvaram Murlidhar Sonar*** (*supra*), the appellant and the complainant were working in same health center, they belonged to different communities, complainant stated to have fallen in love with appellant and needed a companion as she was widow. They were living together sometimes at her house and sometimes at the residence of the appellant. They were in relationship and enjoyed each other's company and living as such for quite some time together. However, when she came to know that appellant married some other woman, she lodged a complaint against him. In such circumstances, the Hon'ble Supreme Court held that it was not her case that the appellant forcibly raped her, she took a conscious decision after active application of mind to things that had happened, it is not a case of passive submission in face of any psychological pressure exerted, there was tacit consent by her which was not the result of misconception created in her mind. Therefore, allegations made in the complaint even if taken at their face value and accepted in their entirety do not make out case against the appellant. Hence, the FIR and the charge sheet pertaining to offence under Section 420 of

IPC and Section 3(1)(x) of SC/ST Act were quashed.

11. In ***Maheshwar Tigga*** (*supra*), the prosecutrix lodged FIR alleging that four years ago the appellant had outraged her modesty at point of knife and since then he continued to establish physical relations with her on the promise of marriage. She also stayed at his house for 15 days and during this period also he had physical relations with her. Subsequently, the appellant was going to solemnize marriage with another girl and all efforts at compromise had failed. The High Court upheld conviction of the appellant under Sections 376, 323 and 341 of IPC. However, the Supreme Court held as under:

“It is not possible to hold in nature of evidence on record that appellant obtained consent of the prosecutrix at the inception by putting her under any fear. In facts of present case, solitary statement of the prosecutrix that at the time of first alleged offence, her consent was obtained under fear of injury, is not sustainable. Under Section 90, consent given under misconception of fact is no consent in the eye of law. But misconception of fact has to be in proximity of time to occurrence, and cannot be spread over period of 4 years. Herein, consent by the prosecutrix was conscious and informed choice made by her after due deliberation, it being spread over long period of time, coupled with conscious positive action not to protest, the prosecutrix in her letters to appellant also mentioned that there would often be quarrels at her home with her family members with regard to their relation and beatings given to her.

Considering the facts and circumstances of present case, held, appellant did not make any false promise or intention misrepresentation of marriage, leading to establishment of physical relationship between the parties. Prosecutrix was herself aware of obstacles in their relationship because of different religious beliefs. Engagement ceremony was also held

in solemn belief that societal obstacles would be overcome but unfortunately, differences also arose whether marriage was to be solemnized in church or in temple, and ultimately failed. It is not possible to hold on evidence available that the appellant right from inception did not intend to marry prosecutrix ever, and had fraudulently misrepresented, only in order to establish physical relation with her. Prosecutrix in her letters acknowledged that appellant's family was always very nice to her. Hence conviction of the appellant under Sections 376, 323 and 341 of IPC stands reversed."

12. In the case of ***Sonu @ Subhash Kumar Vs. State of Uttar Pradesh and another*** reported in ***LL 2021 SC 137***, the prosecutrix alleged that the appellant physically exploited her for the last 1 & ½ years on the pretext of marriage but later on refused to marry her. From the contents of the FIR as well as statement of the prosecutrix under Section 164 of CrPC, it was evident that relationship between them was of a consensual nature, they were in relationship for about a period of one and a half years; and that subsequently the appellant had expressed a disinclination to marry her which led to registration of the FIR.

The Hon'ble Supreme Court considering the law laid down in its earlier judgment in *Pramod Suryabhan Pawar (supra)*, held that even assuming that all the allegations in the FIR are correct for the purpose of considering the application for quashing under Section 482 of CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent (prosecutrix) was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to

registration of FIR. On these facts, the appeal was allowed and the charge sheet as well as the order of the trial Court taking cognizance was quashed.

13. In the present case, the prosecutrix, a major girl of 27 years, lodged FIR on 13.3.2021 alleging that she got acquainted with the applicant while she was studying in Class 12th and for the last 6-7 years prior to lodging of report, the appellant had been making physical relation with her on the pretext of marriage. Whenever her menstrual period stopped, the appellant gave her some medicine. On 1.3.2021 on being called by the appellant, she went to his house at 9 pm and then the appellant took her into a *Kothar* and had physical relation with her and she returned to her house at 11 pm. On 10.3.2021 the parents of the appellant performed his engagement with some other girl and therefore, the appellant refused to marry her and his family members also refused to marry the appellant with her.

14. In her case diary statement though the prosecutrix has stated the same facts as have been mentioned by her in the FIR, but in her statement u/s 164 of CrPC, the prosecutrix states that the appellant was her classmate in the school, there used to be conversation between them and gradually, they began to love each other and started meeting frequently. During this period, they had physical relations on number of occasions. Since the marriage of the appellant was fixed with some other girl, he refused to marry her and therefore, she lodged report against him.

15. From the statement u/s 164 of CrPC of the prosecutrix, it is evident that she had been in contact with the appellant while she was

in Class 12th and there being love affair between them, on number of times she had physical relations with the appellant. She has nowhere stated in the said statement that said relationship was due to promise of the appellant to marry her and it is only when the marriage of the appellant was fixed with some other girl and she asked the appellant to marry her, which was refused by him which led to registration of FIR.

16. Considering the overall facts and circumstances of the case, the fact that the prosecutrix is a well grown up lady, she had been in contact with the appellant for a considerable period while she was studying in Class 12th and for 6-7 years prior to lodging of FIR on 13.3.2021, she had physical relations with the appellant; though in her statement u/s 164 of CrPC she has nowhere stated that the said physical relationship was developed on the promise of marriage by the appellant, even if any such promise was made by the appellant, in the totality of facts and circumstances of the case, the age and conduct of the prosecutrix, the fact that their relationship continued for a considerable period of 6-7 years; in light of the judgments of the Hon'ble Supreme Court as discussed above, it cannot be said that the consent of the prosecutrix for sexual act was vitiated by a misconception of fact amounting to rape. Even in the impugned charge framing order, it has not been mentioned that the appellant had sexual intercourse with the prosecutrix on the pretext of marriage, rather it is mentioned there that the appellant repeatedly committed sexual intercourse with the prosecutrix against her will and without her consent, which does not reflect from the material available on record. Therefore, this Court is of the opinion that even if the entire prosecution case is taken at its face value, the ingredients necessary for attracting

the offence under Section 376(2)(n) of IPC are extremely missing in this case and as such, the impugned order framing charge under the said section is liable to be set aside.

17. In the result, the revision petition is allowed and the impugned order dated 27.9.2021 framing charge under Section 376(2)(n) of IPC against the applicant is hereby set aside. Consequently, the applicant stands discharged of the said charge.

**Sd/
(Gautam Chourdiya)
Judge**

Khan