

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPLICATION NO. 2040 OF 2019

1. Braj Bhushan Pande
Age: Major, Occupation- Service
2. Ranjana Kumari W/o Braj Bhushan Pande
Age: Major, , Occ. Household
3. Shruti D/o Braj Bhushan Pande
Age: 30 years, Occ. Service,
House of late PN. Trivedi,
Road No.1, North Patel Nagar,
Near Ravi Chowk, P.O. Kesari Nagar,
Patna – 800024 (Bihar)

... **Applicants**

Versus

1. State of Maharashtra
Through In charge Police Inspector
Shivaji Nagar Police Station, Latur,
Tq. & Dist. Latur.
2. Neha D/o. Abhaykumar Suri,
Age: 29 years, Occ. Private Service,
Permanent Address : Vijayshri Complex,
Near Magdh University, Kakad Bagh,
Main Road, Patana State Bihar.
Present Address: Bliss Apartment,
Juna AUSA, Near Shivaji School,
Tq. & Dist. Latur.

... **Respondents**

**WITH
CRIMINAL APPLICATION NO. 3781 OF 2019**

Ashish s/o Bruj Bhushan Pande
Age: 30 years, Occupation- Service
R/o House of late P.N. Trivedi,
Road No.1, North Patel Nagar,
Near Ravi Chowk, P.O. Kesari Nagar,
Patna – 800024 (Bihar)

... **Applicant**

Versus

1. State of Maharashtra
Through In charge Police Inspector
Shivaji Nagar Police Station, Latur,
Tq. & Dist. Latur.
2. Neha D/o. Abhaykumar Suri,
Age: 29 years, Occ. Private Service,
Permanent Address : Vijayshri Complex,
Near Magdh University, Kakad Bagh,
Main Road, Patana State Bihar.
Present Address: Bliss Apartment,
Juna AUSA, Near Shivaji School,
Tq. & Dist. Latur.

... **Respondents**

...
Advocate for Applicants : Mr. Prashant M. Nagargoje
APP for Respondent / State: Mr. G.O. Wattamwar
Advocate for Respondent No.2: Mr. V.B. Patil
...

**CORAM : T.V. NALAWADE &
M.G. SEWLIKAR, JJ.**
DATE : 02.02.2021

JUDGMENT : (Per: *M.G. Sewlikar, J.*)

Rule. Rule is made returnable forthwith. Learned A.P.P. and the learned advocate for the respondent no.2 waive service. With the consent of the parties both the matters are heard finally at the stage of admission.

2. Both these applications are being disposed of by common judgment as they arise out of the same crime.

3. Factual matrix involved in these two applications can be briefly stated as under.

4. The informant was working in Ericsson Company, Kolkata since 18.12.2012. She got acquainted with applicant in application no.3781/19 (hereinafter referred to as 'A'). Applicant nos.1 and 2 in application no.2040/19 are the parents of 'A' and applicant no.3 in application no.2040/19 is the sister of 'A'. (Applicant nos.1, 2 and 3 in application no.2040/19 are hereinafter referred to as father, mother and sister respectively).

5. It is further alleged in the FIR that the informant got acquainted with the 'A'. 'A' used to visit her house on one or the other pretext. On 14.02.2013 'A' proposed the informant. In the month of March-2013 the informant went to Delhi as 'A' had called her at Delhi and had purchased an air ticket for her. Both of them had gone to Shimla for sight seeing / picnic. At that time, both of them had stayed in one room. 'A' asked for sexual favour. She refused as both of them were not married to each other. 'A' put a ring into

her finger and took her to a temple at Shimla and after chanting of mantras by the priest applied vermilion (kunku) on her forehead and declared that they were married. Thereafter, he had sexual intercourse with her. Thereafter, 'A' avoided to marry her on the ground that he would marry her after the marriage of his elder sister. He always treated her as his wife. In the marriage of his elder sister, she was treated like a family member. She had financially helped 'A' in the marriage of his elder sister. Her father met the parents of 'A' but the mother refused to get her married to 'A' on the ground that she belongs to a low caste and that she should pay Rupees Fifty Lakhs if at all she wanted to marry 'A'. When she had gone to meet the parents of 'A', parents of 'A' and his sister abused and turned her out of the house. During the period from 03.01.2019 to 07.01.2019 she was called by 'A' to his house at Ausa Road, Latur and had sexual intercourse with her. On 22.03.2019, she had been to Latur as 'A' was posted there. When she opened the subject of marriage, 'A' asked her to wait till 24.03.2019. On 24.03.2019 he refused to marry her and beat her on the road, therefore she lodged this complaint on 25.03.2019 against the applicants in both the applications on the basis of which FIR came to be registered under Section 376, 323, 506 read with Section 34 of the I.P.C. against the applicants in both the applications. After the investigation charge-sheet came to be filed. The applicants in both the

applications have sought quashing of the charge-sheet under Section 482 of the Cr.P.C. in these two applications.

6. Heard Shri Prashant Nagargopje learned counsel for the applicants in both the applications, Shri G.O. Wattamwar learned APP for the State and Shri V.B. Patil learned counsel for the respondent no.2.

7. Shri Nagargoje submitted that on perusal of entire FIR, it is clear that sexual intercourse was with the consent of the informant. He submitted that there is no evidence to show that 'A' had the intention to deceive the informant or that he had the intention of not marrying her right from the beginning. He further submitted that the informant did not submit herself for medical examination as she feared that truth would come out. He submitted that the contents of the FIR show that the parents of 'A' were against the marriage of 'A' with informant. Despite being aware of the opposition of the parents of 'A', she continued physical relations with 'A'. He submitted that the informant kept the physical relations with 'A' knowing full well about the consequence of her act. He submitted that the informant is major and is capable of understanding the consequences of her act. He further submitted that 'A' had submitted an application before the concerned police station stating therein that the informant was blackmailing 'A' feigning pregnancy. 'A'

has stated in the said application that the informant was not pregnant but to pressurise 'A' she is making a false claim that she was pregnant. The document placed on record clearly shows that the informant was not at all pregnant. This document coupled with the fact that the informant refused to undergo medical examination clearly shows that she was not pregnant and she is making false claim just to pressurise 'A' to marry the informant. The consent of the informant was a free consent. Therefore, offence under Section 376 of the I.P.C. is not made out. He, therefore, prayed for quashing of the charge-sheet. He placed reliance on the following cases:

- 1) **Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr.;**
(2019) 9 SCC 608.
- 2) **Vineet Kumar and Ors. V/s. State of Uttar Pradesh and Anr.;**
(2017) 13 SCC 369.
- 3) **Dr. Dhruvaram Murlidhar Sonar V/s. State of Maharashtra and Ors.;**
(2019) 18 Supreme Court Cases 191.
- 4) **Prashant Bharti Vs. State (NCT of Delhi);**
(2013) 9 Supreme Court Cases 293.
- 5) **Shivashankar @ Shiva Vs. State of Karnataka & Anr. Criminal Appeal**
No.504 of 2018 (Arising out of SLP (Cri.) No.454 of 2017)

8. Shri Wattamwar learned APP for the State argued that the consent was vitiated on account of the fact that 'A' kept on giving her promises that he would marry her and ultimately resiled from his promise and therefore offence under Section 376 of the I.P.C. is clearly made out.

9. The Hon'ble Supreme Court has examined the scope of jurisdiction of the High Court under Section 482 of the Cr.P.C. and laid down several principles which govern the exercise of jurisdiction of the High Court under Section 482 of the Cr.P.C. In the case of **State of Karnataka V/s. L. Muniswamy; (1977) 2 SCC 699**, a three Judge bench of the Hon'ble Apex Court held that the High Court can quash the proceedings if it comes to the conclusion that allowing the proceeding to continue would be an abuse of the process of the court or that the ends of justice require that the proceeding ought to be quashed. In the case of State of **Haryana V/s. Bhajan Lal; 1992 SCC (Cri) 426**, the Hon'ble Apex Court has enumerated seven categories of cases where power under Section 482 can be exercised. They are as under:

1] *Where the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.*

2] *Where the allegations in the First Information Report and other materials, if any, accompanying the F.I.R. do not disclose a cognizable offence, justifying an*

investigation by police officers under Section 156 (1) of the Code except under an order of a Magistrate within the purview of Section 155 (2) of the Code.

3] *Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.*

4] *Where, the allegations in the F.I.R. do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155 (2) of the Code.*

5] *Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*

6] *Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.*

7] *Where a criminal proceeding is manifestly attended with mala fide and / or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge."*

10. Thus, FIR can be quashed if it is found that allegations as made in the FIR are accepted at their face value in their entirety do not make out any cognizable offence and that continuation of prosecution would be an abuse of process of law.

11. In the case at hand, it is the allegation of the informant that 'A' had physical relations with her on the false promise of marriage. It is not seriously disputed that 'A' had physical relations with the informant. The only rider is that the said relations were with the consent of the informant. It is evident from paras 11 and 12 of the application of 'A'. They read as under:-

"11. The applicant respectfully submit that, after reading of F.I.R. without admitting the same prima facie case appears to be of consensual relationship. And non committal promise to marry.

12. The applicant respectfully submit that, there is long period of relationship and co-habitation for period in between 2012 to 2019. So there is no question of cheating the informant. Even as per the version of complainant in F.I.R. she visited the house of the applicant in between 2015 to 2019 at Patna for requesting the marriage of applicant and informant. In spite of refusal by applicant's father still informant had continued relationship with the applicant till 2019 at her will."

This shows that 'A' admits physical relations with the informant.

12. The question is whether the consent was free consent or it was obtained out of misconception of fact. Section 90 of the I.P.C. defines consent as under:

Section 90- Consent known to be given under fear or misconception. ... —if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent;

13. In the case of **Kaini Rajan V/s. State of Kerala; (2013) 9 SCC 113**, the Hon'ble Apex Court has observed thus:

“12. ... “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

14. In the case of **Anurag Soni Vs. State of Chhattisgarh; (2019) 13 SCC 1**, it is observed as under:

“12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of act as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 IPC and can be convicted for the offence under Section 376 IPC.”

15. In the case of **Deepak Gulati V/s. State of Haryana (2013) 7 SCC 675**, the Hon'ble Apex Court has observed as under:

“21. ... 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;”

16. In the case of **Pramod Suryabhan Pawar cited (supra)** the Hon'ble Supreme court has summarised the legal position as under:

“18. 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.”

17. On the basis of these settled principles it will have to be examined whether the consent was vitiated as it was given out of misconception of fact. In the case at hand, the informant has alleged that 'A' got acquainted with each other in Ericsson Company, Kolkata. The contents of the FIR show that he had sexual intercourse with her on the false promise of marriage. The contents of the FIR further show that she had refused to consent for the physical relations and that 'A' applied vermilion powder (kunku) and got married with her in the temple. Then she consented for sexual intercourse.

At that time, he did not make her aware of the obstacles that could be created by her parents. He projected before the informant that he was ready to marry her and actually got married to her in the temple and put his ring into her fingers. Thereafter, the informant submitted herself to the desire of 'A'. If 'A' had made known to the informant that his parents would not consent for their marriage, the informant would not have submitted herself for the desire of 'A' to have physical relations with 'A'. This clearly indicates that he concealed this fact from the informant and obtained her consent projecting as if the parents would not go against his wish. 'A' did not let her know that her low caste would also be an obstacle for their marriage. When the parents of the informant met the parents of 'A', the informant was told that parents of 'A' were against the marriage of the 'A' with the informant. These factual aspects clearly demonstrate that the consent was obtained by misconception of fact. 'A' had no intention to marry the informant right from the inception. Even thereafter 'A' kept on promising her that he would marry her. Therefore, the informant believed him. The position would have been different if 'A' had made it clear to the informant that the parents might not give consent for their marriage and still the informant had submitted to the desire of 'A'. But this is not the factual situation. It is true that the informant refused to submit herself for medical examination. However, simply on that count it cannot be

inferred that there were no physical relations with 'A' and informant, especially when it is alleged by 'A' that the said physical relations were with the consent of the informant. When the physical relations are admitted, refusal by the informant to consent for medical examination is of least significance.

18. In the case of **Pramod Suryabhan Pawar cited (supra)** the victim was aware that there existed obstacle for marrying. Despite that she continued to engage in sexual relations. This is not the fact situation in the case at hand. In the case of **Dr. Dhruvaram Murlidhar Sonar cited (supra)** the facts were that the victim was in love with the appellant as she needed a companion being a widow. The appellant was serving as a Medical Officer in the Primary Health Centre and the victim was working as an Assistant Nurse in the said centre. The victim had alleged that the appellant had informed her that he is a married man and had differences with his wife and that they belong to different communities. It was further alleged that she had fallen in love with the appellant and that she needed a companion as she was a widow. On this basis, the Hon'ble Supreme Court observed that she had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit

consent given by her was not the result of a misconception created in her mind. The Hon'ble Supreme Court in para 23 has observed as under:

“23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant 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 also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.”

In the case at hand no circumstances are brought on record to show that because of some unforeseen circumstances he could not marry the informant. It cannot be believed that 'A' was not aware that his parents would oppose the marriage of the informant with 'A' on the ground of her low caste.

19. In the case of **Prashant Bharti cited (supra)** the victim was a married woman on the date when the accused gave the promise of marriage. Since she was married and the marriage subsisted even at the time of the alleged physical relations, the Hon'ble Supreme Court observed that the allegations that the accused had promised to marry her and on that count she had physical relations with her appears to be *per se* false. In the case at hand this is not the factual situation. 'A' concealed the fact from the informant victim that his parents would not consent for their marriage. As stated herein-above, if 'A' had made the informant aware of this fact she would not have consented for sexual relations.

20. Having regard to what is stated herein-above, it is evident that the alleged consent for sexual intercourse was obtained out of misconception of fact and therefore it cannot be said that no cognizable offence is made out against 'A'.

21. So far as applicant nos.1 to 3 in application no.2040/19 are concerned no allegations are made against them except that they refused to give consent for the marriage of 'A' with the informant. It is not the allegation of the informant that at the time of alleged sexual intercourse the applicant's parents and sister had assured that they would consent for the marriage and

later on they resiled from their promise. Therefore, no case is made out against the applicants in application no.2040/19. In view of this, we are inclined to allow application of parents and sister only. Hence the following order is passed:

ORDER

- I) Criminal Application No.2040 of 2019 is allowed.
- II) Relief is granted in terms of prayer clause-A and the prayer of quashing of the case is also granted. Rule made absolute in those terms.
- III) Criminal Application No.3781 of 2019 stands dismissed.
- IV) Observations in this order are made only for the disposal of these applications. Trial Court shall not get influenced by these observations and can come to its independent conclusion.

[M.G. SEWLIKAR, J.]

[T.V. NALAWADE, J.]