

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL APPEAL NO. 292 OF 2009

Nagorao Punjab Kumare,
Aged about 22 years,
R/o. Mazara(Mowada),
Tah. Ghatanji, Dist. Yavatmal.

.... **Appellant**

- **Versus** -

The State of Maharashtra,
Through PSO, Ghatanji,
Tah. Ghatanji, Dist. Yavatmal.

.... **Respondent**

Mr. M. I. Dhatriak, Advocate for the appellant
Mr. N. R. Rode, A.P.P. for the State/respondent

**CORAM : ROHIT B. DEO, J.
DATED : 21st August, 2021.**

JUDGMENT

Appellant Nagorao Punjab Kumare, who shall be hereinafter referred to as accused, is assailing the judgment dated 21-4-2009 rendered by the Additional Sessions Judge, Yavatmal in Sessions Trial 60/2007 whereby the accused is convicted for offence punishable under Section 376 of the Indian Penal Code (IPC) and is sentenced to suffer rigorous imprisonment for five years and to payment of fine of Rs. 3,000/-, and in default to suffer further rigorous imprisonment

for six months, and is further convicted for the offence punishable under Section 417 of the IPC and is sentenced to suffer rigorous imprisonment for six months and to payment of fine of Rs. 1,000/- and in default to suffer further rigorous imprisonment for one month, and is further convicted for the offence punishable under Section 506 II of the IPC and is sentenced to suffer rigorous imprisonment for two years and to payment of fine of Rs. 2,000/- and in default to suffer further rigorous imprisonment for three months.

2. The genesis of the prosecution is the report lodged by P.W. 1 Ms. "R" on 6-10-2006 at Police Station, Ghatanji (Exhibit 20) alleging that the accused induced her to have sexual relationship by promising marriage, that she conceived and the accused refused to marry her.

3. On the basis of report dated 6-10-2006 lodged by Ms. "R", offences punishable under 376, 417 and 506 II of the Indian Penal Code were registered vide Crime 151/2006. Investigation proceeded on the usual lines and upon completion thereof, final report under Section 173 of the Code of Criminal Procedure, 1973 (Code) was submitted in the jurisdictional Court.

4. The learned Sessions Judge framed charge on 25-7-2008 (Exhibit 6) which reads thus :

“I, P S Tarare, Asstt. Sessions Judge, Yavatmal, hereby charge you,

*Nagorao Panjab Kumbre,
aged 20 years,
r/o Mazara (Mowada),
tq. Ghatanji, dist. Yavatmal.*

as follows :

That you accused on 6.10.2006 at 8.30 p.m. at Mazara tq. Ghatanji committed rape on Kum. Renuka Satuji Atram aged 19 years and thereby committed an offence punishable under Section 376 of Indian Penal Code.

That you accused on the same date, time and place, cheated the Kum. Renuka Atram by deceiving her by giving false promise of marriage and committed rape on her and thereby committed an offence punishable under section 417 of Indian Penal Code.

That, you accused on the same date, time and place, committed criminal intimidation by threatening to complainant with injury to her person and to kill her with intent to cause alarm to her and thereby committed an offence punishable under section 506(2) of Indian Penal Code and within my cognizance.

And I hereby direct that you be tried by this Court of Sessions on the above charges.”

5. The accused pleaded not guilty and claimed to be tried in accordance with law.

6. The prosecution examined seven witnesses. PW. 1 is the victim, PW. 2 is the father of the victim, PW. 3 is the panch witness to the spot panchanama, PW. 4 is Head Constable Rajendra Wadhival, PW. 5 ASI Shankar Patil is the Investigating Officer, PW. 6 is Dr. Archana Jadhav who examined the victim and PW. 7 Ambadas Dhurve is the other panch witness.

7. The tenor of the cross-examination and the examination of the accused under Section 313 of the Code discloses that the defence is of total denial. The accused did not step into the witness box nor did the accused examine any witness in defence.

8. The learned Additional Sessions Judge, Yavatmal recorded a finding that the version of the complainant is corroborated by PW. 4 who recorded the First Information Report. The learned Additional Sessions Judge then observed that it is clear from the evidence that Ms. "R" was threatened and then the accused continued to have sexual intercourse with Ms. "R" by promising

marriage. The learned Additional Sessions Judge reasoned that the consent of the victim was under misconception of fact.

9. The judgment of the learned Additional Sessions Judge is not entirely satisfactory. The judgment is cryptic and gives the impression that the submissions canvassed by the accused are dealt with in an extremely cursory manner. Be that as it may, the material on record will have to be reappreciated since the appeal against conviction is a statutory appeal.

10. Ms. "R" has deposed that the forcible sexual intercourse took place seven months prior to the report. She had gone to the agricultural field of Govinda Lonkar to attend nature's call and while she was returning home, the accused held her hand, caused her to fall on the ground, gagged her mouth with handkerchief, undressed her and then sexually ravished her. Ms. "R" then deposed that after the rape, the accused assured to marry her. In the same breath, she states that the accused threatened to kill her, in the event, the incident is disclosed by her to her parents. Ms. "R" then states that thereafter accused used to regularly commit sexual intercourse, she conceived and then informed her parents that the accused is

responsible for the pregnancy. Ms. “R” then states that her parents asked the accused to marry her and the accused refused. Ms. “R” then testifies that she delivered a male child.

In the cross-examination, it is brought on record that the evidence is inconsistent with the report lodged and that Ms. “R” did not make any disclosure as regards incident till she conceived. It is further extracted that Ms. “R” belong to the Kolam Caste and that the accused belongs to the Gond community, who reside in separate localities. Suggestions are given that the accused is not responsible for the pregnancy which suggestions are denied. Ms. “R” however, admits that even prior to the incident, there was a quarrel between her parents and the parents of the accused and the relations were strained.

11. Scrutiny of the evidence on record reveals that the only material evidence is of the prosecutrix. The father of Ms. “R”, who is examined as P.W. 2, corroborates her version only to limited extent. P.W. 2 states that after his daughter conceived, she disclosed that she was raped by the accused.

12. P.W. 3 Rama Kumare is panch to the spot panchanama, who admits in the cross-examination that when he reached the spot, the spot panchanama was already written, that the police did not readover the contents of the panchanama and that he is illiterate. P.W. 4 Rajendra Wadhival proves the report dated 6-10-2006 and P.W. 5 Shankar Patil has deposed as to the steps in the investigation. P.W. 6 Dr. Archana Jadhav has deposed that she examined Ms. "R" on 9-1-2006 and found that she was carrying pregnancy of seven months. P.W. 7 is the panch to the seizure panchanama in respect of biological and blood samples.

13. Perusal of the report dated 6-10-2006 shows that the version of Ms. "R" is that since one year, the accused professed love for her and committed forcible sexual intercourse by promising marriage and ultimately, he refused to marry her after she conceived. In the deposition, Ms. "R" has different narrative to tell. According to her, seven months prior to the lodging of the report, she was forcibly raped and the accused assured marriage only after committing the rape. In my considered view, the version that Ms. "R" was forcibly raped, is not confidence inspiring. She could have immediately

lodged the report. She remained silent and it was only after she conceived, that she allegedly disclosed to her father, that she was raped. The version in the deposition is inconsistent with the contents of the report. The version is further inconsistent with the natural conduct inasmuch as Ms. “R” continued to have sexual relationship with the accused regularly. Notably, there is not even a whisper in the entire evidence that Ms. “R” consented to the alleged sexual relationship post rape in view of the promise of the accused to marry her, and which promise she believed to be genuine. The only reference to assurance of marriage is to the alleged assurance which the accused gave her after committing the forcible sexual intercourse. In view of the mutually inconsistent versions of Ms. “R”, it would be difficult to sustained the conviction on the basis of her testimony.

14. The learned Additional Sessions Judge has recorded a finding that the consent is vitiated due to misconception of fact. It is difficult to appreciate on the basis of which material, such finding is recorded. It is not even the version of Ms. “R” that despite the fact that she was raped, she continued to have sexual relationship with the accused, only because she was promised marriage. It is well

settled that an unfulfilled promise to marry would vitiate the consent, only if the promise is made with intent to seduce or induce the prosecutrix. Suffice it to refer to the following observations in **Uday Vs. State of Karnataka [(2003)4 SCC 46]**.

"21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the

evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

15. It would also be apposite to refer to the observations in ***Deelip Singh Vs. State of Bihar [(2005) 1 SCC 88]***.

"35. The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy

with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that "later on", the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday case at para 24 come to the aid of the appellant".

16. In ***Deepak Gulati Vs. State of Haryana [(2013) 7 SCC 675]***, the Hon'ble Supreme Court emphasized the distinction between rape and consensual sex and *inter alia* observed thus :

"21. 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 misrepresentation 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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24. *Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at the 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.”

17. In the case at hand, except the bare statement of Ms. “R” that she was forcibly raped and which version is belied from the circumstances, there is nothing to suggest that Ms. “R” was raped. Pertinently, the investigating agency took no steps to conduct any scientific test like DNA profiling to determine the paternity of the child. The finding of the learned Additional Sessions Judge that the consent was vitiated due to misconception of fact is not justified by the material on record. Ms. “R” does not state in the deposition that she agreed to sex since she was promised marriage. Her version is that she was raped and then accused assured to marry her. Insofar as the continued sexual relationship, there is not even a whisper in the evidence that Ms. “R” was promised marriage and that but for such promise, she would not have consented to sex. Considering that the testimony of the prosecutrix Ms. “R” does not appear to be natural

and creditworthy, a further enquiry into the factum of consent or its validity, is not necessary. Assuming *arguendo* that after the first sexual intercourse, the accused assured marriage, as noted *supra*, there is not a word in the evidence of prosecutrix Ms. “R” that she was induced or seduced by such assurance and that she would not have otherwise agreed to have sex. In view of the fragile nature of the evidence of the prosecutrix Ms. “R”, neither offence punishable under Section 376 nor Section 417 and 506 II of the IPC is made out.

18. In my considered view, the prosecution has clearly failed to bring home the charge and the judgment of conviction will have to be quashed and set aside.

19. The judgment dated 21-4-2009 rendered by the Additional Sessions Judge, Yavatmal in Sessions Trial 60/2007 is quashed and set aside.

20. The accused is acquitted of the offences punishable under Sections 376, 417 and 506 II of the Indian Penal Code.

21. His bail bond stands cancelled.

22. Fine paid, if any, be refunded.

JUDGE

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