

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.114 of 2022

Arising Out of PS. Case No.-331 Year-2017 Thana- BUXAR MUFFSIL District- Buxar

ABC

... .. Appellant

Versus

1. The State Of Bihar
2. Satish Kumar Son of Subhash Prasad @ Subhash Ram Resident of Village - Nat, P.S. - Buxar Industrial, District - Buxar.

... .. Respondents

Appearance :

For the Appellant/s : Mr. Arvind Kumar Sinha, Advocate
Mr. Pankaj Kumar Singh, Advocate
Mr. Pratik Bharti, Advocate
Mr. Munish Kumar, Advocate
For the Respondent/s : Mr. Mr. Sujeet Kumar Singh, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE KHATIM REZA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 23-09-2022

A Judgment and order dated 12.01.2021 passed by the learned 1st Additional Sessions Judge-cum Special Judge (Scheduled Castes/Scheduled Tribes), Buxar in Sessions Trial No. 287 of 2018/CIS No. 298 of 2018 arising out of Buxar (Mufassil) P.S. Case No. 331 of 2017, whereby and whereunder the respondent No.2 stands acquitted of the charges framed against him for commission of offence punishable under Sections 376, 354 and 354B of the Indian Penal Code, is under challenge in the present criminal appeal filed under Section 372 of the Code of Criminal Procedure, 1973. The identity of the



appellant has been concealed who has been referred to in the present judgment as the appellant/PW-3.

2. We have heard Mr. Arvind Kumar Sinha, learned counsel for the appellant and Mr. Sujit Kumar Singh, learned Additional Public Prosecutor for the State.

3. A complaint petition filed by the appellant before the learned Chief Judicial Magistrate, Buxar giving rise to complaint case No. 983(c) of 2017 is the basis for registration of the aforesaid Mufassil P.S. Case No. 331 of 2017 under Section 156(3) of the Code of Criminal Procedure, 1973.

4. The prosecution's case as unfolded in the complaint petition filed by the appellant is that in the morning at 6:00 am in June 2013, she had received a call from an unknown number on her mobile phone. Upon certain inquiries made by the caller the appellant is said to have replied him that he had called a wrong number. The caller, thereafter, started frequently calling her, and when asked, he disclosed his name as Satish Kumar (respondent No.2). The conversation between them thereafter continued and respondent No. 2 is said to have proposed her for marriage. Respondent No. 2, in the meanwhile got employment. The relationship between the two grew in the meanwhile which became intimate. The respondent No. 2 thereafter established



physical relationship with the appellant. The appellant suggested respondent No. 2 to take a room on rent to which respondent No. 2 agreed and took room on rent at a place called Ahirauli. The appellant and the respondent No. 2 thereafter started living together in the said room. The respondent No. 2 would regularly come from the place of his employment to stay with the appellant in the said room, taking leave from the employer. On 24.10.2017, when the respondent No. 2 had come to the appellant, he had given her a new mobile phone. The respondent No. 2 asked the appellant that he should marry her and take her to the place of his employment as they had remained together for three years. The appellant alleged in the complaint petition, respondent No. 2 got annoyed and leave the appellant for the place of employment. The appellant thereafter started leaving alone for sometime and when contacted on phone assured her that he would marry her. On 03.11.2017, he came to meet the appellant and stayed with her together for two to three days as husband and wife. The appellant further alleged in the complaint petition that she had presumed the respondent No. 2 to be her husband. In the meanwhile, she became pregnant but respondent No. 2 got the pregnancy aborted by administering medicines. On insistence by the appellant for solemnizing marriage respondent



No. 2 assaulted her and told her that his family members would not allow him to marry the appellant. The respondent No. 2, subsequently, declined to marry the appellant she further alleged that she had gone to the police station for registering a criminal case and since the criminal case could not be registered she made an application to the Superintendent of Police. As no case was registered, the appellant filed a complaint case on 16.12.2017 before the learned Chief Judicial Magistrate, Buxar. As has been noticed at the outset, learned Chief Judicial Magistrate, Buxar, referring the complaint case to the concerned police station for investigation under Section 156(3) of the Code of Criminal Procedure, thereafter, formal FIR came to be registered disclosing commission of offences punishable under Sections 376, 354 and 354B of the Indian Penal code. The police submitted its charge-sheet on 24.04.2018 whereupon cognizance came to be taken on 02.11.2018 by the learned Chief Judicial Magistrate, Buxar of the offences punishable under the aforesaid Sections of the Indian Penal Code. The case was thereafter committed to the Court of Sessions.

5. On 07.12.2018 the charges came to be framed against respondent No. 2 for commission of offences punishable under Sections 376, 354 and 354B of the Indian Penal Code.



The respondent No. 2 denied the said charges framed against him and accordingly he was put on trial.

6. At the trial the prosecution examined seven witnesses including the Doctor as P.W.-4, the Investigating Officer as P.W.-5, the Judicial Magistrate before whom the appellant's statement was recorded under Section 164 of the Cr.P.C. as P.W.-6. Another official witness i.e. in-charge of Malkhana of Buxar police station came to be examined as P.W.-7. The appellant, the appellant's father and the appellant's mother were examined as P.W.-3, P.W.-1 and P.W.-2 respectively. In addition to the oral evidence of the prosecution witnesses, the prosecution also proved certain documents. The defence examined altogether five witnesses.

7. The appellant/informant/ in her deposition as PW-3 described the period of occurrence from June 2013 to 04.11.2017. She supported the narrative as disclosed in her complaint petition. According to her deposition, for the first time, she had received a call on her mobile phone made by respondent No. 2 in June 2013 at 6:00 am and that despite forbidding, respondent No. 2 kept on making calls she disclosed to her parents that someone was making repeated calls but was not disclosing anything. Thereafter, her parents talked to



respondent No. 2. Respondent No. 2 expressed to the parents of the appellant his liking for the appellant and his desire to marry her. The aunt (*mausi*/mother's sister) of respondent No. 2 is the next door neighbour of the appellant. The appellant had seen respondent No. 2 when he had visited his aunt's place. Thereafter, they two (appellant and respondent No. 2) started talking with each other. The respondent No. 2 expressed his willingness to marry the appellant and responding to the appellant's query as to when he would marry her, he assured that he would marry her after getting employment. On the appellant's suggestion the appellant and respondent No. 2 started leaving in a room in Ahirauli. With the permission of the parents of the appellant respondent No. 2 took PW-3 to Ahirauli where the respondent No. 2 established physical relationship with the appellant. Respondent No. 2 left for training in connection with his employment on 19.08.2015 but he would come to the appellant on leave and get established physical relationship with her. They remained in touch with each other through mobile phone. On 24.10.2017 respondent No. 2 came and asked the appellant to meet him in the room at Ahirauli. When the appellant again inquired as to when respondent No. 2 would marry her, respondent No. 2 assured that he would discuss about



the marriage on his next visit, on leave. On 03.11.2017 respondent No. 2 came. The appellant and the respondent No. 2 stayed together all night. When the appellant again talked about their marriage, respondent No. 2 denied to marry her since his parents were not ready for the marriage. Thereafter, respondent No. 2 assaulted her. She also deposed that on 04.11.2017, he had submitted an application before the Superintendent of Police whereafter she was directed to the Mahila Police Station and in the Mahila Police Station she was advised to file a complaint petition, whereafter, she filed the said complaint petition.

8. Father of the appellant, who came to be examined as PW-1 at the trial, deposed that in the evening of 06.02.2013 at 6:00 pm.. it was disclosed by the appellant (P.W.-3) that there was a call on her mobile phone and the caller disclosed his name as Satish Kumar (respondent No. 2). Respondent No. 2 thereafter came to his house and disclosed his desire to marry the appellant, which proposal was accepted by them (prosecution's witnesses). He also disclosed that respondent No. 2 had taken a room on rent at Ahirauli where the appellant and the respondent No. 2 had started living together. According to this prosecution witness also, respondent No. 2 had given mobile phone to the appellant and after getting employment,



respondent No. 2 declined in 2017 to marry the appellant. According to him, respondent No. 2 physically exploited PW-3 in a room of a house situated at Ahirauli, which was taken on rent by respondent No. 2. He also deposed that there were some articles lying in the said room at Ahirauli which were shown to the Investigating Officer, who had seized those articles and prepared a seizure list. In his cross-examination, PW-1 disclosed that he had seen the appellant and the respondent No. 2 in the room at Ahirauli. Further, he gone to the house of respondent No. 2 apparently with one Parash Nath Paswan as a mediator for negotiating marriage between the appellant and the respondent No. 2. He, however, admitted that the fact that he had gone to the house of the respondent No. 2 to meet his family members for marriage with the said Parash Nath Paswan, was not disclosed to the police during the course of investigation. He also admitted in his cross-examination that there were disputes pending in the Court between him (PW-1) and the uncle (*mausa*) of respondent No. 2. Initially, respondent No. 2 and her parents were ready for the marriage but since they denied subsequently, the criminal case at hand was filed.

9. P.W.-2, the mother of the appellant described the period of occurrence as between 2013 to 2017. As regards the



first time when she learnt about the call made by respondent No. 2, she deposed that between 7 to 8 in the morning of 2013, P.W.-3 had disclosed to her that she was receiving calls from an unknown number. Thereafter, the caller disclosed his name to be Satish Kumar (respondent No. 2). She also disclosed that the appellant and the respondent No. 2 lived together in a room taken on rent by respondent No. 2 in the house of one Sri Kant Yadav of Ahirauli. According to her, PW-3 had become pregnant, whereafter, they started mounting pressure on respondent No. 2 for marriage but respondent No. 2 declined. She clearly deposed in her evidence that respondent No. 2 had stayed with the appellant for 4-5 years and when respondent No. 2 declined to marry the appellant, the appellant filed the criminal case. In her cross-examination she deposed that family members of PW-3 had not discouraged the appellant and the respondent living together nor they had complained about the physical relationship established by respondent No. 2 with the appellant to any *Chowkidar* or *Mukhiya* of the panchayat because the relationship was good. She further deposed that at the time of filing of the criminal case the appellant was pregnant. However, she had there suffered miscarriage. She also deposed that she had informed the police about the abortion but no one in the



police station had picked up her call.

10. The Investigating Officer, examined as P.W.-5 in his deposition, apart from proving the FIR and seizure list of the articles seized from the room, which according to the prosecution's case was taken on rent by respondent No. 2 at Ahirauli explained the first place of occurrence i.e. house of P.Ws- 1, 2 and 3. He described second place of occurrence as a room in the house of Sri Kant Yadav (DW-2) at village Niranjapur. He denied in his cross-examination that during the course of investigation P.W.-1 had made a statement under Section 161 of the Code of Criminal Procedure that respondent No. 2 had gone to the house of P.W.-1 and had proposed for marrying PW-3. He (PW-1) had also not stated before the police that family members of respondent No. 2 had denied the said proposal of marriage of respondent No. 2 with the appellant.

11. Considering the gist of the prosecution's case as emerging from the evidence of the prosecution's witnesses, we need not go further into the details of other evidences adduced at the trial by the prosecution. However, it would be apt to notice at this juncture the depositions of the defence witnesses.

12. Respondent No. 2 was examined as D.W.-1, who deposed that no room was taken by him on rent at Ahirauli in the



house of Sri Kant Yadav(DW-2). Respondent No. 2 denied the suggestion that he had established physical relationship with the appellant on false promise of marriage and, subsequently, he refused to marry her.

13. Sri Kant Yadav (DW-2) in whose house the appellant and the respondent No. 2 had, according to the prosecution's case stayed together after taking room on rent was examined by the defence as D.W.-2. He denied that his room was ever let out to respondent No. 2. As has been noticed hereinabove, four other witnesses including D.W.-3 (Advocate's clerks), D.W. 4 and D.W-5 another advocate's clerks.

14. Learned counsel appearing on behalf of the appellant has submitted that the court below has not duly appreciated the evidences adduced at the trial which overwhelmingly demonstrate that respondent No. 2, on false assurance to marry the appellant established physical relationship with her and, subsequently, he refused to marry her. He has contended that since the consent of the appellant was obtained by respondent No. 2 to establish physical relationship based on false assurance, which was not genuine from the very inception, an offence of rape is made out within the meaning of Section 375 of the Indian Penal Code read with Section 90



thereof punishable under Section 376 of the said code. He has contended that the consent given by the appellant for sexual intercourse was conditional and, therefore, the same cannot be treated to be unequivocal, voluntary as to fall under explanation 2 of Section 375 of the Indian Penal Code.

15. The only legal issue, in the background of the evidence of the prosecution adduced at the trial is as to whether, even if the prosecution's case is treated to be believed, the act of respondent No. 2 of having established physical relationship with the appellant, apparently with her consent constitutes a rape within the meaning of Section 375 of the Indian Penal Code punishable under Section 376 thereof, on the ground that the consent was given under misconception of facts. Before we proceed to answer the question, we need to consider whether the consent so given by the appellant can be said to be under a misconception of fact within the meaning of Section 90 of the Indian Penal Code. In our opinion, the law on the issue is no more *res integra* in view of the catena of decisions of Supreme Court including the following :-

- (i) ***Uday v. State of Karnataka*** reported in **(2003) 4 SCC 46**
- (ii) ***Deepak Gulati v. State of Haryana*** reported in **(2013) 7 SCC 675**



(iii) ***Kaini Rajan v. State of Kerala*** reported in (2013) 9 SCC 113

(iv) ***Pramod Suryabhan Pawar v. State of Maharashtra*** reported in (2019) 9 SCC 608

(v) ***Anurag Soni v. State of Chhattisgarh*** reported in (2019) 13 SCC 1

(vi) ***Dhruvaram Murlidhar Sonar v. State of Maharashtra*** reported in (2019) 18 SCC 191

(vii) ***Maheshwar Tigga v. State of Jharkhand*** reported in (2020) 10 SCC 108

16. The consent given by a prosecutrix to sexual intercourse to 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 Indian Penal Code, the Supreme Court has ruled in case of ***Uday v. State of Karnataka*** (supra).

17. In case of ***Uday v. State of Karnataka*** (supra) the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant of that case. The proposal of their marriage was bound to be seriously opposed by their family members. Noticing the fact that, the prosecutrix had sufficient intelligence to understand the significance and moral quality of the act that she was consenting to and without any resistance she had allowed sexual intercourse to happen, the



Supreme Court held that “she thus freely exercised the choice between resistance and assent”. The Supreme Court in case of ***Uday v. State of Karnataka*** (supra) dealt extensively with the Section 375 read with Section 90 of the Indian Penal Code as held paragraphs 25 and 26 as under :-

“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 Section 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, are 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.

26. In view of our findings aforesaid, we do not consider it necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling under Section 375 fourthly and fifthly, or whether consent given under a misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC.”

18. In ***Pramod Suryabhan Pawar*** (*supra*), an order passed by the High Court of Judicature at Bombay dismissing an application for quashing of FIR under Section 482 was under challenge. In the said case, the complainant and the appellant before the Supreme Court came to know each other in 1998, whereafter they remained in touch on phone. The complainant met the appellant regularly. Four years thereafter the accused



proposed to marry the complainant in 2009. It was alleged that on promise of marriage the accused forcibly established corporeal relationship with the complainant. The complainant had also alleged that throughout 2010, the accused visited the complainant on multiple occasions and they engaged themselves in sexual intercourse. The accused subsequently denied to marry her. That led to filing of an FIR by the complainant in case of ***Pramod Suryabhan Pawar*** (supra). The Supreme Court again addressed Sections 375 and 90 of the Indian Penal Code and laid down that an individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as various possible consequences following from such action or inaction; consents to such action. The Supreme Court relying on decisions rendered in ***Dhruvaram Murlidhar Sonar*** (supra), ***Kaini Rajan*** (supra), ***Deepak Gulati*** (supra) summarized the legal position in paragraph 18 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.”

19. After having concluded, thus, the Supreme Court in case of ***Pramod Suryabhan Pawar*** (supra) quashed FIR itself as the allegations in the FIR did not indicate on their face value that the promise by the accused was false. The Supreme Court noted that there was no allegation in the FIR that when the accused promised to marry the complainant, it was done with a bad intention or bad faith or with an intention to deceive her. The failure of the accused subsequently to fulfill his promise could not be construed to mean that the promise itself was false, the Supreme Court held. The said decision in case of ***Pramod Suryabhan Pawar*** (supra) and all other decisions referred to therein has been referred to by a three Judge Bench of Supreme Court in case of ***Maheshwar Tigga v. State of Jharkhand*** (supra). The Supreme Court, based on evidence before it concluded in case of ***Maheshwar Tigga*** (supra) that it was not possible to hold on the evidence available that the appellant of the said case, right from the inception did not intend to marry the prosecutrix and had fraudulently misrepresented, only in order to established physical relationship with her.



20. Coming back to the present case, it is easily discernible on comparing the evidence of P.W.-3/informant and her father P.W.-1 that there is significant difference between the date and time when, for the first time, the informant had disclosed the fact that she was receiving calls from an unknown number. P.W.-3 has deposed that she received call from unknown number in June 2013, in the morning at 6:00 am. whereafter she had told her parents. P.W.-2, her father in his testimony at the trial had stated that he was told by P.W.-3 on 06.02.2013 at 6:00 pm in the evening when he had returned after having performed his work as a labourer. The evidences of the main prosecution's witnesses P.Ws. 1, 2 and 3 it not indicate any fact to conclude that from the very inception respondent No. 2 had no intention to marry her. The appellant and the respondent No. 2, according to the prosecution's case itself, established sexual relationship with consent which involved an active understanding of the circumstances, actions and consequences of the act. The "consent", as has been held in case ***Kaini Rajan*** (supra), requires voluntary participation not only after 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 the resistance and assent.



21. In the present case there is no evidence that there was resistance of any nature offered by P.W.-3 rather as per her own deposition she had insisted the respondent No. 2 to take a room on rent away from her residence so that they might live together. There is no evidence to suggest that from the very inception respondent No. 2 did not have any intention to marry and he had a false promise to the appellant to marry, whereupon the appellant gave consent for sexual intercourse on such an assurance by respondent No. 2. A breach of promise cannot be said to be a false promise. To establish a false promise, the maker of the promise must have had an intention not to uphold his word at the time of giving it. We do not find any such circumstance in the present case, based on evidence adduced at the trial.

22. We have refrained from entering into the evidence of the defence witnesses as, in our opinion, based on evidence of the prosecution's witnesses the prosecution failed to establish commission of offence punishable under Section 376 of the Indian Penal Code against the respondent No. 2.

23. The learned trial court has, in our considered view, after duly noticing, analyzing and scrutinizing the evidence on record has rightly acquitted the respondent No. 2 of the charge



of offence punishable under Section 376 of the Indian Penal Code.

24. Situated thus, we do not find any legal infirmity in the impugned judgment and order of the trial court requiring this Court’s interference. This appeal has no merit and is accordingly dismissed.

(Chakradhari Sharan Singh, J)

(Khatim Reza, J):-

anand/-

AFR/NAFR	NAFR
CAV DATE	02.09.2022
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(Khatim Reza, J)

