

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

BAIL APPLICATION NO.1442 OF 2021

**DINESH DATKYA VASAVE
VERSUS
THE STATE OF MAHARASHTRA**

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Advocate for Applicant : Mr. Amit. S. Savale
APP for Respondents/State : Mr. A.V. Deshmukh

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**CORAM : M.G. SEWLIKAR, J.
RESERVED ON : 14th March, 2022
PRONOUNCED ON : 31st March, 2022**

ORDER:-

By this application applicant is seeking his release on bail in connection with crime No. 513/2021 registered with Akkalkuwa Police Station, Dist. Nandurbar under Section 376 of the I.P.C.

2. Facts in short are that the informant aged 22 years is the resident of Kukalkhadi, Tq. Akkalkuwa, Dist. Nandurbar. At present she is staying at Ambabari, Tq. Akkalkuwa, Dist. Nandurbar. The informant, her mother and one Datkya Vasave were tenants in the field at Ambabari village. Since last five years informant along with her mother, uncle Mangya Raut and paternal aunt Jolibai Raut and applicant Dinesh Datkya Vasave were living together in one house at Ambabari.

3. Since July-2019 applicant and the informant were in love with each other. Applicant had promised her and her family members that he would marry her. Therefore, her family members had also permitted informant to live with him. Since they were in love with each other they established physical relationship. Since applicant had promised to her marry, she had consented for physical relations. She realized in the month of March-2021 that she was pregnant. When she disclosed this fact to the applicant that she was pregnant from him applicant promised to marry her. However, he married another woman. Therefore, she lodged the complaint against the applicant. On these allegations offence came to be registered against the applicant.

4. Heard Shri Savale learned counsel for the applicant and Shri A.V. Deshmukh learned APP for State.

5. Learned counsel Shri Savale submitted that the charge-sheet is filed. Tenor of the FIR shows that applicant and informant were in love with each other. The alleged sexual intercourse was with the consent of the informant. He submitted that from the FIR it does not indicate that the applicant had the intention of cheating the informant right from the inception. He submitted that when two young persons are in love with each other and it

culminates into physical relationship it cannot be said that the applicant had no intention to marry the informant right from inception. Whether the applicant had the intention to cheat the informant will be clear only after recording of evidence. For this purpose he placed reliance on the following cases:

- I) *Sonu @ Subhash Kumar V/s. State of U.P & Anr.; 2021 AIR (Supreme Court 1405*
- II) *Babasaheb Bhimrao Mogle V/s. State of Maharashtra; 2021 ALL MR (Cri.) 3772*
- III) *Vishal Omprakash Verma V/s. State of Maharashtra; 2021 ALL MR (Cri.187)*
- IV) *Kashinath Narayan Gharat V/s. State of Maharashtra; (Criminal Appeal No.119/1999*
- V) *Anil Chandu Ghansawant Vs. State of Maharashtra; (Bail Application No.1278/2021)*

6. Learned APP Shri Deshmukh submitted that the applicant had the intention to cheat informant right from the beginning. It is evident from the fact that the applicant refused to marry informant when it was disclosed to him by the informant that she was pregnant. Informant consented for sexual intercourse only because of promise of marriage. He submitted that there is no supervening incident because of which the applicant could not marry informant or because of the circumstances beyond his control. The conduct of

the applicant marrying another woman even after realizing that informant was pregnant from him, speaks volumes about his intention to deceive the informant. He submitted that even at this *prima facie* stage it can be gathered that applicant had the intention to cheat the informant and had established physical relations with her just to satisfy his lust. He, therefore, prayed for rejection of the application. He placed reliance on the following cases:

- I) ***Yedla Srinivasa Rao V/s. State of A.P.; 2006 (11) SCC 615***
- II) ***Pradeep Kumar V/s. State of Bihar & Anr.; 2007 AIR (SC) 3059***
- III) ***State of U.P V/s. Naushad; 2014 AIR (SC) 384***
- IV) ***Anurag Soni V/s. State of Chhattisgarh; 2019 AIR (SC) 1857***

7. Section 90 of the I.P.C. defines consent thus:-

*90. Consent known to be given under fear or misconception.—
A consent is not such a consent as it intended by any section of
this Code, if the consent is given by a person under fear of
injury, or under a misconception of fact, and if the person
doing the act knows, or has reason to believe, that the consent
was given in consequence of such fear or misconception; or
Consent of insane person - 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; or
Consent of child - unless the contrary appears from the
context, if the consent is given by a person who is under*

twelve years of age.”

8. In the case at hand, admittedly, consent was not obtained by putting the informant under the fear of injury. The only question that remains to be answered is whether it was obtained under misconception of facts. In the case of ***Pramod Suryabhan Pawar V/s. The State of Maharashtra & Anr; 2019 (AIR (Supreme Court) 4010***, the Hon'ble Supreme Court held thus:-

“16. 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. In Deepak Gulati this Court observed:

“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; 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.”

9. In the case of ***Uday V/s. State of Karnataka; (2003) 4 SCC 46***, it has been held as under:-

“17. 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, is 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..."

10. In the case of **Yedla Srinivasa Rao** cited (*supra*), the Hon'ble Supreme Court held thus :

*"9. ...If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfill right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked. Therefore, so far as Jayanti Rani Panda (*supra*) is concerned, the prosecutrix was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda's case is fully distinguishable on facts. It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfill.*

If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfill the promise. Such consent cannot condone the offence.”

11. This decision of the Hon’ble Supreme Court instead of supporting prosecution, supports the applicant/accused. In the case at hand also, the informant/victim is not of tender age but a fully grown up girl of 22 years. Moreover, all the authorities which the learned APP Shri Deshmukh placed reliance are after a full-fledged trial. Even otherwise in the case of **Anurag Soni** cited (supra), it has been held thus :-

10.5 Even in the case of Dr. Dhruvaram Murlidhar Sonar (supra), upon which reliance has been placed by the learned counsel appearing on behalf of the accused, in paragraph 23, this Court has observed that 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 later falls within the ambit of cheating or deception, this Court observed and held 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 later 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 of the IPC.”

12. In the case of ***Babasaheb Bhimrao Mogle*** cited (supra), it has been held that no offence punishable under Section 376 of the IPC is made merely because applicant has denied to marry the victim. Thus, in the case of ***Uday V/s. State of Karnataka*** cited (supra), it has been held that the case has to be treated differently when the allegations are that the victim and the accused are in love with each other and because of their passions the relationship culminated into sexual relationship. In the case at hand also the informant has alleged that applicant and the informant were in love with each other. Only after recording of evidence it will be clear whether applicant had the intention to cheat the informant right from the inception. In this view of the

matter, I am inclined to release the applicant on bail. Hence the following order is passed:

ORDER

- I) Application is allowed.
- II) Applicant be released on PR bond of Rs.25,000/- with one solvent surety in the like amount, in connection with Crime No.513/2021 under Section 376 of the I.P.C. with Akkalkuwa Police Station, District Nandurbar on condition that he shall not pressurize the witnesses and shall not leave the jurisdiction of the Court without permission of the Court.
- III) These observations are made only for the disposal of this application and the learned trial Court shall not get influenced by these observations and can come to its independent conclusion during trial.

[M.G. SEWLIKAR, J.]