

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR**

CRIMINAL REVISION APPLICATION NO. 158 OF 2022

Shri Manish S/o Jayramji Dulewale
Aged about 30 Years,
Occ. Private Service
R/o Binaki Layout, plot No.8,
Vrundawan Nagar, Shahu, Mohalla,
Nagpur-17

.... Applicant

// VERSUS //

1. The State of Maharashtra, through
Police Station officer, Police Station
Yashodhara Nagar, Dist. Nagpur
2. XYZ Victim in Crime No.287 of 2018
Police Station Yashodhara Nagar, Dist.
Nagpur

... Non-applicants

Shri A.K.Choube, Advocate for the applicant.
Shri A.M.Kadukar, APP for the non-applicant no.1/State.
Shri R.R.Rajkarne, Advocate for the non-applicant no.2.

CORAM : ANIL S. KILOR, J.

DATED : 15th NOVEMBER, 2022.

ORAL JUDGMENT :

By the present revision application filed under Section 397 of the Code of Criminal Procedure, a challenge is raised to the order dated 28th April, 2022 passed by the learned Additional Sessions Judge-15, Nagpur in Sessions Case No. 578 of 2022 rejecting the application Exh.3 for discharge for the offence punishable under Sections 354, 376, 417 of the Indian Penal Code.

2. The brief facts of the present case, are that on 21st November, 2018 the non-applicant no.2-victim filed a report with the police alleging that from 1st February, 2015 to 10th January, 2018 by establishing love relationship, the applicant from time to time committed sexual abuse and forceful sexual intercourse on the false promise of marriage. It is further alleged that the applicant outraged her modesty.

3. Thereupon, a crime was registered vide crime No.287 of 2018 for the offence punishable under Sections 354, 376, 417 of Indian Penal Code and on completion of investigation, the chargesheet was filed. Whereupon, the applicant filed an application Exh.3 for discharge in the Sessions Trial No.578 of 2018, which came to be rejected vide judgment and order dated 28th April, 2022, the same is under challenge in the present revision application.

4. I have heard learned counsel for the respective parties.

5. Shri Choube, learned counsel for the applicant submits that the age of the complainant was 27 years at the time of lodging the First Information Report and as such she was a consented adult during the course of relationship with the applicant. He further submits that even if the allegations made in the First Information Report are taken on its face value, it can be seen that the incidents have taken place at public place and not on a single occasion she raised any alarm which sufficiently shows that there was a consensual relationship. He further submits that the incidents at the cinema hall is highly improbable. Thus, he submits that

no offence is made out against the applicant and therefore he is entitled for discharge.

6. It is submitted that the informant had entered into sexual relationship with the applicant with full knowledge, understanding and implication and therefore offence under Section 376 of the Indian Penal Code is not made out at any stretch of imagination. He therefore submits that applicant has been falsely implicated in the alleged offence.

7. Learned counsel for the applicant further draws attention to the statement of the brother and submits that it has come in the statement of brother that prosecutrix had affair with other boys in the same locality and therefore it can be safely presumed that this was the reason for not culminating promise into marriage and therefore no offence under Section 417 of Indian Penal Code would attract. In support of his contention, he has placed reliance of judgments of Hon'ble Supreme Court of India in the cases of Union of India Vs. Prafulla Kumar Samal and another¹, Almohan Das V. State of West Bengal² and Pramod Suryabhan Pawar Vs. State of Maharashtra and another³.

8. He further submits that there is no material in chargesheet which would attract any of the offence under which the chargesheet has been filed. Accordingly, he prays for discharge.

1 1979(3) SCC 4

2 AIR 1970 SC 863

3 (2019) 9 SCC 608

9. On the other hand, Shri Kadukar, learned Additional Public Prosecutor strongly opposed the present application and supports the impugned order. It is submitted that there is ample incriminating material available in the chargesheet which *prima facie* shows the involvement of the applicant in the alleged offence. He further submits that there is sufficient material to attract the provisions of Sections 354, 376, 417 of Indian Penal Code. Accordingly, he prays for rejection of the present application.

10. Learned counsel for the non-applicant no.2 reiterates the submission of the learned Additional Public Prosecutor and prays for rejection of the present application.

11. Before examining the correctness and legality of the impugned order dated 28th April, 2022 passed by learned Additional Sessions Judge-15, Nagpur, rejecting the application Exh.3 for discharge, it would be appropriate to reiterate the law pertaining to framing of charges and the scope of this Court to interfere under Sections 397/401 of Code of Criminal Procedure.

12. The Hon'ble Supreme Court of India in the case of *Union of India Vs. Prafulla Kumar Samal and another* (supra) has interpreted and analysed the provisions of Section 227 of Code of Criminal Procedure in the light of introduction of substantial and far reaching changes in the Code of 1898 as amended in 1955, and also considered the authorities on the said point and carved out the principles in para-10 which reads thus:

10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

- (1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.
- (2) Where the material placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.
- (3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.
- (4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.

13. Time and again thus, the Hon'ble Supreme Court of India has held that if the evidence which the prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged

in cross-examination or rebutted by the defence evidence, if any, cannot show that the accused committed the offence, then there will be no sufficient ground for proceeding with the trial. But, if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused.

14. In the case of *Almohan Das V. State of West Bengal* (supra), the Hon'ble Supreme Court of India has observed that a Magistrate holding an enquiry is not intended to act merely as a recording machine. He is entitled to sift and weigh the materials on record, but only for seeing whether there is sufficient evidence for commitment, and not whether there is sufficient evidence for conviction. If there is no prima facie evidence or the evidence is totally unworthy of credit, it is his duty to discharge the accused : if there is some evidence on which a conviction may reasonably be based, he must commit the case.

15. It is a settled law that if two views are possible on one of them rise suspicion as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused. At this stage, he is not to see whether the trial will commence for conviction or acquittal.

16. In the instant case it has been alleged that the applicant has committed an offence punishable under Sections 354, 376, 417 of Indian Penal Code. Section 354 of Indian Penal Code attracts if anybody assault

or used criminal force to any woman, intending to outrage or knowing it be likely that he will thereby outrage her modesty. However, Section 376 of Indian Penal Code attracts in case of commission of rape, whereas Section 417 of Indian Penal Code attracts on commission of cheating.

17. The case of the prosecution is that there was love affair between the applicant and the non-applicant no.2/victim since 1st February, 2015. The applicant has promised to the non-applicant no.2 that he would marry her and on such promise he has committed forceful sexual intercourse with the non-applicant no.2 and also outraged her modesty on number of occasions at various places. Thus, gist of the complaint is that applicant forcefully abused the non-applicant no.2 physically and under the pretext of marriage, he cheated the non-applicant no.2.

18. In the above referred backdrop of allegations, at this juncture it would be pertinent to examine the difference between false promise of marriage and breach of promise to marry. The Hon'ble Supreme Court of India has elaborated this aspect in numerous judgments. In the case of *Pramod Suryabhan Pawar Vs. State of Maharashtra and another* (supra), the Apex Court, has held thus:

12. This Court has repeatedly held that consent with respect to Section 375 of the IPC involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consent to such

action. In *Dhruvaram Sonar* (AIR 2019 SC 327) which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

15.... An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also sated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.”

This understanding was also emphasised in the decision of this Court in *Kaini Rajan Vs. State of Kerala* (2013 AIR SCW 5455)

12. ... “Consent”, for the purpose of Section 375, requires voluntarily 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 asset. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.”

13....

14. In the present case, the “misconception of fact” alleged by the complainant is the appellant’s promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In *Anurag Soni Vs. State of Chattisgarh* (2019) SCC Online SC 509, this Court held:

“37. 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 fact as per Section

90 of the 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 of the IPC and can be convicted for the offence under Section 376 of the IPC.

Similar observations were made by this Court in *Deepak Gulati Vs. State* (2013) 7 SCC 675 (“Deepak Gulati”)

“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...”

15...

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 would 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* (AIR 2013 SC 2071, paras 18, 21) 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.

...

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”.

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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. In the teeth of above referred observations and in order to arrive at a conclusion whether there was a false promise or breach of

promise to marry, it is necessary to examine whether the promise to marry was false or intention of applicant at the time of making promise itself was not to abide by it but to deceive the non-applicant no.2 to convince her to engage in sexual relations.

20. The complaint dated 21st November, 2018 does not disclose that from the inception the applicant had no intention to marry her and the prosecutrix gave consent for sexual intercourse on false assurance by the applicant. In absence of any such material or the allegations it cannot be said that the consent was obtained on false promise and therefore there was misconception of fact.

21. From the complaint, it can be seen that there was continuous efforts from both the sides for marriage, however, because of certain reasons including the dowry demand it was not materialized. From the complaint it can also be seen that talks were taken place between both the families about the marriage and on all such occasions because of some reason the talks were failed.

22. Thus, from the complaint or the allegations made in the FIR, there is nothing to suggest that promise given by the applicant to the non-applicant no.2 to marry, was false and it was with an intention not to abide but to deceive the non-applicant no.2 to convince her to engage in sexual relations. On the contrary, *prima facie*, it appears that promise of marriage was genuine and the marriage failed to fructify due to external circumstances. Thus, in this case, according to me, the consent as per

Section 90 of IPC is not vitiated. In the circumstances, I am of the opinion that even if the prosecution case taken on its face value, Section 376 of IPC would not attract in this case as there was consensual relations between the applicant and the non-applicant no.2.

23. As far as Sections 354 and 417 of Indian Penal Code are concerned, there is no *prima facie* material to attract the said offence.

24. In the backdrop of above referred observations, I have no hesitation to hold that learned Additional Sessions Judge has committed error in rejecting the application Exh.3 preferred by the applicant for discharge. In the circumstances, I pass the following order.

- i. Criminal revision application is allowed:
- ii. Order below Exh.3 dated 28th April, 2022 passed by learned Additional Sessions Judge-15, Nagpur in Sessions Trial No. 578 of 2021 is hereby quashed and set aside;
- iii. Applicant Manish S/o Jayramji Dulewale in Sessions Trial No. 578 of 2021 is hereby discharged for the offence punishable under Sections 354, 376 and 417 of Indian Penal Code arising out of Crime No. 287 of 2018 registered with Police Station Yashodhara Nagar, Nagpur;
- iv. Criminal revision application is disposed of.

[ANIL S. KILOR, J.]

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