

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 697 of 2022

Wasim Ashfaqul Islam

-vs.-

The State of West Bengal & Anr.

Mr. Sekher Kumar Basu, Sr. Adv.,
Mr. Prabir Majumdar,
Mr. Santanu Talukdar,
Mr. Snehangsu Majumder,
Mr. Debraj Shil.

...For the Petitioner

Mr. Sudip Ghosh,
Mr. Suman De.

...For the State

Reserved on : 06.09.2023

Judgment on : 21.09.2023

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the proceeding being G.R. Case No. 3022 of 2021 arising out of Dum Dum Police Station Case no. 459/2021 dated 08.04.2021 under Section 417/376/506 of the Indian Penal Code.

The genesis of the case is on the basis of a letter of complaint addressed to the Officer-in-charge of Dum Dum police station by one "X" wherein she alleged that on or about June, 2019 when she was a student at Gorky Sadan, Kolkata and was studying Russian language the accused

Wasim Ashfaquul Islam at the inception introduced himself and started discussing regarding her academic course. With passage of time a cordial relationship developed between them. Thereafter the accused approached to marry her when she agreed and started accompanying him at different places. The accused represented that he would leave India and go to Moscow and will marry her within a year. He also represented that the complainant should accompany her to Moscow and assured incurring all the expenses. Both of them had been to different hotels at Kolkata and at Dum Dum, it has been alleged by the complainant that she was hypnotized with love, affection and gestures of the accused. Taking advantage of the same accused took dirty nude pictures of intimate moments which she consented under the belief that the accused would marry her. She was manipulated to have sex with him on the ground of future togetherness. In the month of August, 2019 she found a massive change in his behaviour and often used to abuse her in vulgar language, showing forces and violence for displaying her nude pictures through Whatsapp, when she raised objection he threatened of murdering her and as such she was in a state of fear. With time she understood that she had to meet up the dirty requirements of the accused for his mental satisfaction and enjoyment and he used to blackmail her of circulating all intimate chatting, videos/dirty pictures through social media. On 08.10.2019 the accused left India for Moscow and at the relevant time he gave an ultimatum to keep close vigil and do chatting, displaying obscene video/picture like before, in the alternative she and her family would face serious consequences. She was therefore forced to perform several nudities through online which was directed by the accused from

Moscow which was for the purpose of his sexual pleasure and enjoyment. As a result of continuous threatening/blackmailing the complainant started panicking and was suffering from trauma and fear. And the same was because of the direction of the accused from Moscow for his sexual amusement and pleasure for which he had to send those dirty pictures to safeguard from his clutches. After sometime the accused stated that he had already circulated all the photos/chatting videos through online in Moscow and was thus blackmailing her. The complainant fell seriously ill and was under medication. On 10.03.2021 she received a text SMS from his friend to meet with him at Rash Behari Avenue for urgent purpose and on 11.03.2021 at about 11.00 a.m. two unknown persons boarding a motorcycle trespassed into her premises and started shouting with slang language, they threatened her mother and abused her with vulgar languages. On 27.03.2021 surprisingly she received a phone call from Monirul Islam who disclosed him as the father of Wasim Ashfaque Islam, who threatened her that if she proceeded against his son legally she would have to face serious consequences. The complainant thereafter requested the officer to register FIR and take necessary steps against the accused persons for committing sexual intercourse on pretext of false promise of marriage, showing of force and violence and circulating all dirty pictures through online in Moscow.

The Investigating Agency on conclusion of investigation submitted charge-sheet before the Jurisdictional Court under Section

341/323/417/376/506 of the Indian Penal Code against Wasim Ashfaquul Islam and his father namely, Monirul Islam Molla.

The investigating agency in order to prove its case relied upon eight witnesses which included the complainant "X", Sima Paul, Sandip Kumar Paul and Sukhendu Mazumder and rest four witnesses who belong to the Police department.

Mr. Sekhar Basu, learned senior advocate appearing for the petitioner drew the attention of the Court to the allegations made in the FIR, charge-sheet as also the statement of the different witnesses. The learned Advocate also drew the attention of the Court to the statement of the lady under Sections 164 of the Code of Criminal Procedure wherein she stated that in 2018 she had a relationship with Wasim Ashfaquul Islam when she was studying at Gorky Sadan, Kolkata. It was represented by the accused that he would go abroad and after a year he would marry her. She was taken to different hotels and on the first occasion it was represented to her that they should have physical relationship as they would marry in future. Relying upon the future representation of marriage she consented for physical relationship. The accused also took her nude photographs and also of many intimate moments. Thereafter he started threatening her by showing that he is from Khidirpore and will be able to make her life miserable. The accused threatened for circulating the photographs and by this means he entered into a regular physical relationship. On or about October, 2019 the accused left for Moscow and kept communication with her till 3rd October, 2021. The accused had taken many photographs and also compelled her to send

videos. The accused claimed that this is his demand, however, suddenly on 3rd March, 2021 he stated that whatever photographs he had shared with her, have been circulated in Moscow. On 10th March, 2021 one of his friend namely Akash asked her to come at Rash Behari Avenue but she did not go, subsequently two persons in a bike threatened her mother. She was also threatened by Wasim's father for initiating the present case.

Sima Paul, Sandip Kumar Paul are parents of the lady/complainant who narrated the incident in the same manner as was told by the lady/their daughter who is the complainant of the case. The other witness Sukhendu Mazumder happened to be a friend of the complainant who stated that he came to know from the complainant that in 2019 when she was studying Russian language at Gorkey Sadan, she got associated with one Wasim Ashfaul Islam, thereafter a relationship developed between them. The said boy promised to marry her and thereafter had physical relationship, and subsequently stopped communicating with her and started threatening her. On or about 27.03.2021 father of the accused Wasim Ashfaul Islam namely, Monirul Islam threatened the complainant and as such he prayed before the police authorities to take steps against the accused persons.

Mr. Basu, learned senior advocate appearing for the petitioner submitted that both the petitioner and the complainant were adults who were able to understand the consequences of their acts. Learned senior advocate submitted that even if the allegations made in the FIR and the materials which have been collected by the investigating agency in course of investigation are taken to be true, yet hardly any case has been made out

after the charge-sheet has been filed. So far as the petitioner is concerned none of the offences under Section 376 or 417 of the Indian Penal Code has been made out in this case. Additionally it was submitted that even if the prosecution case is accepted as correct in that case the lady on her will had been to hotels and were having physical relationship. The subsequent failure of the petitioner if at all will not implicate him and make him liable for the offence under Section 376 of the Indian Penal Code. It was also pointed out that so far as the facts which have been narrated regarding her obscene pictures circulated or video chats being uploaded at different circulation of photographs no materials have been collected by the investigating agency in support of such allegations and as such the present case is restricted to oral evidence of the complainant and the supporting witnesses are concerned. There was emphasizes on the statement under Section 164 of the Code of Criminal Procedure and it has been stated that the lady refused to undergo for medical examination.

Mr. Sudip Ghosh, learned advocate appearing for the State opposes the contentions, however, the learned advocate accepted the version of the petitioner to the extent that the investigating agency did not collect any materials so far as the circulation of the obscene video and pictures are concerned. Learned advocate stated that it is only four witnesses who are sufficient enough to prove the case so far as the charges which have been brought against the accused is concerned.

I have considered the submissions advanced by the petitioner as well as that of the State. I have taken into account the materials appearing in the

Case Diary which included the statement of the three witnesses as well as the letter of complaint and the statement of the lady under Section 164 of the Code of Criminal Procedure.

Before proceeding further the following judgments are required to be taken into consideration wherein the Hon'ble Supreme Court has been pleased to deal with issues under similar circumstances.

In Pramod Suryabhan Pawar –Vs. – State of Maharashtra, (2019) 9 SCC 608 the Hon'ble Supreme Court was pleased to deal with issues relating to offences under Sections 417 and 376 of the Indian Penal Code with reference to 'promise to marry' and the 'consent' of a woman with respect to Section 375 of the IPC. The relevant paragraphs from the said judgement are set out for the purpose of the present case, which are as follows:

“10. Where a woman does not “consent” to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term “consent”, a “consent” based on a “misconception of fact” is not consent in the eye of the law.

12. This Court has repeatedly held that consent with respect to Section 375 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, consents to such action. In Dhruvaram Sonar [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100] which was a case involving the

invoking of the jurisdiction under Section 482, this Court observed : (SCC para 15)

“15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also stated 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 v. State of Kerala [Kaini Rajan v. State of Kerala, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858] : (SCC p. 118, para 12)

“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 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 v. State of Chhattisgarh [Anurag Soni v. State of Chhattisgarh, (2019) 13 SCC 1 : 2019 SCC OnLine SC 509] , this Court held : (SCC para 12)*

“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 fact 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 Sections 375 IPC and can be convicted for the offence under Section 376 IPC.”

Similar observations were made by this Court in Deepak Gulati v. State of Haryana [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] (Deepak Gulati) : (SCC p. 682, para 21)

“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. *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 [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] this Court observed : (SCC pp. 682-84, paras 21 & 24)*

“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, [Ed. : The matter between two asterisks has been emphasised in original.] unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her [Ed. : The matter between two asterisks has been emphasised in original.] .”

(emphasis supplied)

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.”

In Sonu –Vs. – State of U.P., 2021 SCC OnLine SC 181 and Shambhu Kharwar –Vs. – State of U.P., 2022 SCC OnLine SC 1032 the Hon’ble Apex Court relying upon the aforesaid judgement arrived at its finding thereby quashing the proceedings. In the later judgement it was emphasised that 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.

On an assessment of the materials and the proposition of law which have been placed before this Court, I am of the opinion that the complainant and the accused being major were able to understand the consequences of their acts, as from the statement of the complainant under Section 164 of Cr.P.C. it is clear that such relationship continued from May, 2019 till March, 2021. If the lady entered into physical relationship she should have understood the consequences of the involvement in the proposed act.

So far as the other issue relating to obscene pictures or collection of intimate obscene videos the materials collected in the Case Diary do not reflect the same to have been seized in course of investigation and to that extent the learned Advocate for the State has also admitted regarding such failure.

Having regard to the totality of the circumstances appearing in the materials collected by the investigating agency, I am of the opinion further continuance of the proceedings being G.R. Case No. 3022 of 2021 arising out of Dum Dum P.S. Case No. 459/2021 dated 08.04.2021 (including the charge-sheet filed therein) would result in abuse of the process of law if the same is allowed to continue and the same as such is hereby quashed.

Accordingly CRR 697 of 2022 is allowed.

Pending applications, if any, are consequently disposed of.

Interim order, if any, is hereby made absolute.

Case Diary be returned to the learned Advocate appearing for the State.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

Urgent Xerox certified photocopy of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)