

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRR 1120 of 2021

Sk. Sohel Ashik

-vs.-

State of West Bengal & Anr.

Mr. Satadru Lahiri,
Mr. Syed Wasim Faruque.

...For the Petitioner

Ms. Zareen N. Khan,
Md. Kutubuddin.

... For the State

Heard on : 20.03.2023, 27.03.2023, 03.04.2023,
19.04.2023 & 28.04.2023

Judgment on : 28.04.2023

Tirthankar Ghosh, J:-

The present revisional application has been preferred challenging the continuance of Haroa Police Station Case No. 467/20 dated 31.12.2020 under Section 417/376/506 of the Indian Penal Code as well as the charge-sheet filed therein in connection with the said case.

The allegations made in the letter of complaint addressed to the Officer-in-charge, Haroa Police Station were to the effect that the complainant one Evanaz Parvin a resident of Rajarhat alleged that she had an affair with the

accused Soheli Ashik who promised to marry her and took her to different places. The accused by promising to marry her, cohabitated for a considerable period of time. The accused also on a number of occasions took money through his friend from her and when the complainant pressurised him to marry her he blocked her phone number. The complainant pursued to connect with the accused when the accused abused her with derogatory and filthy languages, having no other option she requested the police authorities to take action against him.

The investigating authority on completion of investigation submitted charge-sheet. The Investigating Officer relied upon 15 witnesses, out of the said fifteen witnesses, eight of the witnesses were the neighbours and acquaintance. The rest were two doctors and five police officials. In Course of investigation the statement of the victim was also recorded under Section 164 of the Code of Criminal Procedure by the Judicial Magistrate.

Mr. Lahiri, learned Advocate appearing for the petitioner submits that even if the allegations made in the letter of complaint which has been treated to be the First Information Report of the instant case is accepted at its face value along with the documents relied upon by the prosecution to prove its case is accepted to be true, the same fails to make out any offence, as in this case both of them were major and were having a consenting relationship. Learned Advocate drew the attention of the Court to the relevant part of the statement of the witnesses as also that of the complainant and prayed that the further

continuance of the proceedings in the given set of facts as is divulged in the present proceedings should not be allow to continue and be quashed.

Mr. Kutubuddin, learned Advocate appearing for the State opposes such prayer and submits that from the very inception the accused not only promised to marry but also took money from the complainant. According to the learned Advocate the materials collected by the Investigating Agency portrayed a picture of a person who had the intention of cheating and using the complainant. Learned Advocate for the State produced the Case Diary and submitted that there is no scope for interference so far as the present case is concerned and the trial case must be taken to its logical conclusion.

In view of the submissions made by the learned Advocates for the parties, I have considered the statements of Amirul Mollah, Remon Khan, Habiba Bibi, Rejaul Karim, Mohibul Mollah, each of the witnesses have supported the version of the complainant and one of the witness stated that there was a relationship between the complainant and the accused and on or about 27.07.2020 he along with Ataur Rahaman, the accused Soheli and the complainant Evanaz had been to Hotel Red Stone and stayed overnight. Soheli and Evanaz stayed in a separate room. After some days their relationship deteriorated and the accused refused to marry the complainant. I have also taken into considerations the statement of the victim under Section 164 of the Code of Criminal Procedure wherein the victim stated that initially she had friendship with the accused Soheli who proposed her, however, she refused

such proposal, after some days both of them had been to a hotel where she met friend of Soheli and his girlfriend. There in a separate room the accused forced her for physical relationship, as a result of which thereafter she became attached to the accused Soheli and such physical relationship continued. After sometime when the complainant requested him to marry her, the accused promised to marry but started evading her. Accused also in facebook threatened and circulated rumours against her. It has been alleged by the complainant that the accused on several occasion took money from her and thereafter started evading. The complainant requested for taking steps against the accused, so that he is punished.

I have taken into account the version of the complainant in the letter of complaint as well as the statement under Section 164 of the Code of Criminal Procedure. Before proceeding further it would be prudent to consider some of the precedents of the Hon'ble Supreme Court in similar circumstances. In Pramod Suryabhan Pawar -Vs. - State of Maharashtra, (2019) 9 SCC 608 the Hon'ble Supreme Court was pleased to deal with the issue, 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 *Uday -Vs. – State of Karnataka* reported in (2003) 4 SCC 46, the relevant paragraphs are set out as follows:

“16. *The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In Jayanti Rani Panda v. State of W.B. [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her*

once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Penal Code, 1860 and concluded: (Cri LJ p. 1538, para 7)

“The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her.”

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.

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.....”*

In Dr. Dhruvaram Murlidhar Sonar –Vs. – State of Maharashtra and Ors. reported in (2019) 18 SCC 191, the Hon'ble Apex Court was pleased to observed as follows:

“17. Thus, Section 90 though does not define “consent”, but describes what is not “consent”. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be ascertained only on a careful study of all relevant circumstances.

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 latter 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 IPC.

24. *In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value*

and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2)(b) cannot be sustained.”

In Maheshwar Tigga –Vs. – State of Jharkhand reported in (2020) 10 SCC 108, paragraphs 18 and 20 was pleased to hold as follows:

“18. *We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to solemnised in the church or in a temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her.*

20. *We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard*

in Uday [Uday v. State of Karnataka, (2003) 4 SCC 46 : 2003 SCC (Cri) 775] are considered relevant : (SCC p. 58, para 25)

“25. ... 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.””

The Hon’ble Supreme Court relying upon the aforesaid judgments also arrived at a similar finding 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.

Having regard to the version of the complainant and the prosecution witnesses who were also aware regarding the relationship of the accused with the complainant particularly with regard to the narration of the facts that the

complainant on her own had been to a hotel and it is only after the physical relationship, the issue regarding marriage cropped up, I am of the opinion that the principles settled hereinabove do apply in the facts and circumstances of the present case. As such the further continuance of Haroa Police Station Case No. 467/20 dated 31.12.2020 and the consequent proceedings including the charge-sheet filed therein calls for interference.

Accordingly, Haroa Police Station Case No. 467/20 dated 31.12.2020 and the charge-sheet filed therein before the jurisdictional Court, as such, is hereby quashed.

Consequently, CRR No. 1120 of 2021 is allowed.

Pending applications, if any, are consequently disposed of.

Interim order, if any, is hereby made absolute.

Case Diary is 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.)