

IN THE HIGH COURT AT CALCUTTA

(Criminal Revisional Jurisdiction)

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRR 1524 of 2020

Santanu Bhattacharya

Vs.

The State of West Bengal & Anr.

For the Petitioner : Mr. Susnigdho Bhattacharyya.

For the State : Ms. Rita Datta.

Heard on : 25.04.2023

Judgment on : 06.06.2023

Shampa Dutt (Paul), J.:

1. The present revision has been preferred praying for quashing of the proceeding in G.R Case No.3520 of 2017 arising out of Bongaon Police Station Case No.986/17 dated 11.10.2017 under Sections 493/376/323/506/34 of the Indian Penal Code, pending before the learned Additional Chief Judicial Magistrate, Bongaon.

2. The petitioner's case is that the opposite party no.2, Rinki Mitra lodged a complaint under Section 156(3) of the Code of Criminal Procedure before the Learned Additional Chief Judicial Magistrate, Bongaon and as per order the said complaint was treated as First Information Report and accordingly, Bongaon Police Station Case No.986/17 dated 11.10.2017

under Sections 493/376/323/506/34 of the Indian Penal Code has been started against the petitioner. It has been alleged in the said written complaint that the complainant is a divorcee and ten months ago she developed a relationship with the petitioner Santanu Bhattacharya and he promised to marry her and on that pretext they met each other intimately and during their relationship they had sexual intercourse on several occasions and they also started residing in a rented house. But subsequently he denied to marry her and thus cheated her. On 27.06.2017 one dramatic (?) marriage was solemnized with the help of a local club and thereafter he started to torture her and also assaulted her and her child.

3. After completion of investigation, the investigating officer submitted charge sheet on 19.11.2017 before the learned Additional Chief Judicial Magistrate, Bongaon under Sections 493/376/323/506/34 of the Indian Penal Code against the petitioner and one Sona Bhattacharjee.

4. The petitioner states that the said complaint lodged against the petitioner is false and concocted and the alleged incident or torture which has been described in the written complaint did not find place in any of the 161 statements recorded by Police and as such the charge sheet is liable to be quashed.

5. **Mr. Susnigdho Bhattacharya, learned counsel for the petitioner** has submitted that the impugned criminal proceedings has been initiated in a malicious and malafide manner and with an oblique purpose of harassing the petitioner with the ulterior purpose of taking vengeance and spite him in eye of society. From the medical report it is seen that no injury was found

and there are also many contradiction in the statements of the witnesses. As such the entire proceeding is liable to be quashed.

6. That the investigating officer without proper appreciation of the evidence, filed the charge sheet and as such the initiation and continuation of the instant case against the petitioner, is a gross abuse of process of law.

7. That the criminal proceeding is being used as a weapon and the same is liable to be quashed in the interest of justice.

8. **In spite of due service there is no representation on behalf of the opposite party no.2.**

9. **Ms. Rita Datta, learned counsel for the State** has placed the case diary.

10. **From the materials on record the following facts are before this court:-**

- i) The complainant/opposite party is a divorcee
- ii) As per her statement in the complaint, she developed a physical relationship with the accused/petitioner when he (allegedly) promised to marry her.
- iii) A dramatic (?) marriage was also solemnized with the help of a local club.
- iv) Statements of her ex-husband, neighbours, club members, maid servant **has been recorded. They have all corroborated the complainant.**

11. **Section 375 of the Indian Penal Code is as follows:-**

“375. Rape.—A man is said to commit “rape” if he-

- (a) *Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*
- (b) *Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*
- (c) *Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*
- (d) *Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,*

under the circumstances falling under any of the following descriptions:—

(First) — Against her will.

(Secondly) — Without her consent.

(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.”

12. Learned counsel for the petitioner has relied upon the following judgments:-

a) *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra & Ors.* (2019) 18 SCC 191, on November 22, 2018.

“15. Section 375 defines the offence of rape and enumerates six descriptions of the offence. The first clause operates where the woman is in possession of her senses and, therefore, capable of consenting but the act is done against her will and the second where it is done without her

consent; the third, fourth and fifth when there is consent but it is not such a consent; the third, fourth and fifth when there is consent but it is not such a consent as excuses the offender, because it is obtained by putting her, or any person in whom she is interested, in fear of death or of hurt. The expression "against her 'will'" means that the act must have been done in spite of the opposition of the woman. 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.

16. Section 90 IPC defines "consent" known to be given under fear or misconception:

"90. Consent known to be given under fear or misconception.- A consent is not such a consent as is 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;"

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."

b) Shambhu Kharwar v. State of Uttar Pradesh & Anr., 2022 SCC

OnLine SC 1032, on August 12, 2022.

“Consent known to be given under fear or misconception- A consent is not such a consent as is 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...”

11. In *Pramod Suryabhan Pawar v. State of Maharashtra*, a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in *Sonu @Subhash Kumar v. State of Uttar Praesh* observed that :

“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, consents to such action...

[...]

14. [...] 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....

[...]

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...**

[...]

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.**

(emphasis supplied)”

13. **Section 90 of the Indian Penal Code, lays down:-**

“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.”

14. **Admittedly the parties were in a relationship. The local Club even got them married. About the marriage being termed 'dramatic', it prima facie appears that there is a doubt as to the validity of the said marriage.**

15. **Section 493 of the Indian Penal Code, lays down:-**

“493. Cohabitation caused by a man deceitfully inducing a belief of lawful marriage.—Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Ingredients of offence:- The essential ingredients of the offence under Section 493 are as follows:-

- (1) The accused practiced deception on a woman.
- (2) The intention of the accused to practise deceit was to induce a woman (complainant) to believe that she was lawfully married to the accused.
- (3) There was cohabitation or sexual intercourse as a result of the deception.”

16. The Supreme Court in **Naim Ahamed vs State (NCT of Delhi)**, **Criminal Appeal no. 257 of 2023**, 2023 LiveLaw (SC) 66, on **30.01.2023**, held:-

“20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. **As stated earlier, each case would depend upon its proved facts before the court.**”

17. **In the present case**, the petitioner had a physical relationship with the complainant initially prima facie with a false promise of marriage, which is further strengthened by the materials on record that there was a forcible (dramatic ?) marriage between the parties through a local Club. Even after

that the parties resided together as husband and wife at a tenanted place at Bongaon. The marriage has also been denied by the petitioner, which prima facie shows that the petitioner right from the beginning had no intention of marrying the complainant and only did so for satisfying his lust by obtaining the complainant's consent by misconception and the said consent was thus not made in good faith.... prima facie. **All this is subject to trial.** The complainant in this case had no reason to disbelieve the petitioner as the circumstances of the parties was such.

18. **As such there is prima facie sufficient materials on record, against the petitioner, to proceed towards trial.**

19. **The revisional application being CRR 1524 of 2020 is thus dismissed.**

20. No order as to costs.

21. All connected applications stand disposed of.

22. Interim order, if any, stands vacated.

23. Copy of this judgment be sent to the learned Trial Court forthwith for necessary compliance.

24. Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)