

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

CRIMINAL APPLICATION NO.276 OF 2022

**SAKHARAM BABASAHEB GHORPADE
VERSUS
THE STATE OF MAHARASHTRA AND ANOTHER**

Mrs. Mansi N. Ghanekar, Advocate h/f Mr. N. S. Ghanekar, Advocate for the applicant
Mr. P. G. Borade, APP for the respondent/State
Mr. G. B. Chate, Advocate for respondent No.2.

**CORAM : SMT. ANUJA PRABHUDESSAI AND
R. M. JOSHI, JJ.**

DATE : 12th JANUARY, 2023

PER COURT :-

1. With consent, heard finally at the stage of admission.
2. This is an application under Section 482 of the Code of Criminal Procedure to quash Special Case No. 349 of 2021 pending before Ld. Additional Sessions Judge, Aurangabad for the offences punishable under Sections 376(2)(n), 323, 504, 506 of the Indian Penal Code and under Sections 3(1)(r), 3(1)(s), 3(1)(w), 3(2)(v), 3(2)(va) of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act.
3. The prosecution against the applicant was initiated on the basis of the FIR No. 165 of 2021 lodged by respondent No.2 at Karmad Police Station alleging that he had sexual relationship with her on a

promise of marriage. The respondent No.2 alleged that the applicant had taken her to Mahadev temple at Aurangabad, where they exchanged garlands. They maintained physical relationship as a married couple. The FIR states that when respondent No.2 was pregnant and the applicant took her to a private hospital and got the pregnancy terminated. The applicant thereafter refused to marry her. The prosecutrix has alleged that the applicant also abused and assaulted her, despite knowing that she is a member of scheduled caste.

4. Learned counsel for the applicant contends that the relationship between the applicant and respondent No.2 was consensual and does not constitute offence under Section 375 of IPC. He submits that even if the entire allegations in the FIR are taken as true and correct, the same do not disclose any cognizable offence.

5. Per contra learned APP and learned counsel for the respondent No.2 submit that respondent No.2 had consented the physical relationship only in view of the promise of marriage. It is submitted that consent under misconception of fact cannot be construed as voluntary participation. It is submitted that the question whether there was valid consent is a matter of trial.

6. We have perused the records and considered the submissions

advanced by learned counsel for the respective parties.

7. The question for our consideration is whether the FIR and the other material collected in the course of investigation and which forms part of the charge-sheet discloses any cognizable offence against the applicant.

8. A perusal of the FIR reveals that the applicant and respondent No.2 were known to each other. They became friendly and were in physical relationship since the year 2016. They had also exchanged garlands in a temple and continued their relationship as a married couple even after terminating the pregnancy. The FIR has been lodged against the applicant solely because he refused to solemnize the marriage as promised. The delay in lodging the FIR has been explained by stating that the applicant has failed to maintain her as assured.

9. The FIR as well as the other material on record reveals that the applicant and respondent No.2, both adults, had entered into consensual relationship. The question is whether such relationship can be termed as 'rape', within the meaning of Section 375 of IPC. One of the essential ingredients of the offence under Section 375 of IPC is that the sexual intercourse with a woman should be "without her consent". In ***Dr. Dhruvaram Murlidhar Sonar Versus State Of Maharashtra and***

Others reported in **(2019) 18 SCC 191**, the Apex Court referred to the decision in **Uday v. State of Karnataka (2003) 4 SCC 46** and observed thus,

"18. In Uday v. State of Karnataka, this Court was considering a case where the prosecutrix, aged about 19 years, had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus:-

"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.

23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

22. Recently, this Court, in Shivashankar v. State of Karnataka, disposed of on 6-4-2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under: (Shivashankar case, SCC p. 205, para 4):-

"4. In the facts and circumstances of the present case, it is difficult to sustain the charges levelled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

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."

10. In ***Shambhu Kharwar Versus The State Of Uttar Pradesh and Another*** reported in **2022 SCC Online SC 1032**, the Apex Court has reiterated that :-

"1. 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 Pradesh, 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 7 2019 (9) SCC 608 8 2021 SCC OnLine SC 181 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)"

11. In the instant case, the applicant and respondent No.2 had been in physical relationship since 2016. They had exchanged garlands in a temple and shared relationship as man and wife. The FIR and the other material on record clearly indicate that the respondent No.2 had consented for sexual relationship with the applicant because of her love for the accused. In fact she continued to be in physical relationship with the applicant even after termination of pregnancy. The reason for filing the FIR was not misrepresentation but was refusal to maintain her. The FIR does not state that the promise of marriage was in bad faith or false from the inception. Hence it cannot be said that the respondent No.2 had entered into a physical relationship with the applicant under misconception of fact. Consequently the allegations in the FIR, even if the same are accepted in totality, do not disclose offence under Section 375 of the Indian Penal Code.

12. As regards the offence under the provisions Scheduled Caste

and Scheduled Tribe (Prevention of Atrocities) Act, it is not in dispute that the respondent No.2, who is a member of the scheduled caste was in consensual relationship with the applicant. It is not her case that the applicant had entered into such relationship only with an intent of sexually abusing insulting her only for the reason that she is a member of the scheduled caste. Hence the allegations in the FIR do not disclose offences under the provisions of Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act.

13. The allegations in the FIR as well as the material collected in the course of the investigation even if accepted in their entirety, do not disclose the offences as alleged. The present case is covered by illustration (1) & (3) of judgment in case of ***State Of Haryana And Ors vs Ch. Bhajan Lal And Ors, 1992 AIR 604***. In such circumstances, continuation of criminal proceedings against the applicant will be abuse of the process of Court. Hence the application is allowed in terms of prayer clause 'B'. As a consequence thereof Special Case No. 349 of 2021 pending before Ld. Add. Sessions Judge, Aurangabad stands quashed.

(R. M. JOSHI, J.)

(SMT. ANUJA PRABHUDESSAI, J.)

ssp