

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

CRIMINAL APPEAL NO. 169 OF 2023

XYZ

... **Appellant**
(Orig. Informant)

VERSUS

1. The State of Maharashtra

2. Abhijit s/o Bharat @ Devidas Sase
Age: 24 years, Occu. Agril.,
Khadgaon, Tq. Pathardi,
Dist. Ahmednagar

... **Respondents**

....

Smt. Manjushri V. Narwade, Advocate for appellant
Mr. A. M. Phule, APP for respondent No.1 - State

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**CORAM : SMT. VIBHA KANKANWADI AND
Y. G. KHOBRAGADE, JJ.**

DATE : 17.03.2023.

ORDER (PER Y. G. KHOBRAGADE, J.) :-

By the present appeal under Section 372 of the Code of Criminal Procedure, the prosecutrix has challenged the judgment and order dated 04.05.2022, passed by the learned Additional Sessions Judge, Ahmednagar in Special Case No.99 of 2021, thereby the respondent No.2 / accused acquitted for the offence punishable under Section 376, 504, 506 of the Indian Penal Code and under Sections 3(1)(w)(i)(ii), 3(1)(r)(s), 3(2)(v-

a) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

2. Brief facts of the case leading to the prosecution trial are that the appellant/prosecutrix and respondent No.2/accused were attending school and college at outstation by travelling in the State Transport Bus from their native place. The appellant/prosecutrix belongs to “Mahar” Hindu, which is recognised as Scheduled Caste. At the relevant time, the appellant/prosecutrix was studying in 10th standard, whereas the accused was pursuing study of B.A. The appellant/prosecutrix and respondent No.2/accused were known to each other as they were neighbours. On a day, the accused proposed the prosecutrix and by giving such false promise of marriage, he took her at his house in absence of his family members and committed sexual intercourse with her. The prosecutrix further alleged that somewhere in the year 2015, the accused first time established physical relations with her and again, in the year 2016, the accused did sexual intercourse with her in Orange Garden. She was on visiting term at the house of accused. The prosecutrix further alleged that since she had attained marriageable age and her family members were searching suitable bridegroom for her;

she insisted the respondent / accused to perform marriage, however the accused asked her to perform marriage as per wish of her family members. He also promised that when she would return from her matrimonial house, he would perform marriage with her. It is the further allegation in the FIR that in the meantime, her family members found suitable bridegroom from her relatives and performed her marriage on 14.08.2016. After marriage, she went for cohabitation with her husband. However, on 09.10.2016, she was having stomachache, therefore, she consumed pain killer, but there was no relief. Ultimately, her in-laws took her for sonography and after conducting sonography it revealed that she is carrying 33 weeks pregnancy. The said fact came to the knowledge of her in-laws and husband, which showed that she had conceived prior to marriage. Her husband gave divorce to her on that count. Subsequently, her family members shifted her at Ahmednagar and on 08.11.2016 she delivered a baby girl, but name of her maternal aunt was shown in her place as the mother of the newly born baby. Her aunt promised her that her marriage would be performed with the accused, but the accused failed to perform marriage with her. Therefore, the prosecutrix approached the accused and his family members, but

they abused her on her caste. Therefore, she lodged a report with Pathardi Police Station, District Ahmednagar, on 25.12.2020. Offence vide Crime No.961/2020 came to be registered against the respondent/ accused for the offences punishable under Section 376, 504, 506 of the Indian Penal Code and under Sections 3(1)(w)(i)(ii), 3(1)(r)(s), 3(2)(v-a) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act. The Investigating Officer recorded statement of the witnesses, collected the documents pertaining to hospitalization of the prosecutrix, etc and on completion of investigation, charge-sheet came to be filed against the accused. The learned Special Court framed the charge at Exh.11. The accused pleaded not guilty and claimed for trial. Accordingly, the plea of accused recorded at Exh.12.

3. In order to bring home the guilt of accused, the prosecution examined five witnesses i.e. PW-1 victim at Exh.15, PW-2 Aunt of the victim at Exh.25, PW-3 Medical Officer Dr. Atul Gugale at Exh.26, PW-4 father of the victim at Exh.27 and PW-5 Investigating Officer Sudarshan Munde at Exh.30. After conclusion of the trial, the statement of the accused under Section 313 of Cr.P.C. was recorded at Exh.32. The defence of the accused is of total denial and false implication.

4. Learned Special Court under the Atrocities Act, passed the impugned judgment on 04.05.2022 and acquitted the accused of the offences punishable under Section 376, 504, 506 of the Indian Penal Code and under Sections 3(1)(w)(i)(ii), 3(1)(r)(s), 3(2)(v-a) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act.

5. Heard Smt. Manjushri V. Narwade, learned Counsel appearing for the appellant/victim and Mr. A. M. Phule, learned APP for the State, at length for the purpose of admission.

6. The learned Counsel appearing for the appellant/prosecutrix vehemently canvassed that the prosecution has adduced supporting evidence to prove the contents of FIR. It has been proved that the appellant prosecutrix and the respondent No.2 accused were knowing each other, being neighbours. There was love affair between them. Accused established physical relations with the prosecutrix from the year 2015 under false promise of marriage. The prosecutrix got conceived from accused. She was forced by the circumstances to get married with another boy, as accused refused to perform marriage with her. During the intervening period, the parents of prosecutrix performed her

marriage on 14.08.2016 with the boy of their choice. However, it was revealed that the prosecutrix was carrying pregnancy of 33 weeks and on that count her husband divorced her. She delivered a baby girl on 08.11.2016 in the hospital. She was constrained to give the name of her maternal aunt as the mother of newborn girl. Accused had promised to perform marriage with the prosecutrix, but failed to keep it. When the prosecutrix visited the house of accused, at that time he as well as his family members had abused her on her caste.

7. The learned counsel appearing for the appellant/prosecutrix canvassed that the prosecution examined five witnesses and brought substantial material on record as well as D.N.A. report Exh.28 (1) and (2) which proves that, the appellant/prosecutrix and the respondent No.2/ accused are biological parents of the newborn female child. It supports her statement that the accused had committed rape on her, against her will. The evidence of prosecutrix stands corroborated with PW-3 Dr. Atul Gugale. There is no dispute that the victim is member of Scheduled caste. Therefore, the learned trial Court ought to have held accused guilty. Learned trial Court failed to appreciate the evidence in positive manner and passed the impugned order,

which is perverse, illegal, bad in law and requires to be quashed and set aside.

8. The learned APP supported the contentions canvassed on behalf of the appellant.

9. Having regard to the submissions canvassed on behalf of both the sides, we have gone through the record.

10. PW 1- victim has deposed as per version of oral report Exh.16 in her examination-in-chief. She has admitted that she had not disclosed about her relations with the accused to her family members or family members of the accused. She admits sexual intercourse between her and accused since considerable time. She has then stated that after she had conceived, accused provided pills for abortion, but there was no positive effect. Accused had in fact refused to perform marriage with her at that time, but she had not lodged any report at that point of time. Rather she performed marriage with the boy of the choice of her parents on 14.08.2016. She has not clarified as to whether her parents and family members were having knowledge about her pregnancy prior to her marriage. She has tried to contend that she was also not knowing about the pregnancy till the sonography was done.

This appears to be unbelievable. It was the pregnancy of 33 weeks, therefore it raises doubt about the her own ignorance as claimed. Thereafter, within a month i.e. on 08.11.2016, she had delivered a baby girl.

11. The accused has not disputed spot panchanama Exh.22, the victim's caste certificate Exh.23, his physical examination Report Exh.24, prosecutrix's examination Report Exh.19, D.N.A. Report Exh.28(1) and (2). The D.N.A. report Exh.28 (1) and (2) proves that the victim and accused are biological parents of baby girl and it is not disputed by the accused /respondents.

12. The evidence of the prosecutrix does not suggest that sexual intercourse between her and the accused were against her will and at the relevant time she was not minor. As per prosecution version, the accused committed sexual intercourse with her lastly in the month of February 2016, however, she has not lodged any complaint. The FIR has been filed after a lapse of four (4) years. The delay has remained unexplained. Benefit of the same should go to accused.

13. Further, PW-1 admitted in her cross examination that after delivery of baby, she persuaded Nursing course and execution of an agreement on 14.10.2016 as well as receipt Exh.21 between her and the accused. PW-1 admitted about receiving payment of Rs.5,00,000/- (Rupees Five Lakh) from the accused. Thereafter, she lodged a report Exh.16 on 25.12.2020 and her supplementary statement was recorded on 26.12.2020, and subsequently, the Judicial Magistrate, First Class recorded her statement under Section 164 of Cr.P.C. In all these documents she has not disclosed the receipt of amount from accused. Possibility of extracting more amount after lodging of FIR by the prosecutrix can not be ruled out. It renders her testimony untrustworthy.

14. The evidence of the prosecution witnesses reveals that the prosecutrix despite having love as well as physical relations with the accused went on to marry with another boy by concealing her relationship from family members as well as husband. It indicates that the prosecutrix herself was not serious to lodge complaint against the accused, in spite of conceiving prior to her marriage from the accused. Not only this, but the prosecutrix did not lodge the report immediately after her delivery. Therefore, conduct of the prosecutrix itself shows that on acceptance of huge

amount, she had no intention to take any action against the accused. This can happen only when she was the consenting party. She had the knowledge of her actions and acts. Therefore the sexual intercourse between her and accused will not amount to 'rape' within the definition of Sec. 375 of Indian Penal Code.

15. In the case of *Babasaheb S/o Bhimrao Mogle Vs. the State of Maharashtra and another – 2021(6) Mh.L.J. (Cri.) 315*, the coordinate Bench of this Court held that “the failure to keep the promise at a future uncertain date to reasons not very clear, does not always amount to a misconception of fact at the inception of the act itself. The meaning of misconception of fact, the fact must have been on immediate relevance. “The acknowledged consensual physical relationship between the parties would not constitute an offence under Section-376 of the Indian Penal Code.”

16. In the case of *Dr. Dhruvaram Murlidhar Sonar Vs. The State of Maharashtra & Ors – 2019 ALL MR (Cri) 771 (S.C.)*, wherein the Hon'ble Supreme Court held thus:-

“Section 90 of Penal Code 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.

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 of the IPC.”

17. In the case of **Anil @ Bowa s/o Aashanna Nannewar Vs. State of Maharashtra – 2009 ALL MR (Cri) 15**, wherein the case of **Uday Vs. State of Karnataka** reported at **2003 ALL MR (Cri) 975 (S.C.)**, and it has been held that: -

"19. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375, IPC, was dealt with by a Division Bench of the Calcutta High Court in Jayanti Rani Panda vs. State of W.B. (1984 Cr.L.J. 1535). The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday's case [2003 ALL MR (Cri) 975 (S.C.)] (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

"Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is ... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged."

The discussion that follows the above passage is important and is extracted hereunder :

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." (emphasis supplied)."

The Court then went on to observed in para 20 as under :

"20. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause second. ..."

Thus only if it is established as a fact that at the very inception of making promise, the accused did not really entertain the intention of marrying the prosecutrix and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375, clause second."

18. Further, the evidence of prosecution does not support about her sexual exploitation at the hands of accused, because the

victim belongs to Scheduled Caste. When she herself says that it was the love affair between her and the accused then it is hard to believe that the cast of the prosecutrix would be a barrier at a later point of time. By the time she made such allegations in FIR, she had already extracted amount from the accused. Therefore, possibility of use of cast card, to pressurize the accused cannot be ruled out. The learned trial Court passed the impugned judgment and order on 26.12.2020 and acquitted the accused for the offence punishable under Section 376, 504, 506 of the Indian Penal Code and under Sections 3(1)(w)(i)(ii), 3(1)(r)(s), 3(2)(v-a) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act., which does not appear to be perverse, illegal, bad in law. Substantial grounds are not set out to interfere with the findings recorded by the learned trial Court.

19. In view of above discussions, the present appeal is hereby dismissed.

[Y. G. KHOBRADE, J.] [SMT. VIBHA KANKANWADI, J.]