

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

CRIMINAL REVISION APPLICATION NO. 34 OF 2023

Harish Panditrao Bhailume
Age 41 years, Occ. Temporary Service,
R/o. Karjat, Tq. Karjat,
Dist. Ahmednagar.

**.. PETITIONER
[original accused]**

VERSUS

1. The State of Maharashtra
Through it's Police Inspector,
Police Station, Karjat,
Tq. Karjat, Dist. Ahmednagar.

2. Gautami Kisan Kadam
Age 36 years, Occ. Household,
C/o. Deepak Sambhaji Kadam,
R/o. Siddharth Nagar, Karjat,
Tq. Karjat, Dist. Ahmednagar.

(Respondent No.2 – Original complainant)

..RESPONDENTS

Mr. Rahul B. Tamak, Advocate for the applicant.
Mr. S.B. Narwade, APP for respondent No.1.
Mr. Vinayak P. Narawade and M.V. Narwade, Advocate for respondent
No.2.

CORAM : S.G. CHAPALGAONKAR, J.

**RESERVED ON : 29 SEPTEMBER, 2023
PRONOUNCED ON : 12 OCTOBER, 2023.**

JUDGMENT :-

1. The applicant impugns the order dated 20.5.2022 passed by the Additional Sessions Judge, Shrigonda below Exh.8, in Sessions Case

No. 23 of 2020, thereby rejecting the application filed by the applicant under Section 227 of the Code of Criminal Procedure, seeking discharge of the offence punishable under Sections 376 and 420 of IPC.

2. The respondent No.2 lodged complaint dated 13.6.2019 with Police Station, Karjat , Dist. Ahmednagar alleging that since 1997-98, she had love affair with Harish Panditrao Bhailume (present applicant). Both of them were pursuing education in Dada Patil College, Karjat. They had affection for each other and out of such love affair, they developed sexual relations. She alleges that under the false promise of marriage, the accused demanded sexual favour from her and maintained sexual relationship. Twice she had conceived pregnancy but aborted on persuasion of the accused. When she realized that applicant is avoiding to marry her, she lodged report dated 17.12.2018 with police station, however, matter was settled when applicant took her at the house of his maternal uncle and then they resided together in a rented room of Rashidbhai Zarekari. Even thereafter, applicant suspected her character, tortured mentally and physically.

3. The police took cognizance of complaint, which culminated into registration of Crime No. 312 of 2019 for the offences punishable under Sections 376 and 402 of IPC.

4. In pursuance of registration of offence, applicant approached this Court seeking protection of pre-arrest bail vide Anticipatory Bail Application No. 888 of 2019 which came to be allowed vide order dated 29th August, 2019, with observation that the informant maintained sexual relations with the accused for 20 to 25 years. As such, prima facie, it is a case of consensual sexual relationship and cannot be termed

as rape under false promise.

5. The investigation progressed. The statement of the informant, her father Kisan Sitaram Kadam, brother Rohan Kisan Kadam and Mother Lata Kisan Kadam are recorded. Finally, the charge sheet came to be filed against the applicant for the offences punishable under Sections 376 and 420 of IPC. Pertinently, the applicant had approached this court under Section 482 of the Cr.P.C. vide Criminal Application No. 3109 of 2019 seeking to quash the FIR and further proceeding in Crime No. 312 of 2019. However, said application was dismissed as withdrawn with liberty to file an application for discharge before the trial court in deference to filing of charge sheet.

6. Mr. R.B. Temak, learned advocate appearing for the applicant vehemently submits that the respondent No.2 had consensual physical relationship with the applicant since school days i.e. for more than 20 years as can be gathered from the contents of the complaint itself. He would submit that the applicant and respondent No.2 had developed affinity during school days. The love affair continued between them. Eventually, physical relationship was developed. He would further submit that in the year 2011, the respondent No.2 married with Shrikant Pratap Kharat, resident of Ghatkopar. After residing for 5 years with him she again continued her relationship with the applicant and lastly, filed complaint alleging cheating and rape by applicant under the pretext of false promise of marriage.

7. Mr. Temak would submit that the physical relationship was developed out of affection and love affair but not because of false promise of marriage. The sexual relationship between the applicant and

respondent No.2 cannot be given colour of cheating and rape. He would, therefore, submit that taking the entire material in charge sheet as it is, no triable case can be made out against the applicant. The Sessions Judge failed to exercise jurisdiction vested with him under Section 227 of the Code of Criminal Procedure in judicious manner, consequently, rejected the application below Exh.8 seeking discharge.

8. Mr. S.B. Narwade, learned APP appearing for the State vehemently opposes the contentions raised on behalf of the applicant. He would submit that the contents of the FIR clearly depicts that the respondent No.2 continued physical sexual relationship only because of promise of marriage by the applicant. He would submit that although there is a long standing physical relationship, it is under expectation of marriage. The respondent No.2 was in deep love with the applicant. They took oath to perform marriage. There is evidence to indicate that till filing of the complaint, they resided together in a rented house. The respondent No.2 was lured to continue physical relationship with the applicant. He would further point out that the respondent No.2 had conceived pregnancy twice. But, on persuasion of the applicant, it was aborted. The statement of the Doctor and medical papers supports case of respondent No.2.

9. Learned advocate for the respondent No.2 supplement the submissions advanced on behalf of the State. He would urge that the applicant had approached this Court under Section 482 of Cr.P.C. seeking quashment of the FIR in Criminal Application No. 3109 of 2019. On disinclination of this court to grant the relief, same was dismissed as withdrawn. He would further urge that the evidence available in the charge sheet is sufficient to raise grave suspicion against the applicant.

The intention of the applicant is explicit from his conduct. He had no intention to perform marriage with respondent No.2, however, under a false pretext to marry, he continued physical relations, which constitutes the offence under Sections 376 r/w. 420 of IPC for which trial is necessary.

10. Having considered the submissions advanced, it would be necessary to advert to the powers of the Court under Section 227 of the Code of Criminal Procedure, which reads thus :-

“227. If, upon consideration of the record of the case and the documents submitted therewith and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

The Supreme Court of India, in the matter of “ ***Union of India Vs. Prafulla Kumar Samal and another***” (1979) 3 SCC 4, laid down the parameters to exercise jurisdiction under Section 227 of the Code of Criminal Procedure. Para. 10 of the said judgment reads thus :-

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge :-

(1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(2) Whether the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained, the Court will be fully justified in framing

a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however, if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court can not act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as it he was conducting a trial.”

11. Adverting to the facts of the present case, apparently, in her complaint, respondent No.2 states that her family was residing in the same lane where the applicant was residing. They were childhood friends having love affair since 1997-98. She states that out of said love affair, the physical relationship was developed. During school days, they had intention to marry and exchanged promises in that line. She alleges that the physical relationship continued with the understanding of the proposed marriage. The applicant had promised to marry after completion of his education. However, he protracted giving reason that his sisters are yet to be married and then for the pretext that he has to find out a good job. She alleges that she conceived pregnancy twice and aborted on persuasion of the applicant. She states that in the month of December, 2018, she realized that the applicant is protracting the marriage or retracting from his promise, she made complaint with the

police, but again compromised and resided with the applicant in a rented premises.

12. If such allegations are read together, it is difficult to gather the necessary ingredients of rape. At this stage, Section 375 of IPC needs to be reproduced for ready reference which reads thus :-

*“375. Rape – A man is said to commit “rape” if he :-
under the circumstances falling under any of the
following descriptions :-*

Firstly— 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.

Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly — With or without her consent, when she is under sixteen years of age.

Explanation — Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception — Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Similarly, it is apposite to refer to Section 90 of the IPC, which reads thus:-

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.”

13. The aforesaid provisions are interpreted by the Supreme Court of India in the case of ***Pramod Suryabhan Pawar Vs. State of Maharashtra and others*** (2019) 9 SCC 608, and after referring to the catena of judgments it is observed in para. 18 as under :-

“18. To summarize 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”.

14. The allegations in the FIR in present case do not appear to

make a out a case of false promise. The physical relationship of applicant and respondent No.2 was purely out of affection developed during tender age of schooling and it continued for years together. It cannot be gathered that the respondent No.2 established physical relations under misconception of fact arising out promise to marry. Even it cannot be gathered that the applicant had ever made false promise with intention to have sexual favour from the respondent No.2. There is no nexus between the initiation of sexual relationship of the applicant with respondent No.2 and the false promise to marry.

14. On visiting the contents of the charge sheet, it is pertinent to note that the statements of the family members of respondent No.2 are recorded under Section 161 of the Cr.PC. It can be gathered from these statements that on 3.1.2011, the respondent No.2 married with Shrikant Pratap Kharat, R/o. Ghatkopar and she resided with him for a considerable period. The respondent No.2 had quarrel with her husband, even she lodged complaint against him. Thereafter, she left his company and started residing with the applicant, so also, continued her physical relations with him.

15. The aforesaid facts clearly indicate that the continuation of the sexual relationship has nothing to do with the promise of marriage. The respondent No.2 had married with Shrikant Kharat and still she continued her physical relationship with the applicant.

16. If the aforesaid material in the charge sheet is considered alongwith the contents of the FIR, so also, the legal position espoused by the Supreme Court of India in the matter "*Promod Suryabhan Pawar Vs. state of Maharashtra*"(*supra*) it can be concluded that a case is made out

for discharge. Pertinently, the applicant has placed on record a copy of the FIR lodged by the respondent No.2 against her husband Shrikant Kharat dated 17.3.2016 in Crime No. 98 of 2016, wherein, she alleges that her husband Shrikant Kharat and his family members ill-treated her on demand of dowry and drove her out of home on 20th February 2016. Although this FIR is not made part of the charge sheet in present case, there is resemblance regarding contents of the FIR and the statements of the parents and brother of respondent No.2. However, the learned Sessions Judge erroneously refused consideration for the reason that it is not made part of the charge sheet. It is trite that impeccable material relied by parties can be considered while adjudicating application for discharge.

17. Considering the totality of the facts and circumstances of case, the material in the charge sheet coupled with FIR in Crime No. 98 of 2016 lodged at the instance of respondent No.2 against her husband, the criminal revision deserves to be allowed by setting aside the impugned order. Hence, the following order :-

:-O R D E R:-

[i] Criminal Revision Application is allowed.

[ii] The impugned order dated 20.5.2022 passed by the Additional Sessions Judge, Shrigonda below Exh.8 in Sessions Case No. 23 of 2020 is hereby quashed and set aside;

[iii] The application below Exh.8 filed by the applicant in Sessions Case No. 23 of 2020 seeking discharge under Section 227 of

Cr.P.C. for the offence under Sections 376 and 420 of IPC stands allowed;

[iv] Consequently, the applicant stands discharged in Sessions Case No. 23 of 2020 for the offence punishable under Section 376 and 420 of IPC.

[iv] Bail bonds of the applicant shall stand cancelled.

[v] The learned Additional Sessions Judge, Shrigonda be informed accordingly.

[vi] The criminal revisions application stands disposed of.

[S.G. CHAPALGAONKAR]
JUDGE

grt/-