

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO.3 OF 2020

- 1 Shri Mahendra Ladu Sawant, ...Petitioner
Son of Ladu Sawant, aged 30 years,
Indian National, resident of Sawantwada,
Mandrem, Pernem- Goa.

v/s.

- 1 State through Public Prosecutor,
High Court of Bomaby, Altinho,
Panaji- Goa.
- 2 The Police Inspector,
Porvorim Police Station, Porvorim, Bardez-
Goa.
- 3 Miss Dipashree Walawalkar,
Daughter of Sunil Walawalkar, of major age,
resident of C/o. Almeida, Fatto- wado, Nerul, ... Respondents
Bardez Goa.

Mr. A.D. Bhobe with Ms. A. Fernandes, Ms. S. Shaikh and Ms
Ramona Prazeres, Advocates for the petitioner.

Mr. Pravin Faldessai, Additional Public Prosecutor for
respondent Nos. 1 and 2.

Mr. S. Shetye h/f Mr. V. Amonkar, Advocate for respondent
No.3.

CORAM: M.S. SONAK &
BHARAT P. DESHPANDE,JJ.

RESERVED ON: 4th September, 2023.

PRONOUNCED ON : 6th September, 2023.

JUDGMENT: (Per BHARAT P. DESHPANDE, J.)

1. Rule. The rule is made returnable forthwith. The matter is taken up for final disposal with the consent of the learned Counsel for the respective parties.
2. Heard Mr. A.D. Bhobe with Ms. A. Fernandes, Ms. S. Shaikh and Ms Ramona Prazeres, learned Counsel for the petitioner, Mr. Pravin Faldessai, learned Additional Public Prosecutor for respondent Nos. 1 and 2 and Mr. S. Shetye h/f Mr. V. Amonkar, learned Counsel for respondent No.3.
3. The petitioner, who is an accused in FIR No.151/2018 lodged on 01/11/2018 for the offence punishable under Section 376, on a complaint made by respondent No.3, preferred the present petition under Section 482 of CrPC praying for quashing of such FIR.
4. Mr Bhobe learned Counsel for the petitioner submits that ingredients of Section 375 of IPC are not at all made out in the present matter since the complainant disclosed that she, along with the accused, were having a love relationship and were staying together. He would then submit that physical contact was not on the promise of marriage. Such physical contact was with the consent of respondent No.3, and only when she suspected another girl in the life of the petitioner she filed the complaint.

5. Mr. Bhobe would submit that, at the most, it could be considered as a breach of promise, and there was no such promise from the inception, only with an intention to cheat. He placed reliance on the following decisions:

1. **Shambhu Kharwar v. State of Uttar Pradesh and Another** [2022 SCC OnLine SC 1032]

2. **Sonu alias Subhash Kumar v. State of Uttar Pradesh and Another** [2021 SCC OnLine SC 181]

3. **Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and Others** [(2019) 18 SCC 191]

4. **Pramod Suryabhan Pawar v. State of Maharashtra and another** [(2019) 9 SCC 608]

5. **Rajesh Sankarsan Tripathy v. State of Maharashtra and another** [2019 SCC OnLine Bom 2376]

6. **Tikal Raj v. State of Himachal Pradesh** [(2016) 4 SCC 140]

7. **Deepak Gulati v. State of Haryana** [(2013) 7 SCC 675]

8. **Uday v. State of Karnataka** [(2003) 4 SCC 46]

6. The learned Public Prosecutor Mr. Faldessai would submit that the complaint disclosed that there was a promise to marry, and under that pretext, the physical relationship developed, but subsequently, the complainant realised that the petitioner made such a false promise and, therefore offence under Section 376 is made out.

7. Mr. S. Shetye h/f. Mr. Vibhav Amonkar would submit that the complaint itself shows that there was a promise to marry, and only on that basis the petitioner took advantage and developed physical relationship with the complainant and subsequently, it was observed that there was a false promise. He would submit that the aspect as to whether the promise from the inception was to deceive and to obtain consent by a misconception will have to be gone into during trial. He would submit that at this stage and from the contents of the FIR, which is supportive of the medicate evidence, ingredients of Section 376 of IPC are clearly made out.

8. The rival contentions fall for determination.

9. Section 375 of IPC deals with “Rape”, wherein clause (d), secondly, it refers to “without her consent”.

10. The question of consent is also covered under Section 90 of IPC, which reads thus :

“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”

11. Thus, when consent is either obtained under fear of injury or misconception of fact, it cannot be termed as free consent in the eyes of law and specifically for the offences under IPC.

12. The Supreme Court 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.

13. In the case of **Dr Dhruvaram Murlidhar Sonar**(supra), the Supreme Court observed in paragraph 15 as under :

“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.”

14. In the case of **Pramod Pawar** (supra), the Supreme Court observed 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. However, when a woman does not “consent” to the sexual acts described in the main body of Section 375, the offence of rape has occurred.

15. The Supreme Court has discussed the distinction between a false promise and a breach of promise in the case of **Deepak Gulati v/s. State of Haryana** [(2023) 7 SCC 675]. It was observed that there is a distinction

between the mere breach of a promise, and not fulfilling a false promise. The court must examine whether there was made, at an early stage, a false promise of marriage by the accused.

16. In **Dr. Dhruvaram Murlidhar Sonar**(supra), the Supreme Court has observed in paragraph No.23 as under:

“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 of the IPC.”

17. In the case of **Shambhu Kharwar**(supra) the Apex Court observed that 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.

18. In the case of **Sonu alias Subhash Kumar** (supra) the Supreme Court again after reiterating its earlier decisions found that the FIR as well as the

statement under Section 164 of CrPC, shows that no offence has been established. The complaint in that case shows three features (i) The relationship between the appellant and the second respondent was of a consensual nature; (ii) The parties were in the relationship for about a period of one and a half years; and (iii) Subsequently, the appellant had expressed a disinclination to marry the second respondent which led to the registration of the FIR. with these three features emerging from the FIR, the Supreme Court observed in paragraph 11 as under:

“11. Bearing in mind the tests which have been enunciated in the above decision, we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482 of CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482 of CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established.”

19. The FIR in the present matter would clearly go to show that the complainant is a native of Bazaran, Vengurla, Maharashtra but from the past six years staying in Goa at Fatto-wado, Nerul. She was working with Deltin Suites in the Security Department wherein the accused was also working in housekeeping. Since the complainant and the accused were working together, they became friends and subsequently their friendship turned into relations from March 2016. The complaint further shows that

on account of their relations, they started staying together at Fatto-wado Nerul since July,2017. The complaint further shows that since their relation developed, both of them started roaming together as the accused had promised to marry her. The complaint further show that on number of occasions the accused took the complainant to his house at Mandrem to meet his family members. Even the complainant stayed at the house of accused at Mandrem during the wedding of elder brother of accused which took place somewhere in July,2018.

20. The complaint further shows that since July 2019 they were in a physical relation and on number of occasions the accused had intercourse with the complainant at her rented room and even at Sheh Hotel as well as in the house of the accused during her stay at the time of marriage of the brother of accused. Similarly, such physical relations continued up to 2018.

21. The complaint then shows that somewhere in September, 2018 she got the knowledge that the accused developed a friendship with other girl working in Deltin Suites. When she confronted the accused, he stopped talking and staying with her in the said rented room. However, after a few days the accused again started visiting the rented room of the complainant and promised that he had no relations with the said girl. However, subsequently, the accused told the complainant that he did not wish to keep any relations with the complainant. The complainant then met the family members of the accused. However, they refused to accept the complainant on the grounds of a different caste. The complaint further disclosed that due to such refusal, she consumed phenyl and was admitted

in Azilo Hospital, Mapusa for two days. Only thereafter she filed a complaint stating that the accused committed sexual intercourse with her on the pretext of false promise.

22. The statement of the complainant recorded under Section 164 of CrPC was also similar. The medical examination no doubt shows about the intercourse, however, such report will not help to prove the aspect of rape since the complainant herself claimed that she gave consent on the promise of marriage.

23. From the overall reading of the complaint as well as the contents of the chargesheet, it is clear that the complaint nowhere says that at the inception itself a promise was given by the accused which was false to his own knowledge. However, the complaint shows otherwise. Since July 2017 till August 2018 i.e. for almost one year the complainant and the accused stayed together in the rented room. The accused even took the complainant to his house at Mandrem and introduced her to his family members. She even stayed in the house of the accused at Mandrem during the marriage ceremony of the brother of the accused. Thus it clearly goes to show that the consent was with the knowledge and the fact that there was a love relationship between them. Both stayed together in one room which further justified that they were in a relationship. In such circumstances, the complainant who is an adult and a working woman gave consent of her own free will for such a relationship and not only on promise of marriage.

24. Only because later on complainant suspected that the accused is friendly with another girl, the dispute started which finally resulted in lodging the complaint.

25. In the backdrop of the above facts, it is difficult to accept that ingredients of Section 376 of IPC are made out. The crucial issue which is to be considered is whether the allegations indicate that the accused had given a promise to the complainant to marry at the inception which was false and on that basis the complainant was induced to have a sexual relationship. Taking the allegations in the FIR and the chargesheet as they stand, we consider that crucial ingredients of an offence under Section 375 of IPC are missing/absent. The relationship between the petitioner and the complainant was purely consensual nature. Such a relationship was in existence prior to the alleged promise of marriage. The physical relationship was more on the basis of love and affection and not only on the basis of an alleged promise to marry. Even otherwise, the complaint itself shows that the complainant went to the house of the accused and discussed with his relatives about the marriage. The relatives of the accused informed that their marriage is not possible because of the caste of the complainant. Thus these circumstances at the most could be considered as a breach of promise and not a false promise.

26. In the case of **Neeharika Infrastructure v/s. State of Maharashtra** [2021 SCC Online SC 315], the Supreme Court reiterated the parameters laid down in its earlier decisions of **R.P. Kapur v/s. State of Punjab** [AIR 1960 SC866] and **State of Haryana v/s. Bhajan Lal** [1992 Supp (1) SCC

335] and held that while the Courts ought to be cautious in exercising powers under Section 482, they do have the power to quash. The test is whether or not the allegations disclose the commission of a cognizable offence. The Court does not enter into the merits of the allegations or trench upon the power of the investigating agency to investigate into allegations involving the commission of a cognizable offence.

27. Keeping in mind the said proposition and applying to the matter in hand and more particularly paragraph No. 102(1) of the case of **Bhajan Lal**(Supra), we could fairly conclude that the allegations made in FIR even if taken on its face value could be accepted in its entirety does not prima facie constitute the offence under Section 376 or make out the case against the accused.

28. We, accordingly, allow the petition as per prayer clause ‘a’, which reads thus:

“(a) The petitioner states that the FIR No.151/2018 dated 01/11/2018 being registered under Section 376 of IPC and the Final Form/Report/Charge Sheet No.124/2018 dated 22/12/2018 is wholly illegal, without jurisdiction and in excess of jurisdiction and therefore, deserves to be quashed and set aside.”

29. The rule is made absolute in the above terms.

30. There shall be no order for costs.

BHARAT P. DESHPANDE, J.

M.S. SONAK, J.