

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL REVISION APPLICATION NO. 10 OF 2023

Balkrishna Sakharam Mandavar ...Applicant

Versus

State Of Maharashtra And Anr. ...Respondents

• • • •

Mr. Ashok Mundargi, Sr. Advocate a/w Mr. Niranjan Mundargi a/w Mr. Jinal Shekhawat, Adv. S. Lad i/by Mr. Santosh Tiwari, Advocate Applicant.

Mr. Y. Y. Dabake, APP for the Respondent – State.

CORAM : PRAKASH D. NAIK, J.

DATE : 18th JULY, 2023.

PER COURT:

1. Vide order dated 22nd February, 2023 notice of final disposal of this revision application at admission stage was issued to Respondent, returnable on 21st March, 2023. Since notice to Respondent No.2 was shown to be awaited, application was directed to be listed on 6th June, 2023. Application was listed on 6th June, 2023. Respondent No.2 was not present in the Court. It was adjourned to 28th June, 2023. The application was listed on 28th June, 2023. Vide order passed on that day it was recorded that despite service none appears for Respondent No.2. It was adjourned to 18th July, 2023. Today Respondent No.2 is not present in Court.

SUNNY
ANKUSHRAO
THOTE

Digitally signed
by SUNNY
ANKUSHRAO
THOTE
Date:
2023.07.27
18:15:14 +0530

2. The Applicant is prosecuted for an offence under Section 376, 417 of Indian Penal Code (for short 'IPC'). The First Information Report (for short 'FIR') was registered on 16th July, 2018 vide C.R. No.180 of 2018 with V.P. Marg Police Station.

3. The case of the prosecution is as under :-

The victim/prosecutrix is aged around 34 years. She is a married lady. Her son aged 21 years is residing with her parents. She is suffering from HIV- Positive since 2004. She is taking treatment at Uttarpradesh. She owns room at Kumbharia Chawl. After death of her husband, her mother-in-law was illtreating her. She has filed complaints against her. She is follower of Sant Nirankari Mission. She attends Satsang. In January 2018 she met one person at 'Satsang' and told him that her mother-in-law is troubling her. That person gave cellphone number of Applicant. She contacted Applicant and narrated her problems. He told her to meet him on 27th January, 2018 at Kharghar which was a place of Satsang. The victim met him at Kharghar. On 28th January, 2018 the Accused/Applicant told her to meet him again. She was introduced to son of Accused. She told the Accused that she wants to discuss her problems in privacy. She informed Accused about harassment by her mother-in-law. She also told him that due to

financial constraints she intends to sell her room. The Accused told her that he would help her after returning to Mumbai. Thereafter they started talking to each other on cellphone for four to five times a day. In February 2018, the Accused called the victim at Bombay Central Station. She reached at station at 11:00 a.m. The Accused came with his vehicle. They had snacks in hotel. They went around at Mumbai Central. In the evening she was taken to Girgaum Chowpati. At about 8:30 p.m. she went home. They used to meet frequently. Accused was insisting that she should accompany him to guest house. She refused. On 8th or 9th February she visited Mumbai Central at 11:00 a.m. She was taken to Kumbharwada at discourse hall. They chatted with each other. The Accused told her that he is in love with her. He would help her in selling her room. He would treat her like his wife. He would provide residence on rental basis to her. She would be relieved from trouble by her mother-in-law. He also told her that he intends to maintain physical relationship with her. She told him that she is HIV-Positive. Accused said that he would take precautions. With consent there was sexual relationship between them. They again met at same place after two days and had physical relationship. After few days Accused did not contact her. He blocked her phone. He told her not to phone him as his son does not like it. He

avoided her. Thus, she realized had that under promises, the Accused had physical relationship with her.

4. The Applicant preferred an application for discharge before the trial Court which has been rejected vide order dated 23rd September, 2022.

5. Learned counsel for the Applicant submitted that the offence under Section 376 or under 417 of IPC are not made out. The FIR and the other statements which forms part of charge-sheet does not support the charge under Section 376 and 417 of IPC. From the contents of FIR it is implicit that assuming the allegations to be true the relationship was consensual. There is delay in lodging FIR. The CDR collected during investigation does not support prosecution case. The Applicant is aged around 67 years. The trial Court has erroneously rejected the application for discharge.

6. Learned APP submitted that the *prima facie* case is made out against the Applicant. The statement of complainant discloses that the Accused had physical relationship with the complainant by giving some promises and subsequently backed out from the promises. The consent was obtained by giving such promises. Hence under Sections 376 of IPC as well as 417 of IPC are attracted in this case.

7. From the tenor of FIR it is apparent that the victim met Applicant/Accused. They exchanged their cellphone numbers. It is alleged that Applicant had informed the complainant that he would help her for selling residential premises and that he would maintained her as his wife. Although the complainant disclosed that she was suffering from diseased, Accused maintained physical relationship on two occasions. The complainant has specifically stated that the physical relationship between them was consensual. Assuming the allegations to be true the relationship was of consensual nature. None of the ingredients constituting the offence under Sections 376 or 417 of IPC are made out.

8. In the case of *Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr. (2019)9 SCC 608*, it was held that, where the promise of marriage is false and the intention of maker at the time of making promise itself was not to abide by it but to deceive women to convince her to engage in sexual relations, there is a “misconception of fact” that vitiates the women’s “consent”. On the other hand, a breach of promise cannot be said to be a false promise. To establish false promise, maker of promise should have had no intention of upholding his word at the time of giving it. The “Consent” of women under Section 375 is vitiated on the

ground of “misconception of fact” where such misconception was the basis for her choosing to engage in said act. “Consent” of a women 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 women’s decision to engage in the sexual act.

9. In the aforesaid decision, the primary contention advanced by the complainant was that the accused engaged in sexual relations with her on the false promise of marrying her, and therefore her “consent”, being promised on a “misconception of fact” stands vitiated. The Court further observed that the apex Court had repeatedly held that, consent with respect to Section 375 of 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.

10. In the case of *Dhruvaram Murlidhar Sonar Vs. State of Maharashtra*, (2018) 18 SCC 191, it was observed as follows :

“15. ... An inference as to consent can be drawn if only based on evidence of 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”.

11. In the case of *Kaini Rajan Vs. State of Kerala*, (2013) 9 SCC 113, it was observed as follows :

“12. ...“Consent” for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances”.

12. In the case of *Anurag Soni Vs. State of Chhatisgarh*, (2019) 13 SCC 1, it was observed as follows :

“12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the

rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC.”.

13. In the case of *Deepak Gulati Vs. State of Haryana, (2013) 7 SCC 675*, it was observed as follows :

“21.... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. 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 misrepresentation made to her by the 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 so. Such cases must be treated differently”.

14. In the case of *Uday Vs. State of Karnataka, (2003) 4 SCC 46* the complainant was a college-going student when the accused promised to marry her. In the complainant’s statement, she admitted that she was aware that there would be significant opposition from both the complainant’s and accused’s families to the proposed marriage. She engaged in sexual intercourse with the accused but nonetheless kept the relationship secret from her family. The Court observed that in these circumstances the accused’s promise to marry the complainant was not of immediate

relevance to the complainant's decision to engage in sexual intercourse with the accused, which was motivated by other factors : (Paragraph 25 reads as follows)

“25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that, the prosecutrix stealthily went out with the appellant to a lonely place at 12 o’ clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married.”

15. In the light of the law laid down in the aforesaid decisions and applying it to the facts of the present case, it cannot be said that the “consent” was obtained for maintaining physical relationship under the “misconception of fact”. None of the ingredients to constitute to alleged offences invoked against the applicant are made out. For lack of prima facie case against the applicant, the impugned order is required to be set aside and consequently the applicant has to be discharged from the impugned proceedings.

ORDER

- i. Criminal Revision Application No. 10 of 2023 is allowed;
- ii. Impugned order dated 23rd September, 2022 passed by Additional Sessions Judge, City Civil and Sessions Court Greater Bombay is set aside.
- iii. The Applicant is discharged from the Sessions Case No.14 of 2019.
- iv. Application stands disposed off.

(PRAKASH D. NAIK, J.)