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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
REVISION APPLICATION NO.344 OF 2022

Dripta Pradeepkumar Dutta] .. Applicant
vs.
State of Maharashtra & Anr.] .. Respondents

Mr.Akshay Dunde a/w J.V. Bhosale, Anirudh Rote and Sonali Bhosale
i/b Expert Jurist LLP for the Applicant.
Ms.Anamika Malhotra, APP for the State.

CORAM : BHARATI DANGRE, J

DATE : 11th April, 2023

JUDGMENT :

1] The Applicant who was charged for committing an offence punishable under Section 376, 354, 354A, 417 of the Indian Penal Code, has filed Application under Section 227 of the Cr.P.C., seeking his discharge.

The Additional Sessions Judge, Borivali Division, Mumbai, rejected the Application by a perfunctory order, which recorded that there is sufficient material and prima-facie ground to frame charge against the Applicant, which require detail, oral as well as documentary evidence and examination of witnesses on merit.

It is further recorded that the complainant and ultimately the prosecution, will face an irreparable loss if the Applicant is discharged without giving an opportunity to examine and scrutinize the oral as well as documentary evidence on merit.

It is this order, which is assailed before me and the submission advanced by Mr. Akshay Dunde is, the Court has failed to exercise the power available to it under Section 227 of the Cr.P.C., where, it is permissible to discharge an accused on finding that there is no sufficient ground for proceeding against him.

2] The factual matrix would take me back to CR No.166/2018, filed at Powai Police Station by Respondent No.2, an adult, alleging that, she came in contact with the Applicant through “Truly Madly” app when a friend request forwarded to her, was accepted. It is her specific case that proximity developed between the two, via Facebook and WhatsApp, which took shape of friendship and subsequently culminated into love.

In this background, when she was asked to come on a date by the Applicant and she readily agreed. Within a period of 5 days of their virtual interaction she visited his hostel and according to her the Applicant assured that they would solemnize marriage and when he made physical overtures, she asked him whether he is sure that he would perform the marriage with her and he reassured her about their relationship.

The complainant alleges that on 14.10.2017, when she visited his hostel, he made her consume liquor and without her consent, established physical relationship with her and he promised her that he will perform the marriage. This act was repeated on 31.10.2017, again on the promise of marriage.

3] The narration in the complaint would reveal that, after this incident, the couple used to meet frequently and on one occasion when she visited his hostel, she refused physical indulgence and some of his

overtures, in their subsequent meetings, were objected by her. He was insisting on indulging with her physically and therefore she wanted to report the incident to police, but she was desisted from doing so, as the Applicant threatened her that if she approach the police, he would commit suicide.

4] Thereafter, on completion of her examination, she reported to Police Station on 22.03.2018 and alleged that from 6.10.2017 to 20.02.2018, the Applicant, on the pretext of solemnization of marriage, had committed forcible sexual intercourse with her against her wishes and without her consent.

The prosecutrix also gave supplementary statement, where she also alleged that on 26.01.2018 when physical relationship was established with her by the Applicant without her consent, from 29.01.2018 he blocked her on social media and also blocked her mobile number. As she alleged that the Applicant had released her photos on social media, she produced the same before the Investigating Officer.

The complainant was subjected to medical examination and she narrated the history of forcible sexual intercourse. She also alleged that the Applicant used to show pornography to her on his laptop.

The medical examination, though did not disclose any external injuries, record that the last incident of sexual intercourse had taken place on 11.11.2017. Upon examination, the report mention about an old healed hymenal tear of 4"-6".

5] The learned counsel for the Applicant would vehemently submit that the relationship between the two was consensual in nature and both being adults were capable of contemplating the consequences of

the act in which they had indulged themselves and, therefore, no offence under Section 376 is made out.

Per contra, the learned counsel for Respondent No.2 would submit that the consent accorded for the sexual intercourse was not free, since it was preceded by the promise to marry, but for which, the complainant would not have accorded her consent. The submission is, the subject CR has invoked Section 417 which prescribe punishment for cheating and cheating takes place when by deceiving any person fraudulently or dishonestly, the person is induced to consent to an act, which he/she would not have permitted in absence of the inducement.

His submission, in opposing the prayer for discharge is, merely having a love affair do not mean that in absence of a promise to marry, the complainant would have permitted sexual intercourse.

6] On perusal of the facts placed before me and particularly in the light of the offences invoked in the subject CR being Section 376, 354, 354A, 417 of the IPC, I must take note of some acts of the complainant from which her consent can be inferred.

As per the complainant, on the say of the Applicant, she herself visited his hostel and her case is that, only after the Applicant assured that he would solemnize the marriage, she permitted physical indulgence.

Alongwith the Revision Application, the copies of the Visitor Book of the hostel where the Applicant was residing is placed on record, which contain entries of the complainant in the hostel on 11.10.2017, 14.10.2017, 9.11.2017 and 11.11.2017. Apart from this, the WhatsApp chat produced on record also reveal the intimacy shared between the two, which purely indict towards establishing physical relationship. The chat exchanged between them, by no stretch of imagination could lead

to an inference that physical indulgence was permitted only when the promise of marriage was given, she allowed sex, only on the eventuality of marriage.

7] The Hon'ble Apex Court in case of **Deepak Gulati vs. State of Haryana**¹, has observed as under : -

“21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused 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 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. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.”

“24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstance. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”

1 (2013) 7 SCC 675

8] Recently while dealing with somehow similar facts in the case of ***Sameer Amrut Kondekar vs. State of Maharashtra & Anr., Revision Application No.408/2019***, I have elaborated the concept of consent by referring to the decision of the Hon'ble Apex Court in the following manner :-

9] While analysing the provision of Rape as contained in Section 375 of the Indian Penal Code and while interpreting the term "without her consent", being explained in Explanation 2, appended to the Section, to mean unequivocal voluntary agreement, when the woman by words, gestures or any form of verbal or non-verbal communication, indicates willingness to participate in the specific sexual act.

Section 90 of the Indian Penal Code provide for a contingency where consent known to be given under fear or misconception is no consent in the eyes of law.

10] Their Lordships of the Hon'ble Apex Court made the following observation as regards 'Consent' in following paras :-

"12. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

13. The primary contention advanced by the complainant is that the appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact (the promise to marry), stands vitiated."

14. 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. In Dhruvaram Sonar which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

"15. 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."

15. This understanding was also emphasised in the decision of this Court in Kaini Rajan v. State of Kerala:

"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 asset. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

9] The act complained of and for which the Applicant is charge-sheeted, is nothing but a consensual act, between the two adults capable of understanding consequences of its commission and since no circumstances in the charge-sheet lead to an inference that the consent accorded for physical indulgence was not free, but it was coerced, induced by promise of marriage, there is no propriety in permitting the charge to be framed, as the material compiled in the charge-sheet on completion of investigation, do not constitute sufficient ground for proceeding against the Applicant for committing an offence with which he is charged.

The learned Judge has failed to exercise his power available under Section 227 of the Cr.PC and this order is liable to be quashed and set aside. The Applicant deserve his discharge in CR No.166/2018 registered with Powai Police Station where he is accused of offence punishable under Section 376, 354, 354A and 417 of the IPC.

As far as offence under Section 417 of the IPC is concerned, the inducement to perform marriage before establishing physical relationship is conspicuously absent in the case of prosecution.

10] In the wake of above, Revision Application is allowed. The impugned order dated 19.10.2020 passed by the Sessions Court, Dindoshi, is quashed and set aside.

The Applicant is discharged in CR No.166/2018 registered with Powai Police Station where he is accused of offence punishable under Section 376, 354, 354A and 417 of the IPC.

His bail bond stand cancelled.

Revision Application is disposed off in the aforesaid terms.

[BHARATI DANGRE, J]