

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL REVISION APPLICATION NO.421 OF 2022

Mhesh Santosh Pawar

...Applicant

Versus

The State of Maharashtra & Anr.

...Respondents

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Mr. Amey Deshpande, Advocate for the Applicant.

Mr. Gaurang Jhaveri with Adv. Vandana Bavit, Advocate for Respondent No.2.

Ms. Pallavi N. Dabholkar, APP for the Respondent – State.

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CORAM : PRAKASH D. NAIK, J.
DATE : 6th JULY, 2023.

PER COURT:

1. Leave to amend. Name of Respondent No.2 may be masked from title of application. Amendment may be carried out immediately.

2. The applicant is aggrieved and dissatisfied with order dated 27.09.2022 passed by learned Additional Sessions Judge, Pune rejecting the application for discharge preferred by applicant in Sessions Case No.161 of 2020.

3. The First Information Report (for short 'FIR') was registered at the instance of Respondent No.2 on 10.03.2019 with Deccan Police Station, Dist.Pune for offences punishable under Sections

376(2)(n), 417 and 506 of Indian Penal Code (for short “IPC”). The complainant has alleged that, she was acquainted with the accused through Facebook. Both were taking medical education. They became good friends. They were in contact with each other from 2018 onwards through Whats-app and mobile phone. On 11.05.2018, the accused proposed the complainant for marriage and intimated her that he intends to meet her. On 19.05.2018, they met at Sane Guruji Hospital, Hadapsar. On that day, the complainant did not consent to the proposal of accused and informed him that she would discuss about it with her family and would convey her decision. On 20.05.2018, they met at Amanora Mall, Hadapsar. The complainant was accompanied by her friends. Thereafter, the accused left for Baroda. They were talking to each other on cell phone. The accused told her that, he had informed about their marriage to his mother and maternal uncle. The accused went to Pune to meet the complainant on 03.06.2018. She spoke to the mother of accused on Whats-app video call. On 01.09.2018, the accused went to Pune to meet the complainant. The accused took her on two wheeler of his friend Nitesh Agarwal and both of them proceeded towards Lonawala. However, the tyre was punctured and they were constrained to go to the house of Nitesh Agarwal at Deccan Gymkhana, Pune. Since it was late in

the evening, they stayed in the house of Nitesh Agarwal. On that day, the accused maintained physical relationship with the complainant without her consent and under coercion by convincing her they have going to perform marriage. On the next day, the accused dropped the complainant at hostel situated at Hadapsar. Thereafter the accused came to Pune to meet the complainant on her birthday on 28.10.2018. The parents of complainant were also called at Pune. The accused met her parents and informed that he will perform marriage with her. The parents of complainant left for village and thereafter the accused took the complainant to Hotel Oyo at Deccan. He threatened her that, in case she does not allow him to maintain physical relationship, he would break their marriage. Hence, the complainant maintained physical relationship with her. On 03.01.2019, again there was physical relationship with the complainant at Hotel Oyo situated at Deccan. on 05.01.2019 the accused left for his native place at Jalgaon. on 14.01.2019 the accused informed the complainant that, his marriage is fixed with another girl. The complainant was shocked and felt that she has been cheated by the accused. Subsequently she spoke to the accused on several occasions and he gave excuses that his uncle is not ready for the marriage and refused to perform marriage with her. On 19.01.2019, the complainant, her uncle,

aunt and elder brother went to the native place of accused at Jalgaon. They met accused. His uncle was not at home. They returned. They again went to Jalgaon on 25.01.2019. They met the uncle of accused. He informed them that he is not coming in the way of marriage and they should decide amongst themselves. However, the accused informed the complainant that he is not interested in performing marriage and he cannot perform the marriage with her. All of them tried to convince him. They returned to village Barshi. On 11.02.2019, the accused made a call to complainant and informed that, in future they should not keep any relationship of any nature between them. The FIR was lodged on 10.03.2019.

4. During the course of investigation, statements of witnesses were recorded and on completing investigation, charge-sheet was filed.

5. The applicant preferred an application for discharge before the Sessions Court which has been rejected by order dated 27.09.2022.

6. Learned Advocate for applicant submitted that, the offences under Sections 376 (2)(n), 417 and 506 of IPC are not made out in the present case. The learned Sessions Judge has committed an

error in rejecting the application for discharge. The relationship was of consensual nature. Merely because the marriage was not performed, the accused cannot be prosecuted for offence under Section 376 of IPC. The applicant and victim were pursuing their studies in the field of Gynecology. The prosecutrix was capable to take conscious decision about physical intimacy and there was active consent for maintaining physical relationship. By no stretch of imagination it can be said that there was commission of offence under Section 376 of IPC. Consensual physical relationship between the parties would not constitute the offence under Section 376 of IPC. The prosecutrix had called the applicant and she had booked the Hotel Oyo room on 03.01.2019. The act of booking room in the hotel by the prosecutrix and informing the applicant clearly shows that there was due consent from the prosecutrix and no offence is made out under Section 376 IPC. The E-mail forwarded by the Hotel Oyo to the prosecutrix establishes that she had booked the Hotel Oyo room on 03.01.2019. This shows that the relationship was consensual. The statements of witnesses and the prosecutrix do not indicate that there was misconception of facts. Even if the allegations of complainant are taken at their face value and accepted in their entirety, they do not make out a case against accused for the alleged offences. Mere breach of promise

does not amount to cheating. There has to be dishonest intention right from inception. The statements of complainant and other witnesses do not warrant an inference that there was no intention to marry right from inception. The note of Investigating Officer dated 23.12.2019 shows that the prosecutrix has expressed her desire not to proceed ahead in the case.

7. Learned Advocate for the applicant has relied upon the following decisions :

- i. *Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr.*¹
- ii. *Shailendra Kumar Yadav Vs. State*².
- iii. Order dated 29.03.2023 passed by this Court in the case of *Sameer Amrut Kondekar Vs. State of Maharashtra and Anr.*
- iv. *Sonu alias Subhas Kumar Vs. State of Uttar Pradesh and Anr.*³

8. Learned A.P.P. Ms. Dabholkar submitted that, at the stage of framing charge, the Court is required to see whether prima facie case is made out against the accused. The FIR clearly specifies that the accused had maintained physical relationship with the complainant under the guise of marriage. Subsequently he backed

¹ (2019) 9 SCC 608

² 2022 SCC OnLine Del 976

³ AIR 2021 SC 1405

out from the marriage. He gave excuses that, his uncle is not ready for the marriage. However, the uncle of accused made it clear that, he is not objecting for marriage and thus the accused had no intention to perform marriage with complainant. The consent for physical relationship was obtained by the accused by misrepresentation. The prosecutrix was not willing to maintain physical relationship with the accused. It was performed under coercion and promise of marriage. The learned Sessions Judge has rightly rejected the application for discharge. The prosecution must be given an opportunity to prove its case by leading the evidence.

9. Learned Advocate representing Respondent No.2 on instructions from Respondent No.2 submitted that, she has no objection for allowing the revision application.

10. The Respondent No.2 has filed affidavit-in-reply dated 15.06.2023 and stated that she do not have any grievance against the applicant. Both are settled in their married life and she do not wish to bring all those old difficult memories to affect her happy married life and she has filed this affidavit in support of this revision application for setting aside the order rejecting application for discharge. She do not have any objection if this revision

application is made absolute as prayed by the applicant thereby discharging him from the Sessions Case No.161 of 2020.

11. The prosecutrix and the accused/applicant were medical students. They were acquainted with each other through Facebook. On 11.05.2018, the accused had proposed her for marriage. They met on 19.05.2018. The prosecutrix did not give her consent for marriage on the ground that, she wanted to discuss it with her family members. They again met on 20.05.2018. The victim was accompanied by her friends. The applicant/accused then informed the complainant that he had discussed about their marriage with her mother and uncle. The applicant met the complainant on 03.06.2018. On that day the prosecutrix spoke to mother of applicant through Whats-app Vide Call. On 01.09.2018, the accused/applicant and the prosecutrix stayed at the house of the friend of applicant. It is alleged that, on that day the applicant/accused had maintained physical relationship with the prosecutrix without her consent under the pretext of marriage. On the next day she was dropped at her hostel by the applicant/accused. The applicant/accused then met the parents of complainant on 28.10.2018 and told them that he would perform marriage with her. On 28.10.2018, there was physical relationship between them for the second time. On 03.01.2019, the accused and the

prosecutrix went to Hotel Oyo and had sexual relationship. The documents on record indicates that the room was booked by the prosecutrix. It is alleged that, thereafter the accused declined to perform the marriage with the prosecutrix. Thus, there was physical relationship between them on three occasions. The initial part of the FIR shows that the accused proposed the prosecutrix for marriage and the prosecutrix was to reciprocate after discussing with her family members. The prosecutrix also spoke to the mother of applicant. From the tenor of FIR it can be discerned that the relationship was consensual. The victim and the accused are major. They are educated persons. It cannot be said that the accused had dishonest intention right from inception not to perform the marriage and under false promise of marriage maintaining physical relationship with the prosecutrix. Statements of friends of prosecutrix were recorded. They referred to relationship between the prosecutrix and the applicant. The statements of the relatives of prosecutrix were also recorded. The record about visit to the hotel Oyo is also collected which indicate that they had occupied at the hotel premises. Charge-sheet includes letter dated 23.12.2019 forwarded by Assistant Police Inspector of Deccan Police Station, Pune to Senior Police Inspector, Deccan Police Station, Pune stating that the prosecutrix was contacted for collecting Whats-app

messages for the purpose of conducting investigation and filing charge-sheet and the prosecutrix had informed that she do not have the conversation in the nature of Whats-app messages and she is not interested in pursuing the proceedings. The prosecutrix was informed to remain present at the Police Station, however, she did not remain present. She did not respond to call made by the Police. Station diary is recorded in that regard. Thus, the material on record shows that the relationship between victim and accused was of consensual nature.

12. In the case of *Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr.* (supra) 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.

13. In the 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.

14. In the case of *Dhruvaram Murlidhar Sonar Vs. State of Maharashtra*⁴, it was observed as follows :

4 (2019) 18 SCC 191

“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”.

15. In the case of *Kaini Rajan Vs. State of Kerala*⁵, 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”.

16. In the case of *Anurag Soni Vs. State of Chhatisgarh*⁶, 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.”.

⁵ (2013) 9 SCC 113

⁶ (2019) 13 SCC 1

17. In the case of *Deepak Gulati Vs. State of Haryana*⁷, 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”.

18. In the case of *Uday Vs. State of Karnataka*⁸, 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)

⁷ (2013) 7 SCC 675

⁸ (2003) 4 SCC 46

“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.”

19. 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.

20. Hence, I pass the following order :

ORDER

- i. Revision Application No.421 of 2022 is allowed;
- ii. The impugned order dated 27.09.2022 passed by learned Additional Sessions Judge, Pune in Sessions Case No.161 of 2020 is set aside.
- iii. The applicant is discharged from the Sessions Case Sessions Case No.161 of 2020..
- iv. Revision Application is disposed of accordingly.

(PRAKASH D. NAIK, J.)