

rajshree

RAJSHREE
KISHOR
MORE
Digitally
signed by
RAJSHREE
KISHOR
MORE
Date:
2023.10.04
15:05:25
+0530

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPLICATION NO.1527 OF 2019

Niraj Dhirendrakumar Goswami] .. Applicant

vs.

State of Maharashtra & Anr.] .. Respondents

Mr.Aniket Nikam a/w Ashish Satpute, Amit Icham and Piyush Toshnival
for the Applicant.

Mr.Y.M. Nakhwa, APP for the State.

Mr.Prajit Sahane, for Respondent No.2.

CORAM : BHARATI DANGRE, J

DATE : 26th September, 2023.

P.C.

1] By the present Application filed under Section 482 of the Cr.P.C., the Applicant seek quashing and setting aside of the order dated 20.09.2019 passed by the Additional Sessions Judge, Pune, on an Application filed by him under Section 227 of the Cr.P.C., seeking discharge.

The Application is rejected by recording that there is sufficient ground to proceed against the accused, as he was accused of committing sexual intercourse with the victim, on the pretext of solemnizing the marriage.

It is this order, which is the subject matter of challenge in the present Application, since it is the case of the Applicant that no offence of rape is made out against him.

2] Heard Advocate Aniket Nikam alongwith Advocate Aashish Satapute for the Applicant, Mr.Y.M. Nakhwa, APP for the State and Mr. Prajit Sahane, for the complainant.

The subject CR came to be registered on the complaint of Respondent No.2, aged 33 years on the date of lodging of the complaint i.e. 05.12.2016. In her complaint, she narrated that she was working in an institution as 'In charge' since 2009 and that is how she became acquainted with the Applicant, who was working as Sales Manager. A bond of friendship developed between the two and as per the complainant, they became good friends. It is her version that in April 2013, she was invited to his flat in Pune and when she stepped into his house, he shut the door, and when she was scared, he expressed to her that he had developed liking towards her and was in love with her. He came close to her and embraced her and without paying any heed to her opposition, he established physical relationship with her.

The prosecutrix allege that since she was all alone, she was terribly scared and he told her not to disclose the incident to anybody,

otherwise, he will defame her.

Subsequently, in December, 2013, he resigned from the job, but in February, 2014, he informed her that his parents were desirous to meet her and he is going to initiate the talks for their marriage.

She accompanied him to Jodhpur and in fact no talks of marriage took place, but when she stayed in his house, he forcibly committed sexual intercourse with her. However, he assured her that he would talk to his parents and she was made to stay in girls hostel and was assured of marriage. She had disclosed about her relationship with the accused to her cousin brother, who had informed her parents.

3] This is the gist of the complaint lodged by the prosecutrix, which resulted into invoking section 376, 376(2)(n), 506 of the IPC. On completion of investigation, the charge sheet has been filed and it is the case of the Applicant, that the relationship was consensual between the two as the prosecutrix is a matured lady and was aware of the consequences of the act as she was approximately 35 years of age on the date of incident, whereas, the Applicant was 30 years old.

In the history given by her during the medical examination, she had conceded that there was consensual relationship on multiple times and it was with her consent, but after the last episode of sex, he refused to marry her. She categorically disclosed to the doctor that

during the intercourse they used condoms, but now since he has refused to marry her, she had reported the happenings to the Police Station.

4] The most significant aspect of the complaint, is the delay. The occurrence of events is described to be from April, 2013, but the complaint is lodged on 05.12.2016. The prosecutrix is an educated lady, holding a good position and it is impossible to believe that she was pressurized or was scared to report the incident. Apart from this, when the first incident took place in April, 2013, on the pretext of marriage, it was possible for to avoid the subsequent incidents, but she continued to maintain the relationship and as per the history given by her, during her medical examination, it was by her consent.

Though it is her case that the relationship was established on the pretext of solemnization of marriage, prima facie, it cannot be inferred that her consent for sexual intercourse was obtained on account of promise to marry.

5] The distinction between a consensual sex and rape is clearly noticed by the Hon'ble Apex Court in case of **Deepak Gulati vs. State of Haryana 2013 Cri.L.J. 2990**, in Para 21 and 24, which read thus:-.

“21. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstance, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. 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.”

“24. If the prosecutrix was in fact going to Ambala to marry the appellant, as stands fully established from the evidence on record, we fail to understand on what basis the allegation of “false promise of marriage” has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be levelled against the appellant, in the light of the aforementioned fact situation.”

6] Further, the Apex Court in case of **Pramod Suryabhan Pawar v/s State of Maharashtra 2019(9) SCC 608**, had an opportunity to elaborate on the term 'Consent' with respect to Section 375 and it is held that it involve an active understanding of circumstances, actions and consequences of proposed act and when an individual makes a reasoned choice to act after evaluating various alternative actions as well as various possible consequences, flowing from such action or inaction, he is said to consent to such an action and when a women does not 'Consent' to sexual intercourse described in the main body of Section 375, the offence of rape has occurred.

Elaborating upon the concept of 'Consent' with reference to Section 375 of the IPC, it is categorically held that an inference as of 'Consent' can be drawn if only based on evidence or probabilities of the case and as the '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.

Referring to its earlier decision in case of **Kaini Rajan vs. State of Kerala (2013) 9 SCC 113**, the Apex Court held as under:-

"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.”

The legal position that emerges from the above proposition is also summarized in Para 18 to the following effect :-

“18. To summarise 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 relevant, or bear a direct nexus to the woman’s decision to engage in the sexual act.”

7] In the light of aforesaid legal scenario, when the material collected by Investigating Agency is scanned, it is evident that the prosecutrix had reached an age of sufficient understanding and she continued to maintain the physical relationship, fully aware and conscious of the consequences flowing from, it cannot be said that she was misled on the pretext of marriage which formed the ground for her consent for establishing sound relationship. This is the specific

reason that she took three years to lodge the complaint, when there was a breach of promise to marry

For the aforesaid reason, the impugned order which has deduced a conclusion that there can be no discharge as there are sufficient grounds to proceed against the accused, cannot be sustained.

The said order dated 20.09.2019 passed by the Additional Sessions Judge, Pune, is quashed and set aside.

The Applicant stand discharged of the charges u/s 376, 376(2)(n), 506 of the IPC, levelled against him.

Criminal Application is allowed.

[BHARATI DANGRE, J]