

IN THE HIGH COURT OF JUDICATURE AT BOMBAY :
NAGPUR BENCH : NAGPUR.

CRIMINAL APPLICATION [APL] NO. 166 OF 2023.

Amit s/o Pyarelal Ramteke,
Aged 30 years, Occupation - Service,
resident of Adarsha Nagar,
Lakhani, Tahsil Lakhani,
District Bhandara, presently
resident of Nehru Ward, Sai Nagar,
Tiroda, District Gondiya.

... **APPLICANT.**

VERSUS

1.The State of Maharashtra,
Through Police Station Officer,
Police Station Bhiwapur,
Tahsil Bhiwapur and District Nagpur.

2.XYZ
through its Police Station
Bhivapur, Taluq Bhivapur,
District Nagpur
Crime No.146/2018.

... **NON-APPLICANTS.**

Mr. R.B. Hingnekar, Advocate for the Applicant.
Mr.N.R. Rode, A.P.P. for Non-applicant No.1/State.
Respondent No.2 – Served.

**CORAM : VINAY JOSHI AND
VALMIKI SA MENENZES, JJ.**

DATE : AUGUST 04, 2023.

ORAL JUDGMENT (PER VINAY JOSHI, J) :

Considering the controversy involved in the matter, and by consent of the learned Counsel appearing for the respective parties, Criminal Application is taken up for final disposal at the stage of admission.

Admit.

2. This is an application seeking to quash the first information report bearing Crime No.146/2018 registered with Bhiwapur Police Station, District Nagpur for the offence punishable under Section 376[2][b] of the Indian Penal Code along with the related charge sheet bearing Sessions Trial No.63/2019 pending on the file of the Additional Sessions Judge-13, Nagpur.

3. It is the contention of the applicant that reading of the first information report does not disclose the offence of rape. According to the applicant, at the most it is a case of consensual relationship in between two adults. Continuation of such prosecution amounts to abuse of the process of Court, hence, the applicant urged to invoke inherent powers of this Court to quash the proceeding.

4. The learned A.P.P. appearing on behalf of the State has raised initial objection about maintainability of the application on the ground of rejection of discharge application and revision against the said order. In response, the learned Counsel for the applicant by placing reliance on the decision of this Court in case of **Shyamrani Wasudeo Prasad Gaur .vrs. State of Maharashtra and others – 1991 [1] Bom.C.R. 324.** In said decision, while answering the reference, this Court has observed that the application under Section 482 of the Code, is independent remedy and maintainable, despite accused availing the remedy of revision under Section 397 of the Code. Besides that, the plain language of Section 482 conveys that the non-

obstante clause employed in the section has the effect of superseding and excluding all other provisions. The inherent powers of this Court are wide and can be exercised in the matters to secure ends of justice. Therefore, the objection regarding maintainability of the application would not sustain in the eyes of law.

5. On merits, the learned A.P.P. has resisted this application by contending that the offence is of serious nature. The informant lady has specifically stated about the deceitful intention, and therefore, the matter requires evidence. Though non-applicant no.2-informant /lady was served, she has chosen not to appear.

6. The report has been lodged by the informant – lady aged 31 years. The informant as well as the applicant were serving with Irrigation Department at Bhiwapur. The informant-lady was working as a Peon, whilst the applicant was a Clerk. Their acquaintance turned into love relationship within few months. The applicant gave marriage proposal, to which the informant accepted. On and often, they had sexual relations. Both were residing in nearby government

Rgd.

quarters. Most of the time, the applicant was halting at the house of the informant during night hours where they had sexual relationship. This relationship continued for the period of near about two years.

7. It is informant's case that in the year 2016, the applicant refused for marriage. On said refusal, the informant's marriage was fixed with some body else. Likewise, the applicant's marriage was also fixed with some other lady. However, both the marriages did not work. Later on again they came together and decided to marry and continued their sexual relationship till the year 2018. Particularly, on 18.04.2018 the informant learnt that applicant's engagement ceremony was fixed, and therefore, she reiterated her demand for marriage on which the later refused, hence, the report.

8. Undisputed facts of the case are as below :

- [a] The victim is aged 31 years, whilst the applicant is of 28 years;
- [b] Both were serving in same government office;
- [c] Both were in love with each other and had maintained

sexual relations for long period of two years;

[d] Both have decided to marry with some body else, however, it could not been worked out;

[e] On 18.04.2018, the applicant refused for marriage.

9. On the above un-resisted facts, the sole question falls for scrutiny is - Whether the victims' consent has been obtained on the false promise of marriage ? It requires careful examination whether the accused actually wanted to marry the victim, or had mala fide motive and had made false promise to satisfy his physical needs. There cannot be a mathematical formula for determination whether consent given by the victim for sexual intercourse is voluntary or under misconception of fact. The test is to analyze the evidence before the Court coupled with surrounding circumstances before reaching to the conclusion, because each case has its own peculiar features.

10. The learned Counsel for the applicant has attracted our attention to paragraph no.18 of the decision of the Supreme Court in

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case of **Pramod Suryabhan Pawar .vrs. State of Maharashtra and another – [2019] 9 SCC 608**, wherein the Supreme Court took a review of earlier decisions and summarized the legal position in paragraph no.18, which reads as under :

“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 relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.”

11. Similarly, the learned Counsel for the applicant has placed reliance on the decision of Supreme Court in case of **Sonu @ Subhash Kumar .vrs. State of Uttar Pradesh and another – AIR 2021**

SC 1405, wherein it is reiterated that subsequent refusal for marriage after consensual relationship does not make out an offence of rape.

12. Useful reference can be made to the decision of the Supreme Court in case of **Deepak Gulati .vrs. State of Haryana – [2013] 7 SCC 675**, wherein in paragraph no.21 of the judgment, it has been 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.”

13. The Court has to examine all the facts to conclude that sexual intercourse was on account of relationship or her consent was solely due to misrepresentation made by the accused. Likewise, it is also to be seen whether though accused genuinely desired to marry, but, the circumstances which could not have foreseen or beyond his control were such that they could not marry.

14. The Supreme Court in the decision in case of **Dr.Dhruvaram Murlidhar Sonar .vrs. State of Maharashtra and others – [2019] 18 SCC 191**, ruled that sexual intercourse without any misconception created by the accused does not constitute an offence of rape. Paragraph no.23 of the said decision reads as below :

“23. 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.”

In said case the Supreme Court has considered its earlier pronouncement in case of Uday .vrs. State of Karnataka – [2003] 4 SCC 46, case of Deepak Gulati [supra], and reiterated the principle that there is a clear distinction between ‘rape’ and ‘consensual sex’. It was considered that there can 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 misconception created by the accused or the circumstances are beyond his control. It is expressed that the Court shall very carefully examine all the aspects in like cases.

15. Section 375 of the Indian Penal Code defines the offence of 'rape' and enumerates 6 descriptions of the offences. The first two are relevant i.e. first clause operates where the woman is in her senses, capable of consenting but, the act is done against her will and the second clause operates where the act is done without her consent. The expression 'against her will' means that the act must have been done inspite of the opposition of the woman. Obviously, the consent is an act of reason coupled with deliberation.

16. Section 90 of the Indian Penal Code defines "consent known to be given under fear or misconception", which reads as below :

"Section 90 – Consent known to be given under fear of misconception – A consent is not such a consent as is 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"

Section 90 of the Code, though does not define the term 'consent', but, in negative manner it describes what does not amount to consent. True, consent may be express or implied, must actuated, obtained through deceit or fraud. If the consent is given under misconception of fact, it vitiates. In order to come out from the clutches of Section 375 of the Indian Penal Code, the consent requires voluntary participation and not on some deceitful misrepresentation. In case at hand undoubtedly there was no resistance for physical intercourse but, as per the victims case she gave consent as the accused assured for marriage.

17. All it needs is careful examination of the facts and relevant circumstances to find out whether in given case the consent was actuated by fraud amounting to absence of consent. In order to find out a prima facie case, which is the requirement at this stage, we have examined all the circumstances to see whether deceitful intention emerges from inception. Apparently, both were major working in public office under one roof. They had maintained sexual relationship for years together. Particularly, most of the time

the applicant was living, as well as dining at the house of the informant. It requires to be noted that in the year 2016, both decided to marry elsewhere and accordingly fixed their marriages, but, it could not work out. The said factual aspect itself postulates that the relations were consensual, otherwise, the victim would have objected for the marriage of the applicant at another place. It is a case of the victim herself that thereafter also for next two years they maintained relationship, therefore, it is difficult to digest that the consent was obtained on the promise to marry. It is a clear case of consensual relationship between two adults. By applying the law as mentioned aforesaid, no prima facie case emerges to constitute the offence of rape. In view of that, continuation of criminal prosecution would amount to abuse of the process of law. In the circumstances, we proceed to pass the following order.

ORDER

[i] Criminal Application is allowed and disposed of.

- [ii] The first information report bearing Crime No.146/2018 registered with Bhiwapur Police Station, District Nagpur for the offence punishable under Section 376[2][b] of the Indian Penal Code along with the related charge sheet bearing Sessions Trial No.63/2019 pending on the file of the Additional Sessions Judge-13, Nagpur, is hereby quashed and set aside.

JUDGE

JUDGE