

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

CRIMINAL APPLICATION (APL) NO. 297/2022

Mr. Abhay S/o. Suresh Jaiswal,
Age 28 yrs., Occ. Private,
R/o. Lane No.17, Rajendra Nagar,
Nandanwan, Nagpur.

APPLICANT

VERSUS

1. The State of Maharashtra,
through Police Station Officer,
Police Station Wathoda, Nagpur,
Dist. Nagpur.
2. XYZ (Victim) Complainant/Informant
in Crime No. 461/2021 registered in
Police Station P.S. Wathoda, Nagpur,
Dist. Nagpur.

NON-APPLICANTS

Mr. R. R. Vyas, Advocate for applicant.
Mr. N. R. Rode, APP for non-applicant No.1/State.
Mrs. Mukta Kavimandar, Advocate for non-applicant No.2 (appointed)

CORAM : **VINAY JOSHI AND**
BHARAT P. DESHPANDE JJ.
DATE : **24.04.2023**

ORAL JUDGMENT (PER VINAY JOSHI, J.)

Heard.

2. **Admit.**

3. The challenge in this application is to the charge-sheet No.
6/2022 which is numbered as RCC No. 172/2022 arising out of First

Information Report ('FIR') vide Crime No. 461/2021 registered with Wathoda Police Station, Nagpur City, Dist. Nagpur for the offence punishable under Sections 376(2)(n), 504 of the Indian Penal Code.

4. The applicant would submit that contents of FIR and the Police paper clearly discloses that even though they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence as alleged. It is submitted that it is a case of consensual relationship in between two adults and therefore, continuation of proceeding amounts to abuse of the process of Court.

5. At the instance of report dated 15.11.2021 lodged by informant married lady aged 30 years, a crime has been registered. The informant is having a son aged 5 years from her marriage. It is her case that there used to be matrimonial dispute in between husband and wife. The applicant is her husband's friend who used to pacify differences. The applicant was good family friend, therefore, was in visiting terms at the house of informant. In the year 2019, the applicant expressed to the lady that he likes her and desires to marry with her. It was followed by sexual relation in between them on and often. On 14.11.2021, the informant's husband suspected about the foul play, hence inquired with the informant. She disclosed about their physical relationship. On the following day, informant specifically asked to the applicant as to when he would marry, on which, the later denied, hence report.

6. The supplementary statement of informant was recorded, in which she reiterated long standing relationship. She added that she remained pregnant from the applicant, however a child was aborted at his behest. The learned counsel for applicant would submit that when both of them were visiting to lodging house, they have disclosed their names separately and thus, it is an instance to show their voluntariness. The learned APP would submit that the applicant has deceived a married lady and established sexual relations under the false pretext of marriage. He took us through the statement of Hotel Manager who stated that both of them have obtained room by posing that they are about to marry.

7. The learned counsel for informant while opposing application relied on the decision of the Supreme Court in case of **Anurag Soni Vs. State of Chhattisgarh, 2019 AIR(SC) 1857**. Particularly our attention has been invited to para 11, 12 and 14 of the judgment. The said decision was based on the facts of the said case, however the principle laid down in the said case is that the offence would complete if from the very beginning, the accused never intended to marry to the prosecutrix, he gave false promise to marry and on such false promise, he had physical relation with the lady. The unfolded facts nowhere disclose that since inception, the accused gave false promise, rather story of promise is unacceptable since the lady was living with her husband during said period.

8. The learned counsel for the applicant would submit that there is marked distinction in between false promise and breach of promise. Moreover, it is submitted that in order to constitute an offence, there must be intention of applicant since inception to deceive the lady. He would submit that the consent must have been given by the lady for the reason that she has been promised for marriage.

9. In the case of **Pramod Suryabhan Pawar Vrs. State of Maharashtra and another, reported in (2019) 9 SCC 608**, the Hon'ble Supreme Court has referred earlier decision in case of **Uday Vrs. State of Karnataka** and summarized the position in para No.18 which reads as below :-

"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."

10. In the case of **Dr. Dhruvaram Murlidhar Sonar Vrs. State of Maharashtra and others, reported in (2019) 18 SCC 191**

the facts are somewhat similar as in that case also, the adults were in relations for several years. In that context, it has been observed in Paragraph No.23 as under :-

"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 IPC."

11. Pertinent to note that informant was a married lady having a child. More importantly not only their marriage was in subsistence, but

she was very much living with her husband. Despite that, the lady has maintained relation with her husband's friend. Both of them visited at different places, went to lodging house where had sexual relations. The things clearly indicate that out of extra marital relation, they had sexual relationship. The informant was well aware that during existence of her marriage, she could not marry. Therefore, the informant's contention that because of only applicant assurance for marriage, she gave consent is apparently unacceptable. The case squarely false within the criteria Nos. 1 and 3 as laid down by the Hon'ble Supreme Court in case of **State of Haryana Vs. Bhajanlal, reported in AIR 1992 SC 604**. Even if contents of FIR are taken at its face value, no offence is made out against the applicant. Continuation of such prosecution amounts to abuse of the process of Court. In above peculiar facts, we find it appropriate to invoke our inherent powers to secure the ends of justice. In view of that, application is allowed. We hereby quashed and set aside FIR vide Crime No. 461/2021 registered with Wathoda Police Station, Nagpur City, Dist. Nagpur for the offence punishable under Sections 376(2)(n), 504 of the Indian Penal Code along with charge-sheet No. 6/2022 which is numbered as RCC No. 172/2022.

12. Application stands disposed of in above terms.

JITENDRA BHARAT GOHANE (BHARAT P. DESHPANDE, J.)

(VINAY JOSHI, J.)