

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

CRIMINAL APPEAL NO. 268 OF 2022

XYZ (Victim), Crime No.388/18, P.S.
 Ramtek

... APPELLANT

VERSUS

1. State of Maharashtra, through Police
 Station Ramtek.
2. Sagar Chunnilal Dadure,
 R/o Mahadula, Tahsil Ramtek, Dist.
 Nagpur.

... RESPONDENTS

Shr Dhanraj Bharne, Advocate for the appellant.
 Shri M.J. Khan, A.P.P. for the respondent/State.
 Shri R.K. Tiwari, Advocate for respondent no. 2.

CORAM : VINAY JOSHI AND VALMIKI SA MENEZES, JJ.

DATED : 13.01.2023.

ORAL JUDGMENT : (Per : Vinay Joshi, J.)

By consent of both learned Counsel, the appeal is taken up
 for final disposal at the stage of admission.

2. The appellant (victim) raises a challenge to the judgment
 and order of acquittal dated 18.01.2022 of the Special Judge whereby

the respondent no.2(accused) has been acquitted from the leveled charges. This is a victim's appeal in terms of Section 372 of the Code of Criminal Procedure. Keeping in mind the well settled principles for dealing an appeal against the acquittal, we have re-scrutinized the entire material.

3. Whether it was a case of consensual relationship in between two adults or it was a case of obtaining consent under misconception of fact is the principal issue for consideration. By and large, the factual aspect is not in dispute, which is a rare phenomenon. The victim lady aged 36 years, has lodged a report on 27.06.2018 alleging a case of rape. Since she belongs to the member of the Scheduled Caste, the provisions of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 have also been invoked. It is the victim's case that way-back in the year 2007, when she was commuting from Mansar to Nagpur by public transport, she met with an accused a young boy taking education. Frequently, they used to commute by same vehicle, which resulted into developing intimacy. In the year 2008, the accused who was 20 years of age, gave a marriage proposal to the victim, who was 26 years of age. The victim has refused the proposal as she was elder in age than the accused and there was caste difference. Despite her refusal, they continued relationship. In the year 2010, the accused

took her at secluded place and by giving promise to marry had established sexual relations. It was followed by establishing sexual relations at various places on different dates. During long span in between the year 2010 to 2017, on umpteen occasions, both went to lodging houses, resorts, where had sexual relations. However in the year 2018, the accused denied for marriage, which resulted into lodging the report.

4. Precisely, it is the prosecution case that the accused never intended to marry but with the fraudulent intention of inducing her for sexual intercourse, made a false promise to marry and therefore, the consent vitiates in terms of Section 90 of the Indian Penal Code (the IPC). As against this, the learned Counsel for the accused would submit that it was a case of love relationship meaning thereby a case of consensual sex. At the most, it is a mere case of breach of promise, which is quite distinct from the case of false promise. Learned Counsel appearing for the victim by placing reliance on the decision of the Supreme Court in case of *State of Uttar Pradesh vs. Naushad (2013) 16 SCC 651* would submit that if the intention of the accused, right from the beginning, was not honest and he kept on promising to marry, this kind of consent obtained by the accused cannot be said to be any consent. He has also relied on the decision of the Supreme Court in

case of *Deelip Singh @ Dilip Kumar vs. State of Bihar 2005 ALL MR (Cri) 220 (S.C.)* to contend that consent given under a misconception of fact will not exculpate accused from the ambit of the offence of rape. There can be no dispute about said proposition of law. There is no straight jacket formula for determining whether the consent given by the victim to sexual intercourse, is voluntary, or whether it is given under a misconception of fact. The Court has to consider each case on the basis of evidence before it and the surrounding circumstances before reaching a conclusion.

5. In the light of above legal position, we have reverted to the facts of the case. It is the victim's evidence that bychance while commuting to Nagpur, she got acquainted with the accused in the year 2007 and friendship was developed. She stated that the accused first time gave marriage proposal in the year 2008, however she refused due to age difference and the accused was still educating. It is her case that first time in the year 2010, the accused had committed sexual intercourse with her at secluded place. She deposed that during the period from year 2012 to 2015 on an often they went to different hotels, resorts and had enjoyed sexual relations. She deposed that finally on 27.03.2018, when they went to a hotel at Khaparkheda, the

accused first time refused for marriage, therefore, she has lodged report on 27.06.2018.

6. It requires to be noted that most of the facts of the case are not in dispute. At relevant time, i.e. in the year 2007, the victim was 26 years of age whilst the accused was 20 years old boy. There was a caste difference in between them. Undisputedly, during the period of long 7 to 8 years, they continued to visit different lodges/resorts and had sexual relations. It is undisputed that since 2010, the accused expressed his willingness to marry which desire continued till the year 2018. It is not in dispute that in the year 2018 elder brother of the accused eloped with a girl by breaking caste barrier and therefore, the accused and his parents first time refused for marriage.

7. It is apparent that both of them got acquainted in the year 2007 and were in relationship for next 10 years. The victim herself stated that near-about 100 to 150 times they had sex at various places. Moreover, undeniably from the year 2008 onwards, the accused gave marriage proposal to the victim. Therefore, the crucial question arose whether it is a case of breach of promise, or since inception the accused with deceitful intention gave a false promise and thereby obtained her

consent for sexual relations. On the basis of given facts, it is to be seen whether from the inception the accused gave promise to marry without intention to marry and the victim gave the consent for sexual intercourse on such assurances by the accused that he would marry. There is a clear distinction between rape and consensual sex. The Court is duty bound to examine from the facts that whether the accused had actually wanted to marry to the victim, or had *mala fide* motive, and had made a false promise to satisfy his lust. The accused is coming with a specific case that he gave marriage proposal, which he maintained throughout, but in the year 2018, as his elder brother married a lady out of caste, his parents were under shock and thus, they refused for marriage.

8. Perusal of victim's evidence indicates that from the year 2008 itself, the accused expressed his intention to marry. It is to be find out from the circumstances whether such expression was backed by *mala fides* or made with deceitful intention. Pertinent to note that as per the victim's own evidence, in the year 2010 itself, she has flatly denied the marriage proposal due to age difference. This itself indicates that assurances of marriage was not consideration for the victim lady to submit her for sexual intercourse. It is apparent that both were having

intimate relationship for last 10 years, had visited various places, had sex for long 10 years at different places, which assumes significance.

9. In order to vitiate a consent in terms of Section 90 of the IPC, it has to be established that the accused has knowledge or reason to believe that the consent was given by the victim in consequence of his representation. Pertinent to note that the victim herself has twice denied the marriage proposal but continued sexual relations, which is sufficient to infer that she did not give consent for the reason of marriage proposal.

10. Looking to other circumstances, the victim has admitted that besides her refusal to marry in the year 2008, she was aware that due to caste differences there would be stiff resistance to their marriage in her house. It has come in her evidence that, in the year 2013, the accused took her to his sister's marriage and also took her to the matrimonial house of her sister for some days. It has come in her evidence that at the time of marriage of the elder brother of the accused, the victim was called by the mother of the accused for preparing gold bangles for her marriage. She admits that after engagement of elder brother of the accused, the elder brother eloped

with a girl from other caste and due to that the parents of the accused have turned their consent for her marriage into refusal. She also stated in her evidence, that after out of caste marriage of elder brother of the accused, his parents were of the view that if the accused again did the same, then they would be badly defamed in the society. She admits that mother of the accused was earlier ready for their marriage but after marriage of her elder son, she has changed her mind. All these things unerringly points out that since inception, there was no deceitful intention at all. Due to change in circumstances and unforeseen event of elder brother marrying out of caste, accused has refused for the marriage. Therefore by any stretch of imagination, it can be said that her consent was obtained under misrepresentation.

11. The Supreme Court in case of ***Dr. Dhruvram Murlidhar Sonar vs. State of Maharashtra and ors. (2019) 18 SCC 191*** took a survey of earlier decision and concluded in paragraph no.23 which read 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 later 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.”

12. It requires to be noted that the Supreme Court has emphasized to carefully examine the of facts for determining whether it was a case of consensual sex or consent was obtained under misconception amounting to rape. In another decision of the Supreme Court in case of ***Pramod Suryabhan Pawar vs. State of Maharashtra and anr. (2019) 9 SCC 608*** again a review was taken of various decisions and ultimately, the legal position is summarized in paragraph 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."

13. In the light of above well settled parameters, we have examined the facts of the case. Since the relationship was for long 10 years the victim was knowing the age and caste difference, she herself has earlier refused for marriage. The accused took the victim to his house and in public functions. The refusal was due to elder brother's marriage out of caste. These circumstances weighs us to hold that the accused did not hold any deceitful intention when he gave a promise for marriage. It is a glaring circumstance that the victim who was well educated lady, though knowing well all barrier for marriage and even after refusing for marriage still continued the relations for 10 years. This by itself indicates that she never surrendered her body because of marriage proposal. Therefore, the only inference which could be drawn, is that it is nothing but a case of consensual sex in between two adults, which does not attract the offence of rape.

14. The learned Counsel for the accused by placing reliance on the Supreme Court's decision in case of ***Uday vs. State of Karnataka***

2003 Lawsuit (SC) 211 would submit that the similar facts were for scrutiny in which the Supreme Court has observed that despite knowing that marriage was difficult, educated girl maintained relationship and therefore, it is a case of giving consent freely, voluntarily and consciously. In cast at hand also, the situation is somewhat similar of which we have already taken a note above.

15. Learned counsel appearing for the accused has made two other submissions that the learned prosecutor who conducted the trial was junior of the defence advocate and the prosecution was intending to drop one of the witness but at the instance of application filed by the victim, the Court has examined the same. In other words, he tried to say that the trial was not conducted fairly. Admittedly, the victim has appointed a lawyer to assist the prosecution, who was throughout present in trial and was monitoring the case. He did not put any grievance to the Trial Court about conducting of prosecution by concerned A.P.P. Therefore, this submission first time coming in appeal, carries no merit.

16. It is a settled proposition of law that while considering the appeal against acquittal, unless the Trial Court rejects an important evidence or the judgment is perverse, there shall be no interference.

The presumption about innocence has become stronger by order of acquittal. We have scrutinized the evidence and found that it is a clear case of consensual sex and therefore, the Trial Court has not committed error in recording the finding of acquittal. In view of that the appeal carries no merit, hence, we dismiss the appeal accordingly.

(VALMIKI SA MENEZES, J.)

(VINAY JOSHI, J.)

Trupti