



Judgment

902 apl 787.22

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

CRIMINAL APPLICATION (APL) NO. 787/2022

Akshay s/o. Bhagwat Thakare,
aged 26 yrs., Occ. Service,
R/o. at Supkhela, Post Kalamba
Mahali, Dist. Washim

.... **APPLICANT**

VERSUS

1. The State of Maharashtra,
through Police Station Officer,
Police Station Kapil Nagar,
Dist. Nagpur (City).
2. XYZ,
through Police Station Officer,
Police Station Kapil Nagar,
Dist. Nagpur (City) in
Crime No. 135/2022

... **NON-APPLICANTS**

Mr. A.R. Prasad, Advocate for applicant.
Mr. M.K.Pathan, APP for non-applicant No.1.
Mr. Anirudh Ananthakrishnan, Advocate for non-applicant No.2.

CORAM : VINAY JOSHI AND
M. W. CHANDWANI, JJ.

DATE : 29.11.2023.

ORAL JUDGMENT (PER VINAY JOSHI, J.) :

Heard.

2. **Admit.**

3. By this application under Section 482 of the Code of Criminal Procedure ('Code'), the applicant is seeking for quashing First Information Report ('FIR') vide crime No. 135/2022 registered with Police Station Kapil Nagar, Nagpur (City) for the offence punishable under Sections 376(2)(n) of the Indian Penal Code. The quashing is sought on account of settlement as well as on merits.

4. Primly, it has been contended that the contents of FIR clearly discloses that it is a case of consensual relationship in between the two adults which cannot be termed as an offence of rape. The victim aged about 22 years has appeared and filed her reply stating that out of misunderstanding, she has lodged report. According to her, relationship was consensual and therefore, she requested to quash FIR.

5. The facts in brief are that the victim aged 22 years stated that she got acquainted with the applicant through Instagram. Both

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were frequenting through social media. It is her case that the applicant was saying that he would marry with her. On such assurance, the victim gives consent and had sexual relationship with him. She stated that on 13.03.2022, she denied for sexual relationship as she felt that the applicant would not marry. He had established physical relation by force. The informant stated that twice she remained pregnant, but got aborted. The informant felt that the applicant would not marry and therefore, the report.

6. Learned counsel appearing for applicant would submit that the entire episode discloses that it was a love relationship in between two youngsters. The victim never gave her consent for sexual relationship. On account of her own violation of mind, she maintained relations which were for two years. He would submit that it is not a case of false promise to marry, but the facts are indicative of consensual sex on account of love relation.

7. In order to impress the submission that one has to see the facts of the case without getting influenced by the section invoked,

reliance is placed on the decision of the Supreme Court in case of **Narinder Singh & ors. Vs. State of Punjab and anr., AIR 2014 SCW 2065**. In the said case, relating to the offence punishable under Section 307 of the Indian Penal Code, it is expressed that despite invoking the particular section, the High Court has to examine whether prima facie offence is made out under said section. The learned counsel for applicant further relied on the decision of this Court in case of **Amit Kumar Arun Kumar Singh Vs. State of Maharashtra & anr. 2016 ALL MR (Crim) 1553**, wherein this Court on facts, held that though the offence is about rape, however, it was in between two adults having the age of understanding. In the situation, this Court has quashed the FIR on account settlement.

8. The learned counsel appearing for the applicant has submitted that apart from settlement, the emerging facts are clear enough to convey that it is a case of consensual relation. In this regard, reliance is placed on the decision of the Supreme Court in case of **Pramod Suryabhan Pawar Vs. State of Maharashtra and anr. (2019) 9 SCC 608**. In the said decision, the Supreme Court took review of earlier decision and summarized the legal position in para

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."

9. On the same line, reliance is placed on the decision of the Supreme Court in case of **Sonu @ Subhash Kumar Vs. State of Uttar Pradesh and anr.**, AIR 2021 SC 1405, whereby it has been observed that in absence of allegation that promise to marry was false at inception, the offence of rape has not been made out.

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. In the decision of the Supreme Court in case of **Deepak Gulati vs. State of Haryana (2013) 7 SCC 675**, specific emphasis is laid on paragraph 21 of the judgment, which reads as follows :

“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 mis-representation 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

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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.”

12. It emerges from the above exposition of law that “consent” of a woman must involve an active and reasoned deliberation towards the proposed act to attract the penal consequence. The promise of marriage must have been a false promise, given in bad faith and with no intention to adhere the promise.

13. Section 90 of the Indian Penal Code defines “consent known to be given under fear or misconception”, 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

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‘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 there was love relationship.

14. In view of above settled position, we have examined the contents of FIR. Undeniably the victim was well grown up lady aged 22 years old. She had acquainted with the applicant since last two years and were in taking terms. She never stated that since beginning, the applicant was intending to chit and thus, his assurance for marriage was false. Though it alleges that on 13.03.2022, there were forcible relation, however she has not lodged report.

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15. The victim never stated the specific instance or details about the occurrence. The entire reading of FIR nowhere gives impression that since inception, there was intention to chit, rather it appears that through social media they got acquainted and maintained relationship for long two years. Moreover, despite her intuition that the applicant would not marry, she still continued relation and did not ventilate grievance for considerable period.

16. Beside that the victim in her reply stated that the relation was consensual. There was misunderstanding which resulted into filing of FIR. The victim specifically stated that by the time, she got married and pendency of criminal case may put hurdle in her smooth marital life. Apart from settlement, we have examined case on merit and unable to find the essential to hold that on account of false promise that too from inception, the applicant has obtained consent of victim for sexual relation. Long standing relationship in between two adults gives impression that it was a consensual relationship between them. Continuation of the prosecution amounts to abuse of the process of the Court.

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17. In view of above, application is allowed. We hereby quash and set aside FIR vide crime No. 135/2022 registered with Police Station Kapil Nagar, Nagpur (City) for the offence punishable under Sections 376(2)(n) of the Indian Penal Code on account of settlement as well as on merits.

18. Application stand disposed of in above terms.

(M. W. CHANDWANI, J.)

(VINAY JOSHI, J.)