

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

CRIMINAL APPEAL NO. 587 OF 2022.

Prathamesh Surendra Sohale,
Aged about 24 years,
Occupation - Student, Resident
of Ward No.4, near State Bank,
Post Kurha, Tahsil Tiwsa,
District Amravati.

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APPELLANT.

VERSUS

1.State of Maharashtra,
Through Police Station Officer,
Police Station, Sadar,
Nagpur.

2.XYZ (Details provided in
sealed Envelop), Crime No.134/2021
Police Station, Sadar,
District Nagpur.

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RESPONDENTS.

Mr. A.S, Manohar, Advocate for the Appellant.
Mr.S.S. Doifode, Addl.P.P. for Respondent No.1/State.
Mrs.S.T. Godbole, Advocate (Appointed) for Respondent No.2.

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

JUDGMENT RESERVED ON : 11.01.2023.
JUDGMENT PRONOUNCED ON : 16.01.2023.

JUDGMENT (PER VINAY JOSHI, J.) :

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

Admit.

2. This appeal once again occasioned us to delve upon the issue to decide on facts and circumstances of the case, whether it is a case of mere breach of promise, or a case of false promise made since inception for obtaining consent for sex. We are undertaking said exercise to the limited extent to find out whether a prima facie case is made out to frame the charge.

3. The appellant/accused aged 24 years was involved in a

Crime No.134/2021 for the offence punishable under Sections 376, 376[2][N] of the Indian Penal Code, and Sections 3[1][w][i], 3[2][5] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 2015 (hereinafter referred to as “the Atrocities Act” for short). Respondent no.2 victim aged 21 years has lodged a report against the accused for the aforesaid offences on 03.04.2021 with the Sadar Police Station, Nagpur. On the basis of said report, the police registered the aforesaid crime. Investigation was carried by the police culminated into filing of charge sheet. The accused has applied to the trial Court for discharge in terms of Section 227 of the Code of Criminal Procedure. On evaluation of the available material, the trial Court has formed an opinion that there are sufficient grounds to proceed further and accordingly rejected the discharge application vide order dated 03.08.2022, which is impugned herein. Since the provisions of Atrocities Act, have been involved, this is an appeal in terms of Section 14A of the said Act.

4. At the inception, the learned Counsel for the accused would submit that at the time of framing charge, the Court has

power to sift and weigh the evidence for limited purpose of finding out whether a prima facie case against the accused has been made out. For this purpose he relied on the decision of Supreme Court in case of **Sajjan Kumar .vrs. Central Bureau of Investigation – [2010] 9 SCC 368**. There can be no dispute about the said proposition of law, which has been reiterated in several decisions. We may refer to a decision of Supreme Court in case of **Union of India .vrs. Prafulla Kumar – [1979] 3 SCC 4**, wherein it has been ruled that while considering the question of framing charge, the Court has power to shift and weigh the evidence for limited purpose, however, if the material discloses grave suspicion, the Court will be fully justified in framing the charge. It is clear that if there is a strong suspicion which leads to think that there are grounds for presuming that the accused has committed an offence, then the Court shall proceed in framing the charge. At this juncture, the requirement is to see whether the material is sufficient to proceed further and not sufficient to convict the accused. Though the Court is permitted to sift the material to the limited extent, however, one should be mindful that at this juncture meticulous examination of the evidence,

its marshaling and roving enquiry into the pros and cons is not permissible. On the enveil of these set parameters, we undertake to examine the material.

5. For considering the question involved, it necessitates us to briefly refer to the facts of the case.

The victim aged 21 years has lodged report with respondent no.1 police station. It is her contention that since she was of marriageable age, she has registered herself on a matrimonial website namely "Jeevan Sathi.com" in the month of December, 2020. She has furnished her personal details with cell number on the website. Soon after, she received a phone call of accused stating that he has seen her matrimonial profile on the website, and expressed to meet her. On 16.01.2021 the accused called her to meet at Eternity Mall, Nagpur. Accordingly, the victim went to the place where both met. In first meeting, the accused expressed that he likes her and desires to marry, to which she agreed. After two days i.e. on 18.01.2021, the accused went to the house victim and took her by riding on motor cycle to Hotel Parashar, situated near

Railway Station, Nagpur. In said hotel the accused booked a room in the name of both where they had overnight stay. During said period, the accused started to make physical advances to which she resisted by saying that yet they have not married. The accused said that he desires to marry and asked her to believe on him, and then had sexual intercourse with her in the lodging house.

6. Thereafter both were frequenting with each other. On 23.01.2021, the accused telephonically called the victim at J.K. Hotel, Nagpur where he had booked a room. In the said hotel they stayed overnight and during that period, the accused again assured to marry and by gaining victims confidence repeated the act of sexual intercourse.

7. It was followed by regular telephonic conversation between them. In their conversation, the accused was saying that he is intending to marry with her. Then on 30.01.2021, again the accused called the victim at Hotel Parashar, Nagpur where they stayed for near about two days, during which they had sexual

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relations. The same was repeated again on 15.02.2021 at J.K. Hotel, Nagpur. This time the accused once again promised to marry and sexually exploited her.

8. It is victims contention that after few days the accused started to avoid her calls and tried to disassociate himself. The victim perceived that the accused is avoiding her, therefore she has asked about marriage. The accused finally replied that their marriage is not agreeable to his parents, and therefore, refused to marry. This was followed by the victim lodging report with concerned police.

9. The learned Counsel appearing for the accused would submit that, the case of the victim as it emerges from the police paper, clearly demonstrates that it is a case of sexual relationship between two adults. There are no allegations of use of force at any point of time. The circumstances show that the victim was in longstanding relationship with the accused and had voluntarily went with him to different lodging houses. There was no intention on the

part of the accused to make false promise, but, as his parents refused, the marriage could not be materialized. The learned Counsel for the accused took us through the statement of the victim recorded by the Magistrate under Section 164 of the Code, and another statement recorded by Amravati Police relating to the crime. On that basis, he tried to make out a case that the victim was in love with the accused and both decided to marry. It is his contention that the marriage proposal was from both side, and thus, there was no element of accused giving false promise of marriage since inception. The learned Counsel for the accused has relied on several decisions of the Supreme Court to buttress his contention that, mere breach of promise occurring due to circumstances beyond his control, does not vitiate the consent amounting to the offence of rape. It is argued that the victim was an educated major lady and she was aware about the nature and consequences of her act. According to him, the police paper itself indicates that due to refusal of parents, the accused was unable to adhere to his assurance, and thus, it is not a case of obtaining consent under misconception of fact. It is submitted that that while dealing with discharge application, the Court is well

empowered to sift the material to the said limited extent.

10. On the other hand, the learned Addl.P.P. as well as Advocate Mrs. Godbole, appearing for the victim put strong resistance for discharge of accused. It is their contention that, it is not a case of love relationship, but, both were made to known each other through matrimonial website. The accused was knowing about the caste of the victim since inception, and therefore, the reason for refusal canvassed at a belated stage is false. It is argued that the victim in her statement has specifically made out a case that on first occasion itself she resisted for physical relations, but, only because the accused assured her for marriage, she submitted herself.

11. Undisputed facts of the case are as under :

- [a] The victim was 21 years of age at the time of occurrence, whilst the accused was 23 years of age.
- [b] The victim was desires to marry for which she has registered herself on a matrimonial website with all personal details including caste, photograph, address, cell number etc.

- [c] The accused has contacted the victim on the basis of her profile on matrimonial website, and called her to meet at Eternity Mall, Nagpur.
- [d] On first meeting the accused expressed that he likes her and intend to marry, on which both agreed to marry.
- [e] On 4 occasions both of them stayed overnight at different lodging houses where they had sexual relations.
- [f] Within 1-2 months from last sexual relations, the accused disassociated himself.
- [g] The accused refused to marry by saying that his parents are not agreeable for their marriage.

12. 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.

13. Initially our attention was drawn by the learned Counsel for the accused to the decision of the Supreme Court in case of **Deepak Gulati .vrs. State of Haryana – [2013] 7 SCC 675**, with a specific emphasis on paragraph no.21 of the judgment, which reads 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.”

14. On that basis, it has been submitted that there is distinction between ‘rape’ and ‘consensual sex’. The Court shall 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.

15. In above case the facts were such that the victim aged 19 years was capable of understanding the complications and issues surrounding to her marriage. The victim herself had called the accused and asked why he did not come at the pre-determined place. The victim waited for the accused for long time and had not raised any objection at the time of sexual intercourse. Moreover, while the accused was taking victim to some other place for marriage, in the mid way they were apprehended by the police. In such facts and circumstances, it has been held that the consent was not given under misconception.

16. The learned Counsel for the accused by placing reliance on the decision of the Supreme Court in case of **Dr.Dhruvaram Murlidhar Sonar .vrs. State of Maharashtra and others – [2019] 18**

SCC 191, would submit that sexual intercourse without any misconception created by the accused does not constitute an offence of rape. Particularly he laid emphasis on paragraph no.23 of the decision, which 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.

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

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 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.”

18. Certainly it needs to be examined whether false promise itself must be of immediate relevance or bear a direct nexus to the woman’s decision to engage in sexual act. In said case the facts were such that both were knowing each other from years together, they

use to meet regularly, traveled long distance, resided in each others house on multiple occasions, engaged in sex regularly for a period of 5 years. In such a background it has been held that consent was not actuated by misrepresentation which is a conclusion drawn on the given facts.

19. The learned Counsel appearing for the accused also relied on the decision of Supreme Court in cases of **Sonu @ Subhash Kumar .vrs. State of Uttar Pradesh – AIR 2021 SC 1405** and **Shambhu Kharwar .vrs. State of Uttar Pradesh – AIR 2022 SC 3901**, wherein the earlier law laid down in case of Pramod Pawar [supra], has been reiterated and the decisions where on the basis of facts of those cases.

20. 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.

21. 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.

22. All it needs is a careful examination of facts and relevant circumstances to find out whether in given case the consent was actuated by fraud amounting to absence of consent. The learned Counsel for the accused laid emphasis on the point that the victim was also equally keen to marry the accused. Our attention has been invited to the contents of first information report that when the accused expressed his desire to marry, she also agreed for the proposal. We are unable to perceive victims own advances from such recital. As a natural corollary of the initial expression by the accused to marry, she responded favourable and nothing else. The learned Counsel for the appellant took us through the statement of victim recorded by the Magistrate in terms of Section 164 of the Code of Criminal Procedure. Similarly in said statement it has been stated that both have agreed to marry with each other. It is pointed

out from the statement that parents of accused were not agreeable for the marriage. On that basis it has been canvassed that the marriage proposal was from both end, and the reason for refusal was non-inclination of parents of the accused. We are unable to agree with the submissions since the statement recorded under Section 164 of the Code has to be read as a whole. It is not permissible to extract some of the sentences, as always the entire statement is to be read in context. In said statement by and large, the victim repeated the story that the accused called her at Eternity Mall, and proposed to marry. Particularly on vital aspect she stated that on their first meeting at lodging house, she resisted for physical relations on which the accused assured to marry and did the things.

23. The learned Counsel for the appellant took us through some photographs of the couple to contend that it is a case of love relationship. We are unable to accede to the said submission, since merely on the basis of photographs no inference can be drawn. We have detailed above as to how the couple met and under which circumstances and assumption, relationship developed. Our

attention has also been drawn towards two statements of hotel manager to impress that it was a consensual relationship. It has been argued that as per statements of hotel manager, the couple booked the room by misleading that they have engaged the room for official work. Infact the said aspect plays little role because in what circumstances and belief the victim went to the hotel was not known to the third party. Obviously to facilitate for obtaining hotel room they have feigned to be office colleagues, from which no inference can be drawn.

24. In order to appreciate one other submission, it necessitates to understand some facts. The victim at the relevant time was staying at Nagpur. The accused was temporarily staying at Nagpur, but, was hailing from Amravati District. On refusal of marriage, the victim instead of lodging report at Nagpur as everything had happened at Nagpur, went to Amravati to lodge report. She gave an application in writing to the Superintendent of Police, Amravati for that purpose, however, the police directed her to lodge the report at Nagpur which she did. The application filed on

the same date to Amravati Police forms part of the charge sheet to which our attention is attracted by the learned Counsel for the accused. It has been stated in said application that they met through matrimonial website, fell in love and decided to marry. At the end of the statement, the victim has stated that she only wants to marry with accused, but, not to bother him. Again we reiterate that said portion cannot be read in isolation. In said application, the victim had made allegations about promise to marry and enjoying sex under said assumption. Therefore, at this preliminary stage much importance cannot be given to some portion of the previous statement of the victim.

25. Reverting back to the first information report, there are specific allegations that on first occasion at Hotel Parashar, Nagpur she had refused to submit herself, but, as the accused assured to marry, and asked her to keep faith, she surrendered her body. The said recital coupled with subsequent recital of giving promise on each occasion assumes significance. Prima facie it emerges that from the view point of victim, she gave consent under the promise of

marriage. Likewise from the view point of the accused, his knowledge can be easily inferred that for the reason of his assurance for marriage, victim gave consent for sexual relations. Reading of the whole first information report postulates that the victim would not have given consent if there was no assurance of marriage from the side of the accused.

26. In order to find out prima facie case which is the requirement at this stage, we have to see whether circumstances indicates that since inception there was deceitful intention, that the accused did not intended to marry or at subsequent stage due to circumstances, he decided to back-out from the assurance. The Court has to prima facie form an opinion on facts, whether there was deceitful intention on the part of the accused since inception, which is crucial one.

27. The very initiation of the episode evolves from the meeting through matrimonial website which assumes significance. The victim girl has registered herself on the matrimonial website with all details, obviously with an intent to see a suitable match for

her. It is important to note that the accused from matrimonial website took all details of the victim and contacted her. It is not a case that the couple had casual acquaintance which later on turned into intimacy, followed by promise to marry. Each case has different shades that is why application of judicial mind is necessary to carefully analyze the facts to find out the real intention of the parties.

28. It is argued on behalf of the victim that she has uploaded her entire information, including caste on the website which is not denied. Obviously, knowing fully well about the caste of the victim, accused has contacted her and expressed his desire to marry. The accused was well aware about the caste difference and approach of his parents, still he ventured into contacting the victim and gave marriage proposal. It means that caste difference was not an issue from his end. In such a background, the later refusal on a facile ground that parents are not agreeable, prima facie does not stand to reason. That too the reason given after enjoying the physical needs repeatedly.

29. One can look into the matter from another angle, that, if the accused was really and bonafidely intending to marry the victim, in normal course he would have taken the victim to his parents with an urge to break the caste barrier, but, he did not. Notably the accused called the victim at Eternity Mall i.e. away from his family, which gives a smell of clandestine intent. Pertinent to note that within two days from first meeting, in proficient way accused took the victim to lodging house and then repeated the things at different lodges in quick succession. To our mind it is a significant aspect as just within two days he made up his mind to have sex and did that. Besides that within short span of one month he took her to different lodges, without bothering about his parents wish. This leads us to prima facie think that since inception, the accused intended to have sexual relations, and as stated by the victim by luring for marriage, satisfied his wish. It is not the case that after first meeting they interacted with the family members, but, the role of parents first time surfaced when the accused started avoiding the victim. The act of accused of abruptly disassociating himself after satisfying physical need strengthens the victims contention that the only intent was to

enjoy the relationship and nothing else. It is not a case that they were in relationship for considerable period to prima facie think that the because of love and intimacy they had physical relationship.

30. There is no material to indicate that the accused endeavored to convince his parents for marriage, but, he has stated to avoid the victim. Whether the obstacle of absence of parents' consent is subsequent development, is certainly a matter of trial. The accused is presumed to be aware about the temperament and views of his parents on inter caste marriage. Therefore, the reason of parents denial canvassed after relations, appears to be untrue. Prima facie case of deceitful intent of accused is made out at least to put him on trial.

31. It emerges that a young girl put her profile on the matrimonial website intending to enter into sacred relationship. The accused choose her knowing well, her caste and other details. He assured her to marry despite caste barrier, enjoyed sex and thereafter played a trump card about reluctance of his parents. Prima facie it emerges that a case is made out to raise strong suspicion that with

deceitful intent, promise was made with a view to obtain her consent for sex. Physical relationship without consent in the eyes of law is nothing, but, an assault on the body, mind and privacy of the victim. It is like a permanent scar on the life of the victim. Reading of police papers prima facie makes out a triable case. Well researched efforts made on behalf of the accused falls short to prima facie make out a case of mere breach of promise. Close examination of the emerging facts indicates a strong prima facie case at least to put the accused for trial. In view of that, we do not find that the trial Court has committed an error in rejecting the discharge application of the accused. In the circumstances, Criminal Appeal fails and is dismissed. We make it clear that above observations will not have any bearing on the trial of the matter.

32. Fees for the appointed Counsel for respondent no.2 be paid as per Rules.

JUDGE

JUDGE