

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

CRIMINAL APPLICATION (APL) NO. 1065 OF 2019

Pawan s/o Bhimrao Jadhav, Aged about
 31 years, Occ. Student, R/o Gram
 Chelka, Tq. Barshitakli, Distt. Akola.

... APPLICANT

VERSUS

1. State of Maharashtra, through Police
 Station Officer, Barshitakli, Tq.
 Barshitakli, Distt. Akola.
2. Prarthana Rajaram Ingale, Aged
 about 25 years, Occu. Household,
 R/o Shelgaon, Garshitakli, Tq.
 Barshitakli, Distt. Akola.

... NON-APPLICANTS

Shri Abhishek Shukla, Advocate for the applicant.
 Shri N.R. Rode, A.P.P for the non-applicant/State.
 Shri Ajay Tote, Advocate for non-applicant no.2 (appointed)

CORAM : VINAY JOSHI AND BHARAT P. DESHPANDE, JJ.
DATED : 05/04/2023.

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

Heard. **ADMIT.**

2. The matter is taken up for final hearing by consent of learned Counsel appearing for the respective parties.

3. This application is under Section 482 of the Code of Criminal Procedure (the Code) seeking to quash the First Information Report (FIR) No.255 of 2019 registered with the Barshitakli Police Station, District Akola for the offences punishable under Sections 376(2)(n), 417 of the Indian Penal Code, 1860, sections 3(1)(w)(i)(ii), 3(2)(5) and 3(2)(va) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989. Once again a question falls for consideration whether it is a case of mere breach of promise or a false promise to marry.

4. The informant lady aged 25 years lodged a report on 14.07.2019, which led registration of crime. It is the informant's case that she got married with one Rajesh Aathvale on 02.02.2015. After few months from the marriage, there was disagreement between the couple, therefore the informant got a divorce from her husband by executing notarized document. At relevant time, she was pregnant. The informant started to reside at her parent's house. She got acquainted with the applicant, who was villager. There casual acquaintance turned into love relationship. She has disclosed to the applicant about her pregnancy, still the applicant assured her for marriage and willingness

to maintain her child. Since the applicant assured for marriage, they had physical relations on and often. Time to time the applicant kept on giving assurance of marriage and maintained the relationship. On 27.11.2015, the informant delivered a baby from her husband. Thereafter also, the informant and the applicant continuing their physical relationship till the month of May,2019. Finally, the applicant refused for marriage, which caused her to lodged the report.

5. Learned Counsel appearing for the applicant would submit that contents of the FIR even if taken at its face value, it does not make out a case of false promise constituting the offence of rape. It is argued that the case squarely falls in the arena of voluntary sexual relations in between two adults. Learned Counsel for the informant as well as learned Additional Public Prosecutor appearing for the non-applicant/State resisted the application by contenting that the informant has specifically stated about assurances given by the applicant for marriage. It is submitted that since consent was given by the informant on promise to marry, therefore, the consent vitiates amounting to offence of rape.

6. Learned Counsel for the applicant has submitted that the facts are clear enough to convey that the consent was not given by the informant only on account of promise to marry, but relations were

established due to love affair.

7. Reading of police papers indicates that there was love affair and out of that they had relations. It is argued that the facts does not discloses that it is a case of false promise vitiating the consent. But at the most, it can be termed as a breach of promise. In support of said contention, learned Counsel for the applicant placed reliance on the following decisions :

- (i) Pramod Suryabhan Pawar v. State of Maharashtra and anr. 2019 SCC OnLine SC 1073.
- (ii) Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra and ors. 2018 SCC OnLine SC 3100
- (iii) Deepak Gulati v. State of Haryana (2013) 7 SCC 675.
- (iv) Deelip Singh Alias Dilip Kumar v. State of Bihar (2005) 1 SCC 88
- (v) Uday v. State of Karnataka (2003) 4 SCC 46
- (vi) Naim Ahamed v. State (NCT of Delhi) 2023 LiveLaw (SC) 66
- (vi) Sonu alias Subhash Kumar v. State of Uttar Pradesh and anr. 2021 SCC OnLine SC 181
- (vii) Shambhu Kharwar v. State of Uttar Pradesh and anr. 2022 SCC OnLine SC 1032.

We have gone through the above decisions of which we wish to refer few as all decisions are on same line.

8. 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 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.”

9. Undoubtedly, 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.

10. On the same line, we may refer another decision of the Supreme Court in case of ***Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and ors. (2019) 18 SCC 191*** with emphasis on paragraph 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.”

11. 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.

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 ‘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 case of Pramod Pawar (*supra*), once again the Supreme Court has summarized the position in paragraph 22, which reads as

below :

“22. 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.”

15. In view of above settled position, it is necessary to examine the facts and relevant circumstances of the case to find out whether in given case, the consent was actuated by fraud amounting to absence of consent. With the assistance of both sides, we have examined FIR as well as related statements.

16. Learned Counsel for the applicant has attracted our attention towards supplementary statement of the informant lady (page 74) recorded within four days from the registration of crime. In said statement, the informant took inconsistent stand from her earlier police report. Initially, the informant has stated that she got divorce by executing notarize document in the year 2015, and then, got acquainted with the applicant at her parental village. Her

supplementary statement speaks the other story. It is her case that initially, she got acquainted with the applicant and developed love relationship. She had not disclosed relationship to any one. Later on, she got married with someone else and remained pregnant. She stated that the applicant assured her for marriage and therefore, by relying on his words, she got divorce and started to reside at maternal house. *Prima facie*, it is evident from said statement that since prior to the marriage there was love relationship in between the applicant and informant. Despite that, she got married with somebody else and thereafter, at the behest of the applicant, she got executed the document of divorce. Moreover, it is her contention that for next four years, she had physical relations with the applicant. Pertinent to note that, as per the informant's own case, there was love affair, though she got married with someone else, she continued relationship and even obtained divorce. Thus, *prima facie*, it cannot be said that since inception, she has consented for sexual relations by relying on promise to marry.

17. Learned Counsel for the applicant took us through the statement of the informant's brother, mother and father to impress that though the informant has produced a notarized document, however she was not divorced. In this regard, it is pointed out from these statements

that in the month of June 2019, family members took the informant to her husband's house, who also agreed to accept her. It reveals from their statement that while after marriage, the informant came to her maternal house, she had relations with the applicant/accused. At that time, all family members tried to persuade her to desist the relationship with the applicant as she was married. The said material *prima facie*, indicates that since prior to and after marriage also, the informant had relationship with the applicant, which lasted for long period of four years. Moreover, it also reveals that formal document of divorce was executed, however matrimonial ties were intact, as in the year 2019 she again went to her husband's house and resided there for few days. Considering all above facts, it reveals that love relationship was since prior to the marriage, still she married with somebody and maintained relations.

18. Bearing in mind the test, which has been enunciated in above decisions, it is evident that even assuming that all the allegations in the police papers are correct, no offence has been made out. It is impossible to find the essential ingredients to constitute the offence of rape, even if the allegations in the police papers are taken it to be true. The crucial ingredients of the offence of rape are missing. The relationship was purely of consensual nature. The fact nowhere

indicates that only because the applicant assured for marriage, the lady gave consent, nor it indicates that since inception the applicant with deceitful intent gave a promise to marry. On the other hand, the facts indicate that since prior to her marriage, the couple was in relationship, which was remained undisturbed despite the informant got married and had a baby from her husband. In view of above facts, the material nowhere discloses that the informant's consent was actuated by a false promise. It is a case of consent of lady out of love relationship. There are no allegations to the effect that the promise to marry given to the informant was false at the inception. On the contrary, it would appear from the police papers that there was subsequent refusal on the part of the applicant to marry, which gave rise to the registration of FIR.

19. The learned Counsel for the informant would submit that as per the police papers, at the behest of the applicant the informant has destroyed the mobile phone so as to cover-up her relationship. It is argued that the applicant intended to keep the relationship in secrecy, therefore there was deceitful intent. Obviously such inference cannot be drawn, because the informant is a married lady, therefore, naturally both intended to keep everything under cover. It is also submitted that the charge-sheet bears a bunch of call details indicating that for long period, they were in close contact with each other. The said

circumstance, is not indicative of anything since apparently, they were in relationship and thus, their frequent calling cannot be termed adverse, nor would help the prosecution in any manner. Continuation of such prosecution amounts to abuse of the process of court. The case squarely falls in the criteria (1) and (3) laid down by the Supreme Court in case of *State of Haryana vs. Bhajan Lal AIR 1992 SC 604*. In order to secure the ends of justice the proceeding needs to be quashed by invoking inherent powers.

20. In view of that, the application is allowed. We hereby quashed and set aside the quash the First Information Report (FIR) No.255 of 2019 registered with the Barshitakli Police Station, District Akola for the offence punishable under Sections 376(2)(n), 417 of the Indian Penal Code, 1860 and Section 3(1)(w)(i)(ii), 3(2)(5), 3(2)(va) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 and the related charge-sheet No.131 of 2019 pending on the file of the concerned Chief Judicial Magistrate.

21. The application stands disposed of accordingly. No order as to costs.