

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

CRIMINAL APPLICATION (APL) NO. 1601 OF 2022

Mr. Bharat @ Pawan s/o Shrikrishna
Rajurkar, Age About 25 yers, Occupation
– Private, R/o Chondhi, Babulgaon,
District – Yavatmal.

... APPLICANT

VERSUS

1. State of Maharashtra, through Police
Station Officer, Police Station,
Yavatmal City, District Yavatmal.
2. XYZ, Victim In Crime No.148/2022
Police Station Yavatmal – City,
District Yavatmal.

... NON-APPLICANTS

Shri S.R. Kadam, Advocate for the applicant.
Shri A.M. Kadukar, A.P.P for the non-applicant/State.

CORAM : VINAY JOSHI AND BHARAT P. DESHPANDE, JJ.
DATED : 14/03/2023.

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. Registration of Crime No.148 of 2022 with the Yavatmal City Police Station District Yavatmal, for the offence punishable under Section 376 of the Indian Penal Code, caused the applicant to invoke inherent jurisdiction of this Court. It is the applicant's contention that the First Information Report coupled with the material collected during the investigation do not disclose the commission of offence, therefore, it is liable to be quashed.

4. The crime was registered at the instance of the report dated 06.03.2022 lodged by a lady aged 21 years. It is the informant's case that in the month of January 2020, she went to reside with her maternal aunt, where she got acquainted with the applicant/accused. Their casual acquaintance turned into love relationship. When the love affair was exposed to the family members, the informant was asked by her father to leave the house. For some days, the informant adopted shelter of her relative and then along with the applicant/accused, started to reside at the applicant's relative's house. The applicant expressed that he would marry with her. Then both of them took a rented room and resided together for the period of more than one year. They have shifted to another rented room for some days. They were

living like husband and wife. During that period, they had sexual relations. Later on, the informant learnt that the applicant was about to marry with somebody else, therefore she inquired with him. The applicant refused for marriage, which caused her to lodge the police report.

5. The crucial issue which is to be considered is whether the allegations indicate that the applicant had given a promise to the informant to marry, which at the inception was false and on the basis of which the informant was induced into a sexual relationship. Reading of First Information Report (FIR) indicates that there was love affair in between two adults. Both of them left their respective houses and lived for the period of more than one year in rented premises. The informant never stated that under the promise to marry, the applicant demanded for sexual relations, and on believing such promise she surrendered herself. It is apparent that everything was smooth for the period more than one year, but when the applicant refused to marry, the report has been lodged.

6. Learned A.P.P. appearing for the non-applicant/State would submit that the contents of FIR constitutes the offence of rape as the consent was obtained by deceitful means. By relying on the decision of the Supreme Court in case of *Anurag Soni vs. State of Chhattisgarh* AIR

2019 SC 1857, it is submitted that, if the consent was given by relying upon the false promise of marriage, then such consent vitiates and the act amounts to rape. There is no dispute about said proposition of law, however it is a factual aspect to see whether the accused had deceitful intention from the beginning and the prosecutrix gave her consent only because she was promised for marriage.

7. At the inception, we may refer the decision of the Hon'ble Supreme Court in case of ***Deepak Gulati vs. State of Haryana (2013) 7 SCC 675***, with a specific emphasis 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.”

8. 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.

9. 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.”

10. 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.

11. 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.

12. 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 be 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 victim's case there was a love relationship.

13. It necessitates 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. Taking the allegations in the report as well as charge-sheet, it is impossible to find the essential ingredients of an offence punishable under Section 376 of the Indian Penal Code. The crucial ingredients of the offence are missing. The relationship was purely of consensual one. It reveals from some of the statement that the victim took initiative for renting the house and posed the applicant as her brother to the landlady. It appears that a young couple ran away from the house and stayed for longer period, during which they had sexual relations. The reading of entire material, nowhere discloses that only because the applicant assured for marriage, she has surrendered herself. Continuation of such prosecution amounts to abuse of 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.

14. The application is allowed. We hereby quashed and set aside the First Information Report No.148 of 2022 registered with the Yavatmal City Police Station District Yavatmal for the offence punishable under Section 376 of the Indian Penal Code and the related charge-sheet No.335 of 2022 pending on the file of the Chief Judicial Magistrate, Yavatmal.

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

(BHARAT P. DESHPANDE, J.)

(VINAY JOSHI, J.)

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