



Judgment

902 apl 1604.23

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

CRIMINAL APPLICATION (APL) NO. 1604/2023

Ayush Rajnand Hadke,
Age about 26 yrs., Occ. Student,
R/o. C/o. Rajnand Hadke Somalwada
Juni Vasti, behind MSEB Somalwada,
Dist. Nagpur.

.... **APPLICANT**

VERSUS

1. State of Maharashtra,
through Police Station Officer,
Police Station Sonegaon,
Dist. Nagpur.
2. Complainant XYZ,
Crime No. 59 of 2022,
Police Station, Sonegaon,
Dist. Nagpur.

... **NON-APPLICANTS**

Mrs. L.P. Ranga, Advocate for applicant.
Mrs. S.V. Kolhe, Addl. Public Prosecutor ('APP') for non-applicant
No.1/State.
Mr. Y.P. Bage, Advocate for non-applicant No.2.

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

DATE : 06.12.2023.

ORAL JUDGMENT (PER VINAY JOSHI, J.) :

Heard.

2. **Admit.**

3. The matter is taken up for final disposal with the consent of learned counsel appearing for the parties. By this application under Section 482 of the Code of Criminal Procedure ('Code'), the applicant is seeking to quash charge-sheet arising out of Crime No. 59/2022 registered at Police Station, Sonegaon, Dist. Nagpur for the offence punishable under Sections 376, 376(2)(n), 506 of the Indian Penal Code on account of settlement as well as merits.

4. The facts in brief are that informant (victim) lady aged about 22 years was studying at College of Engineering, Mohagaon, Butibori, Nagpur. For educational purpose, she was residing with her maternal uncle at Nagpur. The applicant was in visiting terms at the house of informant's maternal uncle. Somewhere in the year 2018, the victim got acquainted with the applicant and then their casual acquaintance turned into love relationship. They used to meet each other frequently at different places. On 04.06.2018 at late

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night, the applicant telephonically called the informant at his house. In response, the victim went to the applicant's house where applicant established sexual relations by force. While leaving the place, the applicant stated to the victim for not to disclose the things as it would defame them. He has also stated that they would marry soon. Later on, the applicant continued to sexually exploiting her by saying that he would marry with her. They had also physical relations at lodging house. Finally, the applicant denied for marriage, therefore 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 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.

6. Learned Counsel appearing for the applicant strenuously argued that the facts does not disclose that it is a case of false promise vitiating the consent. He would submit that both were young

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and had relationship purely out of love affair. It is submitted that despite initial denial, the informant has maintained sexual relations which itself discloses that the consent was not given on account of promise to marry. It is submitted that reading of Police Report itself discloses that the initial relations were out of love relationship. There are no allegations that on first occasion, the applicant assured informant about marriage and under such promise, sexually exploited her. In substance, it is argued that the allegations levelled in the Police Report does not constitute a case of consent obtained under misconception of facts.

7. *Per contra*, learned APP. would submit that, the consent was given by the informant under a misconception of fact. Reading of the FIR discloses that the accused had sexual intercourse with the informant by giving false assurance that he would marry. According to him, it is evident that the applicant never intended to marry with her and therefore, the consent vitiates amounting to the offence of rape.

8. The Supreme Court has occasion to deal the same issue

in several cases. The observations made in this regard would provide us a guiding factor. In case of ***Deepak Gulati vs. State of Haryana (2013) 7 SCC 675***, specific observations were made in 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

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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. On the same line, we may refer the decision of the Supreme Court in case of **Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and ors. 2018 SCC OnLine SC 3100** 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***, 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”, 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”

13. 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 expressed 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 Suryabhan Pawar vs. State of Maharashtra and anr. 2019 SCC OnLine SC 1073**, 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 the material adduced by the prosecution.

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16. Undeniably, the informant lady aged 22 years was well educated and studying in the Engineering College. They had love relationship for long period of four years. During said period, they frequently met each other and had enjoyed sexual relations. The FIR itself discloses that on first occasion i.e. on 04.06.2018, the applicant had called the informant. She went to the house of applicant at mid-night and they had sexual relations. Pertinent to note that victim never stated that, at the relevant time the applicant has established relations by giving promise to marry, though she stated that the applicant has sexual relations by use of force. However admittedly, for next four years, the thing repeated, but she did not lodge report.

17. 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. 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

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since inception the applicant with deceitful intent gave a promise to marry.

18. In substance, the prosecution case even if it is accepted at its face value, it does not make out prima facie case to establish the essential ingredients to constitute the offence of rape. Besides that, the matter has been amicably settled. The informant (victim) has filed affidavit-reply stating that the relation was consensual. Out of minor differences in anger, she has lodged report.

19. Considering all above circumstances, continuation of prosecution amounts to abuse of the process of the Court. In view of that application is allowed. We hereby quash and set aside charge-sheet arising out of Crime No. 59/2022 registered at Police Station, Sonegaon, Dist. Nagpur for the offence punishable under Sections 376, 376(2)(n), 506 of the Indian Penal Code on account of settlement as well as merits.

20. Application stands disposed of in above terms.

(M. W. CHANDWANI, J.)

(VINAY JOSHI, J.)