

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**CRR 952 of 2022
With**

CRAN 1 of 2022

**Kousik Ghosh
Vs.
The State of West Bengal**

For the petitioner : Mr. Kallol Mondal
Mr. Kishan Roy
Mr. Souvik Das
Mr. Anamitra Banerjee
Ms. Isita Kundu

For the O.P. no. 2/Legal Aid : Mr. Ayan Bhattacharjee

For the State : Mr. S.S.Imam
Mr. S. Kundu

Heard on : 05.08.2024

Judgement on : 03.09.2024

Ajoy Kumar Mukherjee, J.

1. Present application has been directed against the proceeding being G.R case no. 1889 of 2021 presently pending before learned Additional Chief Justice Magistrate, Lalbagh, Murshidabad.

2. The petitioner contended that the petitioner has been arraigned as an accused person on the basis of a written complaint lodged by the defacto complainant/opposite party no. 2 herein, where it has been alleged *interalia* that opposite party no. 2 had a love affair with the present petitioner for four years and he had cohabited for a number of occasion after promise to marry her, resultantly she got pregnant twice and the petitioner had also caused abortion and thereafter the petitioner denied to marry her.

3. Consequently on the basis of said written complain Murshidabad police station case no. 251 of 2021 dated 24.06.2021 under section 417/376/313 of the IPC was initiated. It is further contended by the petitioner herein that while granting anticipatory bail by this Court, the answer to the query as to whether there is any medical evidence with regard to the charge under section 313 of the Cr.P.C, was negative. However after completion of investigation police submitted charge-sheet under section 417/376 IPC against the petitioner.

4. Mr. Mondal learned counsel appearing on behalf of the petitioner argued that on a bare perusal of the said written complain, it would be evident that no specific date of any alleged incident had been mentioned in the FIR and the allegations are vague, frivolous and engineered with oblique purpose. He further submits even if it is taken for granted that the petitioner had cohabited with the opposite party, then also none of the allegations can satisfy the basic requirements which may be regarded as an offence punishable under sections 417/376 of the IPC as the co-habitation was on free consent and the petitioner is aged about 30 years and complainant aged about 31 years and both of them are adult. He further submits when it is

evident that the cohabitation was made with free consent, it is not an offence in accordance with the prevailing laws of the land. He further argued that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love, on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. It cannot be said that she was not capable of understanding consequence of the act. On perusal of written complaint it is crystal clear that the present criminal proceeding is manifestly attended with *malafide* intention and is a malicious proceeding with ulterior motive for wreaking vengeance with a view to spite him due to private and personal grudge and as such the instant criminal proceeding is liable to be quashed. In this context opposite party no.2 relied upon the following judgments:-

- (i) ***Anurag Soni Vs. State of Chattisgarh*** reported in **2019 13 SCC 1**
- (ii) ***State of Uttar Pradesh Vs. Naushad*** reported in **2013 16 SCC 651**
- (iii) ***Yedla Srinivasa Rao Vs. State of A.P.*** reported in **2006 11 SCC 615**

5. Learned counsel appearing on behalf of the State as well as learned counsel appearing on behalf of the opposite party no. 2, contended that where consent of the prosecutrix was obtained on false promise of marriage, such consent was tendered under misconception of fact and as such the accused is liable to be punished under the relevant provision. It was further submitted on behalf of the opposite parties that in the present context the victim got pregnant twice and thereafter accused refused to marry her. Such

conduct clearly proves that the accused did not have any intention to marry the victim at the time of giving promise or at the time of making sexual intercourse and as such the consent so obtained has been vitiated in the eye of law. They further contended that under section 90 of IPC read with section 114A of the Indian Evidence Act, where the consent was procured on the anvil that the accused would marry the victim such consent is not a free consent to get rid of the allegation of rape as defined in section 375 of the IPC. Accordingly they have submitted that the truth will come out at the end of the trial and as the FIR and the materials available in the case diary including statement of victim recorded by judicial Magistrate *prima facie* discloses offence committed by the accused person, it is not at all a fit case for quashing the proceeding at its threshold. Accordingly they have prayed for dismissal of the application.

6. I have considered submissions made by both the parties.

7. In the present context it is not in dispute that both the prosecutrix and the petitioner/accused are adult. The allegation levelled against the petitioner in the FIR in substance is that she had love affair with the petitioner and they had co-habitated for a number of occasions as petitioner allured and promised to marry her.

8. Before going to further details about the present case, I need to state that the law on this issue is no more *res integra*. In ***Uday Vs. State of Karnataka*** reported in **(2003) 4 SCC 46**, Supreme Court held that in a case of this nature two conditions must be fulfilled for the application of section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact and secondly it must be proved that the person who

obtained the consent knew or had reason to believe that the consent was given in consequence of such misconception. In ***Yedla Srinivasa Rao Vs. State of A.P.*** reported in **(2007) 1 SCC (Cri) 557**, Apex Court held that consent obtained by making false promise to marry is not a consent and sexual intercourse on such false promise was the sexual intercourse without the consent of the victim and the said act falls in second category as enumerated in section 375 IPC and the conviction order under section 376 IPC was held to be justified.

9. In ***Dilip Singh Vs. State of Bihar*** reported in **(2005) 1 SCC 88** it was held that if on facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of the second clause of 375 IPC.

10. In ***Kaini Rajan Vs. State of Kerala*** reported in **(2013) 9 SCC 113** Supreme Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception to the fact. While applying such principle to a case arising under section 375 IPC, the court held that the consent given pursuant to a false representation that the accused intends to marry could be regarded as consent given under misconception of facts.

11. Now coming back to the case in hand I find that in the FIR petitioner has made specific allegation that the accused petitioner had made sexual intercourse with the prosecutrix against her will alluring her on the false promise of marriage. She had also made statement before magistrate under

section 164 of the Cr.P.C. which more or less corroborates with the statement made in the FIR to the extent that the petitioner had made sexual intercourse with her giving false promise of marriage. The statement recorded under section 161 of the IPC also speaks about sexual co habitation on the false promise of marriage.

12. Accordingly in the present context, the entire case is to be examined on this aspect i.e. whether victim's consent was voluntary or she consented under a misconception of fact. It is well settled that a false promise is not a fact within the meaning of the penal code and for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, can only be decided after considering the evidence and surrounding circumstances of the case. It is also required to be adjudicated during trial by way of evidence, even if there was any sexual relationship on the promise of marriage, the petitioner never intended to marry the prosecutrix. Unless the case goes for trial, it is not possible to know what was in the mind of petitioner and the prosecutrix when she consented.

13. In view of aforesaid facts and circumstance of the case when the allegation in the FIR and the materials available in CD does not satisfy any of the ingredients laid down in **Bhajanlal's Case, (AIR 1992 SC 604)** by which it can be said that the allegations herein made in the FIR even if taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused nor it can be said allegations made in the FIR are so absurd or inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, I find that this

is not fit case where the criminal proceeding can be quashed at its threshold without going for trial.

14. In view of aforesaid discussion **CRR 952 of 2022** stands dismissed.

15. Connected application accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(AJOY KUMAR MUKHERJEE, J.)