

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL WRIT PETITION NO. 1204 OF 2015

Shri. Adgonda Kalgonda Patil,
Age: 45 years, Occ: Teacher,
R/o Itawade Budruk,
Tq. Walva, District : Sangli

...Petitioner
(Orig. accused)

Versus

1. The State of Maharashtra
Through Jaysingpur Police Station,
Kolhapur, District Kolhapur.
(Copy to be served on Public Prosecutor,
High Court of Judicature at Bombay).

2. Smt. Savita Raigonda Neje (Nejkar),
Age : 30 years, Occ : Private Service,
R/o Kothali, Tq. Shirol,
District : Kolhapur.

...Respondents

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Mr. Umesh R. Mankapure, for the Petitioner.

Mr. A. A. Palkar, A.P.P. for the Respondent – State.

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CORAM : AVINASH G. GHAROTE, J.
DATE : 5th JULY, 2024

**SAJAKALI
LIYAKAT
JAMADAR**

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ORAL JUDGMENT:

1. Heard Mr. Mankapure, the learned counsel for the petitioner and learned A.P.P. for the Respondent – State. None appears for the respondent No. 2 though served as is indicated by farad sheet

dated 11.10.2017 and the Court order dated 26.09.2018 by which Rule was issued. The notice on Rule has also been served upon the respondent No. 2 as is indicated by the entry in the farad sheet dated 18.06.2024, however none appears.

2. The petition questions the order dated 07.02.2015 passed by the learned Additional Sessions Judge Jaysingpur, rejecting the application of the petitioner for discharge under Section 227 of the Code of Criminal Procedure (Cr.P.C.) in relation to C.R. No.18/2013 in which the accused is arraigned for the offences under Sections 376, 420 & 506 of the Indian Penal Code (IPC).

3. The impugned order indicates, that though the petitioner is accused of having sexual relations with the prosecutrix, there was no free consent on her part, which a *prima-facie* case is made out (Page-83).

4. The prosecution has been initiated on the basis of the complaint filed by the prosecutrix, whose statement is at (Page-28). A perusal of the said statement indicates, that the prosecutrix and the petitioner were related to each other and also had a liking for each other on account of which the petitioner had expressed his willingness to marry her, however, since the father

of the prosecutrix did not want her to get married within the relation, he refused. The prosecutrix thereafter was married to her paternal aunt's son. Even after her marriage, it is contended that the petitioner used to come to the village where she was residing with her husband and used to demand sexual favours. It is claimed that this was narrated by the prosecutrix, to her mother. It is then alleged that the petitioner, thereafter developed friendly relations with the husband of the prosecutrix, and made him addicted to liquor, on account of which, the husband of the prosecutrix is claimed to have passed away. Six months thereafter the petitioner is said to have approached the prosecutrix at her residence at Village Kothali, Tahsil Shirol and had promised to look after her and promised to marry her, after taking divorce from his wife, on account of which, physical relationship were established between them, which is claimed to be inspite of opposition by the prosecutrix. The relationship thereafter continued.

5. On 06.02.2013 a complaint came to be lodged by the prosecutrix with the concerned police station regarding the above offences, as a result of which, offences under the aforesaid

provisions were registered against the Petitioner. During the course of the investigation, the statements of the father, mother, daughter and son of the prosecutrix and one villager were recorded (pages 28, 34, 36 52, 53 & 54).

6. The learned counsel for the Petitioner submits that the perusal of the statement of the prosecutrix, as recorded on 06.02.2013, (Page- 28) would indicate, that there was consensual relationship between the petitioner and the prosecutrix, she being fully aware, that the petitioner was married. He therefore submits that the necessary ingredients for establishing the aforesaid offences are missing, even if the entire prosecution story is accepted as a whole. He further points out that the statement of the father of the prosecutrix (Page- 34) is merely on the basis of what the mother has told him. The statement of the mother also indicates that the relationship was consensual. The statement of the daughter and the son also according to him are not germane regarding the establishing of the ingredients of the aforesaid offences. He therefore submits that all this has been ignored by the learned Sessions Court while passing the impugned order dated 07.05.2015 (Page- 87) which is required to be quashed and

set aside and the application of the applicant needs to be allowed.

7. Learned A.P.P. supports the impugned order and contends that even if the relationship is consensual, the statement of the prosecutrix indicates, opposition on her part and the position of duress in continuing with the relationship and therefore it is a matter of trial.

8. The law on the point has been elucidated as under:

(i) In *Pramod Suryabhan Pawar v State of Maharashtra*¹ the position regarding 'consent' has been elucidated as under:

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.

(ii) In *Dr Dhruvaram Murlidhar Sonar v State of Maharashtra*²:

17. Thus, Section 90 though does not define "consent", but describes what is not "consent". Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. If the consent is given by the complainant under misconception of fact, it is vitiated. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but also after having fully exercised the choice between resistance and assent. Whether there was any consent or not is to be

¹ 2019(9) SCC 608.

² 2019 (18) SCC 191.

ascertained only on a careful study of all relevant circumstances.

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 IPC.

24. In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas sometimes at his home". Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each other's company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since the complainant has failed to prima facie show the commission of rape, the complaint registered under Section 376(2) (b) cannot be sustained.

(iii) In *Sonu @ Subhash Kumar v State of Uttar Pradesh*³ it has been held as under :

10. Bearing in mind the tests which have been enunciated in the above decision [Pramod Suryabhan Pawar v. State of Maharashtra, (2019) 9 SCC 608 : (2019) 3 SCC (Cri) 903], we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established.

(iv) In *Shambhu Kharwar v State of Uttar Pradesh*⁴ it has been held as under :

12. In the present case, the issue which had to be addressed by the High Court was whether, assuming all the allegations in the charge-sheet are correct as they stand, an offence punishable under Section 376 IPC was made out. Admittedly, the appellant and the second respondent were in a consensual relationship from 2013 until December 2017. They are both educated adults. The second respondent, during the course of this period, got married on 12 June 2014 to someone else. The marriage ended in a decree of divorce by mutual consent on 17 September 2017. The allegations of the second respondent indicate that her relationship with the appellant continued prior to her marriage, during the subsistence of the marriage and after the grant of divorce by mutual consent.

13. In this backdrop and taking the allegations in the complaint as they stand, it is impossible to find in the FIR or in the charge-sheet, the essential ingredients of an offence under Section 376 IPC. The crucial issue which is to be considered is whether the allegations indicate that the appellant had given a promise to the second respondent to marry which at the inception was false and on the basis of which the second respondent was induced into a sexual relationship. Taking the allegations in the FIR and the charge-sheet as they stand, the crucial ingredients of the offence under Section 375 IPC are absent. The relationship between the parties was purely

³ AIR 2021 SC 1405.

⁴ 2022 SCC OnLine SC 1032.

of a consensual nature. The relationship, as noted above, was in existence prior to the marriage of the second respondent and continued to subsist during the term of the marriage and after the second respondent was granted a divorce by mutual consent.

(v) In ***Naim Ahamed v State (NCT of Delhi)***⁵ the Hon'ble Apex Court has held as under :

“ 22. In the instant case, the prosecutrix who herself was a married woman having three children, could not be said to have acted under the alleged false promise given by the appellant or under the misconception of fact while giving the consent to have sexual relationship with the appellant. Undisputedly, she continued to have such relationship with him at least for about five years till she gave complaint in the year 2015. Even if the allegations made by her in her deposition before the court, are taken on their face value, then also to construe such allegations as 'rape' by the appellant, would be stretching the case too far. The prosecutrix being a married woman and the mother of three children was matured and intelligent enough to understand the significance and the consequences of the moral or immoral quality of act she was consenting to. Even otherwise, if her entire conduct during the course of such relationship with the accused, is closely seen, it appears that she had betrayed her husband and three children by having relationship with the accused, for whom she had developed liking for him. She had gone to stay with him during the subsistence of her marriage with her husband, to live a better life with the accused. Till the time she was impregnated by the accused in the year 2011, and she gave birth to a male child through the loin of the accused, she did not have any complaint against the accused of he having given false promise to marry her or having cheated her. She also visited the native place of the accused in the year 2012 and came to know that he was a married man having children also, still she continued to live with the accused at another premises without any grievance. She even obtained divorce from her

⁵ (2023) 15 SCC 385.

husband by mutual consent in 2014, leaving her three children with her husband. It was only in the year 2015 when some disputes must have taken place between them, that she filed the present complaint. The accused in his further statement recorded under Section 313 of Cr.PC. had stated that she had filed the complaint as he refused to fulfill her demand to pay her huge amount. Thus, having regard to the facts and circumstances of the case, it could not be said by any stretch of imagination that the prosecutrix had given her consent for the sexual relationship with the appellant under the misconception of fact, so as to hold the appellant guilty of having committed rape within the meaning of Section 375 of IPC.”

9. Examining the factual position in light of the above legal propositions, it would be an undisputed position that the prosecutrix at the time of the FIR, was a widow, 33 years of age, having three children, one son aged 15 years, daughter aged 13 years and another son aged 11 years and was residing along with her in laws. A perusal of the statement of the prosecutrix (Page-28), indicates, that it is a statement which is devoid of any specifics all-together. There is no mention, as to when and where the alleged promise to marry was given, where the relationship was established, how the relationship was continued. All these details, which otherwise ought to remain present, are absent. As indicated above, the prosecutrix, was residing with her parents-in-law, and three children, and therefore the continuation of the

relationship from year 2011 till 06.02.2013, when the complaint was filed, appears to be clearly with the consent of the prosecutrix. There is also an allegation that the consensual act took place at the residence of the prosecutrix, several times, where it is an admitted position that she was residing with her in-laws, which would also go to indicate the consensual nature of the relationship. Though it is contended that the same was under the promise to marry, it is equally an admitted position, that the prosecutrix was aware, that the petitioner was a married person, inspite of which, she established the relationship and continued it for several years in view of which the continuation of the relationship by her, can only be termed as consensual. The prosecutrix further stated that they were already related to each other and intended to marry each other, however only on the ground of opposition by her father, that in case there was a problem considering the relationship, nothing could be said, on account of enmity being developed, the marriage did not take place. This also indicates that the prosecutrix was favourably disposed in favour of the petitioner.

10. The statement of her father-in-law (Page- 34) is merely based upon the information which he claims to have been received by his wife. The statement of the mother in law (Page- 36), is in sum and substance, nearly an *ad-verbatim* reproduction of the statement of the prosecutrix, as is indicated by comparison of those statements. The statements of the sons and the daughter, also supports the plea of consensual relationship, as it indicates that they were permitted to leave the house by the prosecutrix, on one ground or the other, maybe at the behest of the petitioner, whenever the petitioner used to come and stay at the residence of the prosecutrix.

11. The learned counsel for the petitioner upon instructions submits that a statement that under Section 164 Cr.P.C. was not recorded by the prosecutrix . The learned A.P.P has no instructions in that regard.

12. It is also not in dispute that the prosecutrix, had filed a complaint under Sections 12, 17 to 20 & 22 of the Protection of Women From Domestic Violence Act 2005 (D.V. Act) (Page-12) against the petitioner on 13.06.2012 before the learned Judicial Magistrate First Class, Jaysingpur vide Criminal M.A.

No.109/2012, which came to be dismissed in Criminal Appeal No.24/2012 vide judgment dated 13.02.2013 holding that there was no domestic relationship. It is just 6 days prior to this dismissal of the complaint by the decision of the criminal appeal that the FIR came to be lodged by the prosecutrix on 06.02.2013. Though in her statement dated 6/2/2013, there are allegations of threat to her and her children, the same are absent in the D. V. proceedings which were filed by the prosecutrix on 13/6/2012. In these proceedings she categorically states that the relationship, had her consent as she agreed for the relationship, as opposing it did not appear proper to her (page13), as the petitioner was helping her her out. The aforesaid position clearly indicates, that the prosecutrix, claimed that she was having a willing sexual relationship with the petitioner on account of which, it is apparent, that the relationship was consensual in nature. Even if this position is discarded, still taking the story narrated in her complaint to be true, it also indicates the relationship to be consensual.

13. From the position as indicated above it is thus apparent, that the record demonstrates that the relationship between the

petitioner and prosecutrix was consensual in nature. The fact that the relationship took place, in the house of the prosecutrix, where she was residing along with her children and in-laws would also clearly indicate the consensual nature of the relationship.

14. In view of the reasons stated above, the order dated 07.02.2015 passed by the learned Additional Sessions Judge Jaysingpur is hereby quashed and set aside and the application Exhibit - 4 filed by the petitioner under Section 227 of Cr.P.C. for discharge is allowed.

(AVINASH G. GHAROTE, J.)