



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

REVISION APPLICATION NO. 486 OF 2016

ANURAG RAVINDRA UMALEY ..APPLICANT
VS.
THE STATE OF MAHARASHTRA ..RESPONDENT

Mr. Vivek V. Salunke a/w Mr. Aditya S. Targe a/w Ms.
Sneha G. Sanap for the Applicant.

Ms. Sangeeta D. Shinde, APP for the State.

CORAM : M. S. KARNIK, J.

DATE : FEBRUARY 16, 2024

JUDGMENT:

1. By this revision under Section 397 of the Code of Criminal Procedure ("Cr.P.C." for short), the applicant challenges the order dated 28/07/2016 passed by the trial Court rejecting the application under Section 227 of the Cr.P.C. for discharge. The complainant lodged the complaint against the present applicant under Sections 376 and 506 of the Indian Penal Code (hereafter "IPC" for short) which came to be registered vide C.R. No. 351 of 2013 dated 05/12/2013 with Vishrantwadi Police Station, Pune.

2. Brief facts of the complaint are that the complainant

at the time of registration of the First Information Report (FIR), was working with Aviva Life Insurance Company. Prior to the lodging of the FIR, it is her case that around 7 years ago, when she was working with ICICI Lombard General Insurance Company, she was introduced to the present applicant. Sometime in the year 2011 when the complainant was employed in Pune, she happened to meet the applicant. They exchanged their mobile numbers and that very night the applicant sent a message to the complainant. After a few days, the applicant proposed the complainant for a love relationship. The complainant initially hesitated, but later on accepted the proposal. The applicant went to the house of the complainant on 08/09/2011. He requested the complainant for a physical relationship. The applicant had sexual physical relations with the complainant on that day. On the promise of marriage, the applicant had physical relationship with the complainant on several occasions thereafter. When the complainant brought up the topic of marriage, the applicant avoided any response. Later, the complainant came to

know that the applicant was in a relationship with another woman. The complainant was informed that the said woman was terminated from the service as some obscene photographs of her and the applicant which had surfaced were brought to the notice of the employer. On being questioned by the complainant about his relationship, the applicant told the complainant that the allegations were false. It is alleged that the applicant threatened the complainant with serious consequences if she tried to enquire about his relationship. It is alleged that the applicant thereafter started avoiding the complainant. When the complainant confronted the applicant about the promise of marriage he had made earlier, the applicant flatly refused to marry her. The complainant tried to persuade the applicant time and again to solemnise marriage which he did not pay any heed to and hence, the present complaint was made on 05/12/2013.

3. Learned counsel for the applicant while assailing the order passed by the trial Court rejecting the application for discharge, submitted that the applicant's case is squarely

covered by the decision of the Supreme Court in **Naim Ahamed Vs. State (NCT Of Delhi)**¹. He also relied upon the decision of the Supreme Court in **Uday Vs. State of Karnataka**² which is relied upon in Naim Ahamed (supra). My attention is also invited to the decision of the Supreme Court in **Sheikh Arif Vs. The State of Maharashtra and Anr.**³.

4. Learned APP on the other hand while opposing the application invited my attention to the accusations in the FIR and the relevant materials from the charge-sheet. It is submitted that the applicant should not be discharged as *prima facie*, the accusations taken at its face value satisfy the ingredients of the alleged offence. It is submitted that the applicant had promised marriage and under this misconception, the complainant had consented to maintain the physical relationship and therefore, her consent was vitiated by fraud and misconception justifying framing of charges.

5. Heard. Before considering the rival submissions and

¹ 2023 SCC OnLine SC 89

² (2003) 4 SCC 46

³ Criminal Appeal No. 1368 of 2023

analysing the materials on record, it would be relevant to seek guidance from the observations of the Supreme Court to arrive at a conclusion whether a case for discharge is made out on the touchstone of the well-established principles governing the subject. In Naim Ahamed (supra), the Supreme Court had an occasion to consider the provisions of Section 90 and Section 375 of the IPC. Paragraph Nos. 9 to 17 are relevant and needs to be reproduced which read thus:-

"9. For the better appreciation of the submissions made by the learned counsels for the parties, the relevant provisions contained in Section 90 and Section 375 of IPC, are reproduced below: —

"90. Consent known to be given under fear or misconception. —A consent is not such a consent as it 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 Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child. - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

375. Rape.- A man is said to commit "rape" if he-
(a) penetrates his penis, to any extent, into the

vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions: —

First- Against her will.

Secondly- Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly- With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly- With or without her consent, when she is under eighteen years of age.

Seventhly- when she is unable to communicate consent.

Explanation 1- For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words,

gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

10. It would be germane to note that the basic principles of criminal jurisprudence warrant that the prosecution has to prove the guilt of the accused beyond reasonable doubt by leading cogent evidence, however, considering the ethos and culture of the Indian Society, and considering the rising graph of the commission of the social crime - 'Rape', the courts have been permitted to raise a legal presumption as contained in Section 114A of the Indian Evidence Act. As per Section 114A, a presumption could be raised as to the absence of consent in certain cases pertaining to Rape. As per the said provision, if sexual intercourse by the accused is proved and the question arises as to whether it was without the consent of the woman alleged to have been raped, and if she states in her evidence before the court that she did not consent, the court shall presume that she did not consent.

11. It cannot be gainsaid that a consent given by a person would not be a consent as intended by any Section of the Penal Code, 1860, if such consent was given by the person under the fear of injury, or under a misconception of fact as contemplated in Section 90 IPC. Further, Section 375 also describes certain acts which if committed by the accused under the circumstances mentioned therein, as the commission of 'Rape', even though committed with the consent of the prosecutrix. In our opinion, the

expression "misconception of fact" contained in Section 90 IPC is also required to be appreciated in the light of the Clauses - contained in Section 375 IPC, more particularly the Clauses - Thirdly, Fourthly and Fifthly thereof, when the accused is charged for the offence of 'rape'. The circumstances described in the said three Clauses are wider than the expression "misconception of fact", as contemplated in Section 90 of IPC. Section 375 describes seven circumstances under which the 'rape' could be said to have been committed. As per the Clause - Thirdly, a rape could be said to have been committed, even with her consent, when the consent of the prosecutrix is obtained by putting her or any person in whom she is interested in fear of death or of hurt. As per the Clause - Fourthly, with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married; and as per the Clause - Fifthly, with her consent when at the time of giving the consent, the prosecutrix by reason of unsoundness of mind or intoxication or the administration of stupefying or unwholesome substance by the accused or through another, she is unable to understand the nature and consequences of that to which she gives consent. Thus, apart from the prosecutrix being under the misconception of fact as contemplated in Section 90, her consent would be treated as 'no consent' if she had given her consent under any of the circumstances mentioned in Section 375 of IPC.

12. The exposition of law in this regard is discernible in various decisions of this Court, however the application of such law or of such decisions would depend upon the proved facts in each case, known as legal evidence. The ratio laid down in the judgments or the law declared by this Court do provide the guidelines to the judicial mind of the courts to decide the cases on hand, but the courts while applying the law also have to consider the evidence before them and the surrounding circumstances under which the alleged offences are

committed by the accused.

13. A reference of some of the decisions of this Court dealing with the different dimensions and angles of the word 'consent' in the context of Section 90 and Section 375 would be beneficial for deciding this appeal.

14. In Uday v. State of Karnataka, the prosecutrix aged about 19 years had given her consent for having a sexual intercourse with the accused with whom she was deeply in love, and it was alleged by the prosecution that the prosecutrix continued to meet the accused as the accused had given her a promise to marry her on a later date. The prosecutrix became pregnant and the complaint was lodged on failure of the accused to marry her. This Court while holding that under the circumstances, the consent could not be said to have been given under a misconception of fact under section 90 of IPC, held in para 21 and 23 as under: —

"21. It therefore appears that the consensus of judicial opinion is in favour of the view 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. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or

was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

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23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

15. In *Deelip Singh alias Dilip Kumar v. State of Bihar* (supra), this Court after discussing various earlier decisions of this Court and other High Courts, further explained the observations made in *Uday* case (supra) and observed as under: —

"28. The first two sentences in the above passage

need some explanation. While we reiterate that a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the 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 Section 375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] which was approvingly referred to in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : (2003) 2 Scale 329]. The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p. 1538, para 7) - "unless the court can be assured that from the very inception the accused never really intended to marry her". (emphasis supplied) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case [ILR (1913) 36 Mad 453: 15 Cri LJ 24] (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence, are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case [(2003) 4 SCC 46 : 2003 SCC (Cri)

775 : (2003) 2 Scale 329] as a whole, we do not understand the Court laying down a broad proposition that a promise to marry. could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."

16. In *Deepak Gulati v. State of Haryana*, this Court gave one more dimension of the word 'consent' by distinguishing 'Rape' and 'consensual sex' and observed as under:

"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.

22. xxxxx

23. xxxxx

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her".

17. Again in *Dr. Dhruvaram Murlidhar Sonar v. State of Maharashtra (supra)*, this Court interpreting the Section 90 and the Clause - Secondly in Section 375 of IPC, observed as under: -

"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."

6. I may then refer to the observations of the Supreme Court in Sheikh Arif (supra). Their Lordships in Paragraph No.7 observed thus:

"7) Now, the question is whether a case for quashing the criminal proceeding is made out. For that purpose, we are referring to the material which forms a part of the charge sheet. In view of the provisions of Section 375 of the IPC, if the victim of the alleged offence of rape is not under 18 years of age, maintaining a sexual relationship with her consent, is not an offence. As held by this Court in the case of Anurag Soni, if the consent of the victim is based on misconception, such consent is immaterial as it is not a voluntary consent. If it is established that from the inception, the consent by the victim is a result of a false promise to marry, there will be no consent, and in such a case, the offence of rape will be made out."

7. In the present case, the complainant was admittedly more than 18 years of age when the relationship

commenced. In fact, as per the FIR, though the applicant was known to the complainant 7 years prior to its lodging, their love relationship commenced sometime in the year 2011. The applicant proposed a love relationship with the complainant in 2011 after they became well acquainted with each other. The complainant, though initially hesitated, later accepted the said proposal for such a relationship. It is after the commencement of such a relationship that the applicant met the complainant on 08/09/2011 at her residence when they had physical relations. It is then the applicant told her that they could get married whereafter the physical relationship continued from time to time. The complainant asked the applicant about marriage which the applicant was ignoring. Thereafter, the complainant came to know that the applicant was in a physical relationship with another woman. When confronted, the applicant in a threatening tenor asked her to refrain from making such enquiries and convinced her that whatever was being spread about him was false. Even when the complainant insisted that they get married, the applicant started

avoiding her. The complaint was, therefore, filed on 05/12/2013.

8. The complainant at the relevant time of the filing of the FIR was 30 years of age. Though the relationship commenced in the year 2011, the complainant did not make any grievance about it till December 2013. It is not the case of the complainant that the applicant forced her to maintain the physical relationship. The complainant was in a love relationship with the applicant prior to the physical relationship. Even after getting knowledge that the applicant was in a relationship with another woman, the complainant did not make any grievance. According to the complainant, the applicant convinced her that the allegations are false. The accusation and the materials on record if perused carefully and even if taken at its face value, it is obvious that the physical relationship between the applicant and the complainant was consensual. Taking the prosecution's case as correct, it is not possible to accept that the complainant maintained the physical relationship only because the applicant had given a promise of

marriage.

9. This is not a case where the consent of the complainant is based on misconception. I am satisfied that the materials on record fall short for establishing that from inception the consent of the complainant was a result of the false promise of marriage. In my view, continuing the prosecution in the present case will be a gross abuse of the process of law. The application, therefore, deserves to be allowed and is accordingly allowed in terms of prayer clause (b) which reads thus:

“b) The Hon’ble Court be pleased to quash and set aside the order below exh. 3 dated 28.07.2016 passed by the Ld. Addl. Sessions Judge, Pune in Session’s case no. 870/2014 arising out of C.R. No. 351/2013 registered at the Vishrantwadi Police Station, Pune and the Applicant be discharged from all the charges;”.

10. The application stands disposed of in the above terms.

(M. S. KARNIK, J.)