



Judgment

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

CRIMINAL APPLICATION [APL] NO. 617 OF 2024.

Jitendra s/o Shivaji Salve,
Aged 35 years, Occupation -
Business, Resident of Shyam Colony,
Deulgaon Raja, District Buldhana. ... **APPLICANT.**

VERSUS

1.State of Maharashtra,
through Police Station Officer,
Police Station Deulgaon Raja,
District Buldhana.

2.XYZ,
In Crime No.89/2024
through Police Station Officer,
Police Station Deulgaon Raja,
District Buldhana. .. **NON-APPLICANTS.**

Mr. A.V. Band, Advocate for the Applicant.
Mr. A.B. Badar, A.P.P. for Non-applicant No.1.
Ms P.R. Arbat, Advocate (Appointed) for Non-applicant No.2.

CORAM : VINAY JOSHI AND
VRUSHALI V. JOSHI, JJ.
DATE : OCTOBER 03, 2024.

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ORAL JUDGMENT (PER VINAY JOSHI, J.) :

Heard. Admit. By consent of the learned Counsel for the parties, the matter is taken up for final disposal.

2. This is an application under Section 482 of the Code of Criminal Procedure seeking to quash the first information report bearing Crime No.89/2024 registered with Deulgaon Raja Police Station, District Buldhana for the offence punishable under Sections 376[2][n], 504 and 506 of the Indian Penal Code.

3. The informant lady aged 28 years has lodged the report on 05.03.2024, which led to registration of the aforesaid crime. The informant has imparted her studies in Master in Business Administration in the year 2017. While the informant was taking education at Aurangabad, she came in contact with the applicant and then they befriended with each other.

4. On valentine day i.e. 14.02.2019, the applicant expressed his love and proposed for marriage. On that day itself, he forcibly

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established sexual relation, despite resistance of the informant. He also took her obscene photographs and threatened to make them viral. Time and again the applicant used to meet her at Aurangabad and on every occasion by giving promise to marry had enjoyed sexual relations. Some time they stayed at hotel, where relations were continued. It is the case of the informant that particularly in Star Night Hotel at Aurangabad they had physical relations on 15-20 occasion. The applicant used to threaten her to make her photographs viral. The informant realized that the applicant was not intending to marry, therefore, the report.

5. The learned Counsel appearing for the applicant would submit that contents of the first information report are totally false. It is purely a case of consensual relations between two educated adults. The applicant has produced several whatsapp chat printouts to substantiate his stand that it was a consensual relationship. Moreover, it is argued that the applicant was willing to marry, however, the informant herself denied to marry, but, was interested to keep mere relationship.

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6. The learned A.P.P. as well as the learned Counsel appointed for the non-applicant no.2/informant would submit that the allegations made in the first information report contains the ingredients to constitute the offence of rape.

7. The learned Counsel for the applicant took us through various whatsapp communications, which we have gone through with the assistance of both sides. Pertinent to note that the informant has not denied the said whatsapp chat, therefore, we find no difficulty to go through the same.

8. The informant has stated that first time on 14.02.2019, the applicant has forcibly established physical relationship. In that context, whatsapp communication dated 18.04.2019, has been produced. The said communication indicates that the applicant expressed to marry, however, the informant replied that her family members are not ready for marriage, as family desires a bridegroom having government job. Our attention has been invited to some more communications wherein the applicant informed that he is about to

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marry, on which the informant has replied that she would not forget him, but, they would maintain their friendly relations. Certain other communications have been brought to our notice wherein the informant insisted the applicant to meet at Aurangabad and to book lodging house for them. All these communications in unequivocal terms indicate that the informant was quite interested to maintain physical relations. Rather it falsifies her story that under pretext of marriage, and by giving threat, she has been sexually exploited.

9. In the decision of the Supreme Court in case of Deepak Gulati [supra] specific emphasis is laid on paragraph No. 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.”

10. 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.

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11. 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.”

12. In said case the Supreme Court has considered its earlier pronouncements in cases of Uday .vrs. State of Karnataka – [2003] 4 SCC 46 and 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.

13. 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.

14. 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”

Section 90 of the Code, though does not define the term ‘consent’, but, in negative terms it describes what does not amount to consent. True, consent may be express 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.

15. In case of **Pramod Suryabhan Pawar .vrs. State of Maharashtra and others – [2019] 9 SCC 608**, once again the Supreme

Court has summarized the position in paragraph No. 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.”

16. Bearing in mind the test which has been enunciated in above decisions, it is evident that since the year 2019, both were in the relationship. The informant herself made it clear that the marriage is not possible, since the applicant does not have government job. Some communication indicates that she took leading part and insisted the applicant to book lodging house to satisfy their desire. The informant is a well educated lady, she is Master in Business Administration, thus she is ably understandable person, still she has continued the

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relationship for long three years. In the circumstances, it is evident that the case squarely falls in the criteria (5) and (7) laid down by the Supreme Court in case of **State of Haryana .vrs. Ch. Bhajan Lal and others -AIR 1992 SC 604**. Moreover, reliance is placed by the learned Counsel for the applicant on the judgment delivered by the Supreme Court in case of **Ms. X... .vrs. Mr.A and others – 2024 SCC Online SC 316** which would squarely apply to present case.

17. In view of above discussion, continuation of prosecution amounts to an abuse of the process of the Court. In the result Criminal Application is allowed and disposed of.

The First Information Report bearing Crime No.89/2024 registered with Deulgaon Raja Police Station, District Buldhana for the offence punishable under Sections 376[2][n], 504 and 506 of the Indian Penal Code, is hereby quashed and set aside.

Fees of the appointed Counsel for non-applicant no.2 be determined as per Rules.

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