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

CRIMINAL APPEAL NO.256 OF 2024

Rakesh S/o Suresh Harde,
Aged about 42 years,
Occupation: Private,
R/o Jalalpura, Gurkrupa Apartment,
Plot No.309, Kotwali, Nagpur,
Tah. and District Nagpur.

..... APPELLANT

// VERSUS //

1) State of Maharashtra,
Through Police Station Officer,
Police Station, Gittikhadan, Nagpur,
Tah. and District – Nagpur.

2) X Y Z (Victim in Crime No.48/2024
registerd at Police Station
Gittikhadan, Nagpur)

.... RESPONDENTS

Mr. Harshwardhan Chawhan, Advocate for appellant.
Mr. S. S. Hulke, APP for respondent No.1/State.
Mr. R. K. Pillai, Advocate for respondent No.2.

CORAM : URMILA JOSHI-PHALKE, J.
DATED : 28.06.2024

ORAL JUDGMENT :

1. Heard.

2. **Admit.**

3. By preferring this appeal, the appellant has
challenged the order dated 18.04.2024 passed by the

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learned Additional Sessions Judge and Special Judge Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, rejecting the bail application of the present appellant below Exhibit 3.

4. The appellant is arraigned as an accused in connection with Crime No.48/2024 registered for the offences punishable under Sections 376(2)(n), 313, 328, 323, 504, 506 read with Section 34 of the Indian Penal Code and Sections 3(1)(r), 3(1)(w), 3(1)(w)(ii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

5. The crime is registered on the basis of report lodged by the victim alleging that in the month of October 2013 while informant was living in front of Police Station, Timki. The applicant used to come in front of her house every day. She was serving as Teacher in one school and after leaving the school, appellant used to talk and attempted to talk with her. He had attempted to develop friendship with her. After some days, the appellant received the mobile number of the informant and after getting such he used to talk with informant, accordingly the friendship

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was developed between them. In November 2013 at about 5.00 p.m., on some pretext he took her at his flat, when no one was present in the house and gave her tea and after consuming the same, she became unconscious and when she woke up she came to know that she was subjected for sexual assault. Thereafter also on various occasions, the accused had physical relations with her, due to which, she had a miscarriage on twice. The appellant has time and again promised her for marriage. He has not obtained divorce from first wife and when his first marriage was in existence, he subjected the present victim for the sexual assault. On the basis of the said report, police have registered the crime against the present appellant.

6. After registration of the crime, present appellant approached to the learned Special Court for grant of bail. The learned Sessions Court has considered the entire material and observed that on perusal of the report *prima facie* shows that the appellant under the promise of marriage subjected her for sexual assault and compelled her to abort the child on twice. He kept the physical relationship with her showing her that he is a divorcee and subsequently denied to marry with her. It is further

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observed that the appellant had sexual intercourse with her on the misconception and deceived her. By observing this, the application of the present appellant was rejected for grant of bail.

7. Being aggrieved and dissatisfied with the same, present appeal is preferred by the appellant on the ground that there cannot be misconception of fact for more than ten years. It was a consensual relationship between him and the victim. It was the victim who used to come at his flat and willingly had a physical relationship with the present appellant. As far as the further incarceration is concerned, which is not required, now the investigation is completed and charge-sheet is filed.

8. Learned Counsel Mr. Chawhan for the appellant endorsed the same contention and taken through the entire material which is collected during the investigation. He submitted that the statements of the neighbouring witnesses also substantiated the contention of the appellant that it was the victim who used to visit his flat. He further submitted that there cannot be a misconception of fact for more than ten years. It is now settled that mere breach of

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promise is not sufficient to attract Section 376 of the Indian Penal Code. He submitted that there is difference between the sexual intercourse on the promise of marriage and under the misconception of fact.

9. He placed reliance on the decision of the Division Bench of this Court in **Devendra s/o Vikas Pawar vs State of Maharashtra and another** reported in **2023 (3) Mh.LJ.148** wherein this Court has considered the various decisions of the Hon'ble Apex Court including the decision of **Pramod Suryabhan Pawar Vs. State of Maharashtra and another** reported in **2019 Mh.L.J. OnLine (Cri.) (S.C.) 72**. On the basis of his submissions, he submitted that considering the consensual physical relationship, the appeal deserves to be allowed.

10. Learned APP strongly opposed the said appeal on the ground that when the relationship was started, at that time, the victim was of very tender age, she was promised for marriage and repeatedly she was subjected for sexual assault, due to which, there was miscarriage twice. The appellant has not disclosed that his first marriage is in existence and by concealing the said fact, he has subjected

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her for sexual assault. He further submitted that considering the circumstances under which the crime is committed sufficiently shows that there was an intention since the inception of the appellant to deceive the victim, in view of that, the appeal deserves to be dismissed.

11. Learned Counsel appearing for the complainant /victim also endorsed the same contention. He submitted that for ten years victim was for one or the other reason by keeping her on promise subjected for repeated sexual assault and therefore, the appeal deserves to be dismissed. He submitted that trial can be commenced at any time and it can be disposed of. Considering the gravity of the offence, the appeal deserves to be dismissed.

12. After hearing the learned Counsel for the appellant, the learned Counsel for the complainant and learned APP for the State, perused the entire investigation papers. The recitals of the FIR shows that the victim got acquaintance with the present appellant in the year 2013. As per the allegation, it was the appellant who was talking her and thereafter, taken her in the confidence and developed relationship with her and subjected for sexual

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assault. He also informed her that he is divorcee and promised her marriage and thereafter, subjected her for sexual assault. Admittedly, the relationship was continued for more than ten years.

13. During the investigation, the Investigating Officer has seized the mobile phone of the present appellant. As per the seizure panchnama, no photographs or no obscene videos are found in the mobile phone of the appellant. The statements of the witnesses which are recorded during the investigation shows that the victim used to visit the flat of the present appellant. The medial report also shows that there was twice a miscarriage of the victim. Thus, the entire material collected during the investigation shows that there was a consensual relationship between the victim and the present appellant. Whether there was a misconception of the fact and whether that can be continued for such a long period is the issue involved in the present appeal. As far as the contention of the learned Counsel for the complainant is concerned that victim was kept in dark regarding the existence of marriage between the present appellant and his wife.

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14. Learned Counsel for the appellant invited my attention towards various photographs as well as the communication which is recorded between the wife of the present appellant and the victim which shows that the victim was aware about the relationship between the appellant and his wife which is not cordial and there was no divorce, after that also, she has continued the relationship with the present appellant.

15. As far as the consent part is concerned, the decision of the Hon'ble Apex Court in the case of **Pramod Suryabhan Pawar Vs. State of Maharashtra and another** reported in **2019 Mh.L.J Online (Cri.) (S.C.) 72** wherein Para No.18 it is held:

"To summarise the legal position that emerges from the 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. In the case of **Mandar Deepak Pawar Vs. State of Maharashtra and another** reported in **2022 Mh.LJ. Online (Cri) (S.C.) 35**, while considering the consensual physical relationship was on an assurance of marriage, by relying upon the decision of **Pramod Pawar (supra)**, it has been held that:

"The parties chose to have physical relationship without marriage for a considerable period of time. For some reason, the parties fell apart. It can happen both before or after marriage. Thereafter also three years passed when respondent No.2 decided to register a FIR.

The facts are so glaring as set out aforesaid by us that we have no hesitation in quashing the FIR dated 16-12-2016 and bringing the proceedings to a close. Permitting further proceedings under the FIR would amount to harassment to the appellant through the criminal process itself."

17. In view of the above settled law, it is the parties who have chosen to have physical relationship without marriage for a considerable period. Similar facts are appearing in the present case also.

18. The consent is defined under Section 90 of the Indian Penal Code which reproduced as under:

"90. Consent known to be given under fear or misconception.—A consent is not such a consent as is intended by any section of this Code, if the consent is

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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.”*

19. Thus, from the aforesaid legal position it is clear that even if sexual acts are done with the consent of woman and the consent has been given under misconception of fact, the consent can be vitiated and the sexual act would amount to rape. Undisputedly the relationship between the appellant and the wife was known to the victim. The question of making of the promise of marriage by appellant does not arise. Further perusal of the FIR shows that alleged promise of marriage was not given before committing of the sexual acts by the appellant. This aspect is further considered by the Hon'ble Apex Court in the case of **Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others in Criminal Appeal No.1443 of 2018 arising out of S.L.P. (Criminal)**

No.6532/2018, particularly paragraph No.20 which held as under:

"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 later 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."

20. In view of the above, if the facts of the present case are seen the victim was in relationship with the present appellant for more than ten years. The common thread running from the cases of **Pramod Suryabhan Pawar** or **Dhruvaram Murlidhar Sonar (supra)** which shows that if the accused makes a false promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, and only to

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satisfy his lust such an act would amount to rape. In the present case, there is no material on record that the alleged promise was made by the applicant with the victim with sole intention to seduce for a sexual act.

21. Considering the entire circumstances under which the alleged incident has taken place, it appears to be consensual act between them. In view of that, the appeal deserves to be allowed. The learned Special Court has not considered this aspect and rejected the application. Moreover, now the investigation is completed and charge-sheet is already filed, further incarceration of the appellant is not required. Considering the submission made by the learned Counsel for the appellant, the appeal deserves to be allowed by imposing certain conditions. Accordingly, I proceed to pass following order.

ORDER

(i) The appeal is hereby allowed.

(ii) The order dated 18.04.2024 passed by the learned Special Judge under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act passed in Special Case No.165/2024 below Exhibit 3 is quashed and set aside.

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(iii) The appellant **Rakesh S/o Suresh Harde** shall be released on bail in connection with Crime No.48/2024 registered for the offences punishable under Sections 376(2)(n), 313, 328, 323, 504, 506 read with Section 34 of the Indian Penal Code and Sections 3(1)(r), 3(1)(w), 3(1)(w)(ii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 on executing PR bond in the sum of Rs.25,000/- with one solvent surety in the like amount.

(iv) The appellant shall not enter into the vicinity of Borgaon Chowk, Gittikhadan, Nagpur, till culmination of the trial.

(v) The appellant shall not in any manner threat, contact, induce or pressurize the victim.

(vi) The contravention of any of the conditions would lead to the cancellation of the bail.

22. The appeal is disposed of.

(URMIL A JOSHI-PHALKE, J.)

Sarkate.