



Judgment

apl1295.19

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

CRIMINAL APPLICATION [APL] NO. 1295 OF 2019.

Girish s/o Raju Katakwar,  
Aged about 30 years, Occupation -  
Service, Resident of Near Sharda  
Mata Mandir, Kasturba Gandhi  
Ward, Bhandara – 441904.

... APPLICANT.

VERSUS

1.The State of Maharashtra,  
through Police Station Officer,  
Police Station Bhandara,  
District Bhandara.

2.Trusha d/o Ashok Rodge,  
Aged about 30 years, resident of  
Lala Lajpatrai Ward,  
Bhandara.

.. NON-APPLICANTS.

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Mr. S.P. Sonwane, Advocate for the Applicant.  
Mrs. K.H. Bhondge, A.P.P. for Non-applicant No.1.  
Ms S.D. Paul, Advocate (Appointed) for Non-applicant No.2.  
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CORAM : VINAY JOSHI AND  
VRUSHALI V. JOSHI, JJ.  
DATE : SEPTEMBER 27, 2024.

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.738/2019 registered with Bhandara Police Station, Bhandara for the offence punishable under Sections 376[2][n] and 506 of the Indian Penal Code. The informant lady aged 29 years has lodged the report on 18.11.2019, which led to registration of the aforesaid crime.

3. It is the case of the informant that in the year 2009 itself, while she was studying in 12<sup>th</sup> standard at J.M. Patel College, she got acquainted with the applicant, who was her fellow colleague. In the

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month of September, 2009 the applicant expressed his love, on which they exchanged phone numbers and were frequenting with each other. They also use to go for outing. In the year 2010, the informant took a rented room at Sadak Arjuni, where the applicant was visiting for a period of two years. In the year 2013, she took admission in B.A. Course where also the applicant was meeting her. In the year 2013 itself, she got a job in a private company, where she used to commute daily with the applicant on his motor cycle. In the year 2014, they had a quarrel since the informant suspected that the applicant is involved with some other lady.

4. It is the case of the informant that in the month of December, 2018 again the difference were patched up and they started meeting frequently. In the month of April, 2019, the applicant came to her house and by putting her under threat, had established sexual relations. Then always he used to visit at her house and were maintaining relations. The informant stated that on 23.09.2019, the applicant came to her house, but, at that time brother

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of informant has seen both of them, on which brother insisted for marriage, to which the applicant refused to marry in proximity, hence, the report.

5. The learned Counsel appearing for the applicant would submit that contents of the first information report even if taken at its face value, it does not make out a case of false promise constituting the offence of rape. It is argued that the case squarely falls in the arena of voluntary sexual relations in between two adults. Learned Counsel for the informant as well as learned Additional Public Prosecutor appearing for the non-applicant/State resisted the application by contenting that the informant has specifically stated about assurances given by the applicant for marriage. It is submitted that since consent was given by the informant on promise to marry, therefore, the consent vitiates, amounting to offence of rape.

6. The learned Counsel for the applicant has submitted that the facts are clear enough to convey that the consent was not given by

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the informant only on account of promise to marry, but, relations were established due to love affair.

7. Reading of police papers indicates that there was love affair and out of that they had relations. It is argued that the facts does not discloses that it is a case of false promise vitiating the consent, but, at the most, it can be termed as a breach of promise. In support of said contention, learned Counsel for the applicant placed reliance on the following decisions :

- (i) State of Haryana .vrs. Ch. Bhajan Lal and others -AIR 1992 SC 604.
- (ii) Deepak Gulati .vrs. State of Haryana – [2013] 7 SCC 675.
- (iii) Pramod Suryabhan Pawar .vrs. State of Maharashtra and others – [2019] 9 SCC 608.
- (iv) Naim Ahamed .vrs. State (NCT of Delhi) – 2023 Livelaw (SC) 66.
- (v) Vaibhav Devidas Deshpande .vrs. State of Maharashtra and another – 2024 All MR (Cri) 2002.

We have gone through the above decisions of which we wish to refer few as all decisions are on same line.

8. 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*

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*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.”*

9. 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.

10. 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 :

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*“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.”*

11. 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.

12. 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.

13. 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.

14. In case of Pramod Pawar (supra), 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.”*

15. In view of above settled position, it is necessary to examine the facts and relevant circumstances of the case to find out whether in given case, the consent was actuated by fraud amounting to absence of consent. With the assistance of both sides, we have examined the first information report, as well as related statements.

16. Bearing in mind the test which has been enunciated in above decisions, it is evident that since the year 2009, both were in the relationship. Though the informant tried to say that initially there were no relations, but, admittedly continuously they used to meet and love affair was going on. It is the contention of the informant that for

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the first time in the month of April, 2019 the applicant has forcible physical relation, but, she never ventilated the grievance. Not only when she stated that thereafter also frequently the applicant used to visit her room, where they used to have relationship. It is pertinent to note that on 23.09.2019, the younger brother of the informant has seen both of them, which has triggered her to lodge the report. Thus, it is clear that it is a case of consensual relationship. There is no material to hold that her consent was obtained by deceitful means.

17. The case squarely falls in the criteria (1) and (3) laid down by the Supreme Court in case of State of Haryana vs. Bhajan Lal [supra]. In order to secure the ends of justice the proceeding needs to be quashed by invoking inherent powers.

18. In view of that, the application is allowed and disposed of.

The First Information Report bearing Crime No.738/2019 registered with Bhandara Police Station, Bhandara for the offence punishable under Sections 376[2][n] 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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