



Judgment

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

CRIMINAL APPLICATION [APL] NO. 553 OF 2024.

Aayush s/o Rakesh Jain,
Aged 31 years, Occupation – Private,
Resident of 20, Ashoka Enclave,
Dayalbag, Agra,
Uttar Pradesh.

...

APPLICANT.

VERSUS

1.State of Maharashtra,
through Police Station Officer,
Police Station Hudkehwar,
District Nagpur.

2.XYZ
In Crime No.1/2024,
through Police Station Officer,
Police Station Hudkehwar,
District Nagpur.

.. NON-APPLICANTS.

Mr. A.V. Band, Advocate for the Applicant.
Mr. U. Phasate, A.P.P. for Non-applicant No.1.
Mr. A.K. Bhangde, Advocate for Non-applicant No.2.

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CORAM : VINAY JOSHI AND
SANJAY A. DESHMUKH, JJ.

DATE : OCTOBER 09, 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. By this application, the applicant is seeking to quash the criminal prosecution bearing Special Case No.126/2024 pending with the District Judge-8 and Additional Sessions Judge, Nagpur arising out of Crime No.1/2024 registered with Hudkeshwar Police Station, Nagpur for the offence punishable under Section 376[2][n] of the Indian Penal Code and Sections 3[1][w][i], 3[1][w][ii], 3[2][va] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

3. The informant lady aged 31 years has lodged the report on 01.01.2024 on the basis of which the aforesaid crime came to be

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registered. The informant lady is well educated, serving as H.R in a Company. She has sent a friend request to the applicant, who is resident of Agra, Uttar Pradesh, which she later accepted. The friendship was developed and on 28.02.2020 they met at Bangalore in a cafe. While the informant was serving at Bangalore, in the month of October, 2021 they have performed marriage ceremony at home. After marriage they went for outing to Ooty. On 11.12.2021, the applicant came to Nagpur and stayed in the house of the informant. They had physical relationship on various occasions.

4. In the month of December, both started to stay together at Bangalore as husband and wife, and they stayed as such for a period of one year. On 28.02.2022, they intended to again perform marriage in presence of family members. However, later the applicant refused, therefore the report.

5. The learned Counsel appearing for the applicant would submit that both are well educated and were in a relationship for a period of more than two years. They were in live-in-relationship for a

period of more than one year and stayed together at Bangalore. Even they had undergone marriage ceremony, but, later on due to differences both mutually decided to separate, however, a false report has been lodged.

6. The learned Counsel for the applicant relied on the decision of Supreme Court in case of **Shajan Skaria .vrs. The State of Kerala and another – Criminal Appeal No.2622/2024 decided on 23.08.2024**, to contend that the provisions of Atrocities Act would not apply since there is no material to indicate that the offence was committed only because the victim belongs to Scheduled Caste or Scheduled Tribe. As a matter of fact, there is no material to constitute the principal offence, therefore, the provisions of Atrocities Act would not apply.

7. The learned A.P.P. and the learned Counsel appearing for the non-applicant no.2 resisted the application by contending that the contents of police paper makes out a prima facie case.

8. In the decision of the Supreme Court in case of **Deepak**

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Gulati .vrs. State of Haryana – [2013] 7 SCC 675 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.”

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 :

“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

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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.

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 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.”

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, failure to perform marriage 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. By applying the above principles, it is evident that the informant is well educated lady, serving in a company. Both were in relationship for a period of more than two years. The informant herself has admitted that they had undergone marriage ceremony and stayed for one year at Bangalore. The applicant has produced several whatsapp chat showing that they were in intimate relationship and lived together. The investigation paper discloses that they have visited several places like Ooty, Munnar, Coimbatore and even abroad to Bali. Most of the messages have been pointed out to show that both of them took decision to separate from each other. In the circumstances, it is quite evident that out of love, intimacy and passion the relations had developed. There is absolutely no material to infer

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that on the pretext of false promise, the applicant has sexually exploited the informant.

17. The case squarely falls in the criteria (1) and (3) laid down by the Supreme Court in case of **State of Haryana .vrs. Ch. Bhajan Lal and others -AIR 1992 SC 604**. In the circumstances continuation of trial would amount to abuse of the process of the Court. Hence, we proceed to pass the following order.

18. Criminal Application is allowed and disposed of.

The Criminal prosecution bearing Special Case No.126/2024 pending with the District Judge-8 and Additional Sessions Judge, Nagpur arising out of Crime No.1/2024 registered with Hudkeshwar Police Station, Nagpur for the offence punishable under Section 376[2][n] of the Indian Penal Code and Sections 3[1][w][i], 3[1][w][ii], 3[2][va] of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 is hereby quashed and set aside.

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