

HARSHADA H. SAWANT
(P.A.)

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

CRIMINAL BAIL APPLICATION NO. 4302 OF 2024

Rahul Kashiram Kamble

.. Applicant

Versus

The State of Maharashtra and Anr.

.. Respondents

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- Mr. Rakesh R. Bhatkar a/w. Mr. Amit Mane and Mr. Mohit Dalvi, Advocates for Applicant.
- Mr. Hitendra J. Dedhia, APP for Respondent No.1 – State.
- Mr. Saurish Shetye, Advocate for Respondent No.2 appointed through Legal Aid.

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CORAM : MILIND N. JADHAV, J.

DATE : APRIL 22, 2025

P.C.:

1. Heard Mr. Bhatkar, learned Advocate for Applicant; Mr. Dedhia, learned APP for Respondent No.1 – State and Mr. Shetye, Advocate for Respondent No.2 appointed through Legal Aid.

2. This is an Application under Section 439 of Code of Criminal Procedure, 1973 seeking Bail in connection with C.R. No.369 of 2024 registered with Nehru Nagar Police Station for offence under Section 376 of the Indian Penal Code, 1860 (for short 'IPC').

3. Applicant before me is Veterinary Doctor who is incarcerated in prison in the present crime since 09.07.2024 i.e. for more than 9 months. Briefly stated, case of the prosecutrix is that she got acquainted with Applicant in the year 2022 when she used to visit his

clinic for treatment of her domestic cat and eventually their acquaintance got converted into friendship which blossomed into a love relationship. Prosecutrix has alleged in the FIR that from March 2023 to January 2024 Applicant under the false pretext and promise of marriage with her repeatedly established physical relations with her. Prosecutrix has stated that in September 2023 she was impregnated by Applicant however on his instance she underwent an abortion. She has stated that in the month of March 2024, when she visited residence of Applicant to meet his family members, she was assaulted by them. Age of both, prosecutrix and Applicant at the time of filing of FIR was 32 years.

3.1. FIR is lodged by prosecutrix on 08.07.2024. Precursor incident which led to filing of FIR as per statement of prosecutrix recorded before the police is that on 07.07.2024 when she visited the residence of Applicant for having a discussion regarding their marriage, Applicant's family members did not approve of her and threatened her.

4. Mr. Bhatkar, learned Advocate for Applicant would submit that Applicant is innocent and is falsely indicted in the present crime on the basis of a concocted story narrated by prosecutrix. He would submit that Applicant is a Doctor by profession and has deep roots and good reputation in society and hence there are no chances of him

absconding or not co-operating with the trial. He would submit that prosecution has not placed on record a single statement of any independent witness to even *prima facie* substantiate its case. He would submit that perusal of the statement of prosecutrix recorded by the police itself discards the allegations of 'false promise of marriage' as she herself has stated that there was a meeting between family members of prosecutrix and Applicant for discussing their marriage. He would submit that physical relationship between them was consensual and over a period of substantial time.

4.1. He would submit that investigation of the matter is completed and charge-sheet is filed before the Trial Court. He would submit that though initially charge under Section 323 was levelled against Applicant owing to allegation of assault by prosecutrix in her statement recorded by police on 08.07.2024, the said charge is dropped by prosecution at the time of filing of charge-sheet pursuant to recording of supplementary statement of prosecutrix dated 16.08.2024 wherein she has given clarification regarding the alleged incident. Thus he would submit that violence or force is completely ruled out.

4.2. He has drawn my attention to page No.66 of the Application which is the statement of witness Mohd. Asif Shaikh who is an acquaintance of the prosecutrix. He has stated that in the month of

February 2024 Applicant approached the police station to file complaint against prosecutrix however he intervened and quelled the misunderstanding between them. He would submit that if prosecutrix had any complaint against Applicant, she could have taken steps.

4.3. Next he has drawn my attention to the history narrated by the prosecutrix at the time of her Medico - Legal Examination which is appended at page No.51 of the Application to show the contradictions and improvements in her statements. That apart he would submit that there are also material improvements in her Section 164 statement recorded before the Magistrate.

4.4. In support of his submissions, Mr. Bhatkar has referred to and relied upon the decision of the Supreme Court in the case of *Deepak Gulati Vs. State of Haryana*¹. He would urge the Court to grant bail to the Applicant considering the *prima facie* material on record.

5. Mr. Dedhia, learned APP for Respondent No.1 – State has vehemently opposed the grant of bail. He would submit that conduct of the Applicant cannot be disregarded by the Court as he clearly acted with deceit to lure prosecutrix into relationship and ravished her repeatedly by falsehood. He would submit that there is sufficient material on record to *prima facie* show demeanor of Applicant which corroborates prosecution case as also establishes his complicity in the

¹ AIR 2013 SC 2071

crime. Hence he would pray for rejection of Bail Application.

6. Mr. Shetye, learned Advocate appointed to represent and espouse the cause of Respondent No.2 has opposed grant of bail to Applicant and would submit that consent of a woman to engage in sexual intercourse secured based on a false promise to marry amounts to rape and hence Applicant's case may not be considered by the Court for bail. He would submit that in the present case it is evident that a fraudulent promise of marriage was extended at the inception of the relationship between the parties and relying on the said representation, Respondent No.2 engaged in physical relations with Applicant. He would submit that Applicant declined to fulfill his promise to marry citing religious disparities which clearly demonstrates that Applicant never had intention of fulfilling his promise of marriage since inception. In support of his submissions he has referred to and relied upon the decision of the Supreme Court in the case of ***Anurag Soni Vs. State of Chhattisgarh***² and the decision of the Allahabad High Court in the case of ***Farhan Ahmed Vs. State of Uttar Pradesh***³. In view of his above submissions, he would urge the Court to reject the Bail Application.

7. I have heard the learned Advocates for the respective parties and with their able assistance perused the record of the case.

² (2019) 13 SCC 1
³ MANU/UP/0074/2022

8. Perusal of the record *prima facie* indicates that Applicant and prosecutrix on multiple occasions engaged in physical relations with each other over a period of more than 2 years. Considering peculiar facts in the present case, it cannot be *prima facie* contended that First Informant had physical relationship with Applicant against her wish and consent on the ground of Applicant making a false promise to her that he would marry her. It is seen that 10 months before filing of FIR, First Informant had an abortion and even thereafter she continued with her relationship. She is a matured woman aged 32 years at the time of filing of FIR. She worked in the clinic of Applicant for a substantial period of time as his assistant. There is no evidence of force or violence alleged or attributed. There is material placed on record as per prosecution case to show that talks and meetings took place with the family members of Applicant for arranging the marriage which failed. Hence whether since inception there was an element of deception and false promise becomes doubtful and a matter for trial.

9. In this regard and in the facts of the present case, the Supreme Court in the case of *Mahesh Damu Khare Vs. The State of Maharashtra and Ors.*⁴ deciphered the provisions of Section 375 and Section 90 of the IPC in somewhat identical facts where there was a complaint filed about a promise by the Accused person that he would marry the prosecutrix and therefore she consented to have physical

⁴ 2024 (4) MLJ (Cri) 578

relationship with him on the misconception of the fact that he would marry her because of the promise made by him and while doing so in paragraph Nos.18 to 24 the Supreme Court held as under:-

“18. It is the case of the complainant that the Appellant had engaged in sexual intercourse without her consent. She mentioned that there was a promise made by the Appellant that he would be marrying her. Thus, the contention of the complainant was that she consented to have physical relationship with the Appellant on the misconception of fact that he would marry her because of the promise made by the Appellant that he would ultimately marry her.

19. Section 375 of the Indian Penal Code clearly postulates that a person is said to have committed rape if he performs any of the sexual acts mentioned Under Sub-clauses (a), (b), (c) and (d) without the consent of the woman. As mentioned above, in terms of Section 90 of the Indian Penal Code, if the consent is given under a misconception of fact, such a consent is no consent in the eyes of law and cannot be considered to be wilful and voluntary consent.

20. Keeping this aspect in mind as to what amounts to consent with reference to Section 375 of the Indian Penal Code, this Court has examined and considered in a number of cases that if the person acts with an active understanding of the circumstances, actions and consequences of the act, it would indicate the presence of consent. It was observed in the case of Shambhu Kharwar v. State of Uttar Pradesh and Anr. MANU/SC/1011/2022 : 2022:INSC:827 as follows:

*11. In **Pramod Suryabhan Pawar v. State of Maharashtra** MANU/SC/1142/2019 : 2019:INSC:939 : (2019) 9 SCC 608, a two Judge Bench of this Court of which one of us was a part (D.Y. Chandrachud J.), held in **Sonu @ Subhash Kumar v. State of Uttar Pradesh** (2021) 18 SCC 517, observed that:*

12. This Court has repeatedly held that consent with respect to Section 375 of the Indian Penal Code involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action...

[...]

14. [...] Specifically in the context of a promise to

marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled...

[...]

16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. **The "consent" of a woman Under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act...**

[...]

18. 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.** (emphasis supplied)

21. The complainant had taken the plea that the Appellant had physical relationship with her against her consent by making a false promise that he would marry her. In this regard, it has to be considered whether making a false promise to marry amounts to an offence. If a false promise of marriage is made to a woman by a man, thus deceiving the woman leading her to engage in sexual relations, it may amount to misconception of fact, in which case the consent given by the woman may be vitiated. In this regard one may refer to the decision of this Court in *Niam Ahmed v. State* (NCT of Delhi) MANU/SC/0080/2023 : 2023:INSC:85,

20. The bone of contention raised on behalf of the Respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the Accused had given a false promise to marry her and

subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause - Secondly of Section 375 Indian Penal Code. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the Accused. In case of false promise, the Accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the Accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence Under Section 376.

22. *In our view, if a man is Accused of having sexual relationship by making a false promise of marriage and if he is to be held criminally liable, any such physical relationship must be traceable directly to the false promise made and not qualified by other circumstances or consideration. A woman may have reasons to have physical relationship other than the promise of marriage made by the man, such as personal liking for the male partner without insisting upon formal marital ties. Thus, in a situation where physical relationship is maintained for a prolonged period knowingly by the woman, it cannot be said with certainty that the said physical relationship was purely because of the alleged promise made by the Appellant to marry her. Thus, unless it can be shown that the physical relationship was purely because of the promise of marriage, thereby having a direct nexus with the physical relationship without being influenced by any other consideration, it cannot be said that there was vitiation of consent under misconception of fact.*

23. *It must also be clear that for a promise to be a false promise to amount to misconception of fact within the meaning of Section 90 of Indian Penal Code, it must have been made from the very beginning with an intention to deceive the woman to persuade her to have a physical relationship. Therefore, if it is established that such consent was given under a misconception of fact, the said consent is vitiated and not a valid consent. In this regard we may refer to the case of "Deepak Gulati v. State of Haryana" MANU/SC/0546/2013 : 2013:INSC:349 : (2013) 7 SCC 675, in which it was held 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."

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 Indian Penal Code 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. (emphasis supplied)

24. *It may be also noted that there may be occasions where a promise to marry was made initially but for various reasons, a person may not be able to keep the promise to marry. If such promise is not made from the very beginning with the ulterior motive to deceive her, it cannot be said to be a false promise to attract the penal provisions of Section 375 Indian Penal Code, punishable Under Section 376 Indian Penal Code."*

10. What is held in paragraph Nos.22 and 23 herein above by the Supreme Court while recording findings in the case of *Deepak Gulati Vs. State of Haryana*⁵ is relevant to the facts of the present case also. The Supreme Court has clearly held that 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.

11. The Supreme Court states that consent is an act of reason accompanied by deliberation and it may be express or implied, coerced or misguided, obtained willingly or through deceit.

12. In view of the above position in law and when juxtaposed with the facts in the present case it is *prima facie* seen that the Applicant though had intention to marry the prosecutrix in furtherance of which meetings between Applicant's family and prosecutrix were arranged however owing to some reasons it did not fructify. The Supreme Court as well as this Court has in several cases like the case at hand held that promise of marriage will be a false promise if given in bad faith and with no intention of being adhered to at the time it was given and that it should be of immediate relevance or bear a direct

5 (2013) 7 SCC 675

nexus to the woman's decision to engage in physical relations. This proposition squarely applies to the present case since here it is observed to the contrary in view of her long standing relationship over more than 2 years and other factors delineated herein above.

13. In view of my above *prima facie* observations, further incarceration of Applicant is unwarranted and he has made out a case for grant of bail. Hence, Bail Application is allowed on the following terms and conditions:-

- (i) Applicant is directed to be released on bail on furnishing P.R. Bond in the sum of Rs.25,000/- with one or two sureties in the like amount;
- (ii) Applicant is permitted to furnish provisional cash bail of Rs.25,000/- for his release immediately and file undertaking that he will provide one or two sureties in the like amount of Rs.25,000/- within a period of four weeks after his release which shall be accepted by the Trial Court. Applicant shall provide sureties as directed;
- (iii) Before his actual release from jail, Applicant shall furnish his address where he proposes to reside after his release from jail to the concerned Police Station and also to the trial Court;

- (iv) After his release from jail, Applicant shall report to the Investigating Officer as and when called for;
- (v) Applicant shall attend the trial Court on first Tuesday of every month between 11.00 a.m. and 1.00 p.m. to mark his presence. If the first Tuesday of the said month falls on a holiday and / or non Court working day, the Applicant shall mark presence on the next working day;
- (vi) Applicant shall co-operate with the conduct of trial and attend the trial Court on all dates unless specifically exempted and will not take any unnecessary adjournments, if he does so, it will entitle the prosecution to apply for cancellation of this order;
- (vii) Applicant shall not make any attempts to re-associate with the prosecutrix in any manner wither through a device or in-person and shall not reside in the jurisdiction of the Police Station wherein the prosecutrix is residing till the trial is concluded;
- (viii) Applicant shall not leave the State of Maharashtra without prior permission of the Trial Court;
- (ix) Applicant shall not influence with any of the witnesses or tamper with the evidence in any manner; and

(x) In case of any infraction of the above conditions and / or two consecutive defaults in marking his attendance before trial Court, it shall attract the provisions of Section 439(2) of Cr.P.C. i.e. for cancellation of bail.

14. It is clarified that the observations made in this order are limited for the purpose of granting Bail only and I have not made any observations on merits of the case. The trial shall be adjudicated on the strength of the evidence led and strictly on its own merits being uninfluenced with any of the *prima facie* observations made herein above in this order.

15. Fees of the Mr. Shetye, learned Advocate appointed through Legal Aid to represent and espouse the cause of Respondent No.2 shall be released by the Registry of this Court within a period of one week from the date of presentation of a server copy of this order on compliance.

16. Bail Application No.4302 of 2024 is allowed and disposed.

H. H. SAWANT

[MILIND N. JADHAV, J.]

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