

(2023) 01 CAL CK 0041
In the Calcutta High Court
Case No : Criminal Revision No. 195 Of 2021

Ainul Haque & Anr.

APPELLANT

Vs

State Of West Bengal & Anr.

RESPONDENT

Date of Decision : 19-01-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 90, 323, 375, 376, 417, 506
Code Of Criminal Procedure, 1973 — Section 164, 173, 207

Citation : (2023) 01 CAL CK 0041

Hon'ble Judges : Tirthankar Ghosh, J

Bench : Single Bench

Advocate : Tapas Kumar Banerjee, Satadru Lahiri, Safdar Azam, Syed Wasim Faruque, S. G. Mukherjee, Imran Ali, Debjani Sahu, Dipanjan Dutta

Final Decision : Allowed

Judgement

Tirthankar Ghosh, J

The present revisional application has been preferred challenging the proceedings arising out of Burdwan Women Police Station Case No. 147 of 2019 dated 13.05.2019 as well as the charge-sheet submitted in connection with the said case under Sections 376/417/323/506/34 of the Indian Penal Code.

The present petitioners approached this Court pursuant to the charge-sheet being submitted before the jurisdictional court being the learned Chief Judicial Magistrate, Purba Bardhaman. The allegations made in the letter of complaint which has been treated to be the FIR in the instant case is to the effect that the complainant is aged about 40 years. She is a resident of Muchipara, Central Park, Baronilpur, Uttarpara, P.S. Burdwan. She stated, that her husband for the purposes of his job was staying at Jharkhand and taking this opportunity on or about October 2017 one Ainul Haque, petitioner no.1 herein started coming to her home regularly. The said accused represented that he liked and loved her and promised to marry her; with such representation the accused had physical relationship with her and with passage of time both of them developed a

relationship. The complainant alleges that the accused on several occasions had physical relationship with her and presently when she asked the petitioner no.1 to marry her, he started abusing and assaulting her and for the last six months snapped all relationship; when the complainant went to his house, his wife along with him assaulted her severely, abused her and threatened her of dire consequences. The complainant prayed for taking necessary action against the accused/petitioner no.1 and his wife/petitioner no.2 herein.

On such complaint, the aforesaid case being Burdwan Women Police Station Case No. 147 of 2019 dated 13.05.2019 was registered for investigation against the petitioner no.1 and the petitioner no.2 herein.

The investigating authorities on completion of investigation submitted charge-sheet under Sections 376/417/323/506/34 of the Indian Penal Code against the present petitioners wherein the investigating officer opined regarding a case being made out.

I have considered the contents of the report under Section 173 of the Code of Criminal Procedure and I find that the investigating officer in order to establish the case relied upon five witnesses, viz. CSW-1, Sunita Bokshi, CSW-2, Sukriti Chatterjee, CSW-3, Kripa Sindhu Koner and two police officers of Burdwan Women Police Station viz. Radhamani Banerjee and Atreyi Mukherjee. So far as the statement of CSW-2, Sukriti Chatterjee is concerned, recorded by the investigating officer of the case, it reflects that she is acquainted with the fact that the accused/petitioner no.1 used to come to the house of the complainant but was not aware regarding their relationship. So far as the statement of CSW-3 Kripa Sindhu Koner is concerned, the witness stated that he is the father of the complainant and was acquainted with the petitioner no.1 for a considerable period of time; it was well within his knowledge that the petitioner no.1 used to come at the residence of the complainant. However, he stated that he was not aware regarding the existence of any relationship of the petitioner no.1 with the complainant. The complainant being cited as CSW-1 apart from her allegations made in the letter of complaint addressed to the Inspector-in-Charge, Burdwan Women Police Station also gave her version before the learned Judicial Magistrate, 5th Court, Burdwan which was recorded under Section 164 of the Code of Criminal Procedure. The contents of the said statement recorded under Section 164 of the Code of Criminal Procedure reflect that the complainant is aged about 40 years and knew the petitioner no.1 as he was acquaintance of his father. They were both associated with a particular political party and with passage of time the petitioner no.1 started visiting her residence, she addressed him as uncle. The complainant alleged that the accused/petitioner no.1 represented that he had biological needs and the complainant could believe him; when confronted with the issue that he is a married person, the accused represented that his wife was unable to satisfy him as she was physically incapable. The complainant being assured by the accused had physical relationship on different occasions and subsequently they continued with such

physical relationship. The complainant alleges that the information regarding such relationship subsequently spread when the wife of the accused threatened her and her husband also subsequently came to know regarding the relationship after which he left her by representing that for two years he would go to Delhi and there is no possibility of returning in near future. The complainant alleges that she has been duped as neither her husband is accepting her nor the accused/petitioner no.1. Lastly, she alleges that in spite of the relationship the accused has failed to keep up to his commitment.

Mr. Banerjee, learned advocate appearing for the petitioners submits that the accusations made by the complainant, even if it is accepted in its entirety, fails to make out any case so far as the present petitioners are concerned. According to the learned advocate, if the statement of the complainant is considered to be the sole testimony on the basis of which the investigating officer arrived at her conclusion that a case under Section 417 read with Section 376 of the Indian Penal Code has been made out, then in that case it was incumbent upon the investigating officer also to take into account that the lady was aged 40 years and she was able to understand the consequences of a physical relationship. Neither the FIR nor the statement recorded under Section 164 of the Code of Criminal Procedure reflects that there was any promise to marry made by the accused. Both the accused and the complainant were consenting adults who entered into a physical relationship and at the relevant point of time both of them knew that each of them were married separately. Therefore, the applicability of Section 90 of the Indian Penal Code in the present case does not arise as the complainant did not have any misconception of fact or there was any failure or false promise by way of which the physical relationship was entered into between the parties.

Mr. Dutta, learned advocate appearing for the complainant/opposite party no.2 resisted such contention of the petitioners. Learned advocate emphasised on the statement of the complainant/victim recorded under Section 164 of the Code of Criminal Procedure and submitted that the accused presented a sympathetic version by representing to the complainant who happens to be the daughter of an acquaintance. Learned advocate drew the attention of the Court to the statement recorded under Section 164 of the Code of Criminal Procedure and stated that the accused/petitioner no.1 categorically represented that his wife was physically unable to enter in a physical relationship and his marriage with his wife has been reduced to papers. The complainant stressed on the factum that by way of conduct, the accused/petitioner no.1 allowed the complainant for continuing such relationship which he denied after having physical relationship for a considerable period of time and was known to the public at large. The act of the accused/petitioner no.1 has socially exposed the lady/complainant for which her husband almost threw away and the accused/petitioner no.1 has disowned such relationship.

Mr. Imran Ali, learned advocate appearing for the State produced the case diary.

He drew the attention of the Court to the statement of the three witnesses and the statement of the complainant/victim recorded under Section 164 of the Code of Criminal Procedure. Learned advocate for the State opposed the prayers advanced by the learned advocate appearing for the petitioners.

I have considered the submissions advanced by the learned advocates for the petitioners, the complainant as well as the State. Before proceeding further, the principle of law as set out by the Hon'ble Supreme Court is required to be considered. In *Pramod Suryabhan Pawar Vs. State of Maharashtra* reported in (2019) 9 SCC 608, the Hon'ble Supreme Court was pleased to deal with the issues relating to promise to marry and breach of such promise and the continuance of the criminal proceedings in the background of such facts particularly, under Section 376 of the Indian Penal Code. The relevant paragraphs from the said judgement are set out for the purpose of the present case, which are as follows :

"10. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eye of the law.

12. This Court has repeatedly held that consent with respect to Section 375 IPC 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. In *Dhruvaram Sonar [Dhruvaram Murlidhar Sonar v. State of Maharashtra, (2019) 18 SCC 191 : 2018 SCC OnLine SC 3100]* which was a case involving the invoking of the jurisdiction under Section 482, this Court observed : (SCC para 15)

"15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of."

This understanding was also emphasised in the decision of this Court in *Kaini Rajan v. State of Kerala [Kaini Rajan v. State of Kerala, (2013) 9 SCC 113 : (2013) 3 SCC (Cri) 858] : (SCC p. 118, para 12)*

"12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances."

14. In the present case, the "misconception of fact" alleged by the complainant is the appellant's promise to marry her. 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. In *Anurag Soni v. State of Chhattisgarh* [*Anurag Soni v. State of Chhattisgarh*, (2019) 13 SCC 1 : 2019 SCC OnLine SC 509] , this Court held : (SCC para 12)

"12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 IPC and can be convicted for the offence under Section 376 IPC." Similar observations were made by this Court in *Deepak Gulati v. State of Haryana* [*Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] (*Deepak Gulati*) :

(SCC p. 682, para 21)

"21. ... 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;"

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. In *Deepak Gulati* [*Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] this Court observed : (SCC pp. 682-84, paras 21 & 24)

"21. ... 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.

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 IPC 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, [Ed. : The matter between two asterisks has been emphasised in original.] unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her [Ed. : The matter between two asterisks has been emphasised in original.] ." (emphasis supplied)

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."

Following the aforesaid judgements, the Hon'ble Supreme Court reiterated such principle in *Sonu @ Subhash Kumar Vs. State of Uttar Pradesh & Another* reported in 2021 SCC OnLine SC 181 and *Shambhu Kharwar Vs. State of Uttar Pradesh & Another* reported in 2022 SCC OnLine SC 1032. It would be apposite to state that in both these judgements, it was emphasised that 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.

I have considered the case made out by the investigating agency while submitting the charge-sheet and assessed the material particulars available in the case diary as well as the papers under Section 207 of the Code of Criminal Procedure. On an assessment of the same, I find that there are no materials particularly, that the physical act was entered into between the petitioner no.1 and the complainant with an initial representation that the petitioner no.1 would marry the complainant. The physical relationship was between two consenting adults. The physical relationship also did not have an immediate bearing and the time frame has not been clearly stated. Both the petitioner no.1 and the complainant took advantage of their existing social relationship. The complainant being 40 years of age was able to understand the consequences of entering into such physical relationship and it was well within her knowledge that the accused/

petitioner no.1 was married. Having regard to the principles set out by the Hon'ble Supreme Court in the aforesaid three judgements, I am of the opinion that in the facts of the present case, there is no scope for continuance of the proceedings in view of the facts appearing or leading to the physical relationship is concerned for which it can be said that an alleged offence under Sections 417/376 of the Indian Penal Code is made out.

In view of the factum of the principal sections particularly Sections 417 and 376 of the Indian Penal Code being interfered with, the consequential allegations which led to incorporation of Sections 323/506/34 of the Indian Penal Code are also interfered with in this case.

Thus, all further proceedings arising out of Burdwan Women Police Station Case No. 147 of 2019 dated 13.05.2019 as well as the charge-sheet submitted therein which is pending before the learned Chief Judicial Magistrate, Purba Bardhaman are hereby quashed.

Accordingly, the revisional application being CRR 195 of 2021 is allowed.

All pending connected applications, if any, are consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.