

(2023) 12 BOM CK 0021

In the Bombay High Court

Case No : Criminal Application (APL) No. 169 Of 2023

Govardhan Teltumbade

APPELLANT

Vs

State Of Maharashtra And Others

RESPONDENT

Date of Decision : 08-12-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482

Indian Penal Code, 1860 — Section 90, 375, 376, 376(2)(h)(n), 417, 506

Citation : (2023) 12 BOM CK 0021

Hon'ble Judges : Vinay Joshi, J; M. W. Chandwani, J

Bench : Division Bench

Advocate : S.V. Sirpurkar, A. B. Badar, R.R. Dawada

Final Decision : Allowed

Judgement

Vinay Joshi, J

1. Heard.

2. Admit.

3. The matter is taken up for final disposal with the consent of learned counsel appearing for the parties. By this application under Section 482 of the Code of Criminal Procedure ('Code'), the applicant is seeking to quash charge-sheet arising out of Crime No. 966/2021 registered with Wani Police Station, Dist. Yavatmal for the offence punishable under Sections 376(2)(h)(n), 417, 506 of the

4. At the instance of report lodged by informant married lady aged 38 years, crime has been registered. It is informant's case that she got married long back having two school going daughters. She was running beauty parlor. In the month of July 2019, she got acquainted with the applicant aged 28 years through face-book. Frequently, they used to meet each other and developed close relationship.

5. Informant stated that on 10.08.2019, the applicant came to her house and sexually exploited by emotional talk. The applicant shown her a rosy future and

under said pretext, had sexual intercourse on various occasions. On 10.11.2019, the informant disclosed that she is pregnant from the applicant, on which he agreed to marry and asked her to continue the pregnancy. The informant stated that on 13.06.2020 and thereafter, the applicant had sexual intercourse with her in his four-wheeler. The informant came to know that the applicant had affair with some other lady. It is her case that on 29.06.2020, she has delivered a baby, however the applicant denied paternity. On the contrary, the applicant has disclosed their relation to her husband, who in turn, drove the informant from his house. The informant stated that the applicant used to threaten her that he would defame her and therefore, the report.

6. The learned counsel appearing for applicant vehemently argued that it is a pure case of consensual relation in between two adults. It is argued that the informant is married lady having two daughters. In the circumstances, it is very difficult to believe that on account of marital promise, she has submitted herself to the applicant. It is argued that the reading of First Information Report ('FIR') does not disclose that under false pretext of marriage, the applicant has sexually abused her. It is submitted that the relationship was going on for long three years and thus, by any stretch of imagination, it cannot be termed that it is a case of rape.

7. On the other hand, learned APP and learned counsel appearing for informant resisted the application. It is submitted that the informant has specifically stated that the applicant has emotionally made her weak and enjoyed the relation. The applicant also shown her a better future and under such promise, had maintained the relations. It is argued that the applicant had relation with one other lady for which our attention has been invited to the statement of one lady. In substance, it is contended that the consent obtained for sexual relation vitiates since it was obtained under misconception of facts.

8. The learned counsel appearing for the applicant would submit that there is a marked distinction between the false promise and breach of promise. Unless there was deceitful intention from inception, it cannot be said that the consent vitiates. In order to substantiate said contention, the applicant relied on the following decisions:-

(I) Naim Ahamed Vs. State (NCT of Delhi), (Criminal Appeal No. 257/2023 [arising out of SLP (Crl.) No. 8586/2017] decided on 30.01.2023.

(II) Pramod Suryabhan Pawar Vs. State of Maharashtra, (2019) 9 SCC 608.

(III) Dr. Dhruvaram Sonar Vs. State of Maharashtra, 2018 SCC Online SC 3100.

(IV) Sonu @ Subhash Kumar Vs. State of Uttar Pradesh and anr. 2021 AIR (SC) 1405.

9. The Supreme Court has occasion to deal the same issue in several cases. The observations made in this regard would provide us a guiding factor. In case of Deepak Gulati vs. State of Haryana (2013) 7 SCC 675, specific observations were

made in paragraph 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 mis-representation 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."

10. On the same line, we may refer the decision of the Supreme Court in case of Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and ors. supra 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 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 pronouncement in case of Uday .vrs. State of Karnataka – [2003] 4 SCC 46, 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"

14. Section 90 of the Code, though does not define the term 'consent', but, in negative manner it describes what does not amount to consent. True, consent may be expressed 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.

15. In case of Pramod Pawar (supra), once again the Supreme Court has summarized the position in paragraph 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."

16. Incidentally, our attention has been invited to the case of Naim Ahamed (supra), wherein the facts are quiet similar. In the said case, the victim was married woman having three children. She had long standing relation with the accused. In that context, it is observed that by any stretch of imagination, it cannot be held that the victim had given her consent for sexual relation under misconception of facts.

17. In case at hand also equally the informant (victim) was well grown-up lady

aged 38 years. She was married long back and having two school going daughters. Undisputedly, her marriage is still in subsistence. She was not residing with from her husband when the alleged occurrence took place in the year 2019. Moreover, it reveals from the prosecution case itself that the relationship was on account of emotional talk and a better future projected by the applicant. It is not the case that the applicant has promised for marriage and on believing such promise, she has consented for relation.

18. The learned counsel appearing for the informant relied on the decision of the Pramod Pawar (supra) to impress that the intention of accused at the time of making promise itself was to deceive therefore the consent vitiates. There can be no two opinions about said proposition. In case of false promise, the accused right from the beginning would not have any intention to marry the victim. In case at hand, even there are no allegation that under pretext of marriage, the accused has sexually exploited the victim. Though the learned counsel for informant relied on the decision of this Court in case of Navneet s/o Ashok Bangalkar Vs. State of Maharashtra and anr. 2022 AII MR (Cri) 2095. However, the case is distinguishable on facts. The learned counsel for informant also relied on the decision of this Court in case of Vinay s/o. Pradeep Chawhare Vs. State of Maharashtra & anr., 2022 ALL MR (Cri) 1970. The said decision equally relates to the facts of that case. In the said case, the couple was engaged, but after enjoying sexual relation, the accused has refused for marriage.

19. The learned counsel appearing for the informant would submit that there are allegations of rape on woman knowing that she was pregnant. Moreover, our attention has been invited that DNA profiling matches to the paternity of the applicant with a child. We are not impressed with this submission because unless the act of the applicant amount to "rape", it has no consequence about having sexual intercourse with the pregnant lady. Secondly, though the applicant is a biological father, however a convincing case of sexual relation with consent has been made out. Therefore, we do not find any substance in above submission.

20. In case at hand, already the informant was married and her marriage was in subsistence when the things were going on. After examining the entire material, the following fact emerges :-

- (I) The informant was married woman aged 38 years.
- (II) The informant had two grown-up daughters.
- (III) The informant's marriage was in subsistence when the occurrence took place.
- (IV) The informant continued relationship for long three years.
- (V) The informant delivered a baby from the applicant.
- (VI) The informant never alleges that under promise to marry, she was sexually exploited.

(VII) There was vast difference as lady was quiet older than the boy.

21. In view of settled position of law, by any stretch of imagination, it cannot be said that the consent was obtained under misconception. It requires to be noted that informant was 38 years of age whilst the applicant was 28 years of age only. Their relationship was going on since long. It emerges from the material that when the relationship was exposed, informant was driven away by her husband. All the above facts clearly indicates that it is a case of consensual relationship. We do not see that the consent was obtained by deceiving informant on account of false promise. We find it impossible to see essentials to constitute the offence of rape. Certainly, continuation of such prosecution amounts to abuse of the process of the Court. Discretion is vested with this Court under Section 482 of the Code to pass appropriate order to meet the ends of justice and to avoid the abuse of the process of the Court. We deem it fit to invoke our inherent powers in above facts.

22. In view of above, application is allowed. We hereby quash and set aside charge-sheet arising out of Crime No. 966/2021 registered with Wani Police Station, Dist. Yavatmal for the offence punishable under Sections 376(2)(h)(n), 417, 506 of the Indian Penal Code.