

(2020) 02 MP CK 0180

In the Madhya Pradesh High Court

Case No : Miscellaneous Criminal Case No. 49043 Of 2019

Govind Singh Rajput

APPELLANT

Vs

State Of Madhya Pradesh And Anr

RESPONDENT

Date of Decision : 27-02-2020

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 482
Indian Penal Code, 1860 — Section 90, 376, 376(2)(n), 506, 509

Citation : (2020) 02 MP CK 0180

Hon'ble Judges : S. K. Awasthi, J

Bench : Single Bench

Advocate : Arpit Singh, Yogesh Kumar Gupta, Pooja Murthy

Final Decision : Allowed

Judgement

1. Applicant has preferred this petition under Section 482 of Code of Criminal Procedure, 1973 (for short 'The Code'), for quashment of First

Information Report dated 18/09/2018 bearing crime No.482/2018, registered at police station â?" Pardeshipura, District â?"Indore, for commission of

offence under Section 376(2) (n), 506 and 509 of IPC, 1860 so also the consequential proceedings pending in Sessions Trial No.70/2019 before the XI

Additional Sessions Judge, Indore.

2. Facts leading to filing of the present petition are that the respondent No.2 made a written complaint to the Police that upon death of her husband in

the year 2013 she was appointed as Personal Assistant on compassionate ground in the office of the Deputy Commissioner (Audit) Customs and

Central Excise Department. The applicant was also posted as Superintendent in the same department as a result the applicant became acquainted

with respondent No.2 and he started going to the house of respondent No.2

situated at Street No.10, Chouriya Ka Makam, Nandanagar, Indore

frequently developing good relation with respondent No.2 and her son . It was also alleged that on 17/12/2014, the applicant went to the house of the respondent no.2 and put vermilion (sindoor) upon her forehead promising that as God is his witness he will fulfill all the duties as her husband.

However, in February 2015, respondent no.2 went to the house of the applicant where she came to know that the applicant is already married and he

has two kids, whereupon the applicant promised respondent no.2 that he will keep her as his second wife and purchased her mangalsutra from D.P.

Jewelers.

3. It is further alleged that on 30/04/2015, petitioner married respondent No.2 in Suryamandir, Cant Road, P.S. Rau, Indore. Thereafter he started

going to the house of the respondent no.2 where they had sexual intercourse and further more they stayed at hotel in Indore and Bhopal where they

made physical relation. In October 2015, respondent no.2 shifted from Govt. Quarters to the building in which the applicant was residing. Later on the

applicant distanced himself from respondent no.2 by threatening her and her son by saying demeaning things about respondent no.2. On the basis of

the aforesaid allegation Police registered FIR bearing Crime No.482/2018 at Police Station Pardeshipura, Indore against the applicant and after

completion of investigation charge-sheet has been filed.

4. Learned counsel for the applicant has submitted that even if the entire allegations made by the prosecutrix/respondent are accepted as Gospel truth

then also it would be clear that she was a consenting party and therefore, no offence under Section 376 of IPC is made out against the applicant.

Prosecutrix is currently 52 years old widow and well educated. She is also in service of Central Excise and Customs Department, she is well versed in

the ways of life yet she claims that she succumbed to the promise of marriage and believed that she was married to the applicant despite she had prior

knowledge about the fact that the applicant was already married and having children out of the said wedlock, even then she made sexual relationship

with him. She also continued to have sexual intercourse with the applicant for a considerable period and went along with the applicant to hotels as per

her own story. She also claimed that the applicant married her at Surya Temple by giving mangalsutra on 30/04/2015. Therefore, the allegations made

by the respondent no.2 that on the basis of false promise of marriage the applicant made physical relationship with her is not found to be trust worthy.

In these circumstances it cannot be said that the consent of the prosecutrix was obtained by the applicant either by mis-representation or

misconception of the fact. Under these learned counsel prays for quashment of First Information Report dated 18/09/2018 bearing crime No.482/2018,

registered at police station â?" Pardeshipura, District â?"Indore, for commission of offence under Section 376(2)(n), 506 and 509 of IPC, 1860 so also

the consequential proceedings pending in Sessions Trial No.70/2019 before the XI Additional Sessions Judge, Indore.

5. On the other hand learned Public Prosecutor as well as the learned counsel for the respondent vehemently opposes the application. It has been

contended that the consent of sexual intercourse accorded by the prosecutrix was on account of false promise of marriage held out by the petitioner.

Hence, the consent was vitiated and the sexual intercourse committed by the applicant would fall under the purview of rape. The grounds raised by

the present applicant for quashment of the FIR are disputed question of facts which depends upon the evidence of the parties and they cannot be

considered at this stage. Under these circumstances, counsel prayed for rejection of the petition.

6. Having heard learned counsel for the parties and perused the record.

7. From the perusal of the FIR and the statement of the prosecutrix recorded under Section 161 as well as 164 of Cr.P.C it appears that the husband

of the prosecutrix was working in the Central Excise and Customs Department. In the year 2009 he died on a road accident and the prosecutrix /

respondent no.2 got compassionate appointment in the said department at Bhopal in the year 2012, as stenographer and in the year 2013 she got

transferred to Indore. In the year 2014, she was posted as Personal Assistant to Deputy Commissioner, where the present applicant was working as

Inspector. The applicant knows the husband of the prosecutrix/respondent No.2, therefore, he started conversing with her and developed good

relations with her and her son. He used to visit the house of the prosecutrix and one day he put vermilion (sindoor) on her forehead promising that he

will fulfill all the duties as her husband.

8. It is further alleged that the applicant got promoted as Superintendent and

then he invited her to his house to perform pooja. When she reached his house, she came to know that the applicant is a married person and having children. After getting the knowledge about the applicant's marriage, she talked to him then the applicant assured her that he will keep her as his second wife. Thereafter, she continued relation with the applicant and resided as his second wife. In the year 2015, the applicant was transferred to Bhopal, then he called the prosecutrix/respondent no.2 at Bhopal, where she resided with him at Hotel Hansraj along with her son. Thereafter when the prosecutrix/respondent no.2 shifted to the residency area, Indore she came to know that the applicant's wife portrayed about the prosecutrix/respondent No.2 in the colony as a lady of unsound character. Thereafter, the prosecutrix's son went into depression and when she tried to contact the applicant he refused to reside with her.

9. Looking to the aforesaid, it is clear that the applicant is already married and even then she decided to live with the applicant, therefore, it is clear that she was aware of the immoral acts she had consented to, and she been presumed to be fully understanding the nature and consequences of sexual acts, she had submitted to. She was free to exercise her choice between resistance & assent and consciously elected to exercise later option.

Therefore, it cannot be said that her consent was obtained by misconception of fact or by misrepresentation

10. With regard to consent in the case of rape the Supreme Court in the case of Deepak Gulati vs. State of Haryana reported as AIR 2013 SC 2071

has held as under:-

18. 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.

11. In the case of Yedla Srinivasa Rao vs. State of Andhra Pradesh, reported in (2006) 11 SCC 615, the Hon'ble Apex Court has observed as follows:

“Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.

It was also observed that if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such

activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that Section

90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her. Therefore, it depends on case

to case that what is the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very

tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil

right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked.”

12. Reference can also be made to the case of Uday vs. State of Karnataka reported as (2003) 4 SCC 46 wherein the Hon'ble Supreme Court has held as under:

“21. It therefore appears that the consensus of judicial opinion is in favour of

the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

25. There is yet another difficulty which faces the prosecution in this case. In a

case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix

had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.â??

13. In the recent judgment dated 22/11/2018 in the case of Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra & Ors., (Criminal Appeal

No.1443/2018) the Hon'ble Apex Court has held that 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 malafide motives and had made a false promise to this

effect only to satisfy his lust, as the later 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 malafide 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.

14. In view of the aforesaid pronouncements of the Hon'ble Supreme Court, this Court is of the view that the prosecutrix/respondent No.2 is a major

lady and she had chosen to live with the applicant even after knowing very well that he is already married. Therefore, the prosecutrix cannot be held

to turn around and claim that the consent was based on misconception of the facts. Even if the allegations made by the prosecutrix are taken at their

face value and accepted in their entirety, they did not make a case against the applicant under Section 376(2)(n) and 506-II of IPC, 1860

15. Accordingly, this petition filed under Section 482 of 'Cr.P.C' is allowed and FIR dated 18/09/2018 bearing crime No.482/2018, registered at police

station â?" Pardeshipura, District â?" Indore, for commission of offence under Section 376(2)(n), 506 and 509 of IPC, 1860 so also the consequential

proceedings pending in Sessions Trial No.70/2019 before the XI Additional Sessions Judge, Indore are hereby quashed.

16. With the aforesaid, Miscellaneous Criminal Case No. 49043/2019 stands allowed. A copy of this order be sent to the concerned Court for

necessary information and compliance.

Certified copy as per Rules.