

(2023) 03 MP CK 0027

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 35658 Of 2022

Mayank Tiwari

APPELLANT

Vs

State Of Madhya Pradesh And Others

RESPONDENT

Date of Decision : 02-03-2023

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 164, 482
Indian Penal Code, 1860 — Section 90, 375, 376, 376(2)(n)

Citation : (2023) 03 MP CK 0027

Hon'ble Judges : Deepak Kumar Agarwal, J

Bench : Single Bench

Advocate : Rakesh Kumar Dubey, G.P. Chaurasiya, Shyam Kishore Mishra

Final Decision : Allowed

Judgement

Deepak Kumar Agarwal, J

1. The present petition under Section 482 of CrPC has been filed by the petitioner challenging the charge-sheet as well as consequential criminal proceedings arising out of Crime No.308 of 2021 registered at Police Station Gole Ka Mandhir, District Gwalior for offences punishable under Sections 376(2)(n) of IPC pending before the Court of Eight Additional Sessions Judge, Gwalior in S.T.No.570/2021.

(2) In brief, the case of the prosecution is that on 10.08.2021 complainant-prosecutrix aged 23 years lodged a written complaint at Police Station Gole Ka Mandhir, District Gwalior that she is resident of Etta, Uttar Pradesh. From last two years, she is studying at Gwalior doing course of Nursing. In January, 2020, she contacted the present applicant/accused through Face Book. They developed friendship and started liking each other. They started living relationship. She proposed the petitioner for marriage. He assured that whenever he will get job he will marriage the complainant. During their relationship, they have made physical relationship as husband and wife. On 27.07.2021, he went to Jodhpur

and solemnized marriage with another girl. Therefore, the petitioner lodged complaint. On the basis of such written complaint, FIR vide Crime No.308/2021 has been registered against the petitioner. Statement of prosecutrix was recorded. After completion of investigation and other formalities, charge sheet has been filed by police.

(3) It is submitted by learned counsel for the petitioner that the FIR has been lodged by the complainant with mala fide intention just to take undue benefit. The complainant- prosecutrix is a major girl and she is known the petitioner from the last near about one year and eight months. She has made physical relationship with the petitioner on her own consent and free will. The prosecutrix was in relationship with petitioner over a significant period of time, therefore, consent of the prosecutrix is not obtained by misrepresentation. Just to take undue benefit she has lodged a false FIR. It is further submitted that the statement of prosecutrix was recorded under Section 164 of Cr.P.C., in which she has stated that the petitioner is known to her for the last one year and eight months and if any woman continues to remain in physical relationship for a long period including visiting hotel, then it cannot be said that her consent was obtained by misconception of fact. To buttress his contentions, the counsel for the applicant has relied upon the judgments passed by the Supreme Court in the case of Deepak Gulati vs. State of Haryana AIR 2013 SC 2071, Tilak Raj vs. State of Himachal Pradesh AIR 2016 SC 406, Uday vs. State of Karnataka (2003) 4 SCC 46, Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr. (2019) 3 SCC (Cri.) 903, Sonu @ Subhash Kumar Vs. State of Uttar Pradesh & Anr. AIR 2021 SC 1405 as well as the judgments passed by this Court in the case of Senjeet Singh Vs. State of M.P. and another 2020 (1) MPLJ (Cri.) 260, Abid Ali Vs. State of MP & Anr. passed on 18/5/2017 in M.Cr.C. No.11363/2016 and a judgment passed by a coordinate Bench of this Court in the case of Umesh Lilani Vs. The State of M.P. & Anr. passed on 18/7/2019 in M.Cr.C. No.16158/2019 (Indore Bench) as well as the order dated 28th March, 2022 passed by a Coordinate Bench of this Court in the case of Satendra Rathore vs. State of MP and Another passed in MCRC 45389 of 2021.

(4) On the other hand, the petition is vehemently opposed by the counsel for the State and submitted that if a girl has believed the promise made by the offender for a long period and continued with the physical relationship, then it cannot be said that her consent was not obtained by misconception of fact. From the statement of prosecutrix recorded under Section 161 as well as 164 of CrPC, it is clear that the petitioner on the false pretext of marriage has succeeded in developing relationship with prosecutrix by blackmailing her and therefore, consent given by the prosecutrix cannot be said to be a free consent.

(5) Heard learned counsel for the parties.

(6) From the plain reading of the allegations made by the prosecutrix, in the statement under Section 164 of Cr.P.C., it is clear that she was in relationship with the petitioner since 2020. FIR has been lodged in the year 2021. Before

lodging the report, neither prosecutrix has made any complaint to anybody in this regard.

(7) The Hon'ble Apex Court in the case of Deepak Gulati (supra) 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 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. "

In the case of Tilak Raj (supra), the Hon'ble Supreme Court has held as under:-

"19. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of The Indian Penal Code (in short "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable."

The Hon'ble Supreme Court further in the case of Uday (supra) 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 straitjacket 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 them. 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, are 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."

The Hon'ble Apex Court in the case of Sonu @ Subhash Kumar (supra) has held as under:-

"11. Bearing in mind the tests which have been enunciated in the above decision, we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482 of CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482 of CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established."

The Hon'ble Supreme Court in the case of Pramod Suryabhan Pawar (supra) has held as under:-

"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, 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 of the Indian Penal Code 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 of the Indian Penal Code 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"): (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 that 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* 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

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.

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."

The Hon'ble Apex Court in the case of Dr. Dhruvaram Murlidhar Sonar Vs. Naval Singh Rajput and others reported in 2019 (3) MPLJ (Cri.) SC 52 has held as under:-

"20. 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 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 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 Indian Penal Code.

21. In the instant case, it is an admitted position that the appellant was serving as a Medical Officer in the Primary Health Centre and the complainant was working as an Assistant Nurse in the same health centre and that she is a widow. It was alleged by her that the appellant informed her that he is a married man and that he has differences with his wife. Admittedly, they belong to different communities. It is also alleged that the accused/appellant needed a month's time to get their marriage registered. The complainant further states that she had fallen in love with the appellant and that she needed a companion as she was a widow. She has specifically stated that "as I was also a widow and I was also in need of a companion, I agreed to his proposal and since then we

were having love affair and accordingly we started residing together. We used to reside sometimes at my home whereas some time at his home. Thus, they were living together, sometimes at her house and sometimes at the residence of the appellant. They were in a relationship with each other for quite some time and enjoyed each others company. It is also clear that they had been living as such for quite some time together. When she came to know that the appellant had married some other woman, she lodged the complaint. It is not her case that the complainant has forcibly raped her. She had taken a conscious decision after active application of mind to the things that had happened. It is not a case of a passive submission in the face of any psychological pressure exerted and there was a tacit consent and the tacit consent given by her was not the result of a misconception created in her mind. We are of the view that, even if the allegations made in the complaint are taken at their face value and accepted in their entirety, they do not make out a case against the appellant. We are also of the view that since complainant has failed to prima facie show the commission of rape, the complaint registered under section 376(2)(b) cannot be sustained. "

(8) On going through the law laid down by the Hon'ble Apex Court it is evident that there is a distinction between "mere breach of promise" and "giving a false promise to marry". Only a false promise to marry made with an intention to deceive a woman would vitiate the woman's consent being obtained under misconception of fact, but mere breach of promise cannot be said to be a false promise. In the present case at hand, the complainant- prosecutrix was in physical relationship with petitioner for a long period i.e. near about five years. On the alleged date of incident, the prosecutrix went along with the petitioner to a hotel. Thus, it cannot be said that her consent was obtained by misconception of fact. At the most, it can be said to be a breach of promise to marry. Near about five years are more than sufficient time for a prudent woman to realize as to whether the promise of marriage made by the petitioner is false from its very inception or there is a possibility of breach of promise. When the petitioner was not acceding to her request for marriage, then why she continued with relationship with him till 30th September, 2021 as alleged by the prosecutrix. Thus, it is clear that at the most, it can be said that it is a case of breach of promise and, therefore, it cannot be said that the promise made by the petitioner was obtained under fear or misconception of fact.

(9) Under these circumstances, the prosecution of the petitioner for offence under Sections 376(2)(n) of IPC would be nothing but abuse of process of law and, therefore, no case is made out warranting prosecution of petitioner. As a consequence thereof, charge-sheet as well as consequential criminal proceedings arising out of Crime No.308 of 2021 registered at Police Station Gole Ka Mandhir, District Gwalior for offences punishable under Sections 376(2)(n) of IPC and pending criminal proceedings in S.T.No.570/2021 before Eight Additional Sessions Judge, Gwalior are hereby quashed.

(10) Petition stands allowed.

(11) Let a copy of this order be sent to concerned Court below as well as police station concerned for information and compliance.