
(2019) 10 BOM CK 0041

In the Bombay High Court

Case No : Criminal Application No. 1052 Of 2018

Rajesh Sankarsan Tripathy

APPELLANT

Vs

State Of Maharashtra And Anr

RESPONDENT

Date of Decision : 03-10-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 482
Indian Penal Code, 1860 — Section 90, 375, 376(2)(n), 377, 417, 504, 506
Hindu Marriage Act, 1955 — Section 11, 13b

Citation : (2019) 10 BOM CK 0041

Hon'ble Judges : Ranjit More, J;N.J. Jamadar, J

Bench : Division Bench

Advocate : Prem Keshwani, K.V. Phooole, Aruna S. Pai, Deepika Motilal Bafna, Sonali Mahale

Final Decision : Dismissed

Judgement

N.J. Jamadar, J

1. By virtue of this application under section 482 of the Code of Criminal Procedure, 1973, ('the Code'), the applicant, who has been arraigned for the offences punishable under section 376(2)(n), 377, 417, 504 and 506 of the Indian Penal Code, 1860 ('The Penal Code'), seeks quashment of the first information report bearing C.R.No. 195/2017 and the resultant prosecution, being Sessions Case No.333 of 2019, pending on the file of the Sessions Judge at Dindoshi, Mumbai.

2. The gravamen of indictment against the applicant can be stated in brief as under :-

[A] The respondent No.2 (hereinafter referred to as 'the first informant') claims to have got acquainted with the applicant through a friend in the month of March 2013. The first informant was then married. However, on account of marital discord between the first informant and her husband, the proceedings were

pending before the Courts including a matrimonial petition in the Family Court, Dwarka, New Delhi. The applicant gave assurance to the first informant to help her out in her matrimonial disputes. By persuasive conduct, the applicant induced the first informant to repose confidence in him. On 8th September 2013, the applicant accompanied the first informant for the hearing of the proceedings before the Court at New Delhi. The applicant made a promise that he would marry the first informant and desired to have physical relations with the first informant. Despite resistance, the applicant had forcible sexual intercourse with the first informant. The applicant visited the native place of the first informant and assured the mother and brother of the first informant that he would keep the first informant happy.

[B] The first informant further alleges that the applicant had physical relations with the first informant, under promise of marriage, on a number of occasions at various places. The first informant further claims that the applicant also forcibly subjected her to unnatural sex. According to the first informant, the said state of affairs continued upto the year 2016. It is the claim of the first informant that in the year 2016, she came to know that the applicant is already married and, thus, confronted the applicant. Thereupon, the applicant replied that since six years prior thereto, he had no physical relations with his wife as she was not of a good character and he would get divorce from his wife.

[C] In the month of November 2016, the first informant claimed to have categorically informed the applicant that she would not maintain relations with the applicant thenceforth. The applicant had, at that point of time, threatened to upload the obscene photos and videos of the first informant. The applicant had also threatened to cause harm to the 11 year old daughter of the first informant.

[D] Thus, the first informant addressed a complaint in writing to Malad Police Station on 17th April 2017. Pursuant thereto, the report of the first informant came to be recorded on 21st May 2017. Investigation commenced thereon. After completion of the investigation, charge-sheet has been lodged against the accused for the offences punishable under sections, 376(2)(n), 377, 417, 504, 506 of the Penal Code.

3. In the backdrop of the aforesaid allegations, the applicant has invoked the inherent powers of this Court, on the premise that the instant prosecution is a clear abuse of the process of Court. The applicant claims that it is imperative in the interest of justice to quash the prosecution to secure the ends of justice.

4. The applicant averred in the application that though he became acquainted with the first informant in the year 2013, yet, the further allegations of the alleged liaison between the applicant and the first informant are patently false, imaginary and mala-fide. The applicant claims that the first informant was also a Facebook friend of his wife. In the month of December 2016, as the first informant started to blackmail the applicant by threatening to file a false prosecution, and demanded huge amount, the applicant had lodged a report with

the Commissioner of Police, Ahmadabad on 28th December 2016.

5. Even otherwise, the allegations in the FIR, even if taken at par, do not make out a prima-facie case of commission of any of the offences alleged against the applicant. The situation in the life of the first informant, the fact that the first informant was already married when the applicant allegedly made a promise to marry her and thereby induced to have sexual intercourse with him, and the inordinate and unexplained delay in lodging the FIR, according to the applicant, cumulatively indicate that the instant prosecution is initiated to wreak vengeance. The alleged relations between the applicant and the first informant for over three years, without any demur, justify an inference that the relations were completely consensual and it cannot be said that the first informant had given consent for the physical relations under a misconception of facts. Thus, the applicant prayed for quashing and setting aside the FIR and the resultant prosecution.

6. We have heard Shri Prem Keshwani, the learned counsel for the applicant, the learned APP for the respondent No.1 and Ms.Bafna, the learned counsel for the respondent No.2-first informant at some length. We have also perused the material on record including the charge-sheet lodged against the accused.

7. Shri Keshwani urged with a degree of vehemence that the instant prosecution is a striking manifestation of abuse of the process of the Court at the instance of the first informant. At the outset, Shri Keshwani submitted that the period of over three years for which the first informant had relations with the applicant, by itself, demonstrates that the relationship was nothing but consensual between two grown-up persons. It was further urged that the veracity of the allegations in the FIR is required to be considered in the backdrop of the situation of life of the first informant. It is indisputable that the first informant was already in a wedlock, when the applicant allegedly had physical relations with the first informant. The latter was married not once but twice. Taking us through the FIR, an endeavor was made to show that the physical relations were established between the applicant and the first informant for the first time in the month of September 2013 and the last one was in the year 2016. In between, from the own showing of the first informant, the latter accompanied the applicant at various places and they had physical relations at times without number. In this backdrop, the circumstances in which the FIR came to be lodged, are of material significance, urged Shri Keshwani.

8. Firstly, the FIR is a result of embellishment and creature of after-thought as the first informant claimed to have consulted a legal practitioner and got the compliant drafted on 10th February 2017. However the said complaint was tendered to Malad Police station on 17th April 2017. Secondly, this inordinate and unexplained delay in lodging the FIR, on the one hand, erodes the veracity of the claim and, on the other hand, lends credence to the case of the applicant that the first informant had threatened to falsely implicate him in a prosecution for rape, as reported to Ahmadabad Police in the month of December 2016 itself.

9. In the light of the aforesaid facts, Shri Keshwani strenuously urged that even if the case of the first informant is taken, at its face value, no offence of rape or any other offence, as alleged, can be said to have been prima-facie made out. The allegation that the applicant had made a false promise of marriage and then induced the first informant to give consent for sexual relations with the applicant, in the backdrop of the aforesaid facts was urged to be groundless and unworthy of acceptance, ex-facie.

10. In order to lend support to this submission, the learned counsel for the applicant placed strong reliance upon the judgments of the Supreme Court in the cases of Pramod Suryabhan Pawar Vs. The State of Maharashtra & Anr. 2019 (11) SCALE 209., Dr. Dhruvaram M. Sonar Vs. The State of Maharashtra & Ors. AIR 2019 Supreme Court 327, Deepak Gulati Vs. State of Haryana (2013) 7 SCC 675 and Madhya Pradesh High Court in the case of Umesh Lilani Vs. State of Madhya Pradesh & Anr. Misc. Cri.Case No.16158/2019 dt. 18.7.2019

11. In opposition to this, the learned APP would submit that the material on record indicates that the charge against the applicant cannot be said to be groundless. On the contrary, if the averments in the application are considered in the backdrop of the conduct attributed to the applicant, as emerged from the material collected during the course of investigation, it becomes evident that the applicant had no intention to solemnize marriage with the first informant since the inception of their relationship and repeatedly violated the first informant on the premise of marriage, which he never intended to perform. Thus, according to the learned APP, it cannot be said that the continuation of the prosecution would be either an abuse of the process of the Court or its quashment is necessary for securing the ends of justice.

12. Ms.Bafna, the learned counsel for the respondent No.2 stoutly submitted that the claim of the applicant that he had no relations with the first informant is shown to be patently false not only by the material collected during the course of the investigation, but even from the conversations between the parties, of which the transcript has been placed on record. Inviting the attention of the Court to certain portions of the conversation, Ms.Bafna urged that no other inference than that of the applicant having subjected the first information to sexual harassment to gratify his lust, is possible. The learned Counsel further submitted that the first informant had categorically stated in the report that while she was under severe mental stress on account of the matrimonial dispute with her former husband, the applicant gave a promise of marriage and induced her to have sexual relations with him. Therefore, the case clearly falls within the tentacles of section 375 of the Penal Code, urged Ms.Bafna.

13. We have given our anxious consideration to the submissions across the bar. At the threshold, it is necessary to note that the averments in the application proceed on the premise as if the applicant had no relationship with the first informant. It was sought to be demonstrated that the applicant got acquainted with the first informant in the course of business and social meetings. The first

informant was also a Facebook friend of the wife of the applicant, and in the year 2016, the first informant started blackmailing the applicant on the threat of falsely implicating him in a prosecution for rape. Thus, the applicant claimed to have lodged a report with the Commissioner of Police, Ahmadabad City. From the perusal of the copy of the letter dated 20th December 2016 addressed to the Commissioner of Police, Ahmadabad, it becomes evident that the applicant has not disclosed the nature and duration of the relationship between him and the first informant, and attributed harassment at the hands of the first informant since 15 days prior thereto.

14. Undoubtedly, an accused has the right to maintain silence. However, when the accused invokes the inherent power of the Court and seeks the discretionary relief of quashing the prosecution, at the nascent stage, the accused is expected to approach the Court bonafide. In the context of the defence sought to be developed that the physical relations were consensual and the consent of the first informant was not vitiated, in our view, it was incumbent upon the accused to indicate the circumstances in which the applicant had the relations with the first informant. Nonetheless, we proceed to examine the material on record to find out whether the continuation of the prosecution would amount to an abuse of the process the Court, as claimed by the applicant.

15. With the changing dynamics and a little less taboo about the relationship between the couples without and beyond marriage, the Courts are often confronted with the question like the one posed by the facts of the instant application. The relations develop, over a period of time, leading to physical relations. In some cases, however, the relationship does not take the turn desired by both or one of the parties. In that context, when the relationship comes to an end, it is alleged that the aggrieved party was made to give consent for physical relations on the promise of marriage. The question which then arises is whether the consent for sexual intercourse was vitiated by the false promise of marriage and does it amount to a consent given under misconception of facts. The accused assert that the relationship was thoroughly consensual and the promise of performing the marriage was not the immediate cause for the alleged relations. The criminality often turns on the question as to whether the accused had no intention to solemnize the marriage, as promised, since the inception of the relationship and the first informant was made to believe the false promise to gratify the lust.

16. The considerations which weigh, while determining the said aspect, have been delved into and expounded by the Courts. In the case of Uday Vs. State of Karnataka (2003) 4 SCC 46, the Supreme Court, after advertng to the provisions of clause fourthly and fifthly of section 375 and section 90 of the Penal Code, and the previous pronouncements, observed 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 Penal Code. The Court, however, cautioned 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 the 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.

17. The aforesaid observations of the Supreme Court in the case of Uday (Supra) were further explained by the Supreme Court in the case of Deelip Singh alias Dilip Kumar Vs. State of Bihar (2005) 1 SCC 88. The observations in paragraph No.28 are important. They read as under :

"28 The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 Clause secondly."

(emphasis supplied)

18. In the case of Deelip Singh alias Dilip Kumar (Supra), the Supreme Court further explained that the reading of the judgment in the case of Uday (Supra) as a whole, does not indicate that in the case of Uday (Supra), the Supreme Court laid down a broad proposition that a promise to marry could never amount to misconception of fact. The Court observed in express terms that, "That is not, in our understanding, the ratio of the decision."

19. In the case of Deepak Gulati (Supra), the Supreme Court again considered the previous pronouncements including the judgments in the case of Uday (Supra) and Deelip Singh alias Dilip Kumar (Supra), and the legal position was expounded in paragraph 19 and 21 as under:

"19 This Court considered the issue involved herein at length in the case of Uday v. State of Karnataka, AIR 2003 SC 1639; Deelip Singh @ Dilip Kumar v. State of Bihar, AIR 2005 SC 203; Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615; and Pradeep Kumar Verma v. State of Bihar & Anr., AIR 2007 SC 3059, and came to the conclusion that in the event that the accused's promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only

hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

.....

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."

(emphasis supplied)

20. As regards the finding which was required to establish the charge of rape, where the allegations are of seducing the prosecutrix to indulge in sexual intercourse on the promise of marriage, the Court enunciated the legal position in paragraph No.24 as under :

"24 Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at 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, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."

(emphasis supplied)

21. In the case of Dr. Dhruvaram M. Sonar (Supra), the Supreme Court again took a survey of the authorities on this aspect and postulated the law, pointing out the distinction between rape and consensual sex. The observations in paragraph 20 are instructive and thus extracted below :-

"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 IPC."

(emphasis supplied)

22. Lastly, in the case of Pramod Suryabhan Pawar (Supra), the Supreme Court was again called upon to examine the question of culpability for the offence of rape and the justifiability of the quashment of the proceedings at the threshold, in exercise of the powers under section 482 of the Code, on the premise that the act was consensual. The Supreme Court adverted to the previous judgments, noted the facts and propositions postulated therein, including the judgment in the case of Dr. Dhruvaram M. Sonar (Supra), and culled out the legal position in paragraph 18 as under:

"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)

23. In the backdrop of the aforesaid exposition of the legal position, we now

advert to examine the facts of the instant case. At this stage, for the purpose of this proceeding, there is not much controversy over the fact that the applicant and the first informant became acquainted in the year 2013 and the relationship was in existence upto November 2016. The material on record, prima-facie, supports the allegations that there were physical relations between the applicant and the first informant during the said period and on multiple occasions. The controversy boils down the question as to whether the applicant seduced the first informant to give consent for the sexual act under the promise of marriage? Was the said promise of marriage false? Whether the applicant never intended to perform the said promise? Whether the promise of marriage was the immediate cause for the first informant to give consent for the sexual act?

24. The learned counsel for the applicant would urge that the very fact that the first informant was still in the wedlock when the applicant and the first informant allegedly engaged in the sexual act for the first time, on 8th September 2013, runs counter to the theory of the first informant having given consent for the sexual act on account of the promise of marriage.

25. The learned counsel for the applicant drew our attention to the judgment passed by the learned Judge, Family Court, Dwarka, New Delhi on 19th November 2013 in Hindu Marriage Application No.127 of 2013 whereby, the marriage between the first informant and her former husband (Shri Saurabh Harit), was declared to be null and void under section 11 of the Hindu Marriage Act, 1955 as it was found that on the date of marriage between them, i.e., 5th September 2005, the marriage between the first informant and Mr.Vishwamitra Marwah her quondam husband was still in subsistence, since the decree of divorce by mutual divorce under section 13(b) of the Hindu Marriage Act was passed on 15th October 2005 thereby dissolving the marriage between the first informant and Vishwamitra Marwah.

26. The submission appears attractive at the first blush. However, the submission is required to be scrutinized in the backdrop of the attendant circumstances. It is the claim of the first informant that the applicant gave assurance to help her come out from her matrimonial disputes and the first sexual intercourse occurred when the applicant had accompanied the first informant in connection with the matrimonial proceedings then pending at Delhi. The fact that HMA No.127 of 2013 came to be decided ex-parte on 19th November 2013 thus does not detract materially from the claim of the first informant. Even the judgment in HMA No.127 of 2013 records the fact that the first informant had appeared before the Family Court, Delhi on 9th September 2013. This factor lends ex-facie support to the claim of the first informant that the applicant had accompanied her to Delhi and the incident occurred on 8th September 2013. Indubitably, the first informant could not have married the applicant instantaneously. However, the promise of marriage allegedly made by the applicant whilst the first informant was facing matrimonial proceedings on account of marital discord with her former husband, cannot be said to be insufficient to induce her to give consent

for the sexual act.

27. Conversely, it must be noted that the applicant claims to have been married all along. Evidently, the applicant was also in the wedlock when they allegedly engaged in the sexual act. Could the applicant marry the first informant at that point of time or for that matter during the subsistence of his first marriage? The empathetic answer would be in the negative. If the first informant's version is to be believed, then the applicant could not have, in the given circumstances, performed the said promise nay the applicant never intended to solemnize the marriage with the first informant. Likewise, the applicant can be said to have believed, at that point of time, that he would not be in a position to honour the promise to marry the first informant.

28. At this juncture, the material collected during the course of investigation especially the transcript of the conversation between the applicant and the first informant assumes critical significance. The conversation bear upon the question as to whether the applicant had no intention to honour the promise of marriage since inception of the liaison. Upon perusal of the conversation, we are unable to restrain ourselves from observing that the statements attributed to the applicant reflect promiscuous and perverted character. One of the comment attributed to the applicant is that the applicant loves hurting small girls (Page No.181). The reference is in the context of 11 year old daughter of the first informant. We are, however, dissuaded by two weighty considerations from observing anything more. One, the compulsion to maintain restraint and sobriety in judicial discourse. Two, the risk of prejudging the guilt of the applicant.

29. The learned counsel for the applicant attempted to question the admissibility of the said transcript of conversation. We are afraid to countenance this submission. The question of admissibility of the said evidence will have to be considered and determined at the trial. The aspects of delay in lodging FIR and it being an outcome of deliberation and consultation with advocate are also matters which can be properly tested by recording evidence during the course of the trial.

30. It is true that the circumstances of the case and the material on record may not paint the first informant as a paragon of virtue. However, that does not give a license to exploit and ravish the first informant. The allegations that the applicant made a promise to firstly help the first informant to come out of the matrimonial dispute and then marry her; accompanied the first informant to her native place and even assured her mother and brother, despite himself being married, prima-facie, support the further allegation that the applicant never intended to perform marriage with the first informant. To add to this, the subsequent events, especially the statements attributed to the applicant, would indicate that the allegation of interest of the applicant in the liaison being actuated by lust, since the inception of the relationship, cannot be said to be groundless.

31. We are conscious of the plenary power of this Court under section 482 of the

Code. The inherent powers are of wide amplitude. However, the Court is vested with an element of discretion in the matter of exercising the said power. In our view, the facts of instant case are such that the exercise of the said power is not justifiable. As observed above, the applicant has even not offered a version which competes in probability with that of the case set up by the first informant, especially on the aspect of consensual sexual relationship.

Thus, we are not inclined to exercise the discretion to quash the proceedings in exercise of the inherent power.

32. The conspectus of the aforesaid consideration is that the application deserves to be dismissed. We, however, clarify that the observations hereinabove are made only for the purpose of the determination of the instant application and we may not be understood to have expressed any opinion on the merits of the matter, and, the learned Sessions Judge, who is seized of the matter, shall not be influenced by any of the observations made hereinabove while deciding the matter.

33. The application stands dismissed.