

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 17TH DAY OF JANUARY 2023 / 27TH POUSHA, 1944

CRL.MC NO. 4875 OF 2020

AGAINST CP 85/2019 OF JUDICIAL MAGISTRATE OF FIRST CLASS

-II, KOLLAM

CRIME NO.3516/2017 OF KOLLAM EAST POLICE STATION, KOLLAM

PETITIONER/ACCUSED:

EMMANVEL PETER
AGED 31, S/O. PETER JOSEPH, KANNITTAYIL, ARAVILA,
KAVANAD P.O. SAKTHIKULANGARA,
KOLLAM, KERALA 691 003.

BY ADV C.S.SUMESH

RESPONDENTS/STATE & DEFACTO COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR
HIGH COURT OF KERALA, ERNAKULAM 682 031.

2 VICTIM,
X

BY ADV SMT.K.V.RASHMI

OTHER PRESENT:

SRI.C.N PRABHAKARAN-SR.P.P

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION
ON 12.01.2023, THE COURT ON 17.01.2023 PASSED THE FOLLOWING:

O R D E R

Dated this the 17th day of January, 2023

This Cr1.M.C has been filed to quash Annexures A1 FIR and A2 Final Report in Crime No.3516/2017 of Kollam East Police Station u/s 482 of the Code of Criminal Procedure (Cr.P.C).

2. The petitioner is the accused. The 2nd respondent is the victim/defacto complainant. The offences alleged against the petitioner are punishable under Sections 417, 354 A, 354B and 376 of IPC.

3. The prosecution case in short is that the petitioner by giving false promise of marriage to the 2nd respondent, sexually assaulted her at several places in Palakkad and Coimbatore. It is further alleged that the petitioner later on withdrew from his promise to marry the 2nd respondent and also made preparation to marry another girl.

4. I have heard Sri C.S. Sumesh, the learned counsel for

the petitioner, Smt K.V Rashmi, the learned counsel for the 2nd respondent and Sri C.N Prabhakaran, the learned senior public prosecutor.

5. The learned counsel for the petitioner Sri C.S. Sumesh submitted that even if the entire allegations in the FI statement together with the materials collected during investigation are believed in its entirety, no offence under Sections 376, 354A, 354B and 417 of IPC is made out. The learned counsel further submitted that the statement given by the victim reveals that the petitioner and the 2nd respondent were in love and the alleged sexual relationship they had was only consensual in nature. The learned Public Prosecutor submitted that the FI statement given by the victim would show that the ingredients of the offence of rape and cheating have been attracted and when *prima facie* case is made out, the jurisdiction vested with this Court under Section 482 of Cr.P.C cannot be invoked.

6. I went through the FI statement in detail. The reading

of the FI statement would show that both the petitioner and the 2nd respondent worked together in a T.V serial called 'Akashadooth' and fell in love. The statement would further show that they voluntarily went to several places and stayed in hotels at Palakkad and Coimbatore and had consensual sexual relationship. In the meanwhile, petitioner went abroad, gradually relation broke down, thereafter the 2nd respondent came to know about the marriage of the petitioner with another girl, the 2nd respondent was strained on account of the same and lodged the complaint.

7. Section 375 of IPC, *inter alia* states that a man commits rape if he has had any form of sexual intercourse with a woman without her consent. Consent is at the center of the offence of rape. If we analyze Section 375 of IPC, there is no such mention of the consent obtained under the false promise of marriage. Section 90 of IPC refers to the expression 'consent'. Section 90, though, does not define 'consent', describes what is

not consent. It says that 'consent' is not consent if it is given by a person 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 misconception. Relying on this, the courts have interpreted the word 'consent' in the description 'secondly' under Section 375 of IPC, i.e., 'without her consent', and held that any consent given under a misconception of fact is vitiated. Explanation 2 to Section 375 of IPC refers to the form of consent. It specifically says that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. Thus, if the consent as described in Explanation 2 could be made out from the statement of the victim, the offence under Section 375 of IPC cannot be said to be attracted. The Apex Court in **Deepak Gulati v. State of Haryana** [(2013) 7 SCC 675] and in **Dhruvaram Murlidhar Sonar (Dr) v. State of Maharashtra** (AIR 2019 SC 327) drawing distinction between rape and consensual sex observed

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that the court 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. Drawing distinction between mere breach of a promise and non-fulfilling a promise, it was observed that if the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act will not amount to rape and that if the accused had any malafide intention or clandestine motives, it is a clear case of rape. In ***Sonu alias Subhash Kumar v. State of Uttar Pradesh*** (AIR 2021 SC 1405), while quashing a charge sheet alleging an offence under Section 376 of IPC, the Apex Court observed that if there is no allegation to the effect that the promise to marry given to the victim was false at the inception, no offence of rape has been attracted. In ***Pramod Suryabhan Pawar v. State of Maharashtra*** [(2019) 9 SCC 608], the Apex Court held that “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To

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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. Recently in ***Shambhu Kharwar v. State of Uttar Pradesh*** (AIR 2022 SC 3901), the Apex Court held that in a prosecution for rape on the false promise of marriage, the crucial issue to be considered is whether the allegation indicates that the accused had given a promise to the victim to marry which at the inception was false and based on which the victim was induced into a sexual relationship.

8. Admittedly, the petitioner and the 2nd respondent were in consensual relationship. It is also not in dispute that they voluntarily went together to several places and stayed in hotels and had sexual relationship, which included oral sex. It is also

notable that the 2nd respondent paid the bills of the hotels in which they stayed. It is absolute that the allegations in the FI statement do not on their face indicate that the petitioner had given promise to the 2nd respondent to marry which at the inception was false and based on which the 2nd respondent was induced into a sexual relationship. There is also no allegation in the FI statement that when the petitioner promised to marry the 2nd respondent, it was done with bad faith and with intention to deceive her. That apart, it is seen from the FIS of the 2nd respondent as well as from her statement recorded under Section 164 of Cr.P.C that the petitioner before departing to Dubai on visiting visa in April, 2015, persuaded the 2nd respondent to register the marriage, but she declined the said move stating that she wanted the marriage to be conducted with the consent of their respective families. Moreover, it is apparent from the statement of the 2nd respondent that the stumbling block for the

2nd respondent to marry the petitioner is the stubborn opposition from the part of the petitioner's family and more than anybody else, the 2nd respondent was well aware of this factum of opposition as the same was conveyed to her unequivocally by none other than the mother of the petitioner. These circumstances do indicate that the petitioner was in fact ready to marry the 2nd respondent and the promise made by him was not a false one or lacking bonafide even if there was a promise to marry.

9. The records show that the relationship between the petitioner and the 2nd respondent strained over time. In short, the alleged sexual relationship between the petitioner and the 2nd respondent can only be termed as something out of love and passion for the petitioner and not on account of misrepresentation made to her by the petitioner. That apart, a reading of the FI statement would disclose the consent on the part of the 2nd respondent as defined under Explanation 2 of

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Section 375 of IPC. Therefore, I am of the view that even if the facts set out in the FI statement are accepted in totality, no offence under Section 375 of IPC is made out.

10. In the light of the above findings, I am of the view that no useful purpose will be served by allowing the criminal prosecution against the petitioner to continue. Hence, all further proceedings pursuant to Annexures A1 FIR and A2 Final Report in Crime No. 3516/2017 of Kollam East Police Station stands hereby quashed.

Cr1.M.C. is allowed.

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX OF CRL.MC 4875/2020

PETITIONER ANNEXURES

- ANNEXURE A1 CERTIFIED COPY OF THE F.I.R. DATED 23/10/2017 IN CRIME NO. 3516/2017 OF KOLLAM EAST POLICE STATION.
- ANNEXURE A2 CERTIFIED COPY OF THE FINAL REPROT DATED 25/09/2019 SUBMITTED BEFORE JFCM-11 KOLLAM IN CRIME NO. 3516/2017 OF KOLLAM EAST POLICE STATON.
- ANNEXURE A3 CERTIFIED COPY OF THE 164 STATEMENT DATED 24/10/2017 DEPOSED BY THE VICTIM BEFORE THE JURISDICTIONAL MAGISTRATE IN THE SAID CRIME.
- ANNEXURE A4 CERTIFIED COPY OF THE ADDITIONAL STATEMENT DATED 29/11/2017 GIVEN BY THE VICTIM BEFORE THE KOLLAM EAST POLICE STATION.
- ANNEXURE A5 TRUE COPY OF THE ORDER DATED 20/03/2019 IN B.A. NO. 1735/2019 PASSED BY THIS HONBLE COURT.
- ANNEXURE A6 TRUE COPY OF THE REPLY DATED 31/10/2020 ISSUED BY THE STATE PUBLIC INFORMATION OFFICER & INSPECTOR SHO OF KOLLAM EAST POLICE STATION.
- ANNEXURE A7 CERTIFIED COPY OF STATEMENT OF WITNESSES AND DOCUMENTS SUBMITTED BY THE INVESTIGATION OFFICER IN THE CRIME NO.3516/2017 OF KOLLAM EAST POLICE STATION, KOLLAM.