

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL REVISIONAL JURISDICTION
(APPELLATE SIDE)**

**Present:
The Hon'ble Justice Rai Chattopadhyay**

CRR 687 of 2016

**Vs.
The State of West Bengal & Anr.**

For the Petitioner	: Mr. Shataroop Purokayastha, : Ms. Jagriti Bhattacharya.
For the OP No.2	: Mr. Uday Sankar Chatterjee, : Mr. Suman Sankar Chatterjee, : Ms. Trisa Raksit.
For the State	: Mr. Pravas Bhattacharya, : Mr. Mirza Firoj Ahmed Begg,

Hearing concluded on: 23/02/2023

Judgment on: 01/03/2023

Rai Chattopadhyay, J.

1. The petitioner is the defecto complainant in Burdwan Women Police under sections 493, 376, 377, 420 of the Indian Penal Code and is aggrieved and dissatisfied with the impugned order of the trial Court dated 14.12.2015 passed by the Additional Sessions Judge 2nd Court at Burdwan, in and has preferred to file the present case in this Court. By dint of the said

impugned order, the trial Court has discharged the accused person under provisions of section 227 CRPC.

2. Criminal proceedings were set in motion pursuant to the first information report lodged by the present petitioner/defecto complainant on November 29, 2014. The crux of the allegations made in the FIR may be narrated to be that the defecto complainant maintained a romantic relationship with the accused person, that is, opposite party No. 2 in this case, since previous six years from the date of filing of the said first information report. She stated to have consented to such relationship with the accused person due to his misrepresentation regarding his marital status as well as his false promise to marry the defecto complainant at any future point of time. She has stated that later on, when the accused severed relationship and contact with her, she pursuant to her own endeavour could come to know that the accused has been a married person from a previous date that is since previous two months from the date of her coming to know about the fact. These has prompted the defecto complainant to file the police case against the accused person for falsely representing to her and procuring her consent to the sexual relationship with him on such false representation and false promise to marry her.

3. The police investigated into the matter and ultimately filed charge sheet against the accused person/opposite party number two in this case under sections 393, 376, 420 and adding section 377 of the Indian Penal Code. Subsequent thereto the accused person preferred to file an application

in the trial Court under section 227 of the CRPC praying for his discharge from the case. Upon hearing the parties the trial Court has passed the impugned order dated December 14, 2015, allowing his application for discharge. The petitioner being aggrieved with the said order has come up before this Court in the present case.

4. Ms. Jagriti Bhattacharya, Ld. Advocate, who started arguing for the petitioner, has vehemently challenged the findings and decision of the trial Court in the said impugned order. She has pointed out to the fact that due to misrepresentation by the accused person, the petitioner agreed for the romantic as well as sexual relationship with him, but for which the petitioner would not have indulged into any such alliance. According to her, any consent given by her client under such a misrepresentation of fact would not amount to be a consent under section 375 of the Indian Penal Code, to delink the criminal action of the accused person from coming within the purview of the penal provision of law.

5. Mr. Shataroop Purokayastha, Ld. Senior Counsel appearing for the petitioner who has later on, proceeded with the further arguments, has indicated that the Court must consider presence of the culpable intention of the accused person, his guilty mind, in misrepresenting his status and thereby indulging a like relationship with the defecto complainant. He emphasises that an act done by a person with a guilty mind, must be construed to be a crime as envisaged in the statute. He has suggested that even a long-standing personal relationship interse the parties in this case,

would not benefit the accused person by muddling it up on the question of “consent” or “no consent”, as the very fact of the present case would clearly suggest that even if the defecto complainant has consented to be involved with the accused person sexually, such consent has been extended only under the misrepresentation of fact. He has emphasised that this Court may in exercise of its inherent power under section 482 CRPC, set aside the impugned order and ensure expeditious trial in the case.

6. Mr Chatterjee, while appearing for the opposite party number 2 in this case, has raised vehement objections to such contentions and prayer of the petitioner. He has pleaded that the first information report as well as the other documents collected during investigation has categorically indicated about prolonged and consensual relationship, be it an emotional one or sexual one, between the parties. Hence, he says that pursuant to the provisions of law as already been settled very well, those materials cannot be found to have disclosed any prima facie cognizable offence against his client. He indicates that there is no material to suggest that the accused person might have got any ill motive since the inception of the relationship with the defecto complainant to induce her to satisfy his lust, pursuant to any promise of marriage which was not intended from the very initiation of their relationship. Hence, according to him the impugned order cannot be flawed as the same is based on strong and profound reasoning as to the petitioner having consented to the relationship with full knowledge and understanding of the future thereof. Mr Chatterjee has submitted that the impugned order suffers no impropriety and would warrant no interference by this Court. He has suggested that the present case may be dismissed.

7. This case is basically of an offence against human body. Though not any forceful violation or ravishing any woman physically has been alleged, but the allegation is of exploitation of a woman sexually by obtaining her consent, by false representation and taking advantage of her misconception regarding the actual state of affairs. Rape laws are being given effect to in an intimate relationship on the allegation of violation of promises which might have motivated the victim to give consent to sexual acts in that relationship under misconception. As to what would be the effect of any consent given under misconception, one may resort to the provisions under section 90 of the Indian Penal Code, which is as follows:

“90. Consent known to be given under fear or misconception.—A consent is not such a consent as it 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 Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or Consent of child.—unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.”

8. Thus according to law, any consent given under misconception would not amount to be a consent, as it intended in the Code. Further it is relevant to discuss about section 375 of the Indian Penal Code, a strict interpretation of which would include sexual intercourse with the woman “*without her consent*” to be an offence of rape. This clamour regarding presence of ‘consent’ or ‘no consent’ has been dealt with the use of concepts such as “misconception of facts under section 90 IPC”. That is ‘consent’ given under the misconception of fact would not amount to be so in the eyes of law.

9. Some of the guiding principles, decided in various judicial pronouncements may also be mentioned and referred to, as follows:

(i) ***KainiRajan versus State of Kerala reported in (2013) 9 SCC 113.***

“12. Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90, though, does not define “consent”, but describes what is not consent. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances. (See State of H.P. v. Mango Ram [(2000) 7 SCC 224 : 2000 SCC (Cri) 1331] .)”

Some other judgments of the Hon’ble Supreme Court may be mentioned in this regard, which are as follows:

- i. **Niam Ahamed vs. State (NCT of Delhi), judgment dated 30.01.2023 in Criminal Appeal No. 257 of 2023 arising out of SPL (Crl.) No. 8586 of 2017. (unreported)**
- ii. **Mandar Deepak Pawar vs. The State of Maharashtra & Anr., judgment dated July 27, 2022 in Criminal Appeal No. 442 of 2022. (unreported)**
- iii. **Pramod Suryabhan Pawar vs. State of Maharashtra & Anr. Reported in (2019) 9 SCC 608.**

10. The proposition decided in those cases may be stated to be that, there is a difference between giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the

beginning would not have any intention to marry the prosecutix but cheated her with the false promise only to satisfy his own desires whereas in case of breach of promise one cannot deny a possibility that the accused might have given a promise with all seriousness, though subsequently might have encountered certain circumstances unforeseen or beyond his control which prevented him to fulfil his promise. The Court held that “consent” of a woman due to the “misconception of fact” arising out of a promise to marry is no consent and is liable to be vitiated.

11. Thus we understand how the rape laws would be applicable in a case where the parties have been mutually engaged in a relationship. On the yardstick of the laws settled as discussed earlier, it is to be considered now in this case whether the defecto complainant has at all been able to put forth prima facie material suggesting cognizable offence against the accused person and as to whether the impugned order of the trial Court dated December 14, 2015, to discharge the accused person in the case would be maintainable being proper and in accordance with law.

12. The defecto complainant has not denied her relationship with the opposite party number 2/accused person for a fairly long period of time that is about six years before filing the FIR, either in the FIR or in her statement recorded by the Magistrate under section 164 CrPC. She has however pleaded that even after a prolonged and intimate relationship, when the accused person stopped contacting her, that made her to desperately find out the reasons thereof. Thus she was driven to visit the workplace of the accused person where from she obtained the knowledge of the accused

person having been married from a date two months prior to the date of her such knowledge. Otherwise, the petitioner has not denied her consent in whatever intimacy their relationship has had. Her case is dependent on the fact that the accused person has never disclosed to her about his marriage or intention to marry any other, excepting her. Had that been so, she would not have consented to any sexual relationship with a person not committed to the relationship and actually married some other person. Thus allegedly the accused person has extracted her consent under misrepresentation and her misconception.

13. As discussed earlier, 'mens rea' or a guilty mind or intent of the accused person would be the constituent along with the 'actus reus' as to whether a prima facie cognizable offence has been made out against him or not. In this case, it appears that the parties maintained a relationship for a period of six years prior to lodging of the FIR. The accused is said to have solemnized marriage about more or less 2 months prior to the date of filing of the FIR and during subsistence of their relationship. The most relevant is the accused person to have suppressed the said facts from the defacto-complainant. These materials are sufficient to find prima facie that the accused might had a guilty mind or culpable intent to procure complainant's consent to sexual acts by misrepresentation and induced her to misconceive about his intent to sexually exploit her and not to have any serious thoughts for their relationship. Two young adults, who have been in relationship for years together may even break up at a later stage and anything done in that relationship may, in normal circumstances be presumed to be done in pursuance to their mutual feelings and understanding. However this

element of the mutual mental togetherness is shadowed with doubt, the moment suppression and flippancy creeps in, even at any later stage of the said relationship. In that case a reasonable suspicion of the person backing off in the said relationship, not to have an amount of seriousness as regards the same and even to possess an intention to deceive, from the very initiation – cannot be ruled out. The materials in the form of the FIR or the statement of the defecto complainant recorded under section 164 CrPC are thus cannot be termed to be devoid of any ingredient to prima facie construe the offence as alleged against the opposite party number 2/accused person. The consent of the petitioner, whether obtained by misrepresentation of fact or given by her under any misconception would be a question of fact in this case, which the trial Court shall have to decide upon evidence. In the judgment of *Yedla Srinivasa Rao versus State of Andhra Pradesh reported in (2006) 11 Supreme Court cases 615* the Court has held that ***“it is always a matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the Court of facts comes to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence.”*** And also that ***“What is a voluntary consent and what is not a voluntary consent depends on the facts of each case.”***

14. Under such circumstances and in view of the available materials in the case this Court is constrained to find that there is no scope for discharge of the accused person under section 227 CrPC, as has been done by the trial Court by dint of the order impugned in this revision. Hence the same is not

maintainable and is liable to be set aside. Instead, it is found that the matter should go into trial.

15. The order dated December 14, 2015, passed in Sessions Case No.177 of 2015 by the Additional Sessions Judge 2nd Court at Burdwan, is hereby set aside. The said Court shall henceforth proceed with the trial of the case, as expeditiously as possible, without granting any unnecessary adjournments to either of the parties.

16. Needless is to mention that during trial, the Court shall not be in any way influenced by the findings in this case, and proceed to decide on merits independently and exclusively on the basis of the evidence on record.

17. CRR 687 of 2016 is allowed. Application, pending, if any, is also disposed of.

18. Certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

(Rai Chattopadhyay,J.)