

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

WEDNESDAY, THE 15TH DAY OF MARCH 2023 / 24TH PHALGUNA, 1944

CRL.MC NO. 702 OF 2023

CRIME NO.0280/2020 OF Kazhakkuttom Police Station,

Thiruvananthapuram

AGAINST THE PROCEEDINGS IN SC 287/2021 OF FAST TRACK SPECIAL

COURT, ATTINGAL

PETITIONER/ACCUSED:

KEVIN SIMSON, AGED 31 YEARS,
S/O SIMSON JOSEPH, T.C-12/1222(1) LAW COLLEGE JN.
VIKAS BHAVAN P.O, THIRUVANANTHAPURAM - 695033.

BY ADVS.SRI.K.P.SATHEESAN (SR.)
SRI.S.K.ADHITHYAN
SMT.BHAVYA BINU

RESPONDENTS/STATE & DEFACTO COMPLAINANT:

- 1 STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM,
KOCHI - 682031.
- 2 THE SUBINSPECTOR OF POLICE.
KAZHAKUTTAM, THIRUVANANTHAPURAM - 695582.
- 3 XXXX

R1 & R2 BY PUBLIC PROSECUTOR SRI.G.SUDHEER
R3 BY ADVS.SMT.GEETHA JOB OZHUKAYIL
TANYA TOM(K/1358/2021)
TOM JOSE(K/1053/1992)

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ON
15.03.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

This Crl.M.C. has been filed to quash the proceedings in S.C.No.287/2021 on the file of the Fast Track Special Court, Attingal. The petitioner is the sole accused in S.C.No.287 of 2021. He faces charges under Sections 376(1) and 376(2)(n) of the Indian Penal Code. The prosecution case is that the petitioner committed rape on respondent No.3 after making a false promise of marriage.

2. In the First Information Statement dated 11.11.2019, respondent No.3 alleged the following:-

The victim was employed as Senior Analyst in a company in Technopark, Thiruvananthapuram. The petitioner was working as an Associate in the said Company. She fell in love with the petitioner in March 2018. The petitioner told the victim that he liked her and offered to marry her. When the petitioner repeatedly offered to marry her, the victim agreed to marry him. Both of them travelled together to many places. On 27.5.2019, they travelled to Kanyakumari and stayed at Indian Heritage Resort. He maintained close contact with her. The petitioner sexually ill-treated the victim. The petitioner also appropriated the gold ornaments that belonged to the victim. The

petitioner intentionally cheated her.

3. She gave a statement to the Magistrate concerned on 21.8.2020 under Section 164 Cr.P.C., wherein she alleged thus:-

The victim is a native of Coimbatore in Tamil Nadu. The petitioner pretended love towards the victim. He undertook to marry the victim. In April 2019, the victim was taken to Sreekaryam, Thiruvananthapuram in a car. While travelling in the car, he compelled the victim to have oral sex. In May (27.5.2019), as requested by the petitioner, the victim was taken to Kanyakumari. They took a room in the Indian Heritage Hotel. They stayed on the beach till 11 p.m. When they returned to the hotel, the petitioner made the victim take some juice. After having consumed the juice, the victim lost her memory. After that, the petitioner committed rape on the victim. In the morning, the victim found a bite mark on her neck. The petitioner made the victim have sexual intercourse with him after making a false promise of marriage. Later, he avoided the victim and refused to marry her. He returned a sum of Rs.80,000/- and gold ornaments received from her. At the time of promising to marry the victim, the petitioner actually had no intention to marry her.

4. Heard Sri.K.P.Satheesan, the learned Senior Counsel for the petitioner, the learned counsel for respondent No.3, and the learned Public Prosecutor.

5. The learned Senior counsel appearing for the petitioner, relying on **Mandar Deepak Pawar v. The State of Maharashtra & Anr. (2022 LiveLaw (SC) 649)** and **Pramod Suryabhan Pawar v. State of Maharashtra and Another [(2019) 9 SCC 698]** submitted that in the facts of the case, the prosecution failed to prima facie establish a false promise of marriage. The learned Senior Counsel submitted that, at the most, the allegations amount only to a breach of promise which the petitioner made in good faith but subsequently not fulfilled.

6. The learned counsel for respondent No.3 vehemently resisted the contentions of the learned Senior Counsel. The learned counsel, relying on **Anurag Soni v. State of Chhattisgarh [(2019) 13 SCC 1]**, contended that the petitioner had sexual intercourse with the victim by giving false assurance that he would marry her. The materials placed before the Court, according to the learned counsel, show that the petitioner never intended to marry her and procured her consent only for a sexual relationship with her.

7. The learned Public Prosecutor supported the prosecution and contended that the acts of the accused fall under the definition of "rape" as he had sexual intercourse with the victim by obtaining her consent under a misconception of facts defined under Section 90 of I.P.C.

8. Section 375 of the Indian Penal Code sets out the ingredients of the offence under Section 376 IPC. In the facts of the present case, the description *Secondly* under Section 375 IPC read with Section 90 IPC is relevant.

9. Section 375 IPC reads thus:-

"375. Rape.- xx xx xx

Secondly.- Without her consent.

xx xx xx

Explanation 2. - 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:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity."

10. Section 90 IPC reads thus:-

"90. Consent known to be given under fear or misconception.- A consent is not such a consent as is

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;

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."

11. "Consent" is 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.

12. Consent may be expressed 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 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. (Vide: Anurag Soni v. State of Chhattisgarh [(2019) 13 SCC 1], State of H.P. v. Mango Ram [(2000) 7 SCC 224], Deepak Gulati v. State of Haryana [(2013) 7 SCC 675], Kaini Rajan v. State of Kerala [(2013)9 SCC 113]

13. If the accused had any malafide intention and if he had a clandestine motive, it is a clear case of rape. In **Pramod Suryabhan Pawar v. State of Maharashtra [(2019) 9 SCC 608]**, dealing with a case in the context of a promise to marry, the Apex Court 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. The Apex Court, in paragraph 16, held thus:-

“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.”

The Apex Court summarised two propositions to find whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry; (1) 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. (2) 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.

14. Coming to the facts of the case. In the FIS, the victim stated that she fell in love with the petitioner. The victim is a native of Tamil Nadu. According to the victim, the petitioner made her believe he would marry her. She added, on that belief, she travelled along with him. On 27.5.2019, both went together to Kanyakumari. According to the victim, she was made to consume juice while they were staying in the room, and on taking the juice, she lost her memory and the petitioner had sexual intercourse with her, which she could realise only at 4.30 a.m. She also alleged that she had a bite mark on her neck.

15. The material placed before the Court, prima facie, establishes that the petitioner had never intended to marry the victim and procured her consent only for having sexual relations with her, which falls under the definition of "rape". The pleadings of the victim point to the fact that her consent, to have sexual relations, was obtained by the petitioner under a misconception of fact defined under Section 90 IPC.

16. On the exercise of the extraordinary power under Article 226 of the Constitution of India or the inherent power under Section 482 Cr.P.C. to quash a criminal proceeding, in **State of Haryana v. Bhajan Lal (1992 Supp (1) SCC 335)**, the Apex Court held thus:-

“102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above, we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.

(1) Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.

(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.

(3) Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.

(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.

(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.

(6) Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific

provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.

(7) Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.”

17. The facts of the present case do not come under any of the categories of cases enumerated in **State of Haryana**.

18. The power of quashing criminal proceedings has to be exercised very sparingly and with circumspection, and that too in the rarest of rare cases and the Court cannot be justified in embarking upon an enquiry as to the reliability or genuineness or otherwise of the allegations made in the FIR, unless the allegations are so patently absurd and inherently improbable so that no prudent person can ever reach such a conclusion. The extraordinary and inherent powers of the Court do not confer an arbitrary jurisdiction on the Court to act according to its whims or caprice. (Vide: Neeharika Infrastructure Pvt. Ltd. v. State of Maharashtra and Ors. (2021 (3) KHC 25), State of Maharashtra and Others v. Arun Gulab Gawali and Others [(2010) 9 SCC 701].

19. In the present case, charges have been framed against the petitioner in accordance with Section 228 Cr.P.C. on a finding that a

prima facie case has been made out. The petitioner now seeks to quash the proceedings in the Sessions Case. Once charges are framed under Section 228 Cr.P.C. the High Court would not be justified in invoking its inherent jurisdiction under Section 482 Cr.P.C. to quash the proceedings in the Sessions Case except in those rare cases where forensic exigencies and formidable compulsions justify such a course. Even in exceptional cases, the High Court can look into only those documents which are unimpeachable and can be legally translated into relevant evidence. This view gets support from the decision of the Apex Court in **Minakshi Bala v. Sudhir Kumar and Others [(1994) 4 SCC 142]**.

20. The result of the above discussion is that the criminal proceedings in S.C.No.287/2021 on the file of the Fast Track Special Court, Attingal are not liable to be quashed.

The Crl.M.C. stands dismissed.

Sd/-
K.BABU
Judge

TKS