

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

Reserved on: 21.02.2023
Pronounced on: 02.03.2023

Bail App No. 109/2021
c/w
CRM(M) No. 274/2021
(O&M)

Syed Shahid HamdaniAppellant(s)/ Petitioner(s)

Through: - Mr. P. N. Raina, Sr. Advocate with
Mr. J. A. Hamal, Advocate

Vs.

UT of J&K and another ...RESPONDENT(S)

Through: - Mr. Pawan Dev Singh, Dy. AG
Mr. Zulker Nain Sheikh, Advocate

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

CRM(M) No. 274/2021

1) In the instant petition, the petitioner has challenged FIR No. 53/2021 for offences under Sections 376, 420 and 506 of RPC registered with Police Station, Bahu-Fort, Jammu.

2) If appears that the complainant, respondent No. 2 approached the Judicial Magistrate 1st Class (Munsiff), Jammu with an application under Section 156(3) Cr.P.C. seeking a direction upon the SHO, Police Station, Trikuta Nagar, Jammu to register an FIR and investigate the case. Vide order dated 03.02.2021, passed by the learned Magistrate, the SHO, Police Station,

Bahu Fort, Jammu was directed to register FIR against the petitioner and to carry out the investigation. It would be profitable to reproduce the relevant extracts of the complaint as under:

“2. That the applicant came in contact with one Shahid Hamdani in the month of June 2017 and both the parties having similarities in temperaments and mutual understandings started meeting each other frequently. During this time both the parties developed feelings for each other and accordingly expressed their mutual feelings to each other.

3. That said Shahid Hamdani expressed his desire to marry the applicant and in order to understand each other in a much better and efficient manner the said Shahid Hamdani proposed that they should start living together in a live-in relationship. The applicant was not initially opened to this suggestion and asked him that instead of living in a live-in relationship they should get married to each other. However the said Shahid Hamdani needed some time to get settled in his carrier and till that time the parties start living together in a live-in relationship in the house of applicant situated at Jalalabad, Sunjwan, Jammu.

4. That the parties reside together without any disturbance from any person till February 2019 and thereafter, he went back to his native palace. During this time the parties were in constant contact with each other and he assured that he will persuade his family for the marriage with the applicant. However despite the various attempts, the family of the said Shahid Hamdani that they will eliminate both of them as their marriage is not acceptable to them.

5. That the things became worse when the family members of the accused came to know that the applicant and said Shahid Hamdani were living together in a live-in relationship. The said family members of the accused openly extended threats to the applicant, that they will eliminate the applicant in case she insisted for marriage with Shahid Hamdani. However, despite all the odds the applicant as well as Shahid Hamdani decided to get marry with each other and date of marriage was decided in the second week of October 2019. The said Shahid HamdanI was supposed to meet the applicant on 04.10.2019 at Jammu. However he never reached Jammu and there is no information about the well being of said Shahid Hamdani.

6. That thereafter the applicant unaware of the nefarious designs of the accused filed a Habeas Corpus Petition in the Hon'ble High Court of J&K seeking production of the said accused. However, the accused again appeared before the applicant and expressed her inability to marry him as he was under family pressure. He again assured that he will marry the applicant in the month of November 2020 and thereafter

started visiting the applicant again at her residence situated at Sunjawan where he again developed physical relation with the applicant.

7 That thereafter he never kept his promise of marriage and in the month of January 2021 met the applicant and told her that he never intended to marry her and in case the applicant will file any case he will eliminate her and also circulate her photos and videos on social media....”

3) Apart from narration of the above contents of complaint lodged by the prosecutrix/respondent No. 2, it is pertinent to mention here that during investigation of the case her statement under Section 164 Cr. P.C. has also been recorded. In her statement, she has supported the allegations made in the complaint.

4) Learned Senior Counsel appearing for the petitioner has contended that a bare perusal of the contents of the impugned FIR, even if taken to be true, would reveal that no offence under Section 376 IPC, read with Sections 420 and 506 IPC is made out against the petitioner. According to the learned Senior Counsel, if at all what has been alleged by the complainant is taken to be true, it appears to be a case of consensual sex between two adult persons, which is not punishable under law. Learned Senior Counsel has submitted that the facts emanating from the record would clearly show that there was a long standing relationship between the petitioner and the prosecutrix, which has gone wrong but the same cannot amount to an offence under Section 376 IPC.

5) Learned Counsel appearing for respondent No. 2/prosecutrix as also the learned Counsel appearing for the State, have argued that powers of this Court under Section 482 Cr. P.C to quash the criminal proceedings are very

limited in nature and that such powers should be exercised sparingly. According to the learned counsel, the allegations made by the prosecutrix in the complaint, which are supported by her statement made under Section 164 Cr.P.C needs to be investigated and that the prosecution cannot be scuttled at this stage.

6) I have heard learned counsel for the parties and perused record of the case.

7) The scope and powers of the High Court under Section 482 of Cr.P.C is by now well settled by various judgments of the Supreme Court on the subject. In **State of Haryana vs. Bhajan Lal, 1999 Supp (1) SCC 335**, it has been held that powers under Section 482 Cr.P.C to quash criminal proceedings should be exercised with circumspection only in deserving cases, but nonetheless the Supreme Court has recognized the powers of the High Court to quash the criminal proceedings by taking resort to the jurisdiction under Section 482 of Cr.P.C. One of the parameters laid down by the Supreme Court in the said case, which is relevant to the instant case is where the allegations made in the FIR, even when they are taken at their face value and accepted in their entirety do not *prima facie* constitute any offence, the High Court would be within its jurisdiction to quash the FIR and the proceedings emanating therefrom. These principles have been reiterated and re-affirmed by the Supreme Court in its later judgments, the latest being **M/s Neeharika Infrastructure vs the State of Maharashtra 2021 SCC online SC 315**.

8) From the above analysis of law on the subject, it is clear that if, this Court comes to a conclusion that the allegations made in the complaint/FIR lodged by respondent No. 2/complainant do not make out a case against the petitioner then the same deserves to be quashed or else the petition is required to be dismissed.

9) The contention of the respondent No.2/complainant is that she has contacted physical relations with the petitioner on the basis of consent, which was obtained on the promise of marriage, meaning thereby that she had given her consent for sexual intercourse to the petitioner out of misconception.

10) Section 375 of IPC defines the offence of rape. The offence of rape means a sexual act committed by a man *inter alia* without the consent of the woman. Explanation to Section 375 IPC provides that consent means an unequivocal voluntary agreement by a woman by words, gestures or any form of verbal or non-verbal communication, communicating willingness to participate in the specific sexual act.

11) Section 90 of IPC defines the consent given under fear or misconception. It states that if a person doing the act knows, or has a reason to believe that the consent was given in fear or misconception then it is not the “consent” as intended by the Code. Thus, if the consent has been given under misconception of a fact, the same can be termed as no consent and when a person indulges in sexual activity with a woman on the basis of such

consent, it would be presumed that there was no consent on the part of the woman.

12) In **Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and others, (2019) 18 SCC 191**, the Supreme Court while deliberating on the issue of consent, has observed as under:

“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 mind of a person to permit the doing of the act complained of”

13) Again in **Kaini Rajan vs. State of Kerala, (2013) 9 SCC 113**, the Supreme Court while considering the meaning of consent in the context of Section 375 IPC has observed as under:

“12. ... “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the 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.”

14) From the above, it is clear that consent as required under Section 375 IPC, means an active understanding of the circumstances, actions and consequences thereof and a person, who makes a choice after evaluating all the facts and circumstances and the possible consequences of such actions, consents to such an action. It is also clear that an inference to such an action can be drawn on the basis of the conduct of the prosecutrix while considering the question of consent for the purpose of Section 375 of IPC.

15) In order to understand as to what would constitute consent on the basis of misconception of a fact in the context of the cases relating to sexual relationship on the basis of promise of marriage, it would be apt to refer to some of the cases, where this issue has been dealt with.

16) In **Udhay vs. State of Karnataka, (2003) 4 SCC 46**, the Supreme Court while dealing with the case of sexual intercourse on the basis of promise to marry has observed as under:

“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...”

17) In **Shivashankar vs. State of Karnataka, (2019) 18 SCC 204**, the Supreme Court while dealing with a case of relationship that had continued for about eight years held that it is not a case of rape and observed as under:

"4. In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife"

18) In **Dr. Dhruvaram Murlidhar Sonar** (supra), the Supreme Court after analyzing the case law on the subject, has observed as under:

"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. "

19) In a recent case of **Shambu Kharwar vs. State of Uttar Pradesh and Anr., 2022 SCC Online SC 1032**, the Supreme Court after noting the facts of the said case has observed as under:

"12. In the present case, the issue which had to be addressed by the High Court was whether, assuming all the allegations in the charge-sheet are correct as they stand, an offence punishable under [Section 376](#) IPC was made out. Admittedly, the appellant

and the second respondent were in a consensual relationship from 2013 until December 2017. They are both educated adults. The second respondent, during the course of this period, got married on 12 June 2014 to someone else. The marriage ended in a decree of divorce by mutual consent on 17 September 2017. The allegations of the second respondent indicate that her relationship with the appellant continued prior to her marriage, during the subsistence of the marriage and after the grant of divorce by mutual consent.

13. In this backdrop and taking the allegations in the complaint as they stand, it is impossible to find in the FIR or in the charge-sheet, the essential ingredients of an offence under [Section 376 IPC](#). The crucial issue which is to be considered is whether the allegations indicate that the appellant had given a promise to the second respondent to marry which at the inception was false and on the basis of which the second respondent was induced into a sexual relationship. Taking the allegations in the FIR and the charge-sheet as they stand, the crucial ingredients of the offence under [Section 375 IPC](#) are absent. The relationship between the parties was purely of a consensual nature. The relationship, as noted above, was in existence prior to the marriage of the second respondent and continued to subsist during the term of the marriage and after the second respondent was granted a divorce by mutual consent.”

20) From the foregoing analysis of the law on the subject, it is clear that where allegations in the FIR do not indicate that the promise by the accused was false or that the complainant had engaged in sexual relations on the basis of this promise, it cannot be stated that offence of rape is constituted.

21) Coming to the facts of the instant case, the prosecutrix/complainant has stated that she came into contact with the petitioner in the Month of June, 2017, whereafter she met him frequently and both of them developed feelings for each other. She goes on to state that the petitioner expressed his desire to enter into wedlock with her and in order to understand, he proposed to her live-in-relation, which was agreed to by the prosecutrix/respondent No. 2. The material on record reveals that the petitioner and respondent No. 2 lived with each other in the first instance upto February, 2019 from June 2017. During this period they tried to persuade the family of the

petitioner so that their marriage could be solemnized but there was resistance from the family of the petitioner but still they decided to get married.

22) It is not the case of the prosecutrix that right from the inception, the petitioner had extended false promise of marriage to her, with a view to exploit her sexually. It is clear from the contents of the complaint and the statement of the prosecutrix recorded under Section 164 Cr.P.C. that the petitioner and the prosecutrix lived together for several years and they developed love and feelings for each other. In fact, the prosecutrix has herself stated that the family of the petitioner was not in favour of their live-in-relationship and they resisted their marriage but in spite of this, she continued to have relationship with the petitioner.

23) In the year, 2019, the petitioner is stated to have left the company of the prosecutrix, which prompted her to file a Habeas Corpus Petition before this Court, whereafter, in the month of November, 2020, the petitioner is stated to have again assured the prosecutrix to marry her. Thereafter, the petitioner is stated to have again developed physical relationship with the prosecutrix.

24) Once the petitioner had left the company of the prosecutrix and once she came to know that the family of the petitioner is not in favour of their marriage and live-in-relationship, prudence demanded that the prosecutrix, who is a mature girl of 38 years, should not have allowed the petitioner to stay with her once again and to have physical relationship with her. The circumstances of the case clearly indicate that the petitioner and the

prosecutrix were in love with each other and they had feelings for each other, which prompted them to have physical relations with each other. Thus, it is not a case of false promise to marry but it is a case of consensual sex between two adult parties, which can be inferred from the facts and circumstances of the case.

25) The prosecutrix has admitted that the petitioner wanted to have sometime before entering into wedlock with her and for this purpose she proposed to have live-in-relationship with her, meaning thereby that at the initial stage the petitioner had not indicated his intention to marry the prosecutrix but he only wanted to ascertain as to how their relationship will work out, whereafter he was to make up his mind as to whether or not he would enter into wedlock with the prosecutrix. This goes on to show that there was no promise of marriage from the petitioner at the time of initiation of their relationship.

26) In the instant case, a bare perusal of contents of the FIR reveals that there was no false promise of marriage on the part of the petitioner which had persuaded the prosecutrix to enter into sexual relationship with him. The facts on record show that the petitioner and prosecutrix had a long standing relationship of three to four years and they had lived together as partners for about two years. It is also revealed that the prosecutrix despite knowing that there would be resistance on the part of family of the petitioner to their proposed marriage, because she was ten years elder to the petitioner, still then she continued to have relationship with the petitioner. These facts clearly show that it is not a case of sexual intercourse on the basis of false

promise of marriage but a case of two adult consenting parties living together and having physical relationship. Thus, no offence is constituted against the petitioner from the contents of the impugned FIR and the material collected by the investigating agency during the investigation of the case.

27) For the foregoing reasons, it is a fit case where this court should exercise its power under Section 482 Cr.PC. to quash the impugned FIR and the proceedings emanating therefrom. The petition is, accordingly, allowed and the impugned FIR and the proceedings emanating therefrom are quashed.

28) Disposed of.

29) Case diary be returned to the learned counsel appearing for the State counsel.

Bail App No. 109/2021

In view of the order passed in petition under Section 482 Cr.P.C, the bail application has been rendered infructuous. The same is disposed of accordingly.

(SANJAY DHAR)
JUDGE

Jammu

02.03.2023

Karam Chand/Secy.

Whether the order speaking: Yes/No
Whether the order reportable: Yes/No