



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
REVISION APPLICATION NO.408 OF 2019

Sameer Amrut Kondekar] .. Applicant
vs.
State of Maharashtra & Anr.] .. Respondents

Mr.Girish Kulkarni, Senior Advocate i/b Kripashankar Pandey for the Applicant.

Ms.P.N. Dabholkar, APP for the State.

CORAM : BHARATI DANGRE, J

DATE : 29th March, 2023.

JUDGMENT

1] By the present Revision Application, the Applicant has raised challenge to the order dated 01.03.2019 passed by the Additional Sessions Judge, Sessions Court at Dindoshi (Borivali Division), below Exhibit 4, rejecting application for discharge filed by the Applicant, on the ground that the present case is not of consensual sexual intercourse, but as per the complaint filed by the prosecutrix, some time it was forcible, also.

2] Heard Mr. Girish Kulkarni, the learned senior counsel for the Applicant and Ms.P.N. Dabholkar, learned APP for the State.

The subject CR came to be registered on the complaint filed by the complainant/prosecutrix, aged 27 years, who, by lodging the complaint on 17.02.2016 reported that, in the year 2008 she was

introduced to the Applicant through Orkut Website and thereafter a bond of friendship developed between them and whenever, she used to visit Mumbai, she used to meet him.

In the year 2013 when she visited Mumbai, the friendship nurtured into a bond of love and the Applicant promised her that he will perform marriage with her. In any case, the family of the Applicant as well as prosecutrix were aware of the love affair and they were on visiting terms and both the families were agreeable for solemnization of the marriage.

The complainant state that, whenever she used to visit his house, on the promise of performance of marriage, the Applicant used to commit forcible intercourse with her and thereafter at various places in Mumbai, some times at his home or her house, by consent or forcibly, physical relationship was established.

As per the prosecutrix, she permitted the relationship on the assurance of marriage being solemnized, but when she asked for it, he refused. Thereafter, they started residing separately and the relationship between them was severed. It is alleged that the Applicant via internet forwarded some obscene messages to her and he also used to make bad comments upon her family members and used to suspect her character. It is further alleged that, she was assaulted physically and abused mentally.

3] The above complaint resulted in invoking offence under Section 376, 323 of the Indian Penal Code and Section 67 of the Information Technology Act.

On completion of investigation, charge-sheet has been filed, where the accused face the charge of committing rape upon the prosecutrix.

4] On the last date of hearing, I specifically asked the learned APP to ascertain whether Section 420 of the IPC has also been invoked in the subject CR as at some point of time there was mention about the said section, to which the learned APP has clarified that Section 420 is not been invoked.

5] When the case against the Applicant in the charge-sheet is perused, it can be seen that the prosecutrix was in relationship with the Applicant for almost a period of 8 years. She categorically admit that, initially it was a friendly relationship, which soon got converted into a love affair and the family members were also aware about the ongoing affair, as they were on visiting terms. Thereafter, on several occasions, they indulged with each other physically and the version of the prosecutrix is, it was under the pretext of marriage. She state that she permitted the physical indulgence on a belief that one day the marriage will be solemnized. But when they got separated and he started sending abusive messages, the relationship turned sour, the complaint was lodged on 17.02.2016.

6] Admittedly, the prosecutrix was major at the time when the relationship was established, both emotionally and physically. She was at the age where she is presumed to have sufficient maturity of understanding the consequences of her act and according to her own version, on some occasions, the relationship was consensual, but some times it was forcible.

7] From the reading of the complaint, it can be seen that the Applicant's promise to marry the prosecutrix, was not the only reason

for permitting the Applicant to have sexual indulgence, as according to her own version, she was in love with the Applicant. She was clearly conscious of the effect of sexual indulgence and the relationship being continued for a considerable length of time, do not give rise to a conclusion that on every occasion, only on the promise of marriage the sexual relationship was established. The couple used to meet often and repeated sexual indulgence was out of the love affair between them and it was not necessarily preceded by the promise of marriage on every occasion. It appears that they resided together for some point of time and then they separated. The only bald statement in the complaint is that the Applicant avoided to perform the marriage.

8] The Hon'ble Apex Court in the case of **Pramod Suryabhan Pawar vs. State of Maharashtra & Anr.**¹, while dealing with an Appeal seeking quashing of First Information Report under Section 482 of the Cr.P.C. drew a distinction between a false promise to marry and not fulfilling a promise to marry. By relying upon the earlier decision in the case of **Deepak Gulati vs. State of Haryana**², the relevant portion was gainfully reproduced as under :

“21. 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.

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had

1 (2019) 9 SCC 608

2 (2013) 7 SCC 675

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."

The Lordship, therefore, drew a distinction between breach of promise and not fulfilling false promise and expected the Court to examine whether at early stage false promise of marriage was made by the accused.

9] While analysing the provision of Rape as contained in Section 375 of the Indian Penal Code and while interpreting the term "without her consent", being explained in Explanation 2, appended to the Section, to mean unequivocal voluntary agreement, when the woman by words, gestures or any form of verbal or non-verbal communication, indicates willingness to participate in the specific sexual act.

Section 90 of the Indian Penal Code provide for a contingency where consent known to be given under fear or misconception is no consent in the eyes of law.

10] Their Lordships of the Hon'ble Apex Court made the following observation as regards 'Consent' in following paras :-

"12. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

13. The primary contention advanced by the complainant is that the appellat engaged in sexual relations with her on the false promise

of marrying her, and therefore her "consent", being premised on a "misconception of fact (the promise to marry), stands vitiated."

14. This Court has repeatedly held that consent with respect to Section 375 of the IPC Involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar which was a case involving the invoking of the jurisdiction under Section 482, this Court observed:

"15. 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."

15. This understanding was also emphasised in the decision of this Court in Kaini Rajan v. State of Kerala:

"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."

11] In the present case, it can be clearly seen that for prolonged period of 8 years, the relationship between the two continued and it cannot be said that, only because she was under misconception that he is going to marry her, she had consented for sex. The prosecutrix is sufficiently of matured age to be conscious of the relationship, both physical and mental, and merely because, the relationship had now turned sour, it cannot be inferred that the physical relationship established with her, on every occasion, was against her will and without her consent. Since the couple used to meet in isolation, with no indication that on every occasion when the physical relationship was established, the promise of marriage was made, when she has

unequivocally consented to the physical indulgence, without any grievance being made till she lodged the FIR on 17.02.2016, I do not think that sufficient ground exist to proceed against the Applicant by charging him under Section 376 of the IPC.

12] Moreover, the prosecutrix in her statement recorded under Section 164 of the Cr.P.C. on 26.04.2016 admit that on several occasions physical relationship was established between the couple and he was to get married to her. In the said statement she also state that, it was revealed to her that he has also established physical relationship with some other girl and that girl was staying with her as paying guest.

From the statement of the prosecutrix in the FIR and in the statement under Section 164 Cr.P.C. it cannot be inferred that there was failure to perform the marriage and the promise was not fulfilled. In any case, physical relationship maintained with the prosecutrix was not solely on the promise of marriage but since she was in love with the Applicant, she permitted him to indulge physically and this was repeated on several occasions, according to her own version.

As far as offence under Section 323 of the IPC is concerned, bare allegation is made to the effect that the prosecutrix was assaulted, without any details being furnished and the said allegation is as vague as it could be.

13] In the aforesaid circumstances, refusal to discharge the Accused by the impugned order by exercising power available in the said Court, cannot be said to be justifiable exercise and that too merely with an observation, that at some time intercourse was forcible. Two matured persons coming together and investing in a relationship, one cannot be

blamed only because the other complained of the act at some point of time when the relationship did not go well and for whatever reason need not ultimately culminate into a marriage.

In the wake of above, the impugned order dated 01.03.2019 cannot be sustained. Revision Application is allowed by discharging the Applicant in CR No. 61/2016 registered with Versova Police Station.

[BHARATI DANGRE, J]