

THE HIGH COURT OF MADHYA PRADESH

Single Bench: Hon'ble Shri Justice S.K. Awasthi

Miscellaneous Criminal Case No.16158/2019

Umesh Lilani

vs.

The State of Madhya Pradesh & Anr.

Shri Jalaj Pawar, learned counsel for the applicant.

Shri Pranay Joshi, learned Public Prosecutor for the respondent
No.1/State.

None for respondent No.2.

ORDER

(Passed on 18/07/2019)

Applicant/accused has preferred this petition under Section 482 of Code of Criminal Procedure, 1973 (in brevity 'Cr.P.C'), for quashment of FIR dated 30/08/2017 registered as Crime No.604/2017 at Police Station Lasudiya, District Indore for offence under Section 376(2) (n) and 506-II of IPC, 1860 and the consequential proceedings of S.T. No.406/2018 pending in the Court of Additional Sessions Judge, Indore.

02. Facts necessary for disposal of this petition are that prosecutrix lodged FIR at Police Station Lasudiya, District Indore on 30/08/2017 to the effect that she is a divorcee and she was an employee in the applicant's company as by holding marketing job in the year 2009, therefore, she came in contact with the applicant. Gradually the acquaintance turned into love. The applicant proposed to marry her and established physical relationship with her regularly. On 29/08/2017, when the prosecutrix asked the applicant about their marriage, then he

told her that she is only an employee of his company and asked her to remain like that. He also threatened her that if she reported the matter to anyone, then he would kill her. Thereafter, prosecutrix narrated the incident to her sister and lodged a report. Police after registering the FIR recorded the statement of prosecutrix and other witnesses. Prosecutrix was sent to hospital for medical examination and after completing the formalities submitted the charge-sheet against the applicant.

03. Learned counsel for the applicant has submitted that even if the entire allegations made by the prosecutrix are accepted as true, then it would be clear that she was a consenting party and therefore, no offence under Section 376 of IPC is made out. The prosecutrix is a 35 years old divorcee and she is well versed in the ways of life, yet she claimed that she succumbed to the promise of marriage made by the applicant and continued to submit sexual intercourse for a considerable period. In these circumstances, it cannot be said that the consent given by the prosecutrix to sexual intercourse was based on misconception of facts. It is not a case of the prosecutrix that the applicant had physical relations for once or twice, but according to her she had physical relations with the applicant for a period of about seven years and respondent no.2 knew this fact that the applicant is already married, therefore, her marriage is not possible with him. Even then, if she had consensual sex with the applicant, then it is not a case where consent of the prosecutrix was obtained either by misrepresentation or misconception of fact. This is a clear case of relationship between two consenting adults for mutual sexual gratification, therefore, it is prayed that this Court exercising the powers under Section 482 of 'Cr.P.C' can quash the FIR as well as the consequential proceedings pending before the Court of Additional Sessions Judge.

04. On the other hand, learned Public Prosecutor has vehemently opposed the petition. It has been contended that the consent of sexual

intercourse accorded by the prosecutrix was on account of false promise of marriage held out by the petitioner. Hence, the consent was vitiated and the sexual intercourse committed by the applicant would fall under the purview of rape. It has also been contended that at any rate, such question of fact which depends upon the evidence of the parties cannot be considered at this stage. Thus counsel prayed for rejection of the petition.

05. Having heard learned counsel for the parties and perused the record.

06. From the perusal of the FIR and the statement of the prosecutrix recorded under Section 161 and 164 of 'Cr.P.C' it is evident that applicant and the respondent No.2/prosecutrix fall in love about seven years back i.e. in the year 2010. At that time, the prosecutrix was aged about 28 years and she was major. She was also a divorcee, therefore, it cannot be said that she was immature and was oblivious of the fact of the life. She also knows that the applicant is already married and there is bleak possibility of their marriage. Under these circumstance it cannot be considered that she was unaware of immorality of the Acts she had consented to, and she been presumed to be fully understanding the nature and consequences of sexual acts, she had submitted to. She was free to exercise her choice between resistance and assent and consciously elected to exercise later option. Therefore, it cannot be said that her consent was obtained by misconception of fact or by misrepresentation.

07. During the arguments it is submitted by the learned Public Prosecutor that even if it is assumed that on earlier occasions the prosecutrix was a consenting party to the physical relations, even then the last act of the applicant in having physical relationship with the prosecutrix at false pretext of marriage would amount to rape as it cannot be said that the consent given by the prosecutrix is a free consent as defined under Section 90 of IPC, 1860.

08. In the context of the aforesaid arguments, from the statement of the prosecutrix recorded under Section 164 of 'Cr.P.C', it appears that when she requested the applicant to marry her, he refused to marry and then on 26/07/2017, she had taken sleeping pills then the applicant took her to the hospital and told her that she is pressurizing him by attempting to commit suicide, even then he will not marry her. After that incident, she regularly met the applicant, which clearly indicates that after the refusal of the applicant to marry her, the prosecutrix choose to continue the relationship with the applicant. Therefore, it is not a case that the consent for sex was granted by the prosecutrix due to false promise of marriage given by the applicant, but was granted because the prosecutrix was also in love with the applicant and wanted to remain in his company.

09. With regard to consent in the case of rape the Supreme Court in the case of *Deepak Gulati vs. State of Haryana* reported as *AIR 2013 SC 2071* has held as under:-

“18. Consent may be express 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 in a case like this, 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 mis-representation 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. An accused can be convicted for rape only if the court reaches a

conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

10. In the case of *Tilak Raj vs. State of Himachal Pradesh* reported in *AIR 2016 SC 406*, the Hon'ble Apex Court has held as under:

“19. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of The Indian Penal Code (in short “the IPC”). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

20. The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the Appellant seems to be consensual in nature. The trial court has rightly held thus:

“23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.

24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.

25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her testimony itself shows that the entire story

of marriage has unfolded after 05.01.2010 when the accused was stated to have been summoned to the office of the Dy. S.P. Prior to 05.01.2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but her cross- examination shows that no doubt the two were in relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, come talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage.”

11. In the case of *Yedla Srinivasa Rao vs. State of Andhra Pradesh*, reported in *(2006) 11 SCC 615*, the Hon'ble Apex Court has observed as follows:

“ Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent.

It was also observed that if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that Section 90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked.”

12. Reference can also be made to the case of *Uday vs. State of Karnataka* reported as *(2003) 4 SCC 46* wherein the Hon'ble Supreme

Court in has held as under:

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

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, is 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. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are over come with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.”

13. In the recent judgment dated 22/11/2018 in the case of *Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra & Ors., (Criminal Appeal No.1443/2018)* the Hon'ble Apex Court has held that 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 *malafide* 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 malafide 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.

14. In view of the aforesaid pronouncements of the Hon'ble Supreme Court, this Court is of the view that the prosecutrix was deeply in love with the applicant and she continued to have physical relationship with him even after knowing very well that he is not in a position to marry her. Therefore, the prosecutrix cannot be held to turn around and claim that the consent was based on misconception of the facts. Even if the allegations made by the prosecutrix are taken at their face value and accepted in their entirety, they did not make a case against the applicant under Section 376(2)(n) and 506-II of IPC, 1860

15. Accordingly, this petition filed under Section 482 of 'Cr.P.C' is allowed and FIR dated 30/08/2017 bearing Crime No.604/2017 registered at Police Station Lasudiya, for offence under Section 376(2) (n) and 506-II of IPC and the consequential proceedings pending in Sessions Trial No.406/2018 before the Court of Additional Sessions Judge, Indore are hereby quashed.

16. With the aforesaid, Miscellaneous Criminal Case No. 16158/2019 stands **allowed**. A copy of this order be sent to the concerned Court for necessary information and compliance.

Certified copy as per Rules.

(S. K. AWASTHI)
Judge

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