

MANU/MH/2773/2021

IN THE HIGH COURT OF BOMBAY (AURANGABAD BENCH)

Criminal Application No. 1430 of 2020

Decided On: 24.09.2021

Appellants: **Babasaheb**

Vs.

Respondent: **The State of Maharashtra and Ors.**

Hon'ble Judges/Coram:

S.P. Deshmukh and N.B. Suryawanshi, JJ.

Counsel:

For Appellant/Petitioner/Plaintiff: S.G. Chapalgaonkar, Advocate h/f R.B. Ade, Advocate

For Respondents/Defendant: M.M. Nerlikar, APP and A.V. Patil, Advocate

JUDGMENT

N.B. Suryawanshi, J.

1. This application filed under Section 482 of the Code of Criminal Procedure, seeks quashing of RCC No. 626/2020, pending before the trial Court at Parbhani, which arises out of FIR at Crime No. 185/2020, registered with New Mondha Police Station, Parbhani, for the offence punishable under Section 376 of the Indian Penal Code.

2. Rule. Rule is made returnable forthwith. By the consent of the parties, the matter is heard finally at admission stage.

3. In the FIR in question, the respondent No. 2 - victim has in short alleged that she and the applicant belong to the same caste and they got acquainted with each other. Prior to 2015, when the applicant was serving at Aurangabad they had friendly relations and used to talk on mobile. In the year 2015 - 2016, victim was preparing for competitive examinations and used to go to Vision Classes and Kalyan Mandapwala's Government Library, Parbhani. At that time, the applicant used to come there for studies. Their friendship, therefore, continued. After the selection of the applicant as a clerk in Mantralaya, Mumbai, in the year 2016, he went to Mumbai. They were in constant touch on phone. The applicant used to come to Parbhani on Saturdays and Sundays and the victim and applicant used to meet. The applicant used to tell the victim that he will marry her. The applicant had also given the idea of his decision to marry victim to his parents. In the month of January 2018, the applicant invited the victim to come to Mumbai for celebrating her birthday. The victim went to Mumbai and stayed at the applicant's room at Badalapur for three days. During that time, they had sexual intercourse. Since the applicant was assuring that he would marry the victim, she did not resist. Thereafter, the victim returned to Parbhani and their phone calls and chatting continued. They continued to meet at Parbhani on Saturdays and Sundays and they used to go for outing on applicant's two wheeler and used to enjoy consensual physical relations in the Sugarcane field at the outskirts of Parbhani. On 18.04.2019, the victim went to Mumbai to appear for the examination for the post of Assistant Clerk. That time also she stayed at the room of the applicant and everyday they enjoyed sexual intercourse. The victim, thereafter,

returned to Parbhani. On 13.12.2018, the victim went to Mumbai for new year's celebration. The applicant and victim stayed at a lodge near Dadar Railway Station for two days and they had consensual sexual intercourse. In July 2019, the applicant came for his piles operation to Parbhani, at that time, the applicant and victim met at the house of victim. There was nobody at her house, at that time also they had sexual intercourse. Once when the applicant had come to the house of victim, he demanded victim's hand in marriage from her mother. He used to assure the victim that he is going to marry her. During the years 2018, 2019 and 2020, whenever the victim and the applicant used to meet, they used to indulge in consensual sexual intercourse. Since November 2019 onwards, the applicant talked to the victim on phone. On 06.04.2020, the applicant called and asked the victim about her decision of marriage and told her to send her maternal uncle to applicant's brother for the marriage talks. Thereafter, the applicant's phone was switched off. The victim, therefore, contacted his parents. They also told her that they are not able to contact him since last two months. They asked her to wait since there was lockdown. The victim, therefore, alleged that by giving false promise of marriage, the applicant kept physical relations with her and thereby physically and mentally exploited her.

4. Heard the learned Advocate for the applicant, learned APP for the State and the learned Advocate for respondent No. 2.

5. Learned Advocate for the applicant by relying on the averments in the FIR and the history given by the victim at the time of her medical examination contended that victim was major when she indulged in sexual relations with the applicant. She was thirty years old at the time of lodging FIR. The physical relations between the applicant and victim were consensual and were out of love affair. Even if the allegations made in the FIR and the material collected by the prosecution in the charge-sheet are accepted as it is they essentially show that the physical relations between the applicant and victim were consensual and no ingredients of Section 375 of the IPC are made out in the FIR or charge-sheet. Learned Advocate for the applicant by placing reliance in Pramod Suryabhan Pawar Versus The State of Maharashtra and another, MANU/SC/1142/2019 : 2019 (9) AIR SCC 608, Dr. Dhruvaram Murlidhar Sonar Versus State of Maharashtra and others, MANU/SC/1518/2018 : 2019 AIR (SC) 327 and Sonu alias Subhash Kumar Versus State of Uttar Pradesh and another, submitted that merely because the applicant resiled from promise of marriage subsequently that by itself does not attract Section 376 of the IPC against the applicant, therefore, the application deserves to be allowed and the proceedings against the applicant are liable to be quashed.

6. On the other hand, the learned APP strenuously urged that the FIR clearly makes out a case that consent of the victim was obtained under false promise of marriage and since beginning the applicant had no intention to marry with the victim. He, therefore, submits that the challenge raised by the applicant is devoid of substance.

7. The learned Advocate for respondent No. 2 submitted that since beginning the applicant had obtained consent of the victim by giving her false promise of marriage and it is clear from the record that the applicant never intended to marry the victim. He, therefore, submits that a clear case under Section 376 of the IPC is made out against the applicant and the application is, therefore, liable to be dismissed.

8. Heard the learned Advocate for the applicant, learned APP for the State and the learned Advocate for respondent No. 2 at length. We have perused the Criminal Application, grounds raised therein and the charge-sheet filed by the prosecution.

9. At the time of lodging FIR, the victim was 30 years old. Admittedly, she was acquainted with the applicant and had friendly relations with him since the year 2015 onwards. The applicant and the victim belong to the same caste and they intended to marry. The idea about their intended marriage was also given by the applicant to his family members. Even the hand of victim was asked in marriage by the applicant to the mother of the victim in the year 2019. Admittedly, the victim has kept consensual physical relations with the applicant as per the narration in the FIR. Taking into consideration the uncontroverted allegations in the FIR without adding or subtracting anything, in our considered view, they do not make out offence punishable under Section 376 of the IPC against the applicant.

10. It is clear from the narration in the FIR and from the charge-sheet that since beginning, the applicant was willing to marry the victim. The statement of brother of the victim recorded during investigation, reveals that the applicant was his friend. In the month of April 2018, the applicant told victim's brother that he loves the victim and wants to marry her and the family of victim should not look for bridegroom for her. Applicant used to come to her house and used to take the victim for outing. In the month of November 2019, the applicant told the mother of victim that his mother is admitted in the hospital due to low B.P. and the victim is constantly asking for marriage, they should find suitable bridegroom for victim. Statement of mother of the victim is also same. Thus, the statements of the victim's brother and mother also fortify the case of the applicant that he intended to marry the victim since beginning. However, later he changed his mind. Considering these aspects, it cannot be said that the applicant had given false promise of marriage to the victim and obtained her consent for establishing physical relations.

11. During the medical examination, the victim has narrated history as follows:

"Babasaheb Bhimrao Mogale since back January-2018 as a friend. We both were in love since last 2018 January to July 2019 and also sexual contact with him 1½ year and we decided to get marry. During sexual contact I always used oral pills. First time we were meet in Parbhani in one coaching classes. After that our love affair started. Now he is doing job in mantralay, Mumbai. now this time he is directly told me, I don't want to marry with you clearly. He just used to me. Since than he is not calling me & also not received my call. That why I have asked my parents & than they complaint to police New Munda PBN."

(In verbatim)

The above history narrated by the victim also reveals that there was love affair between the applicant and the victim since 2018 and they had decided to marry. The victim was taking precaution during sexual relations by taking oral pills. Later when the applicant refused to marry with the victim, she lodged the complaint. This also indicates that love affair was the basis for consensual physical relations between the victim and the applicant.

12. In Pramod Suryabhan Pawar (supra) Hon'ble Supreme Court in paragraphs No. 18, 19 and 20 held as follows:

"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise

to marry, two propositions must be established. 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. 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.

19. The allegations in the FIR indicate that in November 2009 the complainant initially refused to engage in sexual relations with the accused, but on the promise of marriage, he established sexual relations. However, the FIR includes a reference to several other allegations that are relevant for the present purpose. They are as follows:

(i) The complainant and the appellant knew each other since 1998 and were intimate since 2004;

(ii) The complainant and the appellant met regularly, travelled great distances to meet each other, resided in each other's houses on multiple occasions, engaged in sexual intercourse regularly over a course of five years and on multiple occasions visited the hospital jointly to check whether the complainant was pregnant; and

(iii) The appellant expressed his reservations about marrying the complainant on 31 January 2014. This led to arguments between them. Despite this, the appellant and the complainant continued to engage in sexual intercourse until March 2015.

The appellant is a Deputy Commandant in the CRPF while the complainant is an Assistant Commissioner of Sales Tax.

20. The allegations in the FIR do not on their face indicate that the promise by the appellant was false, or that the complainant engaged in sexual relations on the basis of this promise. There is no allegation in the FIR that when the appellant promised to marry the complainant, it was done in bad faith or with the intention to deceive her. The appellant's failure in 2016 to fulfil his promise made in 2008 cannot be construed to mean the promise itself was false. The allegations in the FIR indicate that the complainant was aware that there existed obstacles to marrying the appellant since 2008, and that she and the appellant continued to engage in sexual relations long after their getting married had become a disputed matter. Even thereafter, the complainant travelled to visit and reside with the appellant at his postings and allowed him to spend his weekends at her residence. The allegations in the FIR belie the case that she was deceived by the appellant's promise of marriage. Therefore, even if the facts set out in the complainant's statements are accepted in totality, no offence under Section 375 of the IPC has occurred."

Applying the above ratio to the facts of this case, the applicant and the victim knew each other from 2015 - 2016 and they were intimate since 2018. Friendly relations developed between the applicant and the victim from 2015 onwards which culminated into the love affair. From 2018 onwards, the applicant and victim met regularly and had consensual sexual relations every time they met. The applicant and the victim travelled great distances to meet each other and they resided at the house of the applicant on multiple occasions and engaged in sexual intercourse regularly over a course of more than two years on many occasions. It appears that the consensual

physical relations between the applicant and the victim were outcome of their love affair.

13. In Dr. Dhruvaram Murlidhar Sonar (supra) Hon'ble Supreme Court in paragraph No. 20 held as follows:

"20. 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."

14. This ratio is squarely applicable to the facts of the present case, there is no material on record to show that since beginning the applicant had no intention to marry the victim and had made false promise only to satisfy his lust. As per the narration in the FIR and the material collected during the course of investigation, it is clear that the applicant had genuine desire to marry the victim. However, later he changed his mind and decided not to marry her. Merely because he resiled from his promise to marry, no offence punishable under Section 376 of the IPC in the facts of the present case is made out against the applicant. The victim has acknowledged consensual physical relations between the applicant and herself, hence the FIR and the charge-sheet do not make out a case for framing charge under Section 376 of the IPC against the applicant. There is no allegation in the FIR that the promise to marry given to the victim was false at the inception, consensual physical relations are admitted by the victim in the FIR. The record indicates that the applicant subsequently refused to marry the victim.

15. For the aforesaid reasons and keeping in mind the legal position enunciated in the aforesaid decisions, we are of the considered view that even if the allegations made in the FIR are accepted as it is and material in the form of charge-sheet is taken into consideration, the offence punishable under Section 376 of the IPC is not established against the applicant. The application is, therefore, deserves to be allowed.

16. In the result, Criminal Application No. 1430 of 2020 is allowed in terms of prayer clause 'B-1'.

17. Rule is made absolute in the above terms with no order as to costs.

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