

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPEAL NO.119 OF 1999

Kashinath Narayan Gharat ...Appellant
Versus
The State of Maharashtra ...Respondent
....
Ms Vrishali Raje for the Appellant.
Mr. S.V. Gavand, APP for Respondent -State.

CORAM : SMT. ANUJA PRABHUESSAI, J.

DATED: 9th DECEMBER, 2021.

ORAL JUDGMENT:-

1. This appeal under Section 374 of the Code of Criminal Procedure, 1973, is directed against the judgment and order dated 19/02/1999 passed by the learned Additional Sessions Judge, Palghar, in Sessions Case No.334 of 1996.
2. By the impugned judgment, learned Judge held the Appellant (hereinafter referred to as 'accused') guilty of offences punishable under Section 417 of the IPC. He has been sentenced to undergo rigorous imprisonment for one year and to pay fine of

Rs.5000/- i/d. to undergo rigorous imprisonment for six months.

3. The case of the prosecution in brief is as under:-

The prosecutrix(PW1) had lodged the FIR alleging that the accused had sexual relationship with her with promise of marriage. He subsequently declined to marry her. Based on the FIR at Exhibit-6 lodged by the prosecutrix crime came to be registered against the accused for offences punishable under Sections 376 and 417 of the IPC.

4. The crime was investigated by PW8-P.H.C.,Vishwas Bhosale. He recorded the statements of the witnesses, referred the prosecutrix for medical examination and after completion of the investigation filed the charge sheet against the accused for above stated offence. The accused pleaded not guilty to the charge and claimed to be tried. The prosecution in support of its case examined 8 witnesses. The statement of the accused came to be recorded under Section 313 of Cr.PC. The defence of the accused was of total denial. The learned Judge upon appreciating and analysing the evidence on recorded acquitted the accused of offence under Section

376 of the IPC and held him guilty of the offence under Section 417 of the IPC. Being aggrieved by the conviction and sentence, the accused has preferred this appeal.

5. Heard Ms Vrishali Raje, learned counsel for the accused and Mr. S.V. Gavand, learned counsel for the Respondent-State. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

6. The evidence of PW1- Prosecutrix reveals that the accused was known to her. She had sexual relationship with the accused for over about 3 years. Evidence of PW2- sister of the prosecutrix also reveals that there was love affair between the accused and the prosecutrix. The evidence on record thus indicates that sexual relationship between the prosecutrix and the accused was consensual. The accused has been held guilty of offence under Section 417 of the IPC solely for the reason that he refused to marry the prosecutrix. The question is whether in such circumstances refusal to marry constitutes an offence of cheating.

7. While considering a similar issue, in *Sonu @ Subhash Kumar vs. State of Uttar Pradesh and Anr., 2021 SCC Online SC 181* the Hon'ble Supreme Court has observed as under :

“9. In Pramod Suryabhan Pawar vs. State of Maharashtra, (2019) 9 SCC 608, while dealing with a similar situation, the principles of law which must govern a situation like the present were enunciated in the following observations:-

“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...”

10 Further, the Court has observed:

“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.”

8. In ***Maheshwar Tingga Vs. State of Jharkhand, (2020) 10 SCC 108*** the question before the Hon’ble Supreme Court was whether the prosecutrix had consented to the physical relationship under any misconception of fact with regard to promise of marriage or whether her consent was based on fraudulent misrepresentation of marriage. The Apex Court has held that under Section 90 of IPC a consent given under a misconception of fact is no consent in the eye of the law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four years. The Apex Court has observed as under :-

“15. In Uday vs. State of Karnataka, (2003 4 SCC 46, the Appellant and the prosecutrix resided in the same neighbourhood. As they belonged to different castes,

a matrimonial relationship could not fructify even while physical relations continued between them on the understanding and assurance of marriage. This Court observed as follows:

“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 straitjacket 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.””

.....

“20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and

deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday are considered relevant :-

“25...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 overcome 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.””

9. In the instant case, the evidence on record indicates that

the prosecutrix and the accused were known to each other. They had indulged in sexual relationship for a period of over three years. The evidence of PW1-prosecutrix does not indicate that she had sexual relationship with the accused under misconception of fact, with regard to the promise of marriage or that her consent was based on fraudulent misrepresentation of marriage. There is no evidence on record to indicate that since the inception accused did not intend to marry her. In the absence of evidence to prove that the prosecutrix had consented for physical relationship on a misconception of fact, as stipulated under Section 90 of IPC, the mere refusal to marry would not constitute offence under Section 417 of the IPC.

10. Under the circumstances, the impugned judgment cannot be sustained. Hence, the appeal is allowed. The impugned judgment and order is quashed and set aside. Bail bonds of the accused stand discharged.

(SMT. ANUJA PRABHUESSAI, J.)