

Court No. - 49

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Case :- APPLICATION U/S 482 No. - 10125 of 2021

Applicant :- Vipin Kumar @ Vikki

Opposite Party :- State of U.P. and Another

Counsel for Applicant :- Vijay Prakash Mishra

Counsel for Opposite Party :- G.A., Vipul Shukla

Hon'ble Vivek Agarwal, J.

1. Sri V.P. Mishra, learned counsel for the applicant.
2. This application has been filed by the applicant Vipin Kumar @ Vikki S/o Amar Nath Kaithwar, seeking quashing of the summoning order dated 22.12.2020 passed by learned Chief Judicial Magistrate, Shahjahanpur, in Criminal Case No. 2504084 of 2020, under Section 376 IPC, P.S.- Roza, District-Shahjahanpur, against the applicant arising out of Case Crime No. 169 of 2020. The petitioner has also sought quashing of Charge sheet/Final Form and entire proceedings of the said case on the ground that in view of the contents of the FIR, it is evident that complainant/victim had consensual sex with the accused/applicant and therefore, in the light of the law laid down by Supreme Court in the case of **Pramod Suryabhan Pawar vs. The State of Maharashtra and others, (2019) 9 SCC 608**, so also the judgement of Supreme Court in **Maheshwar Tigga vs. The State of Jharkhand (2020) 10 SCC 108**, as well as in **Sonu vs. State of Uttar Pradesh and others 2021 (115) ACC 732**, to submit that in case of consensual physical relationship, no element of criminality can be attached.
3. Placing reliance on these three judgements, it is submitted that once the girl gives consent and surrenders to the physical moves of a person with whom she is deliberately in love, then

later on that person resenting his offer of marriage cannot be said to have committed rape.

4. Taking this Court through the definition of rape as provided under Section 375 IPC, it is submitted that as per explanation (2) below Section 375, consent has been defined as under :-

“Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.”

5. It is submitted that in the FIR itself, it is mentioned that the complainant and the accused belong to the same community. Earlier, applicant, who is working in Border Road Organization on the post of J.E., had sent a request on the Facebook. After some hesitation, when the victim came to know of the fact that accused is known to her through common acquaintance, she accepted his request and they started communicating. Later on, under the garb of and in the name of contracting marriage, she was called to Hardoi from where they had travelled to Lucknow and in a hotel room, accused had established physical relationship with her, despite her reluctance and denial, promising her to marry her as soon as he resumes his vacation after joining at workplace. Reading the FIR and the statement under Section 164 Cr.P.C., it is submitted that no ground is made for continuing with the prosecution and in the light of the law laid down in the case of **Pramod Suryabhan Pawar (supra), Maheshwar Tigga (supra) and Sonu (supra)**, proceedings should be quashed. He submits that there are whatsapp messages, copy whereof has been annexed as Annexure-2 to the affidavit accompanying the application, which reflect that it was the victim, who had called the accused on 27.5.2019, requesting him to call her urgently. Reading these

messages, it is submitted that several missed calls were made by the victim and the messages were also delivered, which reflects that in fact it was the victim who was mad for the applicant and not vice versa, therefore, there cannot be a question of any prosecution when a girl is madly in love with a boy and willingly enters into a physical relationship.

6. Sri Vipul Shukla, learned counsel for the opposite party no. 2, in his turn, opposes the prayer for quashing.

7. Sri Vikas Goswami, learned A.G.A. in his turn, submits that facts of the three cases cited are different. It is submitted that it has come on record that the accused/applicant had performed a ceremony, which is though symbolic, but has a lot of significance under the Indian Tradition and Customs i.e. "मांगभराई". In the name of this ceremony, which is an important step under Hindu Traditions and Culture leading towards the marriage i.e. "सप्तपदी", under a false promise a sort of consummation of marriage took place, which is itself indicative of applicant holding a false promise of marriage inasmuch as he had no intention of marrying the prosecutrix. It is submitted that it has come on record that parents of the accused refused to marry the accused with the complainant on the pretext that daughters from their family are married in the family of the complainant and therefore, they would not like to bring a girl from that family, where they have already given their daughters through alliance of marriage. It is submitted that this fact of family tradition cannot be said to be unknown to the accused. He knew it from the beginning about his family tradition and therefore, despite knowing this family tradition and when there was no suppression of the fact that complainant's sister-in-law (*bhabhi*) is from the family of the accused and it was within the knowledge of both the parties, the assurance given by the accused to obtain consent of the victim cannot be said to be a consent free of any blemishes.

8. After hearing learned counsel for the parties and going through the record, it is evident that in the FIR, there is a specific mention of this fact that prosecutrix had denied establishment of physical relationship. She only reluctantly agreed to physical relationship when she was promised of entering into marriage. Similar statements have been given by her under Section 164 Cr.P.C.

9. As far as law laid down in the case of **Pramod Suryabhan Pawar** (supra), the facts of that case are different. In that case, it has come on record and as has been summarized by the Supreme Court that the "consent" of a woman with respect to Section 375 IPC 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 the 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.

10. When this fact is taken into consideration, then it is evident that facts of the case of **Pramod Suryabhan Pawar (supra)** are different where a girl after being in relationship for long and despite denial of marriage, which was made in the year 2008, filed an FIR in 2016 and the girl continued to remain in relationship for long 8 years despite intermittent breakups and then made allegations invoking provisions of SC/ST Act, the Supreme Court observed that none of the offences under provisions of the SC/ST Act, so to constitute an offence under Section 3(1)(u), (w) and 3(2)(vii) of the SC/ST Act were said to have been made out. Similarly, on the basis of the time gap of long 8 years and dealing with the facts of the case, it is held that the Court had the serious doubt that the promise to marry induced the girl to consent of

having sexual intercourse with the appellant. It is observed as under :-

“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...”

11. Similarly, in case of **Maheshwar Tigga** (supra) reliance has been placed to paragraph 20, which is as under :-

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 deepseated 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 (supra) 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.”

12. In case of **Sonu** (supra), Supreme Court placing reliance on its earlier judgement in the case of **Pramod Suryabhan Pawar** (supra), has again summarized the legal position that 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.

13. In the present case, when these judgements are examined in the factual backdrop, then it is evident that denial of marriage is on account of family tradition. A grown-up man working in Border Road Organization that too on a responsible post of J.E., is supposed to have knowledge of his family traditions. Therefore, the day when the applicant made a promise, he was aware of the fact that as per his family tradition, he will not be able to marry the girl with whom he is making a promise to marry for extracting a favour of physical relationship. Secondly, the act of the applicant of carrying out ceremony of "मांगभराई" is another proof of the fact that he entered into a physical relationship on the solemn promise of entering into a wedlock, whereas from the beginning, the applicant was aware that as per his family traditions and customs, he will not be able to marry the girl in question. Therefore, as has been held in the case of **Maheshwar Tigga** (supra) wherein paragraph 25 from the case of **Uday vs. State of Karnataka, (2003) 4 SCC 46** has been quoted, clearly reflects that if a 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, is a circumstance where it has been held that it will be difficult to impute to the applicant knowledge that the prosecutrix had

consented in consequence of a misconception of fact arising from his promise. In the present case, there is no material available on record to show that prosecutrix was deeply in love with the applicant and that is another distinctive feature of the factual aspect of the present case. In fact there is a qualification to the explanation below Section 375 IPC as has been decided in the case of **Deepak Gulati vs. State of Haryana, AIR 2013 SC 2071**, wherein it has been held that intercourse under promise to marry constitute rape only if from initial step, accused had no intention to keep promise. The accused can be convicted for rape only if the Court reaches a conclusion that the intention of the accused was malafide, and that he had clandestine motives. In the present case, as far as intention and motives are concerned, they will be subject to final scrutiny during the trial, but *prima facie*, two facts namely, knowledge of family traditions of the applicant and another act of the applicant to smear head of the prosecutrix with vermilion, which is not only significant in the Hindu rituals and customs, but also a lot of significance as an intention to show that the person smearing the vermilion has accepted the other person as his spouse, are taken into consideration, then *prima facie* ratio of the judgements cited by the applicant appears to be not applicable at this stage and therefore, no case is made out for quashing of the charge sheet or the summoning order especially when at the stage of summoning, the court below would only be required to see a *prima facie* case rather than carrying a detailed scrutiny.

14. Therefore, the application fails and is dismissed.

Order Date :- 11.8.2021

Shalini