2023:BHC-NAG:13319

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
: NAGPUR BENCH : NAGPUR.

CRIMINAL REVISION APPLICATION NO. 30 OF 2022

APPLICANT : Virendra Dinkarrao Pilondre,
Aged about 41 years, Occu. - Self employed,
R/o Ambora, Tq. Narkhed,
Dist. Nagpur.

VERSUS

NON-APPLICANTS : 1] State of Maharashtra,
through its Police Station Officer,
Police Station, Dhantoli,
Nagpur.

2] XYZ (Victim)
through complainant/informant in
Crime No. 208/2010 registered with
Police Station, Dhantoli, Nagpur.

Mr. Sangram V. Sirpurkar, Advocate for the applicant.
Mrs. Mayuri H. Deshmukh, A. P. P. for the non-applicant/State.
Ms. Shital V. Dhawas, Advocate for non-applicant no.2

CORAM : G. A. SANAP, J.
Date of Reserving Judgment : JULY 07, 2023.
Date of Pronouncement of Judgment : SEPTEMBER 07, 2023

JUDGMENT

1. In this revision application, challenge is to the order dated 27.11.2021 passed below Exh.5 by learned Special Judge,

Nagpur, whereby the learned Judge rejected the application (Exh.5) made by the applicant/accused for discharge in crime bearing No. 208/2010 for the offences punishable under Sections 376, 493, 496 and 417 of the Indian Penal Code.

BACKGROUND FACTS :-

2. The informant in this judgment would be referred as prosecutrix. On the report lodged by the prosecutrix on 18.07.2010, a crime bearing No. 208/2010 was registered at Police Station, Dhantoli, Nagpur for the offences punishable under Section 376 of the Indian Penal Code and under Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (hereinafter referred to as "the Atrocities Act" for short). The investigation in the crime culminated into filing of the charge-sheet. Briefly, it is the case of the prosecution that in the year 2001, the accused and the prosecutrix were preparing for competitive examination. They were residing at Nagpur. They would attend library of Pradnya Prabodhini Institute for studies. Friendship developed between them. The friendship blossomed

into love affair. It is the case of the prosecutrix that the accused through a common friend by name Anita Bele, proposed her. The prosecutrix considering the age difference of seven years between her and the accused, refused the said proposal. She also refused the proposal considering that they belong to different caste. It is stated that in 2001, the accused took the prosecutrix to his village and on the way he took her to Anusaya Mata temple and there applied vermilion (*sindur*) on her head and declared that they are married. He further declared that they would get married after getting employment. It is stated that in December, 2000, the accused called the prosecutrix alone at Nehru Nagar, where he was residing. The accused at that time forcibly committed sexual intercourse with her. After the act of intercourse, she started crying. The accused, according to the prosecutrix, promised to marry her and committed sexual intercourse with her. It is stated that after this, on number of occasions, under the promise of marriage, the accused committed sexual intercourse with her.

3. In the year 2005, the prosecutrix was selected as Police

Sub Inspector. The accused was preparing for competitive examination. The accused, according to the prosecutrix, during this period sexually exploited her. In the year 2009, the accused was also selected as Police Sub Inspector. The accused went to Nashik for police training. The accused throughout promised the prosecutrix to marry with her. On the promise of marriage, he indulged in sexual acts with her. The prosecutrix, in December, 2009, came to know that the accused had developed intimacy with other girl. The prosecutrix with her friends went to the accused and confronted his relationship with another girl. The accused, at that time, flatly refused to marry with the prosecurrix. In the report, various places visited by them together and sexual intercourse committed by the accused with her, have been stated. The prosecutrix realized that the accused sexually exploited her under the false promise to marry her. Her consent was vitiated by false promise. She, therefore, reported the matter to the police. On the basis of her report, the crime was registered, and which ultimately culminated in filing charge-sheet.

4. After filing of charge-sheet, the accused made an application for discharge under Section 227 of the Code of Criminal Procedure. He has stated in his application that the prosecutrix and he met at a study center while preparing for the competitive examination. While doing studies, they became friends. In the year 2005, the prosecutrix was selected as PSI and went to Nashik for training. She joined the service after completion of training, in the year 2006. After this, the accused had no contact with the prosecutrix. The accused continued to make preparation for civil services examination. In the year 2009, the prosecutrix had met with an accident. At that time, the accused met her in the hospital. Apart from this meeting, there was no contact between him and the prosecutrix after 2006.

5. In the year 2009, the accused was selected as Police Sub Inspector and went to Nashik for training. It is stated that after his selection as PSI, the prosecutrix realized that the accused would now join the Police Department as PSI and therefore, she started pressurizing the accused to marry her. The accused refused

to marry with the prosecutrix because she was seven years older than him. Accused got married with one Rajashree Golhar. It is stated that when the prosecutrix came to know about it, she got annoyed. She, therefore, wanted to take revenge. She lodged false report against him. It is stated that there is no evidence at all against the accused to frame the charge. The prosecutrix is working in police department as PSI. She has taken undue advantage of the position and lodged false report against him. There is no evidence against the accused. On the basis of the evidence on record, charge cannot be framed against him. The accused, therefore, prayed for discharge.

6. The application was opposed by learned Additional Public Prosecutor. It is contended in the reply that in the charge-sheet voluminous evidence has been compiled and on the basis of said evidence, *prima facie* case has been made out to frame charge against the accused. It is stated that the accused made false promise to marry with the prosecutrix and committed sexual intercourse with her. The accused, later on, refused to marry with the

prosecutrix on the ground that she belong to '*Mahar*' caste. The allegations made in the FIR are sufficient to make out *prima facie* case. The Court has to decide the issue as to whether promise to marry was false and on the basis of false promise, consent of the prosecutrix was vitiated. It is a question of fact and therefore, the same has to be decided on the basis of the evidence, which would be adduced after framing of the charge by the prosecution.

7. Learned Additional Sessions Judge, after going through the evidence compiled in the charge-sheet and giving thoughtful consideration to the same, rejected the application. The accused has, therefore, come before this Court.

8. I have heard Mr. S. V. Sirpurkar, learned advocate for the applicant/accused, Mrs. Mayuri H. Deshmukh, learned Additional Public Prosecutor for non-applicant no.1/State and Ms. Shital V. Dhawas, learned advocate for non-applicant no.2/ prosecutrix. Perused the record and proceedings.

9. Learned advocate Mr. Sirpurkar for the accused submitted that the accused and the prosecutrix were in physical relationship for almost eight years. Learned advocate submitted that the material compiled in the charge-sheet clearly indicate that it was consensual sex and therefore, in this case, charge cannot be framed against the accused for the alleged offences. Learned advocate submitted that the evidence compiled in the charge-sheet is not sufficient to conclude that the accused had made false promise to marry with the prosecutrix and on false promise to marry, the prosecutrix consented for the sexual act. Learned advocate submitted that the evidence on record is not sufficient to presume that the accused has committed the offence of rape. In order to substantiate his submissions, learned advocate has heavily relied upon the following decisions :-

1] ***Pramod Suryabhan Pawar .vs. State of Maharashtra*** *reported at* ***(2019) 9 SCC 608.***
2] ***Dr. Dhruvaram Sonar .vs. State of Maharashtra*** *reported at* ***2018 SCC Online SC 3100***
3] ***Sonu @ Subhash Kumar .vs. State of Uttar Pradesh & anr.*** *reported at* ***2021 AIR (SC) 1405***
4] ***Balasaheb Mogle .vs. State of Maharashtra and another. Cri.Application No. 1430/2022 (Hon'ble Bombay High***

Court, Aurangabad)

5] *Akshay Gaikwad and others .vs. State of Maharashtra & Anr. APL No. 285/2021 (Hon'ble Bombay High Court, Nagpur.)*

10. Learned Additional Public Prosecutor submitted that the main question involved in this case is, whether the consent for sexual intercourse was vitiated by the false promise to marry or not ?. It is submitted that it is a question of fact and for the purpose of deciding the said question, full fledged trial needs to take place. Learned APP submitted that such a question of fact cannot be decided on the basis of the facts pleaded in the discharge application by the accused. Learned APP further submitted that even in his application for discharge, the accused has not pleaded the defence of consensual sex and therefore, the submissions made on the premise of such defence cannot be accepted. Learned APP pointed out that in his application he has not even admitted sexual intercourse with the prosecutrix. Learned APP, therefore, submitted that in this case the Court has to answer the question of fact on the basis of the evidence and not on the basis of vague statements of fact made in the discharge application. Learned APP

further submitted that at the stage of discharge, a mini trial is not expected by considering the pros and cons of the case of the prosecution and the evidence collected by the prosecution.

11. Learned advocate Ms. Dhawas for the prosecutrix has adopted the submissions advanced by learned Additional Public Prosecutor. Besides, learned advocate submitted that the facts stated in the FIR are sufficient to *prima facie* conclude that the consent of the prosecutrix for sexual act was vitiated by a false promise to marry. Learned advocate submitted that specific facts stated in the FIR are sufficient to reject the contention that it was consensual sex. The case in question falls in the category of breach of false promise to marry. Learned advocate, in support of her submissions, has relied upon the decision in the case of ***Deepak Gulati .vs. State of Haryana***, reported at ***(2013) 7 SCC 675***.

12. At the outset, it would be necessary to consider the legal position that can be culled out from the decisions relied upon by the learned advocate for the accused and learned advocate for

the prosecutrix. The decision in the case of *Deepak Gulati* (*supra*) was considered by the Hon'ble Apex Court in the subsequent decision in the case of *Dr. Dhruvaram Sonar* (*supra*). The decision in the case of *Deepk Gulati (supra)* was considered by the Hon'ble Apex Court in the decision in the case of *Pramod Suryabhan Pawar* (*supra*). The decision in *Pramod Suryabhan Pawar's* case *(supra)* was considered by the Hon'ble Apex Court in *Sonu @ Subhash Kumar* (*supra*). Similarly, the decision in *Pramod Suryabhan Pawar's* case (*supra*), was considered by the Division Bench of this Court in *Balasaheb Mogle .vs. State of Maharashtra and another* (*supra)* and *Akshay Gaikwad and others .vs. State of Maharashtra and another* (*supra*). In view of this position, it would be necessary to consider the proposition of law laid down in the case of *Pramod Suryabhan Pawar* (supra).

13. In *Pramod Suryabhan Pawar's* case (supra), it is held that where the promise to marry is false and intention of maker at the time of making promise itself was not to abide by it, but to deceive woman to convince her to engage in sexual relations, there

is a "misconception of fact" that vitiates woman's "consent". On the other hand, a breach of promise cannot be said to be a false promise. Specifically in the context of promise to marry, there is a distinction between false promise given on understanding by maker that it will be broken, and breach of promise which is made in good faith but subsequently not fulfilled. In order to establish false promise, maker of promise should have had no intention of upholding his word at the time of giving it. It is further held that "consent" of a woman under Section 375 is vitiated on the ground of "misconception of fact" where such misconception was basis for her choosing to engage in said act. To establish whether "consent" was vitiated by "misconception of fact" arising out of a promise to marry, two propositions must be established. 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 made. False promise itself must be of immediate relevance or bear a direct nexus to woman's decision to engage in sexual act.

14. In order to consider the applicability of the proposition

of law to the facts of the case on hand, it would be necessary to bear in mind the facts of the case and the evidence compiled in the charge-sheet. At the outset, it is necessary to mention that in the application for discharge made by the accused, he has not admitted of having committed sexual intercourse with the prosecutrix. He has also not stated that the act of sex was consensual. He has also not stated that he did not make promise to marry with the prosecutrix. His defence is that they were friends. The prosecutrix became PSI in 2006, whereas he became PSI in 2009. It is further stated that when he became PSI, the prosecutrix started pressurizing him to marry with her and when he failed to succumb to her pressure, she lodged false report against him. It is, therefore, apparent that the accused has not put forth in his application the defence of consensual sex. The defence of consensual sex has been put forth at the time of submissions on the basis of the material compiled in the charge-sheet. It is not out of place to mention that the accused has a right to put forth his defence and probalize the same on the basis of the available material at any stage of the trial. However, considering the fact that in the FIR, a categorical

statement was made by the prosecutrix that the accused, under the false promise of marriage, committed sexual intercourse with her against her will and consent, in my view, the defence of the accused, put forth across the bar without pleading the same in the application, needs appreciation in totality of the evidence. However, if appreciated properly, in my view, it would go against the accused.

15. The prosecutrix has narrated, in detail, the events from the year 2000 to 2009. It has come on record that they were in relationship for about 8 to 9 years. It is seen on perusal of the record that the accused treated the prosecutrix as his wife before the friends and his family. The statements of all the witnesses, who were privy to their relationship, have been recorded and the statements are part of the record. Even the statement of the brother of the accused is part of the record. In the report as well as in the subsequent statement, the prosecutrix has, in detail, narrated about their relationship, the treatment given to her by the accused in front of the friends and his family members and the promise

made to marry with her. She has also stated that the accused made false promise to marry with her and on the basis of said false promise of marriage, committed sexual intercourse with her. It is stated that after becoming PSI, the accused performed marriage with another girl and refused to marry with her on the ground that she belong to '*Mahar*' caste.

16. In my view, the main issue of fact arising in this case is, whether the consent of the prosecutrix for sexual intercourse was vitiated by false promise made by the accused to marry her ? The Court is required to address the important question as to whether the accused, at the very inception, had no intention to keep his promise to marry with the prosecutrix. In my view, this question of fact has to be decided on the basis of the evidence. Whether the promise to marry is a false and the intention of maker at the time of making the promise was not to abide by it, is a question of fact and answer to the said question depends upon the facts and circumstances of each case. For the purpose of addressing the question, the material on record has to be considered in totality. In

this case, in order to accept the case and defence of the accused at this stage, the Court would be required to reject the facts stated in the FIR in entirety. The Court would be required to record a finding that the consent was not vitiated by false promise or it was not given under the misconception of fact. In my view, in the teeth of the facts stated in the report and the evidence compiled in the charge-sheet, it would be very difficult to answer this question at this stage and reject the evidence of the prosecution.

17. On minute perusal of the record, it reveals that the evidence compiled in the charge-sheet is sufficient to presume at this stage that the accused committed sexual intercourse with the prosecutrix. In my view, the evidence is sufficient to frame charge against the accused. Whether the evidence would be sufficient to convict the accused or not, is not the issue at this stage. The possibility of conviction or acquittal after a full dressed trial, cannot be gone into while deciding the application for discharge or at the stage of framing of charge. In this context, it would be necessary to consider the principle of law laid down in the various decisions of

the Hon'ble Apex Court. The legal position has been considered by this Court in *Dr. Avinash Manohar Warjurkar .vs. State of Maharashtra* in Criminal Application (APL) No. 641/2022, decided on 17th March, 2023 (MANU/MH/1085/2023). Paragraph 22 is relevant for the purpose of addressing the issue in this case. Paragraph 22 is extracted below :-

> *"22. It is to be noted that the evidence compiled in the chargesheet needs to be sifted for a limited point. The contours of law while deciding the discharge application have been considered by the Hon'ble Apex Court in number of decisions. In this context, the settled legal position having bearing with the issue may be considered. I may usefully refer the decisions of the Hon'ble Supreme Court in the cases of* ***Tarun Jit Tejpal Vs. State of Goa and Another [(2020) 17 SCC 556], Niranjan Singh Karam Singh Punjabi, Advocate Vs. Jitendra Bhimraj Bijjaya and Others [(1990) 4 SCC 76] and Sajjan Kumar Vs. Central Bureau of Investigation [(2010) 9 SCC 368]****, wherein it has been held that appreciation of evidence at the time of framing of charge under Section 228 of Cr.P.C. or while considering discharge application filed under Section 227 of Cr.P.C. is not permissible. The Court is not permitted to analyse all the material touching the pros and cons, reliability or acceptability of the evidence. In Tarun Jit Tejpal's case (supra), it is held that at the time of consideration of the application for discharge, the Court cannot act as a mouth piece of the prosecution or*

> *act as a post office and may sift evidence in order to find out whether or not the allegations made are groundless so as to pass an order of discharge. It is held that at the stage of consideration of application for discharge, the Court has to proceed with an assumption that the materials brought on record by prosecution are true and evaluate the said materials and documents with a view to find out whether the facts emerging therefrom taken at their face value disclose the existence of all the ingredients constituting the alleged offence. At this stage, the Court is not expected to go deep into the matter and hold that materials would not warrant a conviction. It is held that what needs to be considered is whether there is a ground for presuming that the offence has been committed and not whether a ground for convicting accused has been made out. It is further held that the law does not permit a mini trial at the stage of deciding the discharge application or at the time of framing of charge."*

18. In my view, the question of fact as observed above cannot be addressed at this stage on the basis of the facts stated in the application made by the accused for discharge. The question of fact involved in this case needs to be tested on the basis of the evidence. Appreciation of the material compiled in the charge-sheet and dealing with the pros and cons of the case of the prosecution at this stage, would be nothing short of conducting a

mini trial. The law does not permit the same. Therefore, in my view, in this case, the material on record is sufficient to satisfy the requirements to proceed against the accused by framing the charge.

19. Perusal of the order passed by learned Additional Sessions Judge would show that the learned Judge has taken entire material compiled in the charge-sheet into consideration and based on the said material, rejected the application for discharge. The reasons recorded by the learned Additional Sessions Judge, in my opinion, are supported by the material on record. It is further pertinent to note that the accused had applied for quashing the FIR in Criminal Application (APL) No. 1424 of 2010. The FIR was quashed to the extent of the offence under Section 3(1)(xii) of the Atrocities Act. The Division Bench of this Court was not inclined to quash the FIR to the extent of the offence under the IPC. The relevant observations were made in paragraph 6 in the order passed by the Division Bench. The same are extracted below :

> *"6. However, we find that the allegations in the FIR in relation to the offence punishable under Section 376 of the Indian Penal Code are made out insofar as present proceedings are concerned which*

> *means proceedings invoking inherent jurisdiction of this Court under Section 482 of the Code of Criminal Procedure. We, therefore, relegate the applicant to the remedy other than the present one in the matter of charge levelled against him for the offence punishable under Section 376 of the Indian Penal Code. We are sure that the Trial Court shall not be influenced by the observations made by this Court."*

20. The accused, in view of the liberty granted to him, applied for discharge before the Sessions Court. Learned Additional Sessions Judge, for the limited purpose, sifted the available material and evidence and found that the said material is sufficient to frame charge against the accused. In my opinion, the learned Judge has not committed any mistake in rejecting the application. In the facts and circumstances, in my view, therefore, the proposition of law laid down in the decisions, relied upon by the learned advocate for the accused, is not applicable to the case of the accused at this stage. In view of this, the revision application being devoid of merits, deserves to be dismissed.

21. Accordingly, the Criminal Revision Application is dismissed. Considering the fact that the crime was registered in

2010 and the time taken for deciding the discharge application, hearing of Special (Atrocity) Case No. 22/2015 (State.vs. Virendra) is expedited. Learned Special Judge, conducting the trial, is directed to dispose of the trial as early as possible and in any case within a period of six months from today.

(G. A. SANAP, J.)

Diwale