

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/CRIMINAL REVISION APPLICATION NO. 434 of 2021

FOR APPROVAL AND SIGNATURE :

HONOURABLE MS. JUSTICE GITA GOPI

Sd/-

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	No
2	To be referred to the Reporter or not ?	Yes
3	Whether their Lordships wish to see the fair copy of the judgment ?	No
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	No

ROHIT DINANATH RAY
 Versus
 STATE OF GUJARAT

Appearance:

MR ASHISH B DESAI(5163) for the Applicant(s) No. 1

MR DIVYANG A RAMANI(7180) for the Respondent(s) No. 2

MS JIRGA JHAVERI, ADDITIONAL PUBLIC PROSECUTOR for the Respondent(s) No. 1

CORAM: HONOURABLE MS. JUSTICE GITA GOPI

Date : 11/07/2023

ORAL JUDGMENT

1. The applicant is the accused in the First Information Report (FIR) bearing C.R. No.I-101 of 2018 registered with Gujarat University Police Station, Ahmedabad on

24.08.2018 for the offence punishable under Section 376 of the Indian Penal Code (IPC), who is before this Court to challenge the order passed below Exhibit 11 on 20.04.2021 in Sessions Case No.350 of 2019, whereby his Discharge Application came to be rejected.

2. Learned Advocate for the applicant Mr. A.B. Desai submitted that in the past, the complainant had lodged FIR on 10.05.2018 against the present applicant vide C.R. No.I-73 of 2018 registered with Mahidarpura Police Station, Surat for the offence punishable under Section 376, 406 and 420 of the IPC, and in view of the settlement arrived at between the parties, on filing a Criminal Miscellaneous Application No.14650 of 2018 before this Court, by way of an order dated 07.08.2018, the FIR came to be quashed under Section 482 of the Code of Criminal Procedure, 1973 (hereinafter referred to in short as 'the Code').

3. It is further submitted by learned Advocate Mr. A.B. Desai that there was no mention in the Affidavit, so filed by the complainant in the quashing proceedings,

of any promise to marry her, nor was there any statement regarding returning of any money and inspite of quashment of the First Information Report, the complainant again preferred a FIR bearing C.R. No.I-101 of 2018, registered with Gujarat University Police Station, Ahmedabad under Section 376 of the IPC.

4. Learned Advocate Mr. A.B. Desai stated that the complainant on her own volition had filed the Affidavit in the Quashing Petition and the offences which were registered under Section 376 and other allied Sections of the IPC at Mahidarpura Police Station, Surat were quashed and thereafter, the complainant had preferred the First Information Report before the Gujarat University Police Station, Ahmedabad, so the present applicant had filed a Criminal Miscellaneous Application No.2948 of 2018 for quashing the FIR registered with Gujarat University Police Station, Ahmedabad. The same was disposed as withdrawn, with a liberty granted to applicant for moving an application for discharge.

4.1. The said order dated 18.03.2019 reads as under :-

“1. This is a petition seeking quashment of the FIR being IC.R.No.101 of 2018 registered with University Police Station, Ahmedabad for the offences punishable under Section 376 of the Indian Penal Code.

2. Learned advocate for the petitioner seeks permission to withdraw the present petition with a liberty to approach the trial Court for moving the application for discharge.

3. Permission, as sought for, is hereby granted with the aforesaid liberty. The present petition stands disposed of as withdrawn. If any such application is made, the same shall be decided on its own merits within a period of six weeks from the date of the application, without being influenced of the fact that the petitioner has withdrawn this petition. This Court has chosen not to go into the merits of the case.”

5. Learned Advocate for the applicant Mr. A.B. Desai contended that the learned Sessions Judge has committed an error in rejecting the Discharge Application, since the allegations made in the FIR are concocted, are not true and correct, no case is made out against the applicant for the alleged offences. It is further submitted that none of the allegations in the FIR, are in the charge-sheet nor any witness statement supports the allegations of the complainant, and the complainant has falsely implicated the

applicant in the alleged offences with a malafide intention and ulterior motive. It is further submitted that no offence under Section 376 of the Indian Penal Code is made out, the FIR is after considerable delay and since no ingredients to spell out rape have been made out in the FIR, learned Advocate Mr. A.B. Desai stated that it is an abuse of process of law.

6. Referring to the facts of the case, it is submitted that the complainant, a divorced woman had abandoned her husband and her children and had been in a consensual sexual relation with the applicant for a period of six years. Thus, it is submitted that Section 90 of the IPC cannot come to the aid for fastening any criminal liability on the applicant, in view of the earlier FIR been quashed under consent, read with the allegations in the present FIR, no case of any promise to marry or its breach can be made out. It is further submitted that the framing of charge would affect the personal liberty of an individual and thus, every Court even prior to framing of charge is required to apply its mind to consider the question whether there was any ground for the presumption of the offence against the

accused and for that purpose, consideration of materials relied upon so as to prima-facie assert whether there are any sufficient grounds for proceeding against the accused, is required to be made.

7. On the other hand, learned Advocate for the complainant-respondent No.2 Mr. Divyang Ramani has submitted that the applicant-accused is required to face the trial, so as to grant an opportunity to the complainant to produce the record and material evidence to prove the case against the accused. It is further submitted that the complainant had given her consent for quashing of the earlier FIR, only on the assurance that the applicant-accused would marry her. It is also submitted that after the FIR came to be quashed, the accused and the complainant had come to meet the Advocate for getting the certified copy of the order, and, on assurance of marriage, the applicant-accused took the complainant to Hotel Audition-O at Panjrapole Cross Road, Ambawadi, Ahmedabad and during their stay there, he had forcibly entered into sexual intercourse with the complainant on the promise of marriage and when

the complainant had refused, it is submitted, that the applicant forcibly established the physical relations. It is also submitted that since the applicant had assured of marriage, the complainant at the relevant point of time had not filed any complaint. Thereafter, on 12.08.2018 had gone to the applicant's house at Delhi and she stayed till 14.08.2018 alongwith the applicant, where the applicant refused to give the money which the complainant had given to the applicant and also refused to give any writing, by stating that the applicant's mother had refused to give the money; therefore, they had a quarrel, the applicant's mother refused to keep the complainant at home, so, the applicant made the complainant stay at Hotel Golden Park, A/34, Mansarovar Garden, Kirtinagar, New Delhi. It is also submitted that since the applicant has refused to marry the complainant, she has lodged the FIR. It is further submitted that the applicant had no intention from the very beginning to marry the complainant and under the false pretext and assurance of marriage, had continued with the sexual relations and hence, an offence of rape would be made out against the

accused as the relation was under misconception of facts.

8. Having heard learned Advocates for the respective parties, perused the records of the case. Section 90 of the IPC explains consent known to be given under fear or misconception of facts. This Section does not define the term 'consent' while it explains that 'consent' based on misconception of law is not a consent in the eyes of law. Explanation II of Section 375 of IPC states that Consent means an unequivocal voluntary agreement when the woman by words, gestures, or any form of verbal or non-verbal communication, communicates a willingness to participate in the specific sexual act.
9. Here in this case, the earlier FIR which was registered as C.R. No.I-73 of 2018 with Mahidarpura Police Station, Surat for the offence punishable under Section 376, 406 and 420 of the IPC came to be quashed by an order dated 07.08.2018 passed in Criminal Miscellaneous Application No.14650 of 2018. In the order, it has been observed that the issues between the applicant and the respondent No.2 have

been resolved amicably and it was also observed that continuation of the proceedings would create hardship to the applicant. The respondent No.2 as a complainant had filed her Affidavit in the proceedings to declare that the disputes between the applicant and the complainant had been resolved. The complainant was present before the Court and she was identified by her Advocate. On enquiry by the Court, the complainant had stated that all her grievances stood redressed. The said order does not refer to any assurance of marriage nor does it reflect any monetary dealings between the applicant and the complainant. It was submitted by learned Advocate Mr. A.B. Desai that while filing the Affidavit in the quashing petition, there was never any mention of any promise of marriage or money owed by the applicant-accused to the complainant. The subsequent FIR which was lodged before the Gujarat University Police Station, Ahmedabad was also prayed for being quashed by filing Criminal Miscellaneous Application No.2948 of 2019. Learned Advocate for the applicant sought withdrawal, with a liberty to approach the trial Court for moving an application

for discharge. Therefore, in view of the liberty so granted, the applicant had moved the Sessions Court with a prayer for discharge, which came to be rejected and therefore, the present Criminal Revision Application has been moved.

10. The complainant in her written submissions has stated that the applicant had deceived her and destroyed her married life. The applicant had developed contact with the complainant on Facebook and during the chats, the applicant had proposed to the complainant and said that he is in love with her and thereafter, the applicant had demanded / asked for the mobile number and started chatting on Whatsapp with the complainant. The applicant cheated the complainant in the name of love and developed intimacy with her and entered into relationship with the complainant, while the complainant was not aware of the malafide intention and she trusted each and every word of the applicant and entered into a physical relationship with the applicant, as a wife, as the applicant had promised her marriage. The applicant on various occasions

took the complainant at different places and stayed in hotels and entered into physical relations. The complainant has also contended that during her stay at the Hotel, the applicant had given the identity as husband and wife. Initially he had checked at Hotel Aps at Mumbai on 27.11.2013 and on 2nd occasion on 11.12.2013 had stayed at Mount Abu in Hotel Silver Oak for three days and thereafter, from 19.12.2013 to 24.12.2013, the applicant took the complainant to Goa and stayed there for five days, thereafter on 16.03.2014, the applicant took the complainant to Mount Abu and stayed for four days and later on to Kashmir, where they stayed for nine days.

11. The complainant states that the applicant had called her husband and informed of the relationship and thereafter, the complainant's husband had given divorce on 10.07.2014; the complainant continued her relation with the applicant, and many a times, developed physical relations on various occasions and it is alleged that after promising the complainant for four years, the applicant finally refused to marry her. It is further stated that the applicant had taken from

the complainant on different occasions money to the extent of Rs.1,30,000/-, as stated in the FIR bearing C.R. No.I-73 of 2018 registered with Mahidarpura Police Station, Surat and after realising the intention of the applicant, the complainant had filed the above FIR. It is further stated that applicant had absconded, and thereafter, had approached the complainant on her mobile on 17.07.2018 and the applicant had called the complainant to Mumbai where the applicant confessed and again gave promise to the complainant of marrying her. The complainant further states that even the mother of the applicant had assured that the applicant would marry the complainant and since her married life was completely ruined, the complainant came to trust the words of the applicant. The complainant has also relied on copy of the CD which records the conversation between the applicant and the mother and the transcript copies are produced.

12. The complainant further states that the applicant had deceived her, raped her on false assurance of marriage and after quashing of the FIR bearing C.R. No.I-73 of 2018 registered with Mahidarpura Police

Station, Surat, again committed the offence of rape at Hotel Audition-O at Panjrapole Cross Road, Ambawadi, Ahmedabad on 11.08.2018. The complainant states that the earlier FIR was quashed on her consent as the applicant had given a promise to marry her.

13. The complainant is the mother of two children, when she came in contact with the present applicant, she was a married woman and during her married life, she had traveled with the applicant to different places, and according to her, since the applicant had informed the complainant's husband about the relationship, the divorce was given by complainant's husband. The FIR bearing C.R. No.I-73 of 2018 registered with Mahidarpura Police Station, Surat came to be quashed by consent, while in the subsequent FIR bearing C.R. No.I-101 of 2018, registered with Gujarat University Police Station, Ahmedabad, the complainant has stated that when the applicant and complainant had come to Ahmedabad to meet their Advocate for taking the certified copies, they had stayed at Hotel Audition-O at Panjrapole Cross Road, Ambawadi, Ahmedabad.

The statement of Simranjit Singh Amritsingh dated 25.08.2018 recorded by the Police Inspector, Gujarat University Police Station, Ahmedabad states, on verification of the Hotel Register, that the complainant and the applicant had checked in the Hotel on 05.08.2018 at 10.40 hours and checked out on 07.08.2018, and thereafter again on 11.08.2018 at 10.00 hours in the morning they had checked in and on the very same day, they had checked out of the Hotel Room No.203. As per the FIR, the complainant on 12.08.2018 had left for Delhi to applicant's house, she had stayed till 14.08.2018.

14. To establish a false promise, the maker of the promise should have had no intention to uphold it at the time of giving it. The consent under Section 375 of the IPC is vitiated on the ground of misconception of fact. The said misconception should be the basis for the victim to indulge in the said act. Here in this case, as it is noted, the complainant even during the period of her marriage, was in relation with the applicant. She had during her marriage established physical relations with the applicant. Since the complainant was married, she would have no

intention to marry the applicant nor the applicant could have given any promise to marry her. The relation which the complainant established with the applicant during the existence of her marriage would be considered as 'extra marital relation' and according to her, the applicant had developed friendship on social media and thereafter, had entered into intimate relationship. The complainant on her volition during the subsistence of her marriage had traveled with the applicant to different places and had entered into sexual relations with the applicant. For rape to be committed, the circumstances should be falling under the seven descriptions. Here according to the complainant, she had consented for the relationship on the promise of marriage. Section 90 of the IPC clarifies that consent based on misconception of fact is not consent at all and it is the contention of the complainant that the applicant had engaged in sexual relations with her on the false promise of marriage and therefore, the complainant's consent based on misconception of fact, i.e. promise of marriage, stands vitiated.

15. The Hon'ble Apex Court in case of **Kaini Rajan vs. State of Kerala** reported in **(2013) 9 SCC 113** has elaborated on the expression "without her consent" as well as consent given by a woman believing the man's promise to marry her. It has been observed thus :-

"14. This Court examined the scope of Section 375 IPC in a case where the facts have some resemblance with the one in hand. Reference may be made to the judgment of this Court in **Deelip Singh alias Dilip Kumar v. State of Bihar (2005) 1 SCC 88**. In that case, this Court examined the meaning and content of the expression "without her consent" in Section 375 IPC as well as whether the consent given by woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent given pursuant to a false representation that the accused intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC. This Court further held that if, on facts, it is established that at the very inception of the making of promise the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of the second clause of Section 375 IPC. In the facts of that

case, this Court held, that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act.”

16. In the case of **Deepak Gulati vs. State of Haryana** reported in **(2013) 7 SCC 675**, the Hon'ble Apex Court has dealt with the expression “consent” and the distinction has been drawn for mere breach of promise and not fulfilling the false promise. The observations in Paragraph 21 of the said decision are quoted hereinafter :

“21. 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.

17. In the case of **Anurag Soni vs. State of Chhattisgarh** reported in **(2019) 13 SCC 1** to submit that the relation between the parties would be constituted as rape, consent was under promise to marry her and has relied on the observations of the Hon'ble Apex Court in paragraphs 16, 17, 18 and 19 which read as under:-

“16. In the deposition, the prosecutrix specifically stated that initially she did not give her consent for physical relationship, however, on the appellant's promise that he would marry her and relying upon such promise, she consented for physical relationship with the appellant accused. Even considering Section 114A of the Indian Evidence Act, which has been inserted subsequently, there is a presumption and the court shall presume that she gave the consent for the

physical relationship with the accused relying upon the promise by the accused that he will marry her. As observed hereinabove, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship.

17. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under Section 376 of the IPC.

18. Now, so far as the submission on behalf of the accused appellant that the accused had marriage with Priyanka Soni on 10.06.2013 and even the prosecutrix has also married and, therefore, the accused may not be convicted is concerned, the same cannot be accepted. The prosecution has been successful by leading cogent evidence that from the very inception the accused had no intention to marry the victim and that he had mala fide motives and had made false promise only to satisfy the lust. But for the false promise by the accused to marry the prosecutrix, the prosecutrix would not have given the consent to have the physical relationship. It was a clear case of cheating and deception.

19. As observed hereinabove, the consent given by the prosecutrix was on misconception of fact. Such incidents are on increase nowadays. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity. Therefore, merely because the accused had married with another lady and/or even the prosecutrix has subsequently married, is no ground not to convict the appellant accused for the offence punishable under Section 376 of the IPC. The appellant accused must face the consequences of the crime committed by him.”

18. In **Pramod Suryabhan Pawar vs. State of Maharashtra and Another** reported in **(2019) 9 SCC 608**, in which Hon’ble Apex Court considered the case under the provisions of Section 482 of Cr. P. C and quashed the FIR. The Hon’ble Court while referring to the case in **Anurag Soni** (supra), in Paragraph 14 held as under :-

“14. In the present case, the “misconception of fact”

alleged by the complainant is the appellant's promise to marry her. Specifically in the context of a promise to marry, this Court has observed that there is a distinction between a false promise given on the understanding by the maker that it will be broken, and the breach of a promise which is made in good faith but subsequently not fulfilled. In **Anurag Soni v State of Chhattisgarh**, this Court held :

“12. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.”

Similar observations were made by this Court in **Deepak Gulati v State of Haryana** :

“21. ... 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...”

19. In case of **XYZ vs. State of Gujarat** reported in **(2019) 10 SCC 337** to contend that though the High Court has inherent powers under Section 482 of the Cr. P. C to quash the FIR, the same is to be

exercised very sparingly and states that the complainant should be given an opportunity to lead the evidence during trial so she can have the recourse of protection of law under Section 114-A of the Evidence Act read with Section 90 of IPC. In the said decision, the Hon'ble Apex Court has observed that in view of serious allegations made in the complaint, the High Court should not have made a roving inquiry while considering the application filed under Section 482 of Cr. P. C. But, at the same time, the Apex Court has laid down that the powers under Section 482 of Cr. P. C. is to be exercised depending on contents of the complaint and the material placed on record. The Apex Court while entertaining the provisions of Section 114-A of the Evidence Act, has observed that where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped, and such woman states in her evidence before the Court that she did not consent, the court shall presume that she did not consent. In **Deelip Singh alias Dilip Kumar vs. State of Bihar** reported in **(2005) 1 SCC 88**, in paragraph 19, the higher court

expresses the position under Section 90 of IPC.

Paragraph 19 is reproduced for ready reference :-

“19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the Court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the Court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.”

20. In the case of **Pramod Suryabhan Pawar vs State of Maharashtra** reported in **(2019) 9 SCC 608** the following observations were made :-

“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...”

In paragraph 10, the Court has referred to the summary of legal position as depicted in **Pramod Suryabhan Pawar** (supra),

“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.”

21. In the case of **Union of India v. Prafulla Kumar Samal and Another** reported in **1979 AIR SC 366**, it is laid down as under :-

“Section 227 of the Code runs thus:-

"If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

The words 'not sufficient ground for proceeding against the accused' clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to

the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really his function after the trial starts. At the stage of section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. The sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.

The scope of section 227 of the Code was considered by a recent decision of this Court in the case of **State of Bihar v. Ramesh Singh** where Untwalia, J. speaking for the Court observed as follows:-

"Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused. The presumption of the guilt of the accused which is to be drawn at the initial stage is not in the sense of the law governing the trial of criminal cases in France where the accused is presumed to be guilty unless the contrary is proved. But it is only for the purpose of deciding prima facie whether the Court should proceed with the trial or not. If the evidence which the Prosecutor proposes to adduce to prove the guilt of the accused even if fully accepted before it is challenged in cross-examination or rebutted by the

defence evidence; if any, cannot show that the accused committed the offence then there will be no sufficient ground for proceeding with the trial".

22. While dealing with an application under Section 227 of Cr.P.C., upon consideration of the record of the case and the documents submitted and after hearing the submissions of the accused and the prosecution, the enquiry of the Judge must necessarily be limited to deciding of the facts emerging from the record and documents constitute offence with which the accused is charged. At that stage, he may sift the evidence for the limited purpose, but he is not required to marshal the evidence with a view to separating the grain from the chaff. All that the Judge is called upon to consider is whether there is sufficient ground to frame the charge and for this limited purpose, he must weigh the material on record as well as documents relied on by the prosecution.

23. On consideration of the authorities in the case of **Prafulla Kumar Samal and Another** (supra), the following principles were laid down :-

“(1) That the Judge while considering the question of

framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out :

(2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be, fully justified in framing a charge and proceeding with the trial.

(3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(4) That in exercising his jurisdiction under section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a Post office or a mouth-piece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”

24. Here in the present case the complainant was a married woman, mother of two children when she developed friendship with the applicant. It appears from the facts that the applicant was knowing that the complainant was a married lady and the

complainant too, being married was in relation with the applicant. At the inception of relation, there would not have been any promise to marry, for the complainant to give consent for physical relation on the basis of promise. It is not the case that, but for the false promise by the accused to marry, the complainant had given the consent to have physical relation. The complainant was very well knowing the pros and cons of the relation. It is not the case that false promise of marriage was given at the early stage, the complainant was aware of the nature and consequence of sexual indulgence. After having relation with the accused applicant for considerable long time, the complainant's husband gave divorce to her. Thereafter too, she continued with her relationship with the accused probably with the hope of a marriage. The FIR was quashed, which was on the consent of the complainant and while withdrawing the charges, the complainant had not secured any assurance of marriage, to presume that there was any false promise of marriage thereafter to give rise for a cause to lodge an FIR for the offence of rape.

25. In view of the facts as emerging between the parties, no case is made out against the applicant-accused and there is no sufficient ground to pursue the case against the applicant-accused. There is no ground to even assume that the applicant-accused has committed the offence to consider the culpable mentality of the accused. The case is of consensual sex.

26. Therefore, in view of the aforesaid reasons and circumstances, this Criminal Revision Application stands allowed. The order dated 20.04.2021 passed by the learned Additional Sessions Judge, City Civil and Sessions Court, Ahmedabad in Criminal Case No.350 of 2019 is quashed and set aside. The applicant herein is ordered to be discharged in connection with First Information Report bearing C.R. No.I-101 of 2018 registered with Gujarat University Police Station, Ahmedabad for the offence punishable under Section 376 of the Indian Penal Code. Rule made absolute to the aforesaid extent. Direct Service is permitted.

Sd/-
(GITA GOPI, J)