

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PREM NARAYAN SINGH

CRIMINAL APPEAL No. 1380 of 2023

BETWEEN:-

HARIOM SHRIVASTAVA S/O HARINARAYAN
SHRIVASTAVA, AGED ABOUT 35 YEARS, OCCUPATION:
GOVT. SERVICE PATEL COLONY, GWALIOR ROAD,
DISTRICT DATIYA AND HALMUKAM- FLAT NO. 302,
NEELGANGA APARTMENT, NEAR GUFAMANDIR,
LALGHATI, DISTRICT BHOPAL (MADHYA PRADESH)

.....APPELLANT

(BY SHRI VIRENDRA SHARMA, ADVOCATE)

AND

1. THE STATE OF MADHYA PRADESH STATION
HOUSE OFFICER THROUGH POLICE STATION
NEELGANGA (MADHYA PRADESH)
2. PROSECUTRIX X THROUGH P.S. NEELGANGA,
DISTRICT UJJAIN (MADHYA PRADESH)

.....RESPONDENTS

(BY SHRI SACHIN JAISWAL, PANEL LAWYER)

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Heard on : 02.01.2024

Pronounced on : 23.01.2024

*This criminal appeal having been heard and reserved for judgment,
coming on for pronouncement this day, the Court passed the following :*

JUDGMENT

The appellant has preferred this appeal under Section 374 of the Code of Criminal Procedure, 1973 (for short 'the Code') against the judgment dated 17.01.2023 passed by 9th ASJ, Ujjain (M.P.) in Sessions Trial No. 27/2021, whereby the appellant has been convicted for the offence punishable under

Section 376(2)(n) of Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.')

and sentenced to undergo 10 years R.I. with a fine of Rs.10,000/- and in default of payment of fine, to further undergo one year R.I.

2. As per prosecution story, on 06.09.2019, the complainant lodged a written complaint before the police by submitting that the appellant works as Sales Officer in Indian Oil Corporation and at the relevant point of time i.e. May, 2019, he was posted At Ambikapur. The prosecutrix is an employee of EPFO (Employee Provident Fund Organization) and was posted at Ujjain at the time of incident. The prosecutrix became acquainted with the appellant through matrimonial site and they have started exchanging messages through whatsapp and video calls. On 22.07.2019, the appellant came to Ujjain to meet the prosecutrix and stayed in a hotel. The prosecutrix also came to the hotel and they had dinner together. When the prosecutrix asked him to go to her residence, the appellant prevented her from leaving the hotel by expressing his love and promising marriage to her. He established sexual relations with her. The appellant committed the offence subsequently as well but started avoiding her later on. In the meanwhile, the prosecutrix came to know that the appellant is having sexual dalliances with another girl and complaint was lodged by her against the appellant. On the aforesaid written complaint, an FIR was lodged under Section 376(2)(n) of I.P.C. After due investigation, charge-sheet was filed under Sections 376(2)(n) of I.P.C. against the appellant.

3. In turn, the case was committed to the Court of Sessions and thereafter, appellant was charged for offence under Section 376(2)(n) of I.P.C. He abjured his guilt and took a plea that he had been falsely implicated in the present crime and prayed for trial.

4. In support of the case, the prosecution has examined as many as 09

witnesses namely prosecutrix (PW-1), Sunil Malviya (PW-2), Sujeet Sharma (PW-3), Dr. Kaynaat Qureshi (PW-4), Rajendra Meena (PW-5), Sumanlata Verma (PW-6), Rakhi Gurjar (PW-7), Sanjay Mandloi (PW-8) & Vidya Tomar (PW-9). No witness has been adduced by the appellant in his defence.

5. Learned trial Court, on appreciation of the evidence and argument adduced by the parties, pronounced the impugned judgment on 17.01.2023 and finally concluded the case and convicted the appellant for commission of the said offence under the provisions of Section 376(2)(n) of I.P.C.

6. Learned counsel for the appellant submits that the appellant is innocent and the learned trial Court has convicted the appellant wrongly without considering the evidence available on record. Counsel for the appellant further submits that the appellant has not committed any offence because the prosecutrix is a major lady and she was a consenting party, she remained in the relationship with the appellant for more than two years, she herself used to go with the appellant. Even, she had given her own documents to the hotel staff i.e. Adhar card. It is also submitted that the appellant had never forced her to make physical relation. It is also submitted that prior to the written complaint, she has not made any complaint to any person or authority. She stayed with the appellant in the hotel at various times, there is some whatsapp chats on record with the appellant and she has stated in para Nos. 17 and 18 of her cross-examination, and by which itself, it can be established that the prosecutrix was a consenting party.

7. It is submitted that there are material contradictions and omissions in the statements of prosecution witnesses but the learned trial Court has erred in ignoring the same and in convicting the appellant. It is further submitted that

PW-3 Sujeet, an employee of the hotel stated that the appellant and the prosecutrix herself used to come at hotel and she herself had provided a copy of her Adhar Card. Neither there is any DNA report nor FSL report on record, it is also submitted that the appellant is a Government Servant and due to the illegal allegations, the appellant has wrongly been convicted by the learned trial Court by ignoring the material contradictions and omissions as well as the fact that the prosecutrix was a consenting party and the career of the appellant is spoiled, if the conviction of the appellant is not set aside.

8. Further, in support of his contention, counsel for the appellant has vehemently argued and has drawn Court's attention to whatsapp chat between the appellant and the prosecutrix which is very intimate in nature showing condescending and consenting nature of the prosecutrix who being major agewise had arrived at the hotel room of the appellant willingly showing no inducement, coercion or misconception on his part. Hence, prays for setting aside the impugned judgment and passing the order of acquittal.

9. To bolster his arguments, counsel for the appellant placed reliance over the judgment of Hon'ble Apex Court passed in the case of ***Deepak Gulati vs. State of Haryana [2013 (3) MPHT, 82(SC)], Tilak Raj vs. State of Himachal Pradesh [(2016) 2 SCC (Cri.) 247] & Udham Singh S. Raghunath Singh vs. State of M.P. and another [2023 (2) MPLJ (Cri.) 328]***.

10. Learned Public Prosecutor has opposed the prayer. Inviting my attention towards the conclusive paragraphs of the impugned judgment, learned public prosecutor has submitted that the injured has received the injuries caused by the appellant and the learned trial Court has rightly convicted the appellant by sentencing him appropriately. Hence, he prays for dismissal of the appeal.

11. In the backdrop of rival submissions, the question for determination for deciding this appeal is, as to whether the finding of learned trial Court regarding conviction and punishment of the appellant under Section 376 (2)(n) of I.P.C. is incorrect in the eyes of law and facts or not.

12. In view of rival submissions, the statement of prosecutrix (PW-1) recorded before the Court is significant. In this statement, the prosecutrix has narrated that she knew the appellant Hariom Shrivastava from the year 2019. She was residing in Ujjain and working in EPFO Department. She was transferred to Bhopal in the year 2021. When she was unmarried, she opened her account in matrimonial site through which she came into contact of appellant in the year 2019. She had received a proposal of marriage from the appellant and accepted that. Thereafter, both have started whatsapp chat and video calls. On 22.07.2019, the appellant came to Ujjain to meet her and on the same day, the appellant booked a couple room in Hotel Ujjaini using the ID of prosecutrix. Further, she deposed in her statement that when she asked to go to her residence, the appellant prevented her on the pretext or promise of marriage. Further, she deposed that the appellant had committed forcible physical relation with the prosecutrix without her consent. She further articulated that when she asked to tell about the said relationship to her parents, the appellant forbade her on pretext of love and marriage. In examination-in-chief, she further deposed that both have stayed at night in hotel till 25.07.2019 and the appellant made physical relation on the pretext of marriage.

13. On these issues, the prosecutrix also filed whatsapp chats and other evidence. In this case, the prosecution witnesses namely Sunil Malviya (PW-2) and Sujeet Sharma (PW-3), who are hotel receptionists in the same hotel,

asseverated that the appellant and prosecutrix stayed in same hotel and on record, ID of prosecutrix was attached. That apart, the statement of Dr. Kaynaat Qureshi (PW-4) is furnished regarding medical evidence wherein, she has specifically stated that no opinion can be given about forceful physical relations. The witnesses Rajendra Meena (PW-5) and Smt. Rakhi Gurjar (PW-7) stated in their statements that vaginal slide, pubic hair and other material kept in sealed packet which are related to investigation. Witness Sanjay Mandloi, Inspector (PW-8) has stated in his statement that on a written complaint (Exhibit-P/1), FIR has been lodged in the police station bearing Crime No. 483/2019 (Exhibit-P-/2) under Section 376 of I.P.C. The statement of the prosecutrix has been recorded by Vidhya Tomar, Sub-Inspector (PW-8) during the investigation.

14. Having gone through the statements of witnesses, it is crystal clear that the prosecutrix and appellant were connected due to matrimonial site and thereafter both have made physical relations. It also emerged as an undisputed fact that without using any force, both had made physical relations together.

15. On this point, learned counsel for the appellant submitted that since the prosecutrix is a major lady and she was the consenting party, she went to the hotel room with her consent. The allegation of rape is not sustainable. On the contrary, learned counsel for the State has expostulated that inasmuch as the appellant has given a false promise to marry with the prosecutrix, the said consent for sexual relations was obtained under the misconception of fact. Therefore, it cannot be taken for consideration as free consent.

16. On this aspect, relevant portion of Section 90 of I.P.C. is referred to as under :-

"90. Consent known to be given under fear or

misconception – A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear or injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear of misconception; or"

17. In view of aforesaid law, the moot question to decide this appeal is as to whether the prosecutrix has given her consent for physical relations under misconception of facts as the accused has given a false promise to marry with her and subsequently, he did not marry with prosecutrix. On this point, the following extracts of law laid down by Hon'ble Apex Court in the case of *Uday Vs. State of Karnataka* reported in (2003) 4 SCC 46, is worth referring here :-

"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 strait jacket 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.

*23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. **She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.**"*

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18. On this aspect another judgment of Hon'ble Apex Court in the case of *Deepak Gulati Vs. State of Haryana* reported in (2013) 7 SCC 675, is also worth referring here :-

"18. 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."**

19. Further, in the case of *Dhruvaran Murlidharan Vs. State of Maharashtra* reported in (2019) 18 SCC 1991, the Hon'ble Apex Court has held in para 20 as under :-

"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.**"*

20. In conspectus of the aforesaid law, the learned trial Court is expected to carefully examine as to whether the appellant had actually wanted to marry victim or had malafide motives and in course of that, had made false promise for satisfying his lust. In the case at hand, the prosecutrix herself is 30 years old major lady and also working in Government Department. She herself met with the appellant on her wish and started whatsapp chating and video calls. She herself produced her ID Card before the Hotel Management. As per statements of prosecution witnesses, she continuously visited the said room of the hotel for 3 days, no sign of forcible relations can be produced on record. No alarm or crying sound was raised by the prosecutrix. She had not made complaint to her parents or any other person before lodging First Information Report. Under these conditions, it is not safe to conclude that the prosecutrix has made relations only on the basis of promise of marriage or on account of said misconception.

21. That apart, the prosecution has furnished some whatsapp chats wherein, casual conversation regarding love and marriage are visible. It is also pertinent to mention here that as to whether the appellant had specifically declined to marry the prosecutrix or not. In this regard, article A-16 is worth to refer here wherein the prosecutrix asked the appellant 'Shaddi karoge na tum' and in reply the appellant stated 'Hau'. Now, the question is as to whether the word "Hau" indicates complete denial.

22. On this point, Para No. 22 of the prosecutrix's statement, is worth mentioning here wherein she has clearly conceded that it is true to say that Malviya language is used for conversation nearby Ujjain. In sequence, she further conceded that in Malviya 'Hau' means 'Yes'. In this way, the statement of prosecutrix itself establishes that the accused/appellant has not clearly declined to marry her. It is also pertinent to mention here that in para 17 of prosecutrix's statement, she acceded that at the time of recording the Court statement of prosecutrix, the prosecutrix had already consummated her marriage whereas till then the appellant was not married. In para 17, she has clearly deposed that, it is true to say that she has been married and it is also true to say that accused/appellant is still unmarried. Under these circumstances, it cannot be envisaged that till then the appellant has broken the promise of marriage.

23. On this aspect, the observation of Hon'ble Apex Court rendered in recent judgment of **Naeem Ahmad Vs. Stated of 2023 LawSuit (SC) 80**, is also worth to mention here :-
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"20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Secondly of Section 375 IPC. **In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused.** In case of false promise, the accused **right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust**, whereas in case of

breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, **it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376.** As stated earlier, each case would depend upon its proved facts before the court."

24. In view of the aforesaid proposition and analysis in entirety, it is crystal clear that the physical relations between the prosecutrix and appellant were made with consent. Certainly, marriage was not consummated between them due to some unforeseen circumstances. However, since the appellant himself has not specifically declined regarding marriage with prosecutrix, the allegation of false promise can not be established. The prosecutrix is a major lady, she has not made any alarm and she has also used her ID Card in course of check-in the hotel room. She has not made any complaint to her parents in this regard. Hence, the prosecution case regarding committal of physical relations on misconception has not been evinced beyond all reasonable doubts.

25. In the wake of aforesaid analysis, the findings of the learned trial Court regarding conviction of the appellant under Section 376(2)(n) of the Indian Penal Code is perverse and deserves to be set aside. In the result thereof, the present appeal preferred by the appellant is hereby allowed, having set aside the impugned judgment, the appellant is acquitted from the charge under Section 376(2)(n) of I.P.C. The appellant is on bail, hence, his bail bond and surety stand discharged. The appellant is entitled to receive back the fine amount deposited by him from the learned trial Court.

26. A copy of this judgment be sent to the concerned trial Court

alongwith record for information and necessary compliance.

27. The order of the learned trial Court regarding disposal of the seized property stands confirmed.

28. With the aforesaid, the appeal is allowed and disposed off.

(PREM NARAYAN SINGH)
JUDGE

Vindesh

