

# Vijay Shukla vs State Of Uttarakhand And Another on 31 August, 2022

**Author: Sharad Kumar Sharma**

**Bench: Sharad Kumar Sharma**

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Misc. Application No. 730 of 2022

Vijay Shukla ..... Applicant

Vs.

State of Uttarakhand and another ..... Respondents

Present : Mr. Vipul Sharma, Advocate for the applicant.  
Mr. T.C. Agarwal, Deputy Advocate General for the State.  
Mr. D.N. Sharma along with Ms. Manju Bahuguna, Advocates for the private respondent.

## JUDGMENT

Hon'ble Sharad Kumar Sharma, J.

The brief facts, which engage consideration in the present C-482 Application, are the applicants to the present C-482 Application has put a challenge to the charge sheet, which has been against him/or establishment of charges, under Sections 313, 376 and 506 of the IPC and Section 3 (2) (v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. As a consequence of submission of the charge sheet, the learned Sessions Judge, District Champawat, has taken cognizance and has issued an order of summoning of the present applicant dated 25.04.2022, for his participation in Sessions Trial No. 41 of 2022, State vs. Vijay Shukla.

2. The genesis of the dispute was having its origin, as a consequence of the registration of the F.I.R. No. 20, dated 04.03.2022, which was said to have been registered by the complainant/respondent no.2, herein, for trying the named accused person therein i.e. the applicant, as well as one other co-accused person, Anita Samant. The set of allegations which were leveled in the F.I.R. thus registered on 04.03.2022, she admits the fact, that there was a professional relationship of an Advocate and a client between her and the applicant, who was a practicing advocate and the respondent/complainant, was his client. She has submitted that owing to a false impression, and assurances, which was been given by the present applicant, that he is a divorced person and, on an assurance, extended by him, that he will be getting married with her, on that false assurance, she

admits the fact, that she was having a regular physical relationship with the present applicant. She further submitted that as a consequence of the physical relationship of her's with the present applicant, she conceived and later on she got herself aborted owing to the pressure, which was said to have been exercised by the present applicant.

3. It was further averred in the set of allegation of the F.I.R., that some lady, has been consistently giving false calls and threats to the complainant namely, Anita Samant, threatening her to discontinue the relationship, which the complainant, which she admittedly has enjoyed, with the present applicant, on the pretext, that she was threatening her to discontinue the relationship, because existence and continuance of a relationship with a married man itself would be adverse to the interest of the complainant and further she submitted that the complainant was threatened by her, owing to the various affinities which she had with the superior authorities, based on which Anita Samant was pressurizing her to discontinue the relationship with the present applicant. The matter was put to investigation, and ultimately, the Investigating Officer after examining as many as 10 witnesses, had submitted his charge sheet under section 173 of the Code of Criminal Procedure, which was numbered as Charge Sheet No.35 of 2022, dated 12.04.2022.

4. In fact, if the conclusion and the inference which has been drawn in the observations, which has been recorded in para-6, one thing which is quite apparent is, that the complainant was not absolutely ignorant of the fact, that the present applicant was already a married person, her plea taken in defense before the Investigating Officer, that she has entered into a physical relationship, owing to a false assurance which was said to have been extended by the present applicant, on the pretext of getting married with her, as soon as he is awarded with the decree of divorce. That false assurance within itself will not support and justify the act and conduct of the respondents who continued to sustain the physical relationship and concealing it too as a consequence thereto and later on aborting itself.

5. In that eventuality, when admittedly there is a consensual consistent physical relationship and the fact of which stands admitted by the complainant in view of the observations which had been made in the charge sheet, it could not be said, that the offence complained of against the present applicant will at all fall to be within an ambit of Section 376 of the Indian Penal Code.

6. For the purposes to deal with the arguments, which had been extended by the counsel for the parties, the basic ingredient, which is required to be satisfied for attracting and for implicating for the offence under Section 376 IPC, there are certain parameters, which has been self-contained to make an act as rape, as it has been provided under the provisions contained under Section 375, which are extracted hereunder.

"[375. Rape.-- A man is said to commit "rape" if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:

First.---Against her will.

Secondly.---Without her consent.

Thirdly.---With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt. Fourthly.---With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. Fifthly.---With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. Sixthly.---With or without her consent, when she is under eighteen years of age.

Seventhly.---When she is unable to communicate consent.

Explanation 1.--For the purposes of this section, "vagina" shall also include labia majora. 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.

Exception 1.--A medical procedure or intervention shall not constitute rape.

Exception 2.--Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

7. The basic element which is required to attract for punishment Section 376 of the IPC, is where a sexual relationship is established by "exerting force or without consent". In fact, these two basic

elements are required to be prima facie established in order to bring an offence under Section 376, is not available in the context of set of allegations which had been levelled in the F.I.R., and even that too, in view of the conclusion, which has been derived by the Investigating Officer in the charge sheet, which has observed that few facts which stands established are-

- (i) That the complainant had a relationship of being a client of present applicant.
- (ii) She admits that she had voluntarily under assurance, had entered into a regular physical relationship, for a considerable long time.
- (iii) She submitted that the establishment of the physical relationship, was under a wrongful impression and assurance which was drawn by the applicant, on the pretext of getting married with her on grant of decree of divorce.
- (iv) This plea admittedly of having entered into a physical relationship without any relationship or protest, on the pretext of a probable decree of divorce itself will amount to be an establishment of an admitted physical relationship with consent.

8. The consent herein would obviously be inferred, particularly when it is her own case in the F.I.R., as well as in the statement which was recorded under Section 164 of the Cr.P.C., that the consistent physical relationship continued to subsisted to be established ever since 2020 onwards. May be even earlier also, but the said date is being derived on the bases of the statement which was recorded by the complainant under Section 164 of the Code of Criminal Procedure, and particularly, the learned counsel for the applicant had made reference to, the statement which was recorded under 164, which constitutes as to be, Annexure 6 to the present C-482 Application.

9. If the statement recorded under Section 164 itself is read in its totality, the aforesaid observation, which has been made by this Court, about a consenting physical relationship, having being entered into, is a fact which stands admitted by the complainant in the statement recorded, wherein, she has submitted, that they had met together in 2019 and thereafter, after her transfer to Pithoragarh, they started meeting one another and established physical relationship and even she has admitted the fact, that the physical relationship was also established on 22.09.2020, at Tanakpur, as well as at various other places, for example, that as detailed in the statement which was recorded by her, in the statement under Section 164 of Cr.P.C.

10. The argument of the learned counsel for the applicant is that the consensual relationship, established by the complainant, and which persisted to continue ever since 2019, till the registration of the F.I.R in 2022, i.e. almost for 3 years, for the first time, that is itself will not bring the offence complained of under Section 376 of the Indian Penal Code, and in support thereto, when almost under the similar situation, summoning order, as well as the charge sheet was put to challenge in 482 Application, and was subject matter of consideration before Allahabad High Court, the matter which was emanating from the judgment passed by the Allahabad High Court dated 26.09.2019, in Criminal Misc. Application No. 35811 of 2019, wherein, a prayer was made for quashing of the charge sheet of the respective case, as it was involved consideration therein for the offence under

Section 376, as well as seeking to challenge the criminal proceedings itself, which has been drawn based upon the charge sheet, as well as the summoning order which has been issued thereto. The Hon'ble Apex Court while drawing its inferences after appreciating the statement which stood recorded by the victim under Section 164, and particularly, in relation to the age which she carried, and particularly, in relation to establishment of a physical relationship on a pretext of an assurance of marriage and particularly, in the context of having a consistent consensual physical relationship for a considerable long period, which in the said case was a period lesser than the period, than which is involved in the instant case, which is for almost 3 years.

11. The court had after considering the rival contentions had recorded its reasoning in para-7 and 8 of the judgment, wherein, the contention of the F.I.R., which was correlated to be read with the statement which was made under Section 164 of the Code of Criminal Procedure, the Court has drawn an inference that where there is a relationship between the complainant and an applicant to the 482 Application, which is consensual in nature, and where the consent of physical relationship admittedly was permitted to be persisted for over more than one and half year and merely registration of an subsequent F.I.R, because of the disinclination made by the accused person to marry, under a pretext of physical relationship was established.

12. The present applicant had also made a reference to a judgment rendered by the Hon'ble Apex Court in 2021 SCC Online Supreme Court 181, Sonu Vs. State of Uttar Pradesh, the Hon'ble Apex Court has ultimately drawn a conclusion in para-10, 11 and 12 of the said judgement, which is extracted hereunder:

" 10 Further, the Court has observed:

"To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

11. Bearing in mind the tests which have been enunciated in the above decision, we are of the view that even assuming that all the allegations in the FIR are correct for the purposes of considering the application for quashing under Section 482 of CrPC, no offence has been established. There is no allegation to the effect that the promise to marry given to the second respondent was false at the inception. On the contrary, it would appear from the contents of the FIR that there was a subsequent refusal on the part of the appellant to marry the second respondent which gave rise to the registration of the FIR. On these facts, we are of the view that the High Court was in error in declining to entertain the petition under Section 482 of CrPC on the basis that it was only the evidence at trial which would lead to a determination as to whether an offence was established.

12 For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 26 September 2019. In view of the reasons which have been adduced earlier, the charge sheet dated 25 April 2018, which has been filed in pursuance of the investigation which took place, shall stand quashed. The order of the trial Court dated 3 October 2018 taking cognizance shall accordingly stand quashed and set aside."

13. The Court has observed, that the cases of consent of a woman will respect to the act dealt under Section 375, when it involves an active participation and a reasoned deliberation has been made thereto in the statement which was recorded under Section 164 towards the complained act of 376, where the consent is a vital aspect, which stands established, may be entering into a physical relationship might have been under a misconception of an assurance, but that in itself because of a promise to marriage, being a false promise, which was given may be bad in faith, but that in itself will not mitigate the consent, which was extended by the complainant to establish a physical relationship and that too consistently for couple of years together.

14. In the instant case, its almost akin situation which is falling for consideration for this Court. The respondents were noticed, they have put in appearance through Mr. D.N. Sharma, Advocate, who has filed his Vakalatnama on 16.08.2022, but no counter affidavit as such has been filed on their behalf.

15. But owing to the admitted fact and on a conjoint reading of this F.I.R., charge sheet and particularly the statement which was recorded by the complainant under Section 164, owing to an admitted fact which stands established and as already detailed by this Court in the above part of the judgment, this case would too squarely stands covered by the judgment of the Hon'ble Apex Court as reported in 2021 SCC Online Supreme Court 181, Sonu Vs. State of Uttar Pradesh, wherein the Hon'ble Apex Court has observed that in C- 482 proceedings, where apparently, the factum of consent for the offence under Section 376, stands established by statements recorded under Section 164 Cr.P.C., on an assurance to future marriage, the High Court should have exercised its inherent powers in order to defend a malicious prosecution and a misuse or an abuse of judicial proceedings at the hands of the complainant, who was admittedly consenting partner to the physical relationship.

16. In view of the aforesaid reasonings, the present C-482 Application would stand allowed, and as a consequence thereto, the charge sheet and the consequential Sessions Trial No. 41 of 2022, State vs. Vijay Shukla, pending consideration before the Special Sessions Judge, Champawat, would hereby stand quashed.

(Sharad Kumar Sharma, J.) 31.08.2022 Nahid