

Meena

**IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL REVISION APPLICATION NO.19 OF 2023**

CLINTON FERNANDES, ...Applicant.
Son of Baptist Fernandes,
Aged 27 years and resident of H.No.724,
Koshetemb, Charatha,
Sindudurg, Sawantwadi, Maharashtra.

Versus

- 1) State of Goa
Through Public Prosecutor,
Hon'ble High Court of Bombay at Goa,
Porvorim- Goa.
- 2) The Police Inspector,
Panaji Police Station, Panaji- Goa.
- 3) Miss XYZ (Victim name withheld), ...Respondents
R/o. Vasco-Da-Gama, Goa.

Mr. Kautuk Raikar, Advocate for the applicant.

Mr. Pravin Faldesai, Additional Public Prosecutor for the respondent Nos. 1 and 2.

CORAM: BHARAT P. DESHPANDE, J

DATED: 15th January, 2024

ORAL JUDGMENT:

1. Heard Mr. Raikar, learned Counsel for the applicant and Mr. Pravin Faldesai, learned Additional Public Prosecutor for the respondent Nos.1 and 2.
2. Even though the notice was issued to the victim, none appeared for her. Mr. Fallessai points out that the victim is present. A reply is filed

on behalf of respondent No.3 which is dated 05/12/2023 thereby opposing the present proceedings.

3. The challenge in the present petition is to the order passed by the learned Sessions Judge dated 25/08/2023 by which the application for discharge filed by the applicant /accused was rejected and at the same time directed to frame charge against the applicant/accused for the offence punishable under Section 376, 313 and 201 of IPC.

4. Admit. Heard learned Counsel for final disposal at the admission stage itself with consent.

5. Mr. Raikar appearing for the applicant would submit that from the charge sheet and statement of the victim recorded under Sections 161 and 164 of CrPC, it is amply clear that ingredients of Section 376 of IPC are not made out. He submits that relationship between applicant and the victim was consensual and there was no promise to marry with intention to defraud the victim. He submits that first of all the statement/complaint of the victim nowhere shows that from the inspection, the petitioner/applicant had an intention to cheat the victim in connection with the proposal for marriage. He would then submit that the consent has to be considered in view of the statements given by the victim as simply breach of promise cannot be considered as false promise from the inception.

6. Mr. Raikar would submit that there is absolutely nothing on record to show that there was any refusal on the part of the applicant to marry the victim. He submits that due to subsequent developments and the fact that the applicant is of young age, he along with the victim decided to abort the child. Accordingly both approached the Doctor and after consent given by the victim, the procedure was carried out. Thus he submits that the ingredients of Sections 313 and 201 of IPC are not made out for framing of charge.

7. Mr. Raikar placed reliance in the case of **Sonu @ Subhash Kumar v/s. State of Uttar Pradesh and Anr.**(Criminal Appeal No. 233 of 2021) dated 01/03/2021 wherein the Apex Court has considered its earlier decision in the case of **Pramod Suryabhan Pawar v/s. State of Maharashtra**[(2019) 9 SCC 608].

8. Mr. Raikar also placed reliance in the case of **State of Karnataka v/s. Jatin Chhabria** [2020 4 KarLJ 59] He submits that if two views are possible and the view favouring to the accused is a plausible view, the same have to be accepted even at the stage of considering the matter for framing of charges.

9. *Per contra*, the learned Additional Public Prosecutor Mr. Faldessai would submit that the victim had filed affidavit before this Court confirming her statement given to the Police on which FIR was registered

and even before the trial Court, she confirmed her contentions raised in the complaint. He submits that the cumulative facts of such statement would clearly show that there is grave suspicion against the accused which shows that relationship was established on the false promise of marriage. He would further submit that the statement of the Doctor clearly goes to show that initially the victim came to his hospital along with the accused however she suddenly disappeared but was brought again by the accused which shows that she was forced to abort. He therefore submits that the observations of the learned Sessions Court need no interference.

10. Rival contentions fall for determination.

11. Statement of the victim reported by the Victim Assistance Unit on 25/03/2022 shows that the victim along with the accused became friendly and even the accused was introduced to the family members of the victim. The accused used to visit the victim at her place at Caranzalem. During such visits, the physical relationship was established. It was the contention of the victim that such a relationship was consented only when the accused informed her that he would marry her. However somewhere in the month of March 2022 the victim became aware of her pregnancy and accordingly she informed the accused. The victim then disclosed that the accused stated that he is ready to continue with the relationship only if the baby is not there.

Thereafter the accused took the victim to one hospital at Porvorim wherein the concerned Doctor gave her some tablets. The victim claimed that the accused forced her to take those tablets. Thereafter on 22/03/2023 accused again took her to the same Doctor wherein some more medicines have been prescribed /administered and at that time she was forced to sign the consent form. The victim claimed that she was not in her full senses and was forced to sign such a consent form. Thereafter on the same night, the pregnancy was terminated and the fetus was buried near the cross at Bambolim with the help of the accused.

12. The Panchanama and other investigations were conducted. However, the victim refused to cooperate with the investigating agency when she was asked to disclose the place of offence in connection with Section 376 of IPC. On 29/03/2022 the victim herself addressed a letter to Police Inspector stating that on the earlier date she was under the influence of the prescribed anti psychotic pills and alcohol and due to which she was under a grief, displeasure and in such condition her statement was recorded which she claimed that it should be discarded. There is absolutely no material to show that such letter signed by the victim herself on 29/03/2022 was not given voluntarily to the Investigating Officer.

13. In view of this statement dated 29/03/2022, the Investigating Officer addressed a letter to the Magistrate for recording the statement of the victim under Section 164 of CrPC.

14. The statement under Section 164 of CrPC was thereafter recorded on 30/03/2022 by the Magistrate and after giving oath to the victim.

15. Perusal of the statement recorded on oath would clearly go to show that the victim along with the accused were in a consensual relationship and due to which the victim became pregnant.

16. During such a statement the victim disclosed and that too on oath before the Magistrate that she along with the victim voluntarily went to the Doctor at Porvorim with intention to terminate the pregnancy. Accordingly, she signed the consent form and the Doctor prescribed medicines. After consuming the said tablet she aborted the child and the fetus was buried near the cross. She also disclosed that thereafter she was taken to the Police Station by her mother and accordingly her statement was recorded. She also mentioned that later on she realised that the contents of her statement recorded by the Police on 25/03/2022 and accordingly disclosed before the Magistrate that the accused is innocent and has been falsely implicated. She even disclosed that she do not wish to pursue the case.

17. The statement of the Doctor along with the consent form collected and produced along with the charge sheet would clearly go to show that consent was given by the victim without any coercion or force.

18. While considering the provisions of Section 227 of CrPC, the Court is having a duty to sift and weigh all evidence for the limited purpose to find out whether there is any *prima facie* case to proceed against the accused and to frame charge. The test to determine *prima facie* case would always depend upon the fact of each and every case. While doing so it is duty of the Court to find out as to what view could be taken. If two views are possible and one of them giving rise to suspicion only as distinguished from the grave suspicion, the Court is justified in discharging the accused.

19. However while exercising such power Court has to apply its judicious mind and to determine as to whether the case for trial has been made out or not. It is also equally true that at this stage Court is not bound to conduct mini trial by marshaling the evidence on record.

20. In the present matter, question with regard to ingredients of Section 375 and mostly the second aspect i.e. with her consent, will have to be interpreted. It is well settled that this consent must be free from any coercion, force or otherwise. In the present matter, the complaint dated 25/03/2022 clearly goes to show that the victim and the accused

were friendly with each other and in that context they developed physical relationship. It is the contention of the victim that such physical relationship was developed on the basis of promise to marry.

21. It is now well settled proposition of law that if such promise is believed to be false promise from the inception and with only an intention to obtain the consent, then it becomes a promise by misrepresentation. Only in such circumstance, the ingredients of Section 375 comes into play.

22. To establish whether “consent” was vitiated by a “misrepresentation of fact” arising out of a promise to marry, two proposition must be established. Firstly, 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 victim’s decision to engage in physical relationship. This has been laid down by the land mark decision in the case of **Pramod Suryabhan Pawar**(supra).

23. In the case of **Sonu @ Subhash Kumar**(supra) a reference is made to the observations in the case of **Pramod Suryabhan Pawar** (supra) which are found in paragraph No.9. The Apex Court has observed in paragraph 9, 10 and 11 as under :

9. In *Pramod Suryabhan Pawar (supra)*, while dealing with a similar situation, the principles of law which must govern a situation like the present were enunciated in the following observations:

“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...”

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.

24. Though the initial complaint dated 23/03/2022 shows that there was promise to marry, it nowhere shows that such promise was given before establishing a sexual relationship and that too with an intention not to comply with it. The victim herself disclosed that the accused accompanied to her and was introduced to her family members.

25. After detection of pregnancy, though initially the accused came to the victim and stated to her that he would continue the relationship if the baby was not there, such statement is not found when it was recorded by the Magistrate under Section 164 of CrPC. It is necessary to note that the statement recorded under Section 164 of CrPC is on oath and that too before the Magistrate. Such statement is having more weightage than the one which is recorded under Section 161 of CrPC. It is nowhere case of the victim that her statement was recorded by the Magistrate on any false promise or on threat by the accused. The statement so recorded is part and parcel of the charge sheet. It was before the learned Sessions Court while ascertaining as well as considering the material while rejecting the discharge application. Unfortunately, there is no reference or any discussion as to why the statement of the victim recorded before

the Magistrate under Section 164 of CrPC has been disbelieved even at this stage.

26. The learned Sessions Court in the impugned order recorded that while deciding the application for discharge, opportunity was given to the victim who claimed that the statement under Section 164 of CrPC was recorded when the accused again gave her promise to marry. The learned Sessions Judge believed such statement of the victim without considering the impact of the statement recorded by the Magistrate and that too on oath.

27. The reply filed by the victim in this Court is not on affidavit, however, it is only signed by the victim.

28. The question of framing of charge is only on the basis of the material available in the charge sheet itself. It is well settled that the Court cannot look into any other material or even so called affidavit and reply filed by the respective parties in order to come to the conclusion whether to frame charge or not. The power under Sections 227 and 228 of CrPC are therefore limited to the material which is appended to the charge sheet.

29. In the present matter, the learned Sessions Court believed the statement or the reply of the victim which she filed while opposing the application for discharge, however completely ignored the statement of

the victim which she gave on oath before the Magistrate and recorded under Section 164 of CrPC. Besides this, the record shows that the victim is from time to time changing her version. The first statement was recorded on 25/03/2022 wherein she impleaded the accused. The statement under Section 164 of CrPC was recorded before the Magistrate on 30/03/2022 wherein the victim has completely exonerated the accused. The third statement by way of reply of the applicant for discharge filed in trial Court whereas her forth statement is by way of reply filed to this revision.

30. In the case of **Sonu @ Subhash Kumar**(supra) the Apex Court observed that the facts of each case have to be considered for the purpose of arriving to the conclusion that there is material to frame charge or not. In that matter, the statement of the victim was also recorded under Section 164 of CrPC wherein she has specifically stated that her relationship with the accused was a consensual. On that basis, the Apex Court observed that due to subsequent development refusal to marry cannot be termed as the refusal from the inception and obtaining consent by misconception. Accordingly, the charge framed against the accused Sonu was quashed and set aside.

31. The matter in hand is having many similarities with the case of Sonu wherein the statement of the victim recorded under Section 164 CrPC completely exonerate him and the victim herself admits that the

relationship between them was consensual. Similarly, the decision to abort the fetus was taken jointly by the victim and the accused and accordingly both of them visited the clinic/hospital at Porvorim.

32. The statement of Doctor who is having a clinic at Porvorim recorded on 04/04/2022. His statement also clearly goes to show that the victim come to his hospital along with the accused and agreed for the termination of pregnancy. Statement further shows that thereafter the victim visited his hospital for further treatment. It is highly improbable that the victim would visit the same hospital for further treatment when she was forced to terminate the pregnancy.

33. Since the ingredients of Section 375 of IPC are not made out from the material placed on record and the view favouring the accused is more probable, the observations of the learned Sessions Court with regard to framing of charge require interference as the same are against the settled principles as well as the facts in the present matter.

34. The ingredients of Section 313 of IPC are also not made out in view of the statement under Section 164 before the Magistrate, the statement of Doctor and Consent form. These documents *prima facie* show that consent to abort was given by the victim without any coercion or force. Thus ingredients of Section 201 IPC are also not made out.

35. The material placed along with the charge sheet fails to satisfy the ingredients of Section 375, 313 and 201 IPC. The view which is more plausible in the present matter is clearly favouring the accused. Under these circumstances and for the above reasons, the revision succeeds. The impugned order is hereby quashed and set aside. The application filed for discharge by the accused stands allowed.

36. The revision stands disposed of accordingly.

BHARAT P. DESHPANDE, J

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VISHAL BHORI

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