

(Abid Ali vs. State of M.P. & Anr.)

18.05.2017

Shri Anil Kumar Mishra, Counsel for the applicant.

Shri Prakhar Dhengula, Panel Lawyer for the respondent No.1/State.

None for the respondent No.2 though served.

This petition under Section 482 of Cr.P.C. has been filed for quashing the FIR in Crime No.309/2016 registered by Police station Madhoganj, District Gwalior as well as the charge sheet filed for offence under Section 376 of IPC.

The necessary facts for the disposal of the present petition in short are that the respondent No.2 filed a written complaint on 23.7.2016 against the applicant alleging that near about four years back i.e. in the year 2012 she came in contact that the applicant in a marriage ceremony and both of them fell in love with each other. The applicant had promised the complainant to marry and had requested that she must wait for sometime and the parents of the applicant were also ready for the marriage. Thereafter it is alleged that on false promise of marriage, the applicant had taken her on various occasions to Apaganj Farm House and had physical relations with him. Whenever the prosecutrix requested the applicant to marry her, every time he tried to avoid the same on the pretext that he would inform her after talking to his family members. On 15.2.2016 also the applicant took the prosecutrix to his Farm House and had physical relations with her on the promise of marriage and thereafter as the applicant has refused to marry her, therefore, the FIR was lodged.

The police after registering the FIR, recorded the statements of the witnesses, got the pregnancy test of the prosecutrix conducted and after completing the formalities filed the charge sheet against the applicant for offence under Section 376 of IPC.

It is submitted by the counsel for the applicant that the charges have not been framed so far.

It is submitted by the counsel for the applicant that even if the entire allegations made by the prosecutrix are accepted as true then it would be clear that she was a consenting party and, therefore, no offence under Section 376 of IPC is made out. So far as the promise of marriage is concerned, it is not the case of the prosecutrix that the applicant had physical relations with her for once or twice on a false promise of marriage but according to her she had physical relations with the applicant for the last about four years and every time the applicant was avoiding the question of marriage which clearly shows that the respondent knew this fact that the marriage is not possible even then if she had a consensual sex with the applicant, then it cannot be said that the consent of the prosecutrix was obtained either by misrepresentation or misconception of fact. Undisputedly the prosecutrix is major and is aged about 26 years. Even in the year 2012 she was major aged about 22 years and thus it is clear that the prosecutrix was a consenting party and, therefore, no offence is made out. It is further submitted that when two views are possible and one of them gives right to suspicion only which is distinguishable from grave suspicion as to the guilt of the accused then, this Court in

exercise of powers under Section 482 of Cr.P.C. can quash the FIR as well as the charge sheet.

Per contra, it is submitted by the counsel for the State that the applicant had made false promise of marriage to the prosecutrix and under the false promise of marriage he had induced the prosecutrix to get herself involved in physical relations and since the consent was obtained by misrepresentation and misconception of facts, therefore, at this stage it cannot be said that no offence is made out.

Heard the learned counsel for the parties.

The written complaint lodged by the prosecutrix is reproduced as under:-

“प्रति,

श्रीमान् थाना प्रभारी महोदय

थाना-माधौगंज जिला ग्वालियर

विषय:- प्रार्थिनी के साथ शादी करने का झांसा देकर करीब 4 साल तक बलात्कार करने बावत्।

महोदय,

निवेदन है कि मैं प्रार्थिया शबनम पुत्री स्व. अग्गा खान उम्र 26 निवासी कर्नल साहब की डयोढी घुड़चढी मौहल्ला इन्दरगंज में रहती हूं मेरा परिचय करीब 4 साल पेहले 2012 में आबिद अली पुत्र मुन्ना अली निवासी आपागंज से शादी समारोह में परिचय हुआ था तब से ही हम दोनों में प्रेम प्रसंग हो गया और आबिद ने मुझे से शादी करने का आश्वासन दिया और कहा कुछ समय रुक जाओ। इस में आबिद के माता पिता की भी सहमति थी। तब आबिद मुझे बहला फुसलाकर कई बार अपनं आपागंज फार्म हाऊस पर ले गया जहाँ ले जाकर शादी का झांसा देकर कई बार शारीरिक संबंध बनाता रहा जब मेरे द्वारा आबिद से शादी के लिए कहा गया तो बहाने बनाता रहा और कहा कि मैं अपने परिवार वालो से बात करके बताऊंगा। और मुझे 15 फरवरी 2016 को अपने फार्म हाऊस पर ले गया था और शारीरिक संबंध बना कर शादी का आश्वासन दिया इस के बाद से आबिद ने शादी से इन्कार कर दिया कि मैं तुझ से शादी नहीं करूंगा।

तब मेरे भाई ने मुझे घर से निकाल दिया तब मैं थक हार कर अपनी बहन शहनाज के साथ रिपोर्ट लिखाने आई हूँ।”

From the written complaint it is clear that the applicant and the respondent fell in love about four years back i.e. in the year 2012 and at that time the applicant had agreed to marry the respondent. It is clear from the complaint that for the last four years, on the various occasions the applicant took the prosecutrix to his Farm House where he had physical relations with her. If the FIR as well as the case diary statement of the prosecutrix is considered, then it is clear that whenever the prosecutrix had asked the applicant to marry her, at that time the applicant avoided and refused to give a final answer on the pretext that he would talk to his family members. Thus, it is clear that the prosecutrix was aware of this fact that the applicant is avoiding to marry her and still she continued with her physical relations with the applicant. It is not a case that the prosecutrix did not indulge in further physical relations after the applicant had avoided in answering the question of marriage. Once the prosecutrix knew this fact that there is a bleak possibility of marriage then she should not have indulged in further physical relations with the applicant. The prosecutrix is undisputedly is a major lady aged about 26 years in the year 2016 which clearly shows that she must have been 22 years in the year 2012. She was fit and intelligent enough to understand the conduct of the applicant. If she allowed herself to indulge in consensual physical relations out of love then it cannot be said that her consent was obtained by misconception of fact or by misrepresentation.

It is submitted by the counsel for the State that even if it is treated that on earlier occasions the prosecutrix was a consenting party to the physical relations but even then the last act of the applicant in having physical relations with the prosecutrix on a false pretext of marriage would amount to rape as it cannot be said that the consent given by the prosecutrix is a free consent as defined under Section 90 of IPC.

If the complaint is considered it would be clear that it is the allegation that on 15.2.2016 the applicant took the complainant to his Farm House had physical relations with her and thereafter he refused to marry the prosecutrix. It is clear that the refusal of the applicant to marry the respondent subsequent to 15.2.2016 would not make the consent of the prosecutrix obtained by misrepresentation or misconception of fact.

It is next contended by the counsel for the State that all these arguments can be raised by the counsel for the applicant at the time of framing of charges.

Once the petition under Section 482 of Cr.P.C. has been filed then it has to be decided on merits. The petition under Section 482 of Cr.P.C. cannot be dismissed only on the ground that the applicant has an opportunity to argue the matter at the stage of framing of charges. Even otherwise Section 227 of Cr.P.C. provides that if the judge considers that there is no sufficient ground for proceeding against the deceased then he shall discharge the accused, therefore, it is clear that whether the prosecutrix was the consenting party or not may be a disputed question of fact under the facts and circumstances of some of the cases

which may require the prosecution/trial of the accused but where the allegations are so clear and apparent on the record which leads to conclusion that the prosecutrix knowing fully well that the applicant was avoiding the question of marriage but still she continued with her physical relations with the applicant then it cannot be said that her consent was obtained by misconception of fact or by misrepresentation.

The Supreme Court in the case of **Deepak Gulati vs. State of Haryana** reported in **AIR 2013 SC 2071** has held as under:-

"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 misrepresentation 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.

In the case of **Tilak Raj vs. State of Himachal Pradesh** reported in **AIR 2016 SC 406**, the Supreme Court has held as under:-

19. We have carefully heard both the parties at length and have also given our conscious thought to the material on record and relevant provisions of The Indian Penal Code (in short "the IPC"). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After a perusal of copy of FIR and evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.

20. The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of prosecutrix regarding sexual intercourse on false

pretext of marrying her is concocted and not believable. In fact, the said act of the Appellant seems to be consensual in nature. The trial court has rightly held thus:

"23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.

24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.

25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her testimony itself shows that the entire story of marriage has unfolded after 05.01.2010 when the accused was stated to have been summoned to the office of the Dy. S.P. Prior to 05.01.2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but

her cross-examination shows that no doubt the two were in relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, come talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage."

The Supreme Court in the case of **Uday vs. State of Karnataka** reported in **(2003) 4 SCC 46** has held as under:-

"**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 straitjacket 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 them. 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.

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the

prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

Thus, from the facts and circumstances of the case, it is clear that the prosecutrix was deeply in love with the

applicant. She continued to have physical relations with applicant knowing fully well that the applicant is avoiding the question of marriage. The prosecutrix went along with the applicant all alone to his farm house on various occasions and had physical relations with him. Under these circumstances it cannot be held that the consent of the prosecutrix was obtained by making false promise of marriage.

Considering the allegations and the surrounding circumstances, this Court is of the considered opinion that the consent of the prosecutrix cannot be said to have been obtained by making false promise of marriage, and therefore it cannot be said that the applicant had committed offence punishable under Section 376 of IPC.

Consequently, the charge sheet filed against the applicant for offence under Section 376 of IPC is quashed.

The petition succeeds and is hereby **allowed**.

(G.S. Ahluwalia)
Judge

(alok)