

IN THE HIGH COURT OF ORISSA AT CUTTACK
BLAPL No.2818 of 2021

Santosh Kumar Nayak *Petitioner*
Mr. Debasnan Das, Adv

-versus-

State of Odisha *Opposite Party*
Mr. D. Mund, AGA

CORAM:
DR. JUSTICE S.K. PANIGRAHI

Order

No.

8.

ORDER

23.12.2022

1. This matter is taken up through hybrid mode.
2. The Petitioner has filed this application under Section 439 of Cr.P.C. seeking for bail in connection with Nimapara P.S Case No.29 of 2020 under Section 344/376(2)(n)/506/109 of the I.P.C corresponding to G.R Case No. 85 (A) of 2020 pending before the court of Learned J.M.F.C Nimapara.

I. CASE OF THE PROSECUTION

3. The case of the prosecution, in brief, is that on 12.01.20, at about 10A.M, the present petitioner took the victim from her house to Bhubaneswar with a promise to marry her. The present petitioner maintained physical relationship with the victim for several days and later, abandoned her. After getting information from the victim, her father and brother proceeded to Bhubaneswar and rescued her. It is further alleged that on 03.02.2020 when the father of the informant brought such fact to the notice of the father of the present

petitioner, the latter abused them and also threatened with dire consequences in case such fact is reported to the local police.

II. SUBMISSIONS ON BEHALF OF THE PETITIONER

4. It is submitted by Learned Counsel for the Petitioner that admittedly, the victim in the present case is a major and accompanied the present petitioner to Bhubaneswar according to her sweet will. Moreover, the victim has not stated the exact date of alleged incident in the F.I.R. Therefore, taking into account the age of the victim and other surrounding circumstances, there is no legal bar to release the present petitioner on bail.
5. It is contended by Learned Counsel for the Petitioner that the medical examination report negatives the allegations of forceful sexual assault. In view of such medical evidence the liability of the present petitioner cannot be attracted in a case u/s 376(2)(n) of I.P.C.

III. SUBMISSION ON BEHALF OF THE OPPOSITE PARTY

6. Per Contra, Learned Addl. PP raised objection to Petitioner's bail application considering the nature of allegations and offences committed by the Petitioner. It was alleged that the Petitioner with assurance of marriage took the victim with him and repeatedly committed sexual intercourse with the victim and took photos of her naked body. Thereafter, he absconded after abandoning the victim. Therefore, the facts

and circumstances of this case establishes a prima facie case u/s 376 of the I.P.C along with other offences against the Petitioner.

IV. COURT'S ANALYSIS AND REASONS

7. Perused the up to date case diary and material on record, more specifically, the F.I.R. lodged by the victim and her statement U/s 161, Cr.PC. It. prima facie, reveals from the record that both the victim and the accused had acquaintance with each other and had love affairs which is affirmed by the victim. There is also a prima facie belief that the petitioner had given a false promise to the victim to marry and based on such assurances, the victim had accompanied the Petitioner to Bhubaneswar on 12.01.20, at about 10 A.M. However, it is alleged that the Petitioner abandoned the victim due to which the victim had to starve for two days. The allegation that the petitioner committed sexual intercourse with the victim and captured photos of victim's naked body and subsequently, abandoned her seems to be cloudy without a proper trial. The prima facie look of the medical report suggests that there was no forcible sexual intercourse though it is a matter of trial. Similarly, medical report suggests that the victim girl was not pregnant at the time of her medical examination. Truthfulness or falsity of the allegations, essentially pertains to the realm of

evidence and the same cannot be pre-judged at this initial stage which warrants a trial to establish.

8. The factual position narrated above would enable this Court to draw some inferences on the assertion made by the complainant/victim -against the Petitioner. As the facts unfold, the victim being a major girl with sound mind, there seems to be no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. There could be a possibility of experimentation with erotic asphyxiation which is very much part of their sexual autonomy. It is an undenying fact that our society is still largely conservative when it comes to matters of sex and sexuality. The virginity is a prized element. Even if such relationship existed, though it is unequivocally denied by the Petitioner, a consensual relationship without even any assurance, obviously will not attract the offence under Section 376 of the Indian Penal Code.

9. The definition of rape as codified in Section 375 of the Indian Penal Code wherein rape has been defined as certain sexual acts when committed on a victim, falling under any of the seven descriptions:

First; against her will; second, without her consent; third; with her consent, when consent has been obtained under fear of death or hurt, fourth; where consent has been given by the victim in the wrong belief that the man is her

husband, fifth; when the consent is given when she is of unsound mind or intoxicated and unable to understand the nature of consequences of what she is consenting to, sixth; consent from a girl under the age of 18 years; and seventh; when she is not in position to communicate the consent. The septet ingredients mentioned hereinabove does not cover the false-promise-of-marriage induced sexual intercourse.

10. The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In *Jayanti Rani Panda vs. State of West Bengal and Anr*¹, the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be

¹1984 CrL. L.J. 1535

performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded:-

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. S. 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

11. The Supreme Court in *Yedla Srinibas vs. State of Andhra Pradesh*² held that the voluntary consent depends on facts of each case and factors such as age of the girl, her education, her social status and likewise the social status for the boy.

²(2006) 11 SCC 615

Though the version of the victim also commands great respect and acceptability in rape cases, if there are circumstances which cast some doubt in the mind of the court about the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape. The Supreme Court in *Vinod Kumar vs. State of Kerala*³ held that it is not possible to convict a person, who did not hold out the promise and not present in the false scenario which had the consequence of other party inducing commission of an act. In such cases, the accused cannot be held to be culpable. In fact, such cases are on rise, where both the persons, out of their own sweet will and choice, develop consensual physical relationship but when the relationship gets sour for some reasons, the women use the law as a lethal weapon for vengeance and personal vendetta. They, out of anger or frustration, tend to convert such consensual acts as incidents of rape. This misuse defeats the very purpose of the provision of law.

12. In the recent case of *Anurag Soni vs. State of Chhattisgarh*⁴, the Supreme Court, has attempted to make a distinction between a promise which is unfulfilled and a promise which is false from the very beginning. The natural corollary that flows from it is that if a man can prove that he intended to marry the woman but changed his mind later, then it's not

³(2014) 5 SCC 678

⁴(2019) 6 Scale 211

rape. It's only considered rape if it's established that he had dubious intentions from the beginning of the relationship. The consent obtained on a false promise to marry has been succinctly articulated in *Pramod Suryabhan Pawar vs. The State of Maharashtra and Ors*⁵ wherein the court held as follows:

"To summarize 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 sexual act."

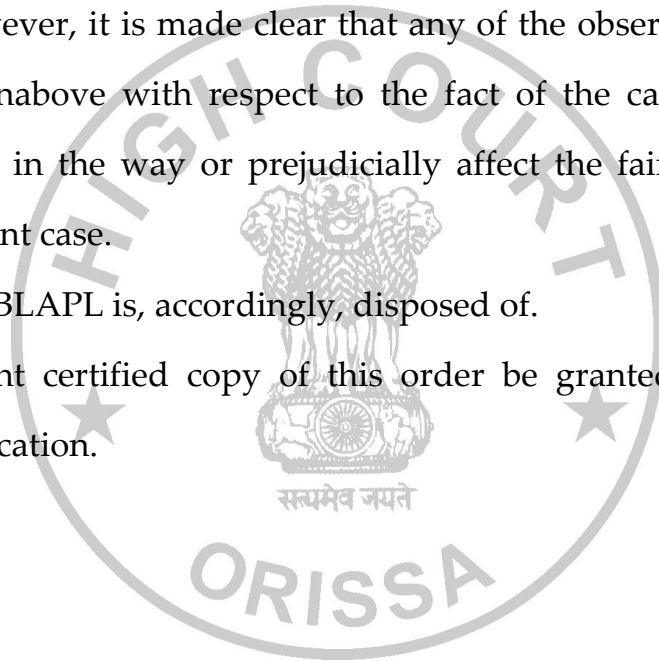
13. The intention of the law makers is clear on this issue. The rape laws should not be used to regulate intimate relationships, especially in cases where women have agency and are entering a relationship by choice. It is also equally disturbing, many of the complaints come from socially disadvantaged and poor segment of the society, rural areas, who are often lured into sex by men on false promises of marriage. The rape law often fails to capture their plight. Nonetheless, it radiates from the above discussion that the

⁵(2019) 9 SCC 608

law is well settled that consent obtained on a false promise to marry is not a valid consent. Hence, the automatic extension of provisions of Section 90 of I.P.C. to determine the effect of a consent under Section 375 of I.P.C. deserves a serious relook. The law holding that false promise to marriage amounts to rape appears to be erroneous. The authoritative commentary on Criminal Law by Glanville William corroborates this proposition of law. (Glanville Williams, Criminal Law, Second Edition, Universal Law Publishing, at page 559-560.) Since the framers of law have specifically provided the circumstances when 'consent' amounts to 'no consent' in terms of Section 375 of I.P.C., hence consent for the sexual act on the pretext of marriage is not one of the circumstances mentioned under Section 375 of I.P.C.

14. The alleged conduct of the Petitioner may not be a generally approved social conduct but the instant case is riddled with some visible contradiction of facts. The law on this issue, at this stage, as discussed above, has potency to come to the rescue of the Petitioner. The factual matrix of the case is based on a prima facie view based on records, as so many aspects of the matter are hungry for a thorough trial and till that time the benefit of bail deserves to be passed on to the Petitioner.

15. Having considered the matter in the aforesaid perspective and guided by the precedents cited hereinabove, prayer of the Petitioner is allowed.
16. Accordingly, the Court in seisin over the matter will enlarge the Petitioner on bail imposing some terms and conditions as deems fit and proper with further condition that he will cooperate the investigation and shall not threaten the victim or misutilise the liberty granted to him.
17. However, it is made clear that any of the observation made hereinabove with respect to the fact of the case, shall not come in the way or prejudicially affect the fair trial of the present case.
18. The BLAPL is, accordingly, disposed of.
19. Urgent certified copy of this order be granted on proper application.



(Dr. S.K. Panigrahi)
Judge

B.Jhankar