

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 05th APRIL, 2022

IN THE MATTER OF:

+ **CRL.REV.P. 175/2021 & CRL.M.A. 6024/2021**

SHAILENDRA KUMAR YADAV Petitioner
Through Mr. Badar Mahmood, Advocate.

versus

STATE Respondent
Through Ms. Neelam Sharma, APP for the
State with SI Ajay Singh, Police
Station Paharganj.
Complainant - in person.

CORAM:

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. This petition under Sections 397/401 Cr.P.C. read with Section 482 Cr.P.C. has been filed for setting aside the Order dated 08.03.2021, passed by the learned Additional Sessions Judge/SFTC – 2 (Central), Tis Hazari Courts, Delhi, in Case No. 436/2020 arising out of FIR No. 319/2019 dated 10.11.2019 registered at P.S. Paharganj for offences under Section 376(2)(n) of the Indian Penal Code, 1860 (*hereinafter*, “IPC”), framing charges against the Petitioner for offences under Section 376(2)(n) IPC.

2. Facts, in brief, leading up to the instant petition are as follows:

- a) It is stated that the Petitioner had extended a false promise of marriage to the prosecutrix on the basis of which he had sustained a physical relationship with her. The prosecutrix and

the Petitioner were engaged, and the wedding was postponed due to some issues in the family of the prosecutrix. Thereafter, arguments arose about the date of marriage as well as the financial condition of the prosecutrix. It is stated that the prosecutrix requested the Petitioner to marry her by way of court marriage or in an Arya Samaj temple, and this request was rejected by the Petitioner.

- b) It is stated that the Petitioner and his family would quibble with the prosecutrix with regard to her way of living and her lifestyle, and other trivial matters, in order to put an end to the marriage. The prosecutrix has alleged that the issues were being raised by the Petitioner and his family due to the fact that the prosecutrix was not financially well-off, and that the Petitioner wanted to marry a girl whose father would have the wherewithal to invest money in his marriage. On the basis of this complaint, the instant FIR was registered under Section 376(2)(n) IPC against the Petitioner.
- c) *Vide* Order dated 28.01.2020, this Court granted anticipatory bail to the Petitioner herein. Chargesheet was filed on 19.08.2020, and *vide* Order dated 08.03.2021, the Ld. Trial framed charges against the Petitioner under Section 376(2)(n) IPC. Aggrieved by this, the Petitioner has approached this Court by way of the instant revision petition.

3. Mr. Badar Mahmood, learned Counsel for the Petitioner, submits that the Petitioner and the prosecutrix were involved in a serious relationship and that physical relations between the two had never taken place. He states that

despite the incompatibility between the two, the Petitioner was in love with the prosecutrix and intended to settle down with her. Mr. Mahmood states that a *roka* ceremony had also taken place between the Petitioner and the prosecutrix, and that the instant matter is merely a case of a relationship that has ended on bad terms.

4. The learned Counsel for the Petitioner submits that the prosecutrix would constantly fight with the Petitioner and taunt him about his profession as well as his financial capacity. He states that the prosecutrix insisted on the wedding ceremony being held at a venue which was too expensive for the Petitioner to finance, and due to this, the marriage between the two was put off which led to the parents of the Petitioners being forced to face a very embarrassing position.

5. Mr. Mahmood brings to the attention of this Court that the prosecutrix and her family threatened the Petitioner and his family that if they did not get the Petitioner married to the prosecutrix immediately, they would file false cases of rape and suicide against them. As a result, the Petitioner and his father immediately filed a complaint dated 11.11.2019 with SHO, North Rohini, Delhi. He states that they were later on made aware that FIR No. 319/2019 dated 10.11.2019 was registered at P.S. Paharganj.

6. With regard to the impugned Order dated 08.03.2021, the learned Counsel for the Petitioner submits that the Ld. Trial Court has failed to apply its judicial mind to the facts of the case and has mechanically framed charges against the Petitioner under Section 376(2)(n) IPC. Mr. Mahmood submits that the disclosure statement of the prosecutrix under Section 164 Cr.P.C. categorically notes that it had taken the Petitioner three months to convince the parents of the prosecutrix to allow her to get married, and

therefore, the issue pertaining to false pretext of marriage. He states that the allegations against the Petitioner are *prima facie* fabricated and that the Ld. Trial Court has failed to take the same into account while discerning that there was sufficient ground to proceed against the Petitioner. He, therefore, prays for the impugned Order dated 08.03.2021 to be set aside.

7. *Per contra*, Ms. Neelam Sharma, learned APP for the State, submits that the investigation has revealed that during investigation, a statement of the prosecutrix under Section 164 Cr.P.C. had been recorded and the allegations in the FIR were corroborated. She further submits that raids had been repeatedly taken place at the residence of the Petitioner and he was never found at the available address. She states that the Petitioner did not join investigation initially, and that it was only after this Court granted anticipatory bail to the Petitioner *vide* Order dated 28.01.2020 that he joined investigation. She opposes the instant application on the ground that the Ld. Trial Court has sufficiently satisfied itself that a *prima facie* case is made out against the Petitioner.

8. The prosecutrix-in-person has also addressed this Court and put forth her submissions with regard to the matter at hand. She has reiterated the allegations that have been delineated in FIR No. 319/2019 and has opposed the instant revision petition on the ground that the facts of the case clearly make out the charges that have been framed against the Petitioner.

9. Heard Mr. Badar Mahmood, learned Counsel for the Petitioner, Ms. Neelam Sharma, learned APP for the State, the prosecutrix-in-person, and perused the material on record.

10. Before delving into the correctness of the impugned Order dated 08.03.2021 whereby the Ld. Trial Court framed charges under Section

376(2)(n) IPC against the Petitioner, this Court finds it necessary to reiterate the law pertaining to the framing of charges and the scope of this Court to interfere under Sections 397/401 Cr.P.C. In Union of India v. Prafulla Kumar Samal, (1979) 3 SCC 4, the Supreme Court laid down the principles that are to be followed while dealing with discharge under Section 227 Cr.P.C. or framing of charges under Section 228 Cr.P.C. The same has been reproduced as under:

“10. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

- 1) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.*
- 2) Where the materials placed before the Court disclose grave suspicion against the accused which has not been properly explained the Court will be fully justified in framing a charge and proceeding with the trial.*
- 3) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. **By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.***

4) *That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced court cannot act merely as a Post Office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the Court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial.”* (emphasis supplied)

11. The Supreme Court has time and again held that at the stage of framing of charges, the Court possesses the power to sift and weigh the evidence for the limited purpose of ascertaining whether or not a *prima facie* case has been made out against the accused. The Ld. Trial Court must exercise its judicial mind to the facts of the case before arriving at the conclusion that there is sufficient ground for proceeding against the accused. This exercise must be undertaken so as to ensure that an individual does not have to be put through the rigours of the criminal judicial system for no fault of their own.

12. Similarly, in P. Vijayan v. State of Kerala, (2010) 2 SCC 398, the Supreme Court had enunciated that a Judge was not a mere post office that was to frame the charge at the behest of the prosecution, but was compelled to apply its mind to the facts of the case. The relevant portion of the said judgement has been reproduced as under:

“10. Before considering the merits of the claim of both the parties, it is useful to refer to Section 227 of the Code of Criminal Procedure, 1973, which reads as under:

“227. Discharge.—If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing.”

If two views are possible and one of them gives rise to suspicion only, as distinguished from grave suspicion, the trial Judge will be empowered to discharge the accused and at this stage he is not to see whether the trial will end in conviction or acquittal. Further, the words “not sufficient ground for proceeding against the accused” clearly show that the Judge is not a mere post office to frame the charge at the behest of the prosecution, but has to exercise his judicial mind to the facts of the case in order to determine whether a case for trial has been made out by the prosecution. In assessing this fact, it is not necessary for the court to enter into the pros and cons of the matter or into a weighing and balancing of evidence and probabilities which is really the function of the court, after the trial starts.

11. At the stage of Section 227, the Judge has merely to sift the evidence in order to find out whether or not there is sufficient ground for proceeding against the accused. In other words, the sufficiency of ground would take within its fold the nature of the evidence recorded by the police or the documents produced before the court which

ex facie disclose that there are suspicious circumstances against the accused so as to frame a charge against him.”
(emphasis supplied)

13. In the instant case, it has been alleged that the Petitioner has committed an offence under Section 376(2)(n) IPC as per which whoever commits rape repeatedly on the same woman shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The allegation is that under the garb of marriage, the Petitioner has repeatedly raped the prosecutrix.

14. At this juncture, it would be pertinent to examine the difference between a false promise of marriage and a breach of promise to marry. In the latter, sexual relations are initiated on the premise that the two individuals will marry at a later point of time. However, in the former, sexual relations take place without any intention of marrying at all and the consent that is obtained for the said relations to take place is vitiated by way of misconception of fact. The Supreme Court has elaborated this aspect in various judgements. In Pramod Suryabhan Pawar v. State of Maharashtra and Anr., (2019) 9 SCC 608, the Supreme Court had observed as follows:

"16. 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. The “consent” of a woman under Section 375 is vitiated on the ground of a “misconception of fact” where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati [Deepak Gulati v. State of Haryana, (2013) 7 SCC 675 : (2013) 3 SCC (Cri) 660] this Court observed : (SCC pp. 682-84, paras 21 & 24)

“21. ... 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.

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to

marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, [Ed. : The matter between two asterisks has been emphasised in original.] unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her [Ed. : The matter between two asterisks has been emphasised in original.] .”

(emphasis supplied)

18. *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.”*

15. Similarly, the Supreme Court had categorically distinguished between rape and consensual sex, as well as the distinction between the mere breach of a promise, and not fulfilling a false promise in Deepak Gulati v. State of Haryana, (2013) 7 SCC 675. It had been stated as follows:

“21. 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.

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance”. Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”

16. Therefore, in order to arrive at the conclusion that sexual relations were coerced, it is necessary to examine that whether at the stage of rendering a promise to marry, it was done with the intention of not keeping the promise and, therefore, was false at the inception itself (See also Sonu @ Subash Kumar v. State of Uttar Pradesh and Anr., 2021 SCC OnLine SC 181). If it is found that the promise of marriage was genuine and that the marriage failed to fructify due to external circumstances, then the promise cannot be said to be false, and consent as per Section 90 IPC is not vitiated.

17. The FIR as well as the Status Report stipulate that the Petitioner and the prosecutrix were in a long-term relationship and even a *roka*(engagement) had taken place. Pictures of the engagement ceremony have also been produced before this Court. The FIR further states that a wedding ceremony was supposed to take place and that it was only at the

instance of the prosecutrix that the marriage was postponed. The FIR goes on to state that thereafter, arguments began to take place between the prosecutrix and the Petitioner. Further, the prosecutrix started facing resistance from the Petitioner's family who were against the marriage and that this led to the breaking off of the relationship between the Petitioner and the prosecutrix. The Section 164 CrPC statement of the prosecutrix reveals that it took the Petitioner three months to convince the prosecutrix's parents to allow her to marry him.

18. As per Section 90 IPC, consent given under fear or misconception cannot be said to be consent, and in this context, it becomes relevant to factor in the aspect that the prosecutrix and the Petitioner were in a long-term relationship. Furthermore, even an engagement ceremony had taken place between the two and the same was attended by all family members, which indicates that the Petitioner did indeed intend to marry the prosecutrix. Just because the relationship ended on hostile terms, it cannot be said there was no intention of the Petitioner to marry the prosecutrix in the first place. Flowing from this, this Court is of the opinion that the consent so accorded by the prosecutrix for the establishment of a physical relationship was not predicated upon misconception or fear.

19. The impugned Order dated 08.03.2021 fails to accord any reasons to substantiate as to how there is sufficient material to proceed against the Petitioner under Section 376(2)(n) IPC. The said Order has merely recorded the submission of the Ld. APP therein that there is sufficient material on record and has proceeded at the behest of the prosecutor, without providing any reasons to justify its stand. As has been stated above, the Ld. Trial Court is not a mere post office and must apply its mind to the facts of the case to

arrive at the conclusion as to whether a *prima facie* case is made out against the accused that would warrant charges to be framed against them. The impugned Order dated 08.03.2021 has evidently failed to perform its duty and has rendered a mechanical order on charge without sifting or weighing the evidence before it. Due to the legal infirmity replete in the said Order, this Court deems it fit to exercise its jurisdiction under Sections 397/401 Cr.P.C. read with Section 482 Cr.P.C. to set the same aside.

20. In light of the above observations, the instant petition is allowed, along with pending application(s), if any.

SUBRAMONIUM PRASAD, J.

APRIL 05, 2022

Rahul

नात्यमेव जयते