

IN THE HIGH COURT OF JUDICATURE OF BOMBAY  
BENCH AT AURANGABAD

ANTICIPATORY BAIL APPLICATION NO. 268 OF 2020

Siddharth Ramkirshna Chitte  
Age 33 years, occ. Labour work,  
r/o Navagaon, Tq. Navapur  
Dist. Nandurbar  
At Present r/o Narayanpur  
Tq. Ucchhal, Dist. Tapi (Gujrat State)

Applicant

Versus

1. The State of Maharashtra
2. The Deputy Superintendent of Police  
Nandurbar, Tq. Nandurbar  
Dist. Nandurbar

Respondents

Mr. R.S. Shinde, Advocate for the applicant.  
Mr. V.S. Badakh, APP for respondents.

**CORAM : M.G. Sewlikar, J.**  
**RESERVED ON : 22<sup>nd</sup> JUNE, 2020**  
**PRONOUNCED ON : 26<sup>th</sup> JUNE, 2020.**

PER COURT :

1. This is an application for grant of anticipatory bail in Crime No. 67/2020 registered under Sections 376, 417, 323, 504, 506 of the Indian Penal Code with Navapur Police Station, Dist. Nandurbar.

2. Facts leading to this application are that the informant

aged 20 years lost her mother during her childhood and lost her father two years ago. She used to go for labour work at poultry farm, Naya Mondha, where she got acquainted with the applicant. He promised her to marry. About 4 to 5 months before the lodging of First Information Report, the applicant took her to Shabri Dham in his four wheeler bearing No. GJ RF 9444. He had sexual intercourse with her twice in a lodge under the promise of marriage. He had also sexual intercourse with her in his car. The prosecutrix was insisting on him to marry her. About two months before the filing of the First Information Report, he called her to Navapur and demanded sexual favour from her. She declined to do so unless he performs marriage with her. He got enraged and beat her. Thereafter she learnt that the applicant is a married man. She did not lodge the report soon after the incident as her parents are no more. On the basis of the First Information Report, offence under the aforesaid sections has been registered against the applicant.

3. Heard Shri R.S. Shinde, learned counsel for the applicant and Shri V.S. Badakh, learned APP for the State.
4. Shri Shinde argued that from the bare reading of the

First Information Report, it is evident that the alleged sexual intercourse was with the consent of the informant. Bare reading of the First Information Report reveals that the alleged sexual intercourse was a consensual sex. Therefore, offence under Section 376 of the Indian Penal Code cannot be invoked. The prosecutrix is major. She was well aware of the marital status of the applicant and the consequences of her action. He submitted that there is a custom of performing second marriage in Adiwasi community and the prosecutrix is aware of it. Therefore, the applicant is entitled to be released on anticipatory bail.

5. Learned APP Shri Badakh submitted that the investigation papers do not reveal that the prosecutrix was aware of the marital status of the applicant. The applicant never disclosed that he was a married man. Had he disclosed his marital status to the prosecutrix, she would not have surrendered herself to the sexual advances of the applicant. He submitted that the prosecutrix would not have surrendered herself to the sexual advances of the applicant, but for his false promise to marry. He, therefore, prayed for the rejection of the application.

6. From the allegations contained in the First Information Report, it is apparent that the prosecutrix gave consent for the sexual intercourse as the applicant promised to marry her. The question is whether the consent of the prosecutrix was a voluntary consent or it was a consent based on mis-conception of facts. In case of rape under Section 376 of the Indian Penal Code, more particularly, in cases where consent is obtained by giving false promise of marriage, it has to be ascertained whether the accused did not have the intention to marry the prosecutrix right from the inception. The law is well settled on this aspect of the matter. In the case of Kaini Rajan Vs. State of Kerala, (2013) 9 SCC 113, the Honourable Supreme Court has observed thus :-

“12. Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. “Consent” is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90 though, does not define “consent”, but

describes what is not consent. “Consent”, for the purpose of section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances.

7. In the case of Deepak Gulati Vs. State of Harayana, (2013) 7 SCC 675, the Honourable Supreme Court has observed thus:-

“21. Consent may be express or implied, coerced or misgued, 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."

8. The term "Consent" is defined under Section 90 of the Indian Penal Code thus :-

**90. Consent known to be given under fear or misconception :** A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear or injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or

9. Bare reading of this provision makes it clear that the consent will be vitiated if it is obtained by putting the prosecutrix

under fear of injury or under a misconception of fact and, if, the person doing the act knows that the consent was given in consequence of such fear or misconception. Thus, the essential requirement is that the consent must have been obtained under fear of injury or under misconception of fact and the accused must be aware that the consent was given in consequence of such fear or misconception.

10. On the basis of these settled principles, it will have to be examined whether the applicant did not intend to marry the prosecutrix.

11. It is not in dispute that the accused is a married man. Investigation papers do not reveal that the prosecutrix had the knowledge that the accused was a married man before submitting herself for sexual intercourse. If she had submitted herself for sexual intercourse with full knowledge that the applicant was a married man, the consent would not be vitiated. As stated earlier, there is no evidence to show that the accused had disclosed his marital status to the prosecutrix. If he had disclosed his marital status to the prosecutrix, in all probability, the prosecutrix would not have

submitted herself for the sexual intercourse. In view of Section 5(i) of the Hindu Marriage Act, a person cannot contract second marriage if his or her spouse is living. Therefore, the applicant could not have legally married the prosecutrix during the subsistence of his marriage. The submission regarding custom of second marriage cannot be considered at this stage because it will require evidence to be adduced for the proof of it. Therefore, accused had knowledge that he would not be able to marry the prosecutrix as long as his marriage is subsisting. This fact clearly shows that the applicant had the intention to deceive the prosecutrix by giving false promise of marriage. Therefore, the consent given by the prosecutrix is vitiated because of the concealment of material fact by the accused from her. In this view of the matter, the promise given by the accused was false to the knowledge of the accused and was given with the intention of establishing physical relations with the prosecutrix.

12. In the case of Anurag Soni Vs. State of Chhattisgarh (2019) 13 SCC 1, the facts were that the accused had given promise of marriage to the prosecutrix. The prosecutrix submitted herself for the sexual intercourse relying on this promise of the accused. Thereafter, the accused went back on his promise and refused to



marry the prosecutrix and married another girl. The Honourable Supreme Court observed thus :-

“14. Considering the aforesaid facts and circumstances of the case and the evidence on record, the prosecution has been successful in proving the case that from the very beginning the accused never intended to marry the prosecutrix; he gave false promises/promise to the prosecutrix to marry her and on such false promise he had physical relation with the prosecutrix; the prosecutrix initially resisted, however, gave the consent relying upon the false promise of the accused that he will marry her and, therefore, her consent can be said to be a consent on misconception of fact as per Section 90 IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 IPC.

13. Therefore, on the basis of the aforesaid facts, it cannot be said that the applicant is entitled to be released on anticipatory bail. Hence the application is rejected.

14. Observations made above are for the purpose of disposal of this application only. The trial Court shall not get influenced by the observations made in this order and can come to an independent conclusion.

( M. G. SEWLIKAR )  
Judge

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