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

Date of decision: 13.02.2025

+ **CRL.A. 1069/2023 & CRL.M.(BAIL) 1816/2023, CRL.M.(BAIL) 667/2024**

SHIVAM PANDEY

.....Appellant

Through: Mr. Pradeep Kr. Arya, Mr. Rishabh Malhotra, Mr. Aditya Kr. Arya, Ms. Garima, Advs.

versus

STATE

.....Respondent

Through: Mr. Yudhvir Singh Chauhan, APP

**CORAM:
HON'BLE MR. JUSTICE JASMEET SINGH**

: **JASMEET SINGH, J (ORAL)**

1. This is an appeal seeking setting aside of the impugned judgment dated 13.09.2023 and order on sentence dated 08.12.2023 passed by the learned Additional Session Judge (SFTC) Dwarka Courts, New Delhi in SC No. 88/2020 arising out of FIR No. 597/2019 registered at PS Baba Haridas Nagar, wherein the appellant has been convicted for the offences under section 366 and 376 of IPC and sentenced for a period of 10 years of rigorous imprisonment.
2. As of today, the appellant has undergone 1 year 3 months 20 days,

remission of 3 months, leaving an unexpired portion of the sentence of 8 years 5 months 10 days.

3. Notice was issued to the prosecutrix and the prosecutrix is present in Court today and states that she has nothing to urge in the matter and the appeal may be heard and decided on merits.
4. Brief facts, the FIR was registered by the father of the prosecutrix on the ground that his daughter aged about 20 years went missing on 03.11.2019. He suspected that she has gone with the appellant who was aged about 18 and a half years. Subsequently, they were found at Dharuhera, Haryana and the appellant was arrested.
5. After completion of investigation, a chargesheet was filed against the appellant and the charges were framed under section 366 and 376 of IPC.
6. Prosecution examined total 4 witnesses to prove their case beyond reasonable doubt and thereafter, the statement of the appellant was recorded under section 313 of CrPC.
7. Learned Trial Court, after analysing the evidence placed on record, convicted the appellant for the said charges and sentenced to 10 years of RI.
8. Hence the present appeal is filed by the appellant.
9. Mr. Arya, learned counsel for the appellant states that the present case is of consensual physical relations based out of love and affection and there is no criminality involved. Learned Trial Court failed to appreciate and consider that there was no physical relation between the prosecutrix and the appellant on the alleged promise of marriage.
10. Further, the prosecutrix accompanied the appellant to the hotel on

03.11.2019 out of her own free will and on an earlier occasion, the prosecutrix had even consumed poison when her father objected to her relationship with the appellant.

11. Learned counsel submits that the learned Trial Court failed to consider that the prosecutrix is elder to the appellant, which shows her maturity level that she cannot be persuaded by the appellant.
12. Mr. Chauhan, learned APP supports the impugned judgment and states that the testimony of the prosecutrix is clear and the learned Trial Court has correctly appreciated the evidence placed on record and the impugned judgment does not require any interference.
13. I have heard learned counsel for the appellant, learned APP as well as the prosecutrix.
14. It is necessary to refer to section 375 of IPC which reads as under:-

375. Rape.—A man is said to commit “rape” if he—

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions:—

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

15. It is also necessary to refer to section 90 of IPC which states that a consent is not a consent, if such a consent is given by a person under fear of 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 consequences of such fear or misconception. For perusal, the said section is extracted below:-

“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 of 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”

16. The Hon’ble Supreme Court in ***Deepak Gulati v. State of Haryana, (2013) 7 SCC 675*** has observed as under:-

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.

17. Recently, the Hon'ble Supreme Court in ***Mahesh Damu Khare v. State of Maharashtra, 2024 SCC OnLine SC 3471*** has observed as under:-

21. The complainant had taken the plea that the appellant had physical relationship with her against her consent by making a false promise that he would marry her. In this regard, it has to be considered whether making a false promise to marry amounts to an offence. If a false promise of marriage is made to a woman by a man, thus deceiving the woman leading her to engage in sexual relations, it may amount to misconception of fact, in which case the consent given by the woman may be vitiated. In this regard one may refer to the decision of this Court in Niam Ahmed v. State (NCT of Delhi),

“20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause - Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between

giving a false promise and committing breach of promise by the accused. In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise. So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376.”

22. In our view, if a man is accused of having sexual relationship by making a false promise of marriage and if he is to be held criminally liable, any such physical relationship must be traceable directly to the false promise made and not qualified by other circumstances or consideration. A woman may have reasons to have physical relationship other than the promise of marriage made by the man, such as personal liking for the male partner without insisting upon formal marital ties. Thus, in a situation where physical relationship is maintained for a prolonged period knowingly by the woman, it cannot be said with

certainty that the said physical relationship was purely because of the alleged promise made by the appellant to marry her. Thus, unless it can be shown that the physical relationship was purely because of the promise of marriage, thereby having a direct nexus with the physical relationship without being influenced by any other consideration, it cannot be said that there was vitiation of consent under misconception of fact.

23. It must also be clear that for a promise to be a false promise to amount to misconception of fact within the meaning of Section 90 of IPC, it must have been made from the very beginning with an intention to deceive the woman to persuade her to have a physical relationship. Therefore, if it is established that such consent was given under a misconception of fact, the said consent is vitiated and not a valid consent.

24. It may be also noted that there may be occasions where a promise to marry was made initially but for various reasons, a person may not be able to keep the promise to marry. If such promise is not made from the very beginning with the ulterior motive to deceive her, it cannot be said to be a false promise to attract the penal provisions of Section 375 IPC, punishable under Section 376 IPC.”

(Emphasis added)

18. Time and again, the Hon’ble Supreme Court has laid down the distinction between the two concepts **(i)** false promise to marriage and

(ii) breach of promise of marry. If there is a promise to marry and the said promise is given in a bad faith and with no intention to adhere to the said promise, and the women on the pretext of this promise gives her consent to engage in a sexual act, then said consent will be vitiated by virtue of section 90 of IPC and will not be a valid consent attracting the rigors of section 375/376 of IPC. In cases of breach of promise to marry, if said promise was made in good faith but subsequently, due to certain unforeseen circumstances or the circumstances beyond control, the said promise could not be fulfilled, it cannot be termed as false promise to marry and be a reason to prosecute a person for the offence under Section 376. Also, it is to be noted that if there is consensual physical relationship continues for over a substantial/long/extended period, it cannot be said that the consent was purely based on the promise to marry.

19. In the present case, it is pertinent to refer to the testimony of PW-1 i.e. the prosecutrix which reads as under:-

“I was studying with accused (correctly identified) in same class, section and school since class 9th. I passed out 12th class in the year 2018.

After passing 12th class, I got admission in JBT. On 18.06.2018, at around 10-11:00 am accused met me at Vijay Enclave bus stop, Dabri. From there, we went to Kalkaji Temple by an auto, then we went to Purana Quila (Old Fort) and thereafter we returned to our house.

After that, we used to talk to each other over phone and we used to send messages to each other on Whatsapp.

One day in the month of August 2018, accused made a call to me on my phone and asked me to come to Vijay Enclave bus stop, Dabri. After receiving the call from accused, at around 11:00 am, I reached at Vijay Enclave bus stop, where he met me. From there, we went to Buddha Jayanti Park by an auto. On that day after visiting the Buddha Jayanti Park, we returned to our respective houses in the evening.

On 31.12.2018, accused again made a call on my mobile phone and he asked me to accompany him to a room, to have a party. But I had refused the same.

On 22.03.2019, accused made a call on my mobile phone and again asked to come at Vijay Enclave bus stop, Dabri. Accordingly, I reached there and from there accused took me to one Oyo Hotel at Mahipalpur. In the hotel, accused promised to marry me after which I had given my consent for the marriage. Thereafter on the same day, accused established physical relation with me. On the same day, we returned to our respective houses in the evening.

One day in the month of April 2019, accused again took me to the same hotel at Mahipalpur and established physical relations with me.

On 04.11.2019, accused asked me to come at Sai Baba Mandir, Najafgarh Road. Accordingly, I reached there, where he met me and asked me to accompany him to some place where we could live together or else he will commit suicide. Thereafter we took a bus for Palam. From there we took the

train for Gurugram. Accused sold his mobile phone for Rs.1,000/- and booked a room in Oyo Hotel in Gurugram and we stayed there for one night. Next morning, accused sold my phone as well for Rs. 2,800/- and thereafter we went to Dharuhera. In Dharuhera, we took a room on rent and we stayed there for 9-10 days. During this period, we made physical relations.

One day, the accused got emotional by remembering his family and went out to fetch a rat killer to commit suicide. However, he could not get the said rat killer. Thereafter, he quarrelled with me and thrown me out of the room at 10:00 pm. Thereafter I took a phone from one uncle and called the father of accused and told him about our whereabouts.

XXXX by Sh. Randhir Kumar Singh, Id. counsel for accused.

.....I met accused after 12th through facebook. Accused had sent me the friendship request on facebook. It is wrong to suggest that I had approached the accused on facebook. I know Nazia Bano. As on date I do not know the mobile number of accused. On 22.03.2019 my visit to the hotel with accused was not pre planned. The room was booked in the name of accused. It is wrong to suggest that I had planned the visit to hotel and had also booked the room in my name. It is correct that entry at point A on Ex.PW-1/D1 bears my name. I knew that due to different castes to which we belonged, my marriage with accused was difficult. It is wrong to suggest that accused had never promised to marry me nor he had ever established

physical relations with me under that promise. I had never refused to accompany the accused to hotel room. Vol. Since, he had promised to marry me, hence, I had not objected. It never came to my mind that my marriage with accused was not possible. I had not objected while boarding the train on 04.11.2019. Vol. Since, accused had given me a threat of committing suicide if I refused to accompany him, hence, I could not refuse him bluntly.”

(Emphasis added)

20. What transpires from the above is that the prosecutrix and the appellant both were in love with each other. The prosecutrix gave her consent for marriage and subsequently, they entered into physical relationship. Further on 04.11.2019, the appellant asked her to come at Sai Baba Mandir, Najafgarh Road and after the prosecutrix reached the spot, they went to Gurugram. The appellant sold his mobile phone for Rs.1,000/- and booked a room in Oyo Hotel in Gurugram and they stayed there for one night. Next morning, the appellant sold the phone of the prosecutrix as well for Rs. 2,800/- and thereafter they went to Dharuhera where they both again established physical relationship.
21. Now coming to the testimony of the father of the prosecutrix, examined as PW4, wherein he stated as under:-

“In the year 2019, my daughter 'A' (prosecutrix) was doing ANM Course from Najafgarh Health Centre and she was staying in the government hostel of health center. On 02.11.2019, she had come to her house from hostel. On the next day i.e. 03.11.2019 she had left the house at about

01.30-2 PM for the market for purchasing study materials. When she did not come back till 5- 5.30 PM, I made a call on her mobile phone to contact her but her mobile phone was switched off. Thereafter, I had tried to trace her but she could not be traced. On the same day at about 8-9 PM, I had made a call to mother of accused Shivam to inquire about prosecutrix as accused was her friend. Mother of accused told me that accused was not present at his house since afternoon. Accused had already visited our house 3-4 times prior to 03.11.2019. Thereafter, I had waited for 3-4 days and thereafter, I went to police station and made a complaint regarding missing of my daughter prosecutrix. After 2-3 days of making complaint, I had received a call from one police station of Rewari, Haryana and the said police officer told me that accused and prosecutrix were present in the police station. Thereafter, I went to PS Baba Haridas Nagar and from PS Baba Haridas Nagar I along with Inspector Rakesh and one lady police officer went to Rewari, Haryana. My daughter had told me that accused had sold her mobile phone during this period. I along with police official from PS Baba Haridas Nagar had brought prosecutrix and accused to PS Baba Haridas Nagar from Rewari. On 09.11.2019, my statement was recorded in the police station.

XXXXXX by Sh. Vijai Pal Singh, Ld. Counsel for the accused.

I am 12th passed. I along with my family is residing at Dichau Enclave since 2019 and prior to that I was residing at Mahavir Enclave. I have three children and prosecutrix is the eldest one. Her date of birth is 21.10.2000. I had met accused one or twice prior to the incident at Dichau Bus Depot and at that time no one was there except me and the accused. No other meeting had ever taken place between me and the accused. Whenever my daughter prosecutrix used to leave house, she used to leave after getting my permission. It is correct that in the year 2019, my daughter prosecutrix remained admitted at DDU Hospital for one day as she had consumed some tablets.

It is correct that I had met inquiry from prosecutrix as to why she had taken the poisonous tablets, my daughter told me that as I was not permitting her to meet accused, hence she had taken such step. I had never visited the house of accused. It is correct that I do not know the address of the house of the accused. I had met father of accused for the first time at Dwarka Courts and second time at DDU Hospital when my daughter had consumed poison. I had never met mother of accused. However, I had conversation with mother of accused when she had made a call on my mobile phone.

About one and half month prior to the incident mother of accused had made a call on my mobile phone and on that she told me that accused was missing from this house and

he was not traceable. About one and half month prior to the incident I came to know that prosecutrix used to love to accused. I do not know whether prosecutrix is about three years older than accused. I had never made a call at 100 number regarding missing of prosecutrix.

I had visited PS Baba Haridas Nagar only once after prosecutrix went missing. Police had never visited my house regarding the present case. It is wrong to suggest that my daughter had allured or persuaded accused to accompany her. I along with police officials had never visited any place regarding the present case. Again said I along with police officials from PS Baba Haridas Nagar had visited Rewari, Haryana. I along with police officials had visited Rewari in a private vehicle and I had paid for the same i.e. Rs. 2000/-, however, I do not remember the colour, make and register no. of the said vehicle. I had hired the said vehicle from near PS Baba Haridas Nagar: We had left Delhi at about 10.00 AM and reached Rewari Police Station at about 12.00 PM and we remained there for about 45 minutes. From Rewari we went to Gurgaon and reached there at about 03.00 PM and from Gurgaon we returned to PS Baba Haridas Nagar at about 05.30-06.00 PM.

After 03.11.2019, I came to know that Accused and prosecutrix were willing to marry to each other. It is wrong to suggest that the case was registered on my complaint (Vol. My daughter had herself given the statement on her

own). I do not remember the make, colour of mobile of prosecutrix which was recovered from a shop at Gurgaon. It is wrong to suggest that I am deposing falsely.”

(Emphasis added)

22. On perusal, the father of the prosecutrix has categorically stated that when his daughter went missing, he called the mother of the appellant to know the whereabouts of his daughter. PW4 further stated that the appellant had already visited the house prior to 03.11.2019. So it is not the case that the appellant is unknown to the father of the prosecutrix. PW4 knew about the relationship of the appellant and his daughter and stated that they were willing to marry each other. Also, the prosecutrix tried to consume tablet when PW-4 did not permitted her to meet the appellant.
23. From the above, it is clear that the appellant and prosecutrix had known each other since 18.06.2018, loved each other, and wanted to marry. They have established physical relations since March, 2019 till November, 2019. During this entire period, the prosecutrix knew that the appellant and prosecutrix belong to different castes and the marriage between the two was difficult. There is no evidence led by the prosecution to show that the appellant did not intend to marry the prosecutrix or refused to marry the prosecutrix.
24. The appellant and the prosecutrix were both adults, consenting individuals and established physical relationship being in love with each other and out of their own free will. The marriage for whatever reason could not happen between the appellant and the prosecutrix but it cannot be said that physical relations were established on account of



a false promise to marry. In order to convict a person on false pretext of marriage, there must be a clinching and clear evidence that physical relations were established only on the basis of promise to marry which was never intended to be kept. The same has not been proved.

25. The findings of the learned Trial Court that there was a false promise of marriage cannot be inferred from the aforesaid testimonies and the reasons noted above.
26. At this juncture, the prosecutrix, present in Court, has stated that she does not want any interference in her life from the appellant.
27. For the aforesaid reasons, the benefit of doubt must accrue to the appellant. The present appeal, accordingly, succeeds and the impugned judgment dated 13.09.2023 is set aside and consequently, the order of sentence dated 08.12.2023 is also set aside.
28. I am informed that the appellant is in jail. He shall be released forthwith, if not required, in any other case.
29. It is directed that the appellant shall ensure that neither he nor any person of his family shall interfere in the life of the prosecutrix or any of her family members or get in touch with her through any mode, be it WhatsApp, mobile or in any manner.
30. The appeal is hence, allowed and disposed of in the aforesaid terms.

JASMEET SINGH, J

FEBRUARY 13, 2025 / (MS)

(Corrected and released on 20.02.2025)

Click here to check corrigendum, if any