

AFR

HIGH COURT OF ORISSA: CUTTACK

BLAPL No.6629 OF 2020

(In the matter of an application under Section 439, Criminal
Procedure Code, 1973)

Rinku Pradhan ... **Petitioner**

Versus

State of Odisha and another ... **Opposite Parties**

For Petitioner : M/s. Nishikanta Mishra and
S. K. Pal, Advocates

For Opposite Parties : Mr. Sibani Sankar Pradhan,
Additional Standing Counsel

(For the State)

M/s. T. K. Mohanty, D.K. Mohanty
and S. Das, Advocates

(For the informant)

PRESENT

THE HONOURABLE SHRI JUSTICE S.K. PANIGRAHI

Date of Hearing: 05.03.2021 Date of judgment: 31.03.2021

1. The petitioner has filed the instant application under Section 439 of Cr. P.C. seeking bail in connection with Chandaka P.S. Case No.76 of 2020 corresponding to G.R. Case No.306 of 2020 pending in the Court of the learned Judicial Magistrate First Class (O), Bhubaneswar. The petitioner herein is the accused in connection with alleged

commission of offences punishable under Sections 376(1)/313/294/506 of the Indian Penal Code and Sections 66(E) and 67(A) of the Information Technology (Amendment) Act, 2008.

2. The case of the prosecution is that the petitioner met the complainant in the house of the latter's relative and thereafter contacted her over phone and lured her to fall in love with him. Thereby they developed a romantic relationship and the petitioner kept physical relationship with her promising her to marry. Due to physical relationship, the complainant became pregnant twice, which the petitioner aborted by giving medicine to her. On 22.01.2020, the complainant asked the petitioner to marry her, but he denied and thereafter the family members of the complainant contacted petitioner's family members to get their consent for such marriage. However, they denied the marriage proposal as well. Having no alternative, the complainant's family fixed her marriage elsewhere. However, on 26.04.2020, the petitioner posted personal photographs of the complainant along with him using fake Facebook IDs created in her name and used a caption stating that the character of the complainant is not good. The petitioner further mentioned that the complainant had relationship with him but was marrying someone else. As

a result of this, the complainant's marriage was broken and she was defamed in the society. Additionally, the petitioner has threatened to viral the obscene photographs in the Facebook and also threatened to kidnap her and kill her. Thereafter, the complainant lodged an FIR and the accused was forwarded on 27.06.2020.

3. Heard Mr. N. Mishra, learned counsel appearing for the petitioner, Mr. S.S. Pradhan, learned Additional Standing Counsel for the State and Mr. T.K. Mohanty, learned counsel appearing for the informant and perused the case records.

4. Mr. N. Mishra, learned counsel for the petitioner, has submitted that the medical report does not reveal that the rape has been committed although the matter was reported for such purposes on 02.05.2020. Additionally, no prima facie case is established against the petitioner. Further, he has submitted that the petitioner is in no way connected with the case rather he has fallen prey to a conspiracy. The complainant being in rival terms has tried to victimise the petitioner. The present case has been foisted in a fabricated manner to harass the present petitioner. Hence, the petitioner should be granted bail. The facts of the case and the conduct of the petitioner require a brief analysis especially, this being

a sensitive issue concerning the plight of the victim. The Hon'ble Apex Court has dealt with such issues in so many cases.

5. In the case of **Kaini Rajan v. State of Kerala**¹, this Court has explained the essentials and parameters of the offence of rape. In the said decision, the Court observed and held as under:

“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 not consent is. “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.”

¹(2013) 9 SCC 113.

6. A strict interpretation of the provisions of Section 375 IPC states that sexual intercourse with a woman without her consent is punishable as rape. Additionally, judiciary has dealt with this clamour with the use of concepts such as “misconception of facts under Section 90 of IPC” and “intention of accused from the beginning” to provide justice to the parties. However, a certain viewpoint has not been reached and still under the shroud of confusion. There is a need for the amendment in the legislation defining what constitutes “sexual intercourse” with the prosecutrix on the “pretext of a false promise of marriage”. As in the present scenario, the law on this matter lacks clarity for the conviction of the accused. Similarly, in the case of **Yedla Srinivasa Rao vs. State of A.P.**², the Supreme Court iterated that:

“9. The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of Section 375 IPC as mentioned above. It is clear that the prosecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90 of the IPC says that if the consent has been given under fear of injury or a

²(2006)11SCC615.

misconception of fact, such consent obtained, cannot be construed to be valid consent. Section 90 reads as under:

Section 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;...*

10. *It appears that the intention of the accused as per the testimony of PW1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the Panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfill the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent."*

7. The Supreme Court in the case of **Anurag Soni vs. State of Chhattisgarh**³ iterated that if an accused from the very beginning has given a promise of marriage without any intention to fulfill that promise and in lieu of such promise

³ AIR 2019 SC 1857.

that the accused will marry her, she gave her consent for sexual intercourse with the accused, then such consent would not amount to valid consent. It shall come within the ambit of the misconception of fact under Section 90 of IPC. Thus, such consent shall not excuse the accused from the charges for the offence of rape under Section 375 of IPC. The Court iterated that:

“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 a 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 of the IPC and such a consent shall not excuse the accused from the charge of rape and offence under Section 375 of the IPC. Though, in Section 313 statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the Accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable..... As observed hereinabove, from the very inception, the promise given by the accused to marry the prosecutrix was a false promise and from the very beginning there was no intention of the accused to marry the prosecutrix as his marriage with Priyanka Soni was already fixed long back and, despite the same, he

continued to give promise/false promise and alluded the prosecutrix to give her consent for the physical relationship. Therefore, considering the aforesaid facts and circumstances of the case and considering the law laid down by this Court in the aforesaid decisions, we are of the opinion that both the Courts below have rightly held that the consent given by the prosecutrix was on misconception of fact and, therefore, the same cannot be said to be a consent so as to excuse the accused for the charge of rape as defined under Section 375 of the IPC. Both the Courts below have rightly convicted the accused for the offence under Section 376 of the IPC.

15.....*The prosecution has been successful by leading cogent evidence that from the very inspection the accused had no intention to marry the victim and that he had mala fide motives and had made false promise only to satisfy the lust. But for the false promise by the accused to marry the prosecutrix, the prosecutrix would not have given the consent to have the physical relationship. It was a clear case of cheating and deception.*

As observed hereinabove, the consent given by the prosecutrix was on misconception of fact. Such incidents are on increase now-a-days. Such offences are against the society. Rape is the most morally and physically reprehensible crime in a society, an assault on the body, mind and privacy of the victim. As observed by this Court in a catena of decisions, while a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, the rape tantamounts to a serious blow to the supreme honour of a woman, and offends both her esteem and dignity. Therefore, merely because the Accused had married with another lady and/or even the prosecutrix has subsequently married, is no ground not to convict the appellant-accused for the

offence punishable under Section 376 of the IPC. The Appellant-accused must face the consequences of the crime committed by him.”

8. 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. However, it needs to be brought forward that many of the complaints come from socially disadvantaged and poor segments of the society and rural areas, women from these sections are often lured into sex by men on false promises of marriage and then dumped as soon as they get pregnant. The rape law often fails to capture their plight. The law is well settled that consent obtained on a false promise to marry is not a valid consent. Since the framers of the law have specifically provided the circumstances when ‘consent’ amounts to ‘no consent’ in terms of Section 375 of IPC, consent for the sexual act on the pretext of marriage is not one of the circumstances mentioned under Section 375 of IPC. Hence, the automatic extension of provisions of Section 90 of IPC to determine the effect of consent under Section 375 of IPC deserves a serious relook. The law holding that false promise to marriage amounts to rape appears to be erroneous, however, the plight of the victim and the probability of the accused tarnishing the

dignity of the victim and her family need to be looked at while deliberating on the question of bail.

9. In *Shreya Singhal v. Union of India*⁴, the Supreme Court was concerned with the question as to whether Section 79 and other provisions i.e. Sections 66A and 69A were constitutionally valid. The Court, while balancing the rights of citizens under Article 19(1)(a) with the provisions of the IT Act deals with the chilling effect which could result if the provisions of the same are interpreted broadly. On the question of chilling effect, the court observes as under:

“83. Information that may be grossly offensive or which causes annoyance or inconvenience are undefined terms which take into the net a very large amount of protected and innocent speech. A person may discuss or even advocate by means of writing disseminated over the internet information that may be a view or point of view pertaining to governmental, literary, scientific or other matters which may be unpalatable to certain sections of society. It is obvious that an expression of a view on any matter may cause annoyance, inconvenience or may be grossly offensive to some. A few examples will suffice. A certain section of a particular community may be grossly offended or annoyed by communications over the internet by “liberal views” such as the emancipation of women or the abolition of the caste system or whether certain members of a non-proselytizing religion should be allowed to bring persons within their fold who are otherwise outside the fold. Each one of these things may be grossly offensive, annoying, inconvenient, insulting or

⁴AIR 2015 SC 1523

injurious to large sections of particular communities and would fall within the net cast by Section 66A. In point of fact, Section 66A is cast so widely that virtually any opinion on any subject would be covered by it, as any serious opinion dissenting with the mores of the day would be caught within its net. Such is the reach of the section and if it is to withstand the test of constitutionality, the chilling effect on free speech would be total.”

10. In the instant case, the investigation is still going on. From perusal of the FIR, it appears that the offences under the Indian Penal Code, are definitely made out though it cries for a thorough trial. A perusal of the FIR and other documents available in the present case prima facie shows that there are very specific allegations against the petitioner who is arrayed as accused. It is not, as if, the allegations are casual and sweeping against the accused generally. The possibility of coercion of victim's family, repetition of similar type of offence and flee from justice cannot be ruled out in the present case. Therefore, the petitioner does not deserve to be granted bail.

11. There are numerous other allegations as well in the charge sheet which are very detailed and need not be reproduced since the above extracts are sufficient to indicate that the allegations are specific and not of a general nature. They make out a prima facie case.

12. In view of the above, I am not inclined to enlarge the petitioner on bail. The Bail Application is accordingly dismissed.

However, the petitioner will be at liberty to raise all the points, already raised in this petition, at the time of framing of the charge, which will be considered by the trial court in seisin over the matter by passing a reasoned order. It is further made clear that any of the observations made in this judgment shall not come in the way of a fair trial of the case, nor shall the trial Court be influenced by these observations.

[S.K. PANIGRAHI, J.]

Orissa High Court, Cuttack.
The 31st day of March, 2021/AKK/LNB