

Mohd. Shafi Vs. State of Karnataka

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Court : Karnataka

Decided On : Mar-13-2013

Judge : Anand Byrareddy

Appeal No. : Criminal Revision Petition No. 2619 of 2010

Appellant : Mohd. Shafi

Respondent : State of Karnataka

Judgement :

(Prayer: This Criminal Revision Petition is filed under Section 397 read with Section 401 Code of Criminal Procedure, 1973, by the advocate for the petitioner praying that this Hon'ble Court may be pleased to, set aside the impugned judgment of conviction and order of sentence dated 30.12.2009 passed in CC.No.1018/2003 by the II Additional Civil Judge (Jr.Dn.) and Judicial Magistrate First Class, at Gulbarga and judgment dated 03.07.2010 passed in Criminal Appeal No.6/2010 by the Principal Sessions Judge at Gulbarga by allowing this revision petition, consequently acquit the accused/petitioner of offences punishable under Section 420 and 506 of IPC.)

1. The petitioner has been convicted for offences punishable under Sections 420 and 506 of the Indian Penal Code, 1860 (hereinafter referred to as the 'IPC', for brevity) in the following background:

One Ramjanbi, alias Shaheda Begum was married to Mohammed Bhasheer, in the year 1995. A female child was born to them. The said Bhasheer had divorced her in accordance with their personal law. Ramjanbi thereafter lived with her parents at Gulbarga. It was during this time that the petitioner is said to have developed an intimate relationship with her. He had proposed marriage and had promised to marry her. They regularly engaged in sex. He had rented a room for her in Khaja Colony during the year 2000 and she lived there. She was soon pregnant with the child of the petitioner. However, he persuaded her to abort the pregnancy on the ground that the child should not be born before their proposed marriage. But she became pregnant yet again after some time. On this occasion however, Ramjanbi had insisted on their getting married. But to her dismay, the petitioner had got married to one Anis Fathima. In spite of the same, Ramjanbi continued to hope that the petitioner would take her as his second wife and hence, did not seek to get the pregnancy aborted and delivered a male child on 22-5-2001. When the petitioner did not show any sign of marrying her even after the child was born, she was constrained to allege before the Rural Police Station, Gulbarga of the commission of offences punishable under the Sections as aforesaid by the petitioner against her, the report was lodged on 28-2-2003. It was in this background that a case came to be registered in Crime no.58/2003.

2. After further investigation, the petitioner was charge-sheeted. After further proceedings, charges were framed against him. The petitioner having pleaded not guilty and having claimed to be tried, the prosecution had examined 18 witnesses and marked Exhibits P-1 to P-10. The statement of the petitioner having been recorded under Section 313 of the Code of Criminal Procedure, 1973, and after having heard the parties, the trial court had framed the following points for consideration:

“1) Whether the prosecution proves beyond reasonable doubt that the accused in between the period of 1999 to 2002 cheated the complainant who is a divorced woman with a promise to marry her and then the accused resided with her in a room as a husband and wife and thereafter due to his illicit connection with complainant she got a male child, then when she forced the accused to marry, he did not agree and thereby the accused has committed an offence punishable

under Section 420 of IPC?

2) Whether the prosecution further proves that the accused on the above said period at Qamar Colony, Gulbarga, on 11.10.2001 when the complainant came to the house of accused along with child, threatened her to finish her life with an intention to give alarm and thereby the accused has committed an offence punishable under Section 506 of IPC?

3) What order or sentence?"

The Court answered the points in the affirmative and convicted the petitioner and imposed a punishment of rigorous imprisonment of 2 years and a fine of Rs.4000/- for the offence punishable under Section 420 of the IPC and rigorous imprisonment of 6 months and a fine of Rs.1000/- for the offence punishable under Section 506 of the IPC.

3. The petitioner had challenged the said judgment by way of an appeal. The Appellate Court having dismissed the appeal and having confirmed the judgment of the Trial Court, the petitioner is before this Court.

4. Shri S.K.Venkata Reddy, learned counsel appearing for the petitioner contends as follows:

That though the Courts below had accepted the respondent's allegations that the petitioner had cheated her on his promise to marry her and also had threatened her with dire consequences, if she continued to pester him to marry her, the inexplicable claim by the respondent also to the effect that the petitioner had in fact married her, at a Durgah in Gulbarga and she also having claimed maintenance before the Family Court on that basis, was glossed over by the Courts below.

Further, that apart from the interested testimony of the respondent, there was no evidence of the alleged threats held out by the petitioner of dire consequences that would befall her at the behest of the petitioner. In any event, the petitioner not having furnished any details as to the date, time or place at which such threats were held out to her, the Courts below were not justified in holding that there was

even a valid charge and that the same stood established. It is hence contended that the conviction and sentence on both the counts are liable to be set aside.

It is also contended that from the conduct of the respondent, it was evident that she had a sustained and willful sexual relationship with the petitioner even according to her, and she did go through two pregnancies before resorting to the criminal case, this would point to her hyper-active sexual behaviour and not to that of an innocent woman misled into a furtive and fleeting rendezvous, on the promise of marriage. Especially, given the circumstance that she was a once married woman before she got into a relationship with the petitioner. Reliance is placed on the following authorities to contend that no offence, either of rape or cheating can be attributed on the facts and evidence on record in view of the ratio laid down therein:

- 1) ILR 2000 KAR 266 (DB) - State of Karnataka V/s Anthonidas,
- 2) ILR 2000 KAR 3336 - Honayya V/s State of Karnataka,
- 3) Judgment in CrI.A.762/2006, dated 01.06.2006 in Zahirabbas Kashimsab Hattarki of this Court.
- 4) 2002 (2) Crimes 63 - Kumaresh Chikkappa Bagodi V/s State of Karnataka.

It is pointed out by the learned counsel for the petitioner that the judgments of the Courts below cannot be sustained, as the same are contrary to the evidence on record. In that, the admissions of various circumstances by almost all the witnesses for the prosecution does not justify the Courts below in having held that the prosecution had established its case beyond all reasonable doubt. More specifically the following glaring aspects are highlighted:

The respondent herself has admitted in cross examination that she was married to the petitioner and that she had sought maintenance before the Family Court on that ground. The claim that the respondent was married to the petitioner is also endorsed by P.W.3 - the mother of the respondent as well as P.W.8 - the brother of the respondent. This would negate the case of the prosecution that an offence punishable under Section 420 IPC was made out. It is also pointed out that all

other witnesses have either turned hostile or their testimony was irrelevant and hence, there was no case made out against the petitioner.

5. The learned Government pleader on the other hand seeks to justify the judgments of the Courts below.

6. In the light of the above contentions and on an examination of the record, the point that arises for consideration is 'whether the Courts below were justified in coming to the conclusion that the prosecution had established its case beyond all reasonable doubt?'.

7. In arriving at a finding that the petitioner was guilty of an offence punishable under Section 420 IPC, it is to be kept in view that where a charge of cheating rests upon a representation which is false and which relates not to an existing fact but to an event that is to occur in the future, it must be established by the prosecution that the representation was false to the knowledge of the accused at the time when it was made. It is of little purpose to show that in fact the representation is ultimately borne out to be untrue. It is also not sufficient to bring the charge of cheating home, by merely proving that there was a false representation made. It is further necessary to prove that such a representation was falsely made, to the knowledge of the accused, and was made in order to deceive the prosecutrix. In a case such as the present one on hand, where the accused and the complainant have consistently carried on a sexual relationship - resulting in two pregnancies - one of which was aborted, even if it is assumed that the prosecutrix agreed to sexual intercourse with the accused on account of the alleged promise of marriage by the accused, the charge of cheating cannot be substantiated in the absence of evidence to demonstrate that the representation by the accused was false to the knowledge of the accused at the time it was made. On the specific question whether the consent obtained on the basis of a promise to marry which was not acted upon, could be regarded as consent given under a misconception of fact and could therefore, enable the prosecution of the accused for an offence, the Apex Court on a review of the case law, in the case of UDAY VS.STATE OF KARNATAKA (2003) 4 SCC 46, has held thus :

“21. It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

The above view has been further clarified in the case of *DEELIP SINGH V. STATE OF BIHAR* (2005) 1 SCC 88, thus:

“28. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to ‘misconception of fact’ within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of *Jayanti Rani Panda*, supra which was approvingly referred to in *Uday’s case*, (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end. “unless the Court can be assured that from the

very inception, the accused never really intended to marry her". In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu's case, supra (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code". it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no strait jacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out."

It is further observed in Deelip Singh's case that even though it was not established beyond reasonable doubt that there was a false or fraudulent promise to marry, there was no doubt that the appellant had committed a breach of a promise to marry, for which the accused was prima facie accountable for damages in civil law. In the light of the above, the ambiguous claim of the respondent, in the present case on hand, that the petitioner and she were married, while in the same breath alleging that there was a fraudulent promise of marriage made by the petitioner, cannot be reconciled. Applying the above test laid down by the Apex Court, as to whether there was a false promise made in the first instance, in the respondent having allowed herself to be physically exploited and having been harmed in mind and reputation, it can safely be said that the prosecution has not discharged its burden of establishing that there was a promise of marriage made by the petitioner and it was false to his knowledge at the time that it was made.

In so far as the charge pertaining to an offence punishable under Section 506 IPC is concerned, the very allegations being vague and bereft of particulars, the Courts below were not justified in holding that the same has been established beyond all

reasonable doubt. Consequently, the revision petition is allowed. The judgments of the Courts below are set aside. The petitioner is acquitted. The fine amount if any, paid by the petitioner shall be refunded. The bail bond furnished by the accused shall stand cancelled. However, this Court is not oblivious to the circumstance that the petitioner and the respondent had embarked on a sustained relationship and whether the same is attributable to a mutual libidinous drive of the petitioner and the respondent, or otherwise, is not so material. The hope of the respondent that there would be a permanence to the relationship has been dashed. The fact that there was a sustained relationship is however, established. Notwithstanding, the fact that it is for the respondent to establish her claim to any compensation, damages or maintenance from the petitioner in appropriate proceedings, this Court is of the opinion that the respondent has certainly made out a prima facie case for damages in civil law. In view of the fact that the petitioner is now absolved of the criminal proceedings and in order to give a quietus to all litigation between the parties, and in the ends of justice, the petitioner is directed to pay a sum of Rs.1,00,000/- to the complainant as compensation, which shall be taken into account, in other pending proceedings or in any other proceedings, involving monetary relief claimed against the petitioner. The registry may not issue a certified copy of this order to any person, till such time that the deposit of the said amount of compensation, now directed, is made by the petitioner. On such deposit, the registry may issue Court notice of such deposit to the respondent and release the same in her favour.