

IN THE HIGH COURT OF DELHI: NEW DELHI

+ CRL. APPEAL 248/2010

% Judgment decided on: 27th January, 2011

SUJIT RANJAN

.....APPELLANT

Through: Mr. Vinod Kumar and Ms.
Kimmi Brara Marwaha,
Advs.

Versus

STATE

.....RESPONDENT

Through: Mr. Arvind Gupta, APP for
the State.
Mr. Pawan Madan, Adv. for
the complainant with
complainant in person.

Coram:

HON'BLE MR. JUSTICE A.K. PATHAK

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | No |
| 2. To be referred to Reporter or not? | No |
| 3. Whether the judgment should be reported in the Digest? | Yes |

A.K. PATHAK, J. (Oral)

1. Appellant has been convicted under Section 376 IPC by the Trial Court and sentenced to undergo rigorous imprisonment for three years with fine of ₹5000/- and in default of payment of fine to undergo simple imprisonment for three months.

2. Prosecutrix was about 22 years of age at the time of incident. Prosecutrix and appellant were neighbours. They

were living in the same building. Appellant was working as Lower Division Clerk (LDC) in Naval Headquarters, R.K. Puram, New Delhi. He was unmarried. Prosecutrix was pursuing Bachelor's degree in Arts through "correspondence course". She was taking tuitions from the appellant. During her fourth month of pregnancy, prosecutrix disclosed to her mother that appellant had sexually exploited her by promising her that he would marry her. Thereafter, she made a written complaint with the Crime Against Women Cell, Nanakpura, Moti Bagh, Delhi, pursuant whereof FIR No. 270/2004 under Sections 376/493/506 IPC was registered at Police Station Sarojini Nagar. In her complaint she stated that appellant had sex with her after enticing her and by promising to marry her. Now he had been saying that he cannot marry her because of his family members.

3. Prosecutrix has been examined as PW1. She has deposed that in the year 2004 appellant had been giving tuitions to her; he often molested her. He had even proposed to marry her. One day he came to her house and raped her after extending threats. He also told her that she should not raise alarm as he would eventually marry her. Appellant also threatened her that in case she disclosed this fact to any one, he would defame her, kill her and her family members. Even thereafter, he committed rape upon her two/three times. After about two months, when she came to know

from a doctor that she was pregnant, she asked the appellant to marry her. Instead of marrying her, appellant shifted to some unknown place. Thus, she was compelled to lodge the FIR.

4. A perusal of both the statements of the prosecutrix, that is, one made before the police and the other before the court, one thing is clear that she has made improvements on material points while deposing in the court. Initially, she had stated that appellant had established sexual relations with her by extending promise to marry her. However, while in the witness box she has introduced the allegations of molestation, use of force and threats. In view of the shifting stands taken by her, story propounded by her that appellant committed sexual intercourse with her against her wishes by using force or extending threats, cannot be given much credence. It is a case of consensual sex between the two adults. It may not be out of place to mention here that while bail application of the appellant was being heard by the Additional Sessions Judge on 22nd May, 2004, prosecutrix appeared in person and stated that she was in love with the appellant. While deposing in the court prosecutrix has admitted that she was present in the court at the time of hearing of bail application. However, she denied having made any such statement in the court that she was in love with the appellant. It is hard to believe that a Judicial

Officer of rank of Additional Sessions Judge would have wrongly recorded a fact which had not been told to him. Even otherwise, from the conduct of the prosecutrix it can be inferred that she was in love with the appellant, which might have developed between them as they had been meeting on regular basis.

5. What constitutes offence of rape has been defined vide Section 375 of the Indian Penal Code which reads as follows:-

“A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following 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 sixteen years of age.”

6. Case of the prosecution is that consent obtained on the promise to marry was inconsequential and it has to be taken as if

appellant had sex with the prosecutrix “without her consent”. Thus, as per the prosecution Clause Secondly of Section 375 of the Indian Penal Code gets attracted in this case.

7. Indian Penal Code does not define “consent” in positive terms, but what cannot be recorded as “consent” under the Code is explained by Section 90 which reads as follows:-

“90. Consent known to be given under fear or misconception- A consent is not such a consent as it 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; ”

8. A bare perusal of above provision clearly shows that it is in two parts: First part envisages that consent given (a) under the fear of injury or (b) under a misconception of fact is not “consent” at all. The first part is from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirement of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the Court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given.

9. In somewhat similar facts, both the above provisions, that is, Clause Secondly of Section 375 and Section 90 of the Indian Penal Code, came to be scrutinized by the Supreme Court in **Uday vs. State of Karnataka, (2003) 4 SCC 46**. After considering several judgments clinching the issue, Supreme Court held that consent given by the prosecutrix to sexual intercourse with a person, with whom she was 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”. It was further held that no straitjacket formula can be adopted 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.

10. In **Jayanti Rani Panda vs. State of West Bengal, 1984**

Crl.L.J. 1535, a Division Bench of Calcutta High Court, in the similar facts, has held as under:

“The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of, fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court' can be assured that from the very inception the accused never really intended to marry her.”

(emphasis supplied)

11. In **Krishna Pada Mahato vs. State of West Bengal,**

2005 (3) Crimes 644, victim was about 16 years of age.

There was love affair between the victim and accused. It was alleged that one day accused had sexual intercourse with the victim forcibly and when she raised objection, accused told her that he will marry her soon. Thereafter, accused and victim continued to meet and have sex on several occasions.

In these facts, Calcutta High Court held as under:

“The evidence and circumstances also supports that the victim had full consent in sexual intercourse with the appellant as from January,

1991 to 4th August, 1991. She had regular sexual intercourse with the appellant but did not report anything to her parents. She even did not report to her parents about her pregnancy during initial stages. On 4th August, 1991 when she last met with the appellant on that date also she enjoyed sexual intercourse with the appellant as it transpired from her evidence. She reported it to her mother only when the appellant refused to marry her. Relying on the decisions cited above by the learned Advocate of the appellant I am of opinion that in the instant case there was no misconception of fact and the victim being a full grown lady voluntarily consented to having sexual intercourse with the appellant. Her evidence also reveals that the appellant once disclosed to marry her but he could not marry her as his father objected to the marriage. It establishes that there was no misconception of fact in the instant case and the victim was a consenting party and her conduct was nothing but an act of promiscuity on her part.”

12. In **Kuber Chandra Das vs. State of Bihar, 2004 CrI.**

L.J. 4776, prosecutrix was aged about 17 years. She continued to have sexual intercourse with the accused for a long period on the assurance and promise that he would marry her, until one day accused refused to solemnize marriage with her. In these facts, Jharkhand High Court has held as under:

“It is crystal clear as per the testimony of PW 1, the informant that it is a case where on her own showing the informant was willing and fully consenting party to the act of sexual intercourse with, the appellant. It also appears that she continued without any protest demur on objection with the affair of having sexual intercourse with the appellant since much prior to the alleged occurrence. In this view of the matter the allegation that the informant was made to have sexual intercourse with the accused on the assumption based on an assurance and promise or giving out an understanding that appellant would marry her cannot amount to the lack of consent so far as the

informant is concerned. Here PW 1, the informant is a major woman and if she gives consent even on any of the aforesaid assumptions and thus she has sexual intercourse with the appellant she will be under all circumstances and in all respect considered to be a consenting party. This consented sexual intercourse continued for a long period prior to the occurrence and until the day of reckoning when she filed this case on assumption that the appellant has cheated her by refusing to solemnize his marriage with her. Therefore, in the facts and circumstances of this case the Informant is deemed to have given consent so far as sexual intercourse between her and the appellant is concerned and such consent cannot be called as an illegal consent so far as the applicability of Section 376 of the Indian Penal Code is concerned. Viewed thus, in such a situation the appellant cannot be deemed to have even prima facie committed the offence of rape under Section 376 of the Indian Penal Code.”

13. In **Dilip Mahto vs. State of Bihar, 2003 (1) Crimes 45**, prosecutrix was sister-in-law (wife’s sister) of accused. Wife of accused was pregnant. Prosecutrix had come to live in the house of accused in order to take care of her sister. During this period accused and prosecutrix developed sexual relations which continued for three months. When prosecutrix became pregnant, she disclosed that she had sex with the accused as he had promised to marry her. In these facts, Jharkhand High Court has held as under:

“It is equally crystal clear from the testimony of P.W. 1, Meena Kumari that it is a case where on her own showing she was willing and full consenting party to that of sexual intercourse with the appellant. It also appears that P.W. 1, Meena Kumari continued without any protest, demur or objection with the affair of having sexual intercourse with the appellant for a period of three months in his house prior to the institution of the case. In this view of the matter the allegation,

P.W. 1 Meena Kumari was subjected to sexual intercourse with the appellant on the assumption based on an assurance or promise or giving out an understanding that the appellant shall marry her, cannot amount to the lack of consent for sexual intercourse as far as P.W. 1, Meena Kumari is concerned. In view of the finding above that P.W. 1, Meena Kumari is major at the relevant time and if she gives consent even on any of the aforesaid assumptions and, thus, she has sexual intercourse with the appellant she will be under all circumstances and in all respects considered to be a consenting party. This consented sexual intercourse between P.W. 1 Meena Kumari and the appellant continued for three months until the day of the reckoning when P.W. 3, the informant filed this case.”

14. In **Kumaresh Chikkappa Bagodi vs. State of Karnataka, Kolghatigi Police, 2002 (2) Crimes 63**, prosecutrix, aged about 18 years, continued to have sexual intercourse with the accused for one year on the alleged ground of promise of marriage, prosecutrix became pregnant and gave birth to a child. Only thereupon she lodged a complaint with the police. In these facts, Karnataka High Court has held as under:

“12. Taking into consideration these aspects and after bestowing my attention in detail, I am of the view that as the victim was a consenting party though possibly on the basis of alleged promise of marriage by no stretch of imagination, the act of having sexual intercourse by the accused can be brought under the offence of rape as defined under Section 375 Indian Penal Code, punishable under Section 376 Indian Penal Code. Similar is the view taken by Calcutta High Court in the case of Hari Majhi v. The State reported in MANU/WB/0371/1989 : 1990 Cri. LJ 650, M.C. Prasannan v. State reported in MANU/WB/0072/1999 : 1999 Cri. LJ 998 and this Court in the case of State of Karnataka v. Anthonidas reported in ILR 2000 Kar 266. In my

view, without considering this basic aspect the trial Court has erroneously held that the offence of rape punishable under Section 376 Indian Penal Code has been proved against the accused. As the conclusion arrived at by the trial Court is based on wrong interpretation of section of rape as defined under Section 375 Indian Penal Code read with Section 90 Indian Penal Code, the conviction is liable to be set aside and the accused is to be acquitted of the charge of rape made against him.”

15. In **Baldhari Ohdar vs. State of Bihar, 2001 CrL.L.J.**

883, Prosecutrix stated that accused way-laid and overpowered her, took her to a solitary place and sexually assaulted her against her will. She wanted to raise alarm but she desisted when he gave an assurance to marry her and counseled her not to disclose this fact to anyone else. Thereafter, he had sexual intercourse with her on many occasions. When she was 5-6 months pregnant her parents came to know about their relationship. A panchayat was held in the village in which accused confessed his guilt and took her with him from the panchayat as his wife. However, he turned her out of his home by saying that he would not marry her. In these facts, Patna High Court has held as under:

“15. It is true that prosecutrix by the time of her evidence in Court gave birth to a child. She stated that the accused-appellant is the father of the child. The evidence of the prosecutrix is that accused-appellant had procured her consent by telling/assuring that he would marry her and believing on the same she had submitted to sexual intercourse with him. It has been urged on behalf of learned A.P.P. that consent of the girl was procured on false promise made by the

accused-appellant to marry her was not a free or voluntary consent. As such the conviction of the accused-appellant is liable for the offence under Section 376, I.P.C. Even if the accused-appellant had made false promise to marry her and whereupon she had consented to sexual intercourse with him, it would not vitiate her consent for the sexual intercourse which she had given fully understanding the nature and implication of the act involved therein. It is not that the girl consented to the act on any understanding or misunderstanding that the accused-appellant was her husband (as distinct from 'would-be' husband). It is not a case where the girl had any misconception about the nature of the act which she consented. In the instant case, the prosecutrix fully knew that what they were going to commit was the act of sexual intercourse. That being so, it does not become a case of rape when she consented to the act of sexual intercourse fully knowing the nature and implication of such act and when she was fully aware that the person concerned was not yet her husband, even if he had proposed to marry her.”

16. Legal position which can be culled out from the judicial pronouncements referred above is that the consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under “misconception of fact”. Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under “misconception of fact” depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each

and every ingredient of the offence. Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to “misconception of fact” right from the inception.

17. Now reverting back to the facts of this case, prosecutrix was a grown up educated woman aged about 22 years living in a metropolis like Delhi and was expected to know the consequences of indulging in sexual activity with a man. She continued to have sex with the appellant for more than three months. Even after she became pregnant, she did not immediately disclose this fact to anyone including her mother. At the time when FIR was lodged, she was four months pregnant. In her deposition she has admitted that after two months she became aware that she was pregnant. Meaning thereby, even after prosecutrix became pregnant she did not disclose this fact to her family members immediately. There was no reason for her not to disclose to her mother that appellant had promised her to marry. She disclosed this fact only when her parents came to know through a doctor that she was carrying four months pregnancy. She was living in a building where other persons

were also living as tenants. Landlord of the prosecutrix was living at the ground floor. As per the prosecutrix, appellant had committed the act of rape 2/3 times on her. However, she did not raise any alarm at any point of time. She meekly submitted to the advances of the appellant. All this shows that she was in love with the appellant and was a consenting party. The consent given by her does not get diluted merely because, after the pregnancy was detected and she was confronted with this fact by her family members, she stated that appellant had established sexual intercourse with her on false promise of marriage. Above all, prosecution has not adduced any evidence to show that appellant had no intention to marry the prosecutrix right from the beginning and had extended the same only to establish sexual relations with her. Even if it were so, there is hardly any evidence to prove the fact that the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. PW2, mother of the prosecutrix has admitted that after it came to her notice that prosecutrix was pregnant, father of the appellant agreed for the marriage, which was fixed for 30th April, 2004, but appellant and his father ran away a day prior to the date so fixed. From her this answer also it cannot be said that right from the beginning appellant

had no intention to marry and had promised to marry the prosecutrix only to establish sexual relations with her. On the contrary, the circumstances of the case goes to support the conclusion that the appellant had a reason to believe that the consent given by the prosecutrix was the result of their love affair.

18. For the foregoing reasons, I am of the view that Trial Court was not right in convicting the appellant under Section 376 IPC. Accordingly, conviction of appellant under Section 376 IPC and the sentence awarded to him by the Trial Court is set aside. Appellant is on bail. His personal bond is cancelled and surety bond is discharged.

19. Appeal is disposed of in the above terms.

A.K. PATHAK, J.

JANUARY 27, 2011

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