

IN THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment dated 11th July, 2013

+ Crl. L.P. 329/2013

STATE

.....Petitioner

Through : Ms. Richa Kapoor, Adv.

versus

RAJESH BURARIA

.....Respondent

Through

CORAM:

HON'BLE MR.JUSTICE G.S. SISTANI

HON'BLE MR.JUSTICE G.P. MITTAL

G.S. SISTANI, J (ORAL)

1. Present petition for leave to appeal has been filed by the State under Section 378 of the Code of Criminal Procedure, 1973 against the judgment passed by the learned Additional Sessions Judge on 06.03.2013 in case FIR No. 70/12, under Section 313/328/376/377 of the Indian Penal Code (IPC), whereby the respondent has been acquitted.
2. The case of the prosecution, as noticed by the trial court, is that the prosecutrix was working as a Data Entry Operator in the Ministry of Commerce. The respondent was her officer. The respondent offered the prosecutrix to provide her coaching and books for clearing S.S.C Examination for a better job. On the pretext of giving her certain books, the respondent called her at his friend's rental accommodation in C.P.W.D Quarters, Talkatora, where, he established physical relations with her after giving her a cold drink laced with some intoxicant. Upon regaining consciousness, the prosecutrix started crying and told the respondent that

he had ruined her life. In response, the respondent told her that he loved her and that she should not worry as he would be marrying her. Thereafter, the respondent established physical relations with the prosecutrix for about 20-25 times during a period of three years, on the promise of marriage; he even had carnal intercourse/oral sex with the prosecutrix. He always told her that there was nothing wrong in that as they are husband and wife and would be getting married. In between, she became pregnant, but, on 29.09.2011, the respondent got her aborted forcibly at Life Line Hospital, after giving her false name as Chanchal. When prosecutrix inquired as to when he would marry her, the respondent told her that he would marry her after marriage of his two sisters. On 16.08.2012, all of a sudden, the respondent told the prosecutrix that he would not be able to marry her as his parents are forcing him to marry someone else. When the prosecutrix offered to discuss the matter with his family members, the respondent stopped her from doing so and assured her that he himself will talk with them. Ultimately he told her that he will marry the girl chosen by his parents on which, the prosecutrix lodged the complaint with police station Tuglak Road, on 22.08.2012. On the basis of the prosecutrix's complaint, FIR No. 70/2012, u/Ss 313/328/376/377 IPC was registered against the respondent. After investigation, charge sheet u/Ss 313/328/376/377 IPC was filed.

3. The respondent pleaded not guilty to the charges, upon which the prosecution examined 18 witnesses to bring home the guilt of the respondent.
4. Learned counsel for the state submits that the order of acquittal passed by the learned trial court is not sustainable in the eyes of law as it is based on presumptions, conjectures and surmises and thus is liable to be set aside.

Counsel further submits that the learned trial court erred in ignoring the vital pieces of evidence which emerged during the course of the trial.

5. It is submitted by the learned counsel for the state that the learned ASJ summarily rejected the testimony of PW-2 (Prosecutrix) without appreciating that she had specifically mentioned that the entire incident occurred in the year 2009 and the respondent had committed rape upon her. Counsel further submits that the trial court erred in disbelieving the testimony of PW-2 who had specifically stated that at the first instance she was offered a cold drink laced with some intoxicant and was raped and when she regained consciousness and started crying the respondent assured her that he will get married to her which later on came to be a false promise. Counsel for the state further submits that the trial court did not appreciate the testimony of PW-1 Balbir Singh, PW-4 Ms. Poonam, and PW-5 Kusam Lata who had specifically stated that the respondent had sexually exploited the complainant.
6. Learned counsel for the state further submits that the trial court did not appreciate the proposition of law settled by the Hon'ble Supreme Court in *Yedla Srinivasa Rao v. State of A.P.* (2006) 11 SCC 65 wherein the accused committed rape upon the prosecutrix in the garb of marrying the prosecutrix and it was held that a consent obtained by misconception while playing fraud is not a consent and the conviction of the accused was upheld by the Hon'ble Supreme Court.
7. We have heard the counsel for the petitioner and perused the impugned judgment dated 06.03.2013. The case of the prosecution is primarily based on the testimony of the prosecutrix, PW-2.
8. The trial court has considered the testimony of the prosecutrix, PW-2, in paras 7.1 and 7.1.1 of the judgment, regarding the first occasion when the prosecutrix was allegedly intoxicated and sexually assaulted by the

respondent in the month of September 2009. Paras 7.1 and 7.1.1 of the judgment read as under:

“7.1 Prosecutrix has deposed that the accused advised her to take coaching for examinations for a better job and offered to provide her coaching and books. On the pretext of helping her purchase some books, in Sept 2009, the accused called her at Rajendra place Bus Stand. Instead of taking her to market, the accused took her to a CPWD Quarter behind Bus Stand of Talkatora Stadium, on the pretext of waiting there as shops had not opened till then. He offered her tea, which she refused. Thereafter, the accused gave her cold drink, which she consumed; the accused showed her 2 – 3 books; but, after sometime, she started feeling dizzy. While she was still a little bit conscious, the accused started misbehaving with her i.e. touching her face, breasts and other parts of her body and because of dizziness she could not put up much resistance. When she regained consciousness, she found herself naked and even the accused was naked and that she was bleeding from her private parts. She could sense that the accused had established physical relations with her.

7.1.1 Prosecutrix has further deposed that and when she inquired from the accused as to what had he done with her, the accused told her that he loved her and wanted to marry her. He also told that – “*ye to pavitra wala pyar hai*”. *At that time I was in doldrums and was not able to take any decision. Then accused consoled me by saying that “Jo ho gaya so ho gaya, tum to meri wife ho*”. *When I got up from the bed accused Rajesh again caught hold of me by my hand and again established physical relations with me there. I started bleeding profusely. Accused took me to the bathroom and poured water on me..... thereafter he dropped me to Laxmi Nagar by his motorcycle. Accused repeatedly told me not to disclose that incident to anybody and promised to marry me..... I was not able to make any decision on this point.....*”.

9. As per the testimony of the prosecutrix PW-2, on first occasion, the respondent had sexual intercourse with her while she was unconscious as the respondent had intoxicated her. However, it has been correctly observed by the trial court that there exists no evidence on record to prove

the mixing of intoxicant in the cold drink by the respondent. In light of this fact, it becomes uncertain as to whether the respondent actually had sexual intercourse with her in unconscious condition and therefore without her consent. We agree with the view taken by the trial court that the unsubstantiated oral testimony of PW-2 alone in the circumstances of this case is not sufficient to arrive at any finding of guilt on the part of the respondent. Therefore, in our view, the trial court has rightly acquitted the respondent under Section 328 IPC.

10. Regarding the subsequent physical encounters between the prosecutrix and the respondent, the trial court has noticed the testimony of PW-2 in paras 7.2, 7.2.1 and 7.2.2 which read as under:

“7.2 The prosecutrix has given details of her further meetings/physical relations established with accused even subsequently. Prosecutrix has stated that on the next Saturday the accused again took her to the same quarter on the pretext of making her meet his parents. But, there was no-one at home and the accused again forcibly established physical relations with her. He also had unnatural sex with her on that day. She further stated that - *“On that day, accused kept me there in the room whole day and repeatedly committed sex with me as well as committed unnatural sex with me. He assured me that he was in love with me and will marry me. When I questioned him as to when he will marry me.... he told.... his two sisters were still to be married and after their marriage he assured me to perform marriage with me...”*

7.2.1 Prosecutrix has also stated that after a gap of one Saturday, the accused again called her on the pretext that Senior Officers had called a meeting and took her to that very room (i.e. the above said Government quarter). On that day also, the accused established physical relations with her despite her resistance; he repeatedly had sexual intercourse with her. She has further deposed that the accused used to say that she was his wife and there was nothing wrong in it.

7.2.2 The prosecutrix has further stated that thereafter, the accused also used to take her to Lodhi Garden and other gardens. In those

gardens also, the accused used to touch her body.”

11. As per the testimony of the prosecutrix, the respondent took her to the same CPWD quarter to make her meet his parents on the next Saturday but instead repeatedly committed rape upon her including unnatural sex. This part of her testimony is falsified by the fact that after first encounter with the respondent in the CPWD quarter, she was well aware that the quarter was not the residence of the respondent. In her complaint dated 22.08.2012, Ex.PW2/A, the prosecutrix herself mentioned that the respondent took her to his friend's rented accommodation at CPWD Quarters, Talkatora. Further, in her statement to learned MM under section 164 Cr.P.C which is Ex.PW2/G she initially stated “*Mujhe apne dost ke Flat No. 666 jo Talkatora Stadium ke Bus Stand ke sath sarkari Flats hain le gaya*”. However, the trial court has observed in its judgment that the words “apne dost ke” were struck off by the learned MM. We find that this alteration made by learned MM casts a doubt on the version given by the prosecutrix that the respondent had taken her to meet his parents.
12. From the testimony of the prosecutrix it is evident that she accompanied the respondent to the same Government quarter despite being subjected to sexual intercourse against her wishes on the previous occasion. In her cross examination, she stated that she visited the said Government quarter with the respondent 4-5 times during the period September, 2009 to December, 2009. She also admitted that she had mentioned in her complaint Ex.PW2/A that the respondent established physical relations with her 20-25 times. However she has not given any details of use of force by the respondent. Further, in her cross examination she had denied that she loved the respondent. She stated that she had no option but to wait for the respondent to marry her after what he did to her on the first

occasion. In the light of these facts, even if one is to believe that the prosecutrix was deceived by the respondent on the first occasion, there is no reason to believe as to why a 27 year old educated and independent urban girl would agree to accompany a man and incessantly keep falling in his trap on multiple occasions. If the respondent was having sexual intercourse with the prosecutrix against her wishes, why did she always fall for his pretexts and never suspected his malicious intention. Instead, mostly on Saturdays/off days, the prosecutrix readily accompanied the respondent to the CPWD quarter, where she alleges to have been raped. The trial court has rightly observed that there is no plausible reason as to why the prosecutrix abstained from lodging a complaint against the respondent when she was sexually exploited for the first time in September 2009 and on multiple occasions thereafter.

13. In order to explain this, the prosecutrix deposed in her testimony, that when she refused to accompany the respondent, he showed her photographs of the first day's incident and threatened her that he would show these photographs to others. However, in her cross-examination she admitted that she had not mentioned this fact either in her complaint (Ex.PW2/A) or in her statement made before the Learned Magistrate or to the police that the respondent blackmailed her by taking her photographs/video. She further deposed that she did not raise this allegation earlier as the respondent had already deleted the said video/photographs. However, the reasoning given by the prosecutrix does not inspire confidence. The fact that she chose to raise such an allegation with regard to blackmailing for the first time at the stage of trial and never before in itself casts a doubt on the veracity of her statement which seems to be concocted by the prosecutrix in order to paint a picture of her being victimized by the respondent. Furthermore, it is highly inconceivable that

the prosecutrix continued to succumb to respondent's blackmailing for three consecutive years and continued to have herself subjected to sexual exploitation by him.

14. We concur with the conclusion reached at by the trial court that the prosecutrix and the respondent were in relationship and had consensual sexual intercourse. Counsel for the State has been unable to persuade us to take a different view. The trial court has recorded its finding in Para 9.4 which reads as under:

“9.4 The fact that despite accused having sexual intercourse with her allegedly against her wishes on the first occasion, the prosecutrix continued to accompany the accused despite possibility of being subjected to same fate; continuous physical relations between the accused and the prosecutrix and their going around to different parks and gardens show that they were in relationship/ love with each other; and prosecutrix submitted herself to the accused thinking that they would get married, some day. The prosecutrix (as per her own version) even became pregnant once; the said pregnancy as per prosecutrix was aborted on 29.09.2011. Even thereafter, the prosecutrix had physical relations with the accused and lastly in June, 2012. From these facts and circumstances, it is clear that the prosecutrix was a consenting party to the sex with the accused. Of course, she thought that they would get married. But, when accused refused to marry her against wishes of his father, this complaint came to be filed. Prosecutrix herself has given an explanation that - *“I had not lodged any complaint with police for three years as the accused had been assuring to marry me. Vol. When he refused to marry, I lodged the complaint.”*

15. Even PW-4, sister of prosecutrix and PW-1, father of prosecutrix, have deposed that prosecutrix and respondent were in a relationship. PW-1 stated that when the respondent visited his house on 19.08.2012, he informed that he developed intimacy with his daughter and even established physical relations with her.

16. After careful examination of the trial court's findings and the testimony of PWs 1 & 4, we are of the opinion that the prosecutrix and the respondent were indeed in a relationship and prosecutrix had consensual intercourse with the respondent.
17. It has also been argued before us that the consent obtained by the respondent was under a false promise to marry the prosecutrix. In other words, the respondent intended to marry the prosecutrix when he had sexual intercourse with her.
18. Consent given under fear of injury or under misconception of a fact is not considered to be a valid consent under Section 90 of IPC. But merely showing that consent was given under a fear of injury or under a misconception of a fact is not sufficient to prove that no consent existed. It has to be further established that the person committing the act i.e. the alleged offender had knowledge or had reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. The Hon'ble Apex Court has explained this point in the case of **Deelip Singh @ Dilip Kumar v. State of Bihar** (2005) 1 SCC 88, more particularly in paras 19 and 20, which read as under:

“19. Consent given firstly under fear of injury and secondly under a misconception of fact is not 'consent' at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries.

20. The factors set out in the first part of Section 90 are 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 requirements 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. This is the scheme of Section 90 which is couched in negative terminology.”

19. In the instant case, the trial court has observed that the prosecutrix was in love with the respondent and she continued to have physical relations with the respondent spanning over a period of approximately three years. In her testimony she had stated that the respondent kept assuring to marry her after the marriage of his sisters. But when the respondent’s father fixed his marriage with someone else he refused to marry the prosecutrix against his father’s wishes. She further deposed that on 19.08.2012 the respondent even told his mother that he wanted to marry her. Respondent even introduced the prosecutrix to his father as his girlfriend and disclosed about the sexual relations between them. Later when the prosecutrix visited the respondent’s house along with her father and sister, the respondent told his parents that he wanted to marry her on which the father of respondent took two days’ time to reply but ultimately refused to marry the respondent with her. Thus, from the evidence adduced it cannot be inferred that the respondent never intended to marry the prosecutrix. Rather, it points to the contrary.

20. The judgment of the Hon’ble Supreme Court in the case of Yedla Srinivasa Rao v. State of A.P. (2006) 11 SCC 65 as relied upon by the learned counsel for the state is not applicable to the facts of the present case. In that case, the girl was aged 16 years and was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfill and it was totally under misconception on the part of the

victim that the accused is likely to marry her, that she submitted to the lust of the accused.

21. Applying the settled position of law to the facts of the instant case, we agree with the view taken by the learned trial court that the prosecution was under an obligation to lead positive evidence to demonstrate that the respondent had no intention to marry prosecutrix at all from the very inception and that the promise to marry made by him, was false to his knowledge. In the present case, there is no evidence adduced by the prosecution to prove that the respondent never intended to marry the prosecutrix. Therefore, we agree with the findings of the trial court that the accused cannot be held guilty of offence punishable under sections 376/377 IPC.
22. The last issue that needs to be dealt is the charge under section 313 IPC. The observations of trial court that deal with this issue are recorded in Para 10.0 of the judgment.

“Prosecutrix has deposed that on 28.09.2011, she felt that she was pregnant. She told the accused about the same. Accused asked her to get the foetus aborted, but she was not agreeable. On her persuasion, accused agreed with her. Thereafter, accused took her to Mandi house and told that it was a very good news for him as he has become father; he gave her a piece of chocolate and thereafter, he asked her to close her eyes; when she shut her eyes, accused put two tablets in her mouth and gave her a water bottle to drink water; she consumed the tablets; she felt a bitter taste in her mouth and asked the accused about the same; the accused then told her that he gave her abortion pills. When she protested as to why he gave her abortion pills, then he told her that marriage of his sister was to be solemnized on 02.12.2011 and revelation of the factum of her pregnancy would have created problem in the marriage of his sister. From Mandi house Metro Station, she returned home. At night she felt severe pain and bleeding started and by morning hours, her condition deteriorated; she informed the accused over phone; accused then came to a place outside her house on 29.09.2011 and took her to Life Line Hospital, located at Guru

Angad Nagar. Doctor, after examining her, advised her to get ultrasound done. Accordingly, she got ultrasound done. Doctor then prescribed medicine for 15 days and advised her to take care in future.”

23. There exist material discrepancies in the statements made by the prosecutrix as to how the abortion took place. In her testimony, she deposed that the respondent deceitfully gave her abortion pills whereas in her complaint Ex.PW2/A, the prosecutrix has stated that the respondent got her forcibly aborted at Life Line Hospital. The prosecutrix further stated in her cross-examination that the doctor who examined her told her that she is pregnant. Dr. Sandeep Jain PW-9 stated that ultrasound of a patient named Chanchal was carried out as she was suffering from abdominal pain. PW-9 has proved, by way of a certificate Ex.PW9/A, that ultrasound report was normal. He further stated in his cross-examination that when he had examined the patient there was no evidence of any mass/gestational sac in the uterus and both ovaries were normal. There is no mention of abortion being carried out either in the testimony of PW9 or in Ex.PW9/A. The investigating officer PW-17 also deposed that the hospital informed her that no abortion was carried out on 29.09.2011. This casts a serious doubt on the veracity of allegations made by the prosecutrix. Therefore, we believe that the trial court has rightly disbelieved the prosecution case in respect of charge under section 313 IPC.

24. It is a well settled position of law that leave to appeal is to be granted in exceptional cases where the judgment under appeal is found to be perverse. The court must take into account the presumption of innocence of the accused and the acquittal by trial court adds to the presumption of his innocence.

25. We do not find any reasons for interference in the present case. Accordingly, no grounds are made out and the leave to appeal petition stands dismissed.

G.S.SISTANI, J

G.P. MITTAL, J

JULY 11th , 2013
msr