

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 1936

CRL.A.No. 147 of 2014 ()

AGAINST THE JUDGMENT IN SC 241/2012 of SESSIONS COURT, THODUPUZHA
DATED 06-09-2013

AGAINST THE ORDER IN CP 37/2012 of J.M.F.C.- I, DEVIKULAM

CRIME NO. 664/2011 OF MUNNAR POLICE STATION , IDUKKI

APPELLANT/ACCUSED:

JAIMON, S/O. LALU UMMAN,
C.NO.1762, CENTRAL PRISON, KANNUR

BY ADV. RESMI NANDANAN (STATE BRIEF)

RESPONDENT/RESPONDENT:

STATE OF KERALA REP. BY
PUBLIC PROSECUTOR,
HIGH COURT OF KERALA

BY PUBLIC PROSECUTOR SRI.N. SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06-11-2014,
THE COURT ON 06.01.2015 DELIVERED THE FOLLOWING:

K. RAMAKRISHNAN, J.

.....
Crl.A.No.147 of 2014
.....

Dated this the 6th day of January, 2015.

JUDGMENT

This is a jail appeal filed by the accused in S.C.No.241/2012 on the file of the Sessions Court, Thodupuzha. The appellant was charge sheeted by the Deputy Superintendent of Police, Munnar in Crime No.664/2011 of Munnar police station alleging commission of the offence under Section 376 of the Indian Penal Code and Section 3(2) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act (hereinafter referred to as the SC and ST Act).

2. The case of the prosecution in nutshell was that the appellant belongs to Christian community and the prosecutrix belongs to Pallan community of Hindu religion of scheduled caste community. She is a widow and residing at Munnar. The appellant had acquaintance with her in connection with a murder case involving her cousin and aunt getting himself introduced as an officer attached to Crime Branch and Crime magazine and promised to help her in getting bail for them and also promised to marry her. Taking advantage of that

acquaintance, he had managed to stay in her house during night on 2.7.2011 and on the promise of marriage, had intercourse with the prosecutrix from her residence in the line room in Laskshmi Estate, Munnar and thereafter took her to the house of PW6 at Rajapalayam on the promise of getting the marriage registered there in a speedy manner and on 4.7.2011, he had intercourse with her from there also on the same promise and thereafter it was revealed that he is having some connection with Smt.Surabhi Das, another lady, and suppressing that fact, he had intercourse with her and thereby he had committed the offence punishable under Section 376 of the Indian Penal Code and Section 3(2) of the SC/ST Act.

3. After investigation, final report was filed before the Judicial First Class Magistrate Court-I, Devikulam, where it was taken on file as C.P.No.37/2012 and later it was committed to special court trying cases under the SC/ST Act namely the Principal Sessions Court, Thodupuzha, where it was taken on file as SC.No.241/2012.

4. When the appellant was produced before the court below, after hearing the Special Public Prosecutor and the defence counsel, the learned Special Judge framed charge

under Section 376 of the Indian Penal Code and Section 3(2) of the SC/ST Act and the same was read over and explained to him and he pleaded not guilty. In order to prove the case of the prosecution, Pws 1 to 17 were examined and Exts.P1 to P13, C1 and MO1 were marked on their side. After closure of the prosecution evidence, the appellant was questioned under Section 313 of the Code and he denied all the incriminating circumstances brought against him in the prosecution evidence. He had filed a statement under section 313 (5) of the Code of Criminal Procedure in which he had admitted that he had promised to marry the prosecutrix and further stated that as requested by her, he went to her house on 2.7.2011 and with her consent, he had intercourse with her and as requested by her, they went to the house of PW6 at Rajapalayam and stayed there and he did not have any intercourse with her from there. He had further stated that at the instance of Nandhakumar, the Chief Editor of Crime magazine, he has been falsely implicated in the case registered at the instance of Smt.Surabhi Das, who was a staff in Crime Magazine of Nandakumar. In fact, he was willing to marry the prosecutrix. Since he was taken into custody in connection with the crime

registered by the police at the instance of Smt. Surabhi Das, he could not marry her. The said Smt. Surabhi Das was instrumental to file SMS case against the Minister, Sri. P.J.Joseph and he was insisted to give evidence against the Minister which he did not agree and he had made press conference about the same and on account of that enmity, at the instance of Nandakumar through Smt. Surabhi Das, he has been falsely implicated in the case. Smt. Surabhi Das is a friend of PW1 also. He had not committed any offence. He had intercourse with the prosecutrix only with her consent. In order to prove his case, he had examined DW1, the Sub Registrar, Devikulam and proved Ext.D1, an application given by them for conducting marriage under the Special Marriage Act. Exts.D2 and D3 were marked through him in the cross examination by the Special Public Prosecutor as objections received in connection with the marriage from PW2, the father of the prosecutrix and one George, an alleged social worker. After considering the evidence on record, the learned Special Judge found the appellant not guilty under Section 3 (2) of the SC/ST Act and acquitted him of that charge. But he was found guilty under Section 376 of the Indian Penal Code

and convicted thereunder and sentenced to undergo rigorous imprisonment for seven years and also to pay a fine of Rs.10,000/-, in default to undergo simple imprisonment for six months. Set off was allowed for the period of detention already undergone by him. Aggrieved by the same, he filed the above appeal through jail authorities and Smt. Resmi Nandanani was appointed as legal aid counsel to argue the case on behalf of the appellant.

5. Heard the Public Prosecutor appearing for the State and Smt. Resmi Nandanani, legal aid counsel appointed.

6. The legal aid counsel submitted that the case of the prosecution was that the appellant promising to marry the prosecutrix had intercourse with her against her wish and also suppressed the factum of his earlier marriage with one Smt. Surabhi Das and thereby he had committed the above said offence. Except the evidence of PW1, there is no other evidence to prove the incident as evidence of PW2-the father and PW6-the cousin in whose house they resided and had intercourse on the second occasion are not much helpful to prove the case of the prosecution especially when the act of intercourse was admitted by the appellant and the only question

to be considered is whether it was with the consent of the prosecutrix or not and whether the consent if any was vitiated by any fraud or other vitiating circumstances and obtained by misconception or misrepresentation. The evidence of PW1 will go to show that there was no misrepresentation made and there is nothing on record to show that the appellant had retracted from his promise to marry her. Further, in spite of the fact that PW2 had objected the appellant residing there, on 2.7.2011 at 5 p.m when he came there, PW1 permitted him to stay there and thereafter had intercourse with him will go to show that she was the consenting party to the intercourse. Further, she had gone with the appellant to Rajapalayam at her own will without even intimating her parents. Further, she is not an ordinary woman. She is a widow with two female children. She was a Panchayath President and also an active member of a political party in that locality. So, under the circumstances, it cannot be said that she was not aware of the consequences of her act and she can be easily cheated. Further, the prosecution has not proved that the appellant had married Smt. Surabhi Das which fact was said to have been suppressed. She was not even examined as a

witness to prove this fact. So under the circumstances, the court below was not justified in coming to the conclusion that the consent was obtained by misrepresentation and he had intercourse with her on the false promise of the marriage. But for his arrest probably he would have proceeded with the promise of marriage. So under the circumstances, the conviction entered by the court below is not justifiable and unsustainable in law and the appellant is entitled to get acquittal.

7. On the other hand, the learned Public Prosecutor appearing for the State submitted that the conduct of the appellant will go to show that he had dishonest intention to have intercourse with the prosecutrix and the evidence of PW1 will prove that fact beyond reasonable doubt. She belongs to lower strata namely scheduled caste and that has been exploited by the appellant. Further, she is a widow and her father's sister and son were arrested and they were in jail and she was made to believe that he was in police department and he would be able to help her in getting her relatives out of jail. That prompted her to have intercourse with him. So the prosecution has proved beyond reasonable doubt that the appellant had committed the offence and no

interference is called for.

8. The case of the prosecution as emerged from the prosecution witnesses was as follows:

The appellant is a Christian by religion which was proved by Ext.P7 caste certificate given by PW10 and he had approached PW2, the father of the prosecutrix through PW5 - Shaji, an auto rickshaw driver, and told that he was working in Crime magazine and he would be able to help to bring out his sister Pandiamma and son Sathyavelu, who were in jail in connection with a murder case. According to the prosecution, he had told that he is working in Crime magazine and also working as a Co-ordinator in Crime Branch and he obtained Rs.45,000/- from her for getting bail for them which she obtained by borrowing Rs.20,000/- and Rs.25,000/- by pledging her gold ornaments. Further, when he expressed his willingness to marry PW1 to PW2, he told that he wanted to ascertain the willingness from his relatives and thereafter it appears that they have agreed to marry and on 28.6.2011 went to the Sub Registrar's Office, Devikulam and submitted Ext.D1 application for marriage by giving 30 days notice required under the Special Marriage Act. Thereafter, according to the prosecution,

on 2.7.2011, he came to the house of the prosecutrix and told that there was no bus to his native place and wanted to stay there. But, PW2 objected the same stating that before marriage, he was not expected to stay there and left the place and it was thereafter that he stayed in the house along with the prosecutrix as her mother and children were also not there and had intercourse with her during that night making her to believe that they were going to marry and so she did not object.

9. According to the prosecution, he told that, if they went to Tamil Nadu, they would be able to get the marriage registered quickly without waiting for a period of 30 days under the statute and accordingly they went to the house of PW6, Ashok Kumar, a relative of the prosecutrix at Rajapalayam and stayed there on 4.7.2011. Even on that night, he had intercourse with her. Thereafter they went to the Sub Registrar's Office to enquire about the procedure and one stamp vendor told that their age proof certificates were required and so they could not proceed with the registration. While so, on 7.7.2011 two ladies by name Smt. Surabhi Das and Smt.Raji came to Rajapalayam enquiring about the appellant along with the parents of PW1 and on seeing them,

the appellant went inside the house and they made a complaint to the police there. But they told that since the incident happened in Kerala, they had to make the complaint to the Kerala police and accordingly they went back and her father and mother stayed there. Thereafter Smt. Surabhi Das gave a complaint to the Vellathuval police and she along with Vellathuval police came to Rajapalayam on 9.7.2011 and they arrested the appellant and went from there.

10. Thereafter on 28.9.2011 PW1 came to Vellathuval police station and gave Ext.P1 statement which was recorded by PW14, the Assistant Sub Inspector of police, Vellathuval police station and he registered Ext.P11 First Information Report as Crime No.341/2011 of Vellathuval police station against the appellant under Section 376 of the Indian Penal Code. Since the incident occurred within the jurisdiction of Munnar police station, the case was transferred to Munnar police station which was received by PW15 and he re-registered the case and registered Ext.P12 First Information Report as Crime No.664/2011 of Munnar police station against the appellant under Section 376 of the Indian Penal Code.

11. Earlier part of the investigation was conducted by

PW17, the Circle Inspector of police, Munnar police station. He arrested the appellant on 30.7.2011 and went to the place of occurrence namely the line room in which the prosecutrix was residing with her parents and children in Lakshmi estate of Devikulam and prepared Ext.P4 scene mahazer in the presence of PW7 and another. He subjected the appellant to medical examination by PW4 and obtained Ext.P3 potency certificate which will go to show that he was not incapacitated from having sexual intercourse. Thereafter he came to understand that the offence under Section 3(2) of the SC and ST Act was also committed and he gave a report to add that section and then handed over the investigation to PW16, the Deputy Superintendent of Police, Munnar, who had undertaken further investigation in the case.

12. PW16 questioned the witnesses and he questioned PW1 and seized MO1 nighty said to have been worn by the prosecutrix on the date of commission of the offence as per Ext.P13 mahazer in the presence of witnesses. The knithy was sent for chemical analysis through court and Ext.C1 analysis Report was obtained. She was subjected to medical examination by PW3, the doctor attached to the hospital and obtained

Ext.P2 medical certificate which will go to show that there was no evidence of recent intercourse and any evidence of violence on the body of the prosecutrix. He went to Rajapalayam and prepared Ext.P8 scene mahazer of the room in the house of PW6 from where the second act of intercourse was committed in the presence of PW8 and another. As per the request of PW16, PW9 - the Tahsildar gave Ext.P6 caste certificate of the appellant which shows that she belongs to Pallan community of scheduled caste and obtained Ext.P6 caste certificate of the appellant issued by PW11, the Village Officer, which shows that he belongs to Christian community. As per the request of the investigating officer, PW11- the Village Officer, prepared Ext.P8 sketch plan of the first place from where the appellant had intercourse with the prosecutrix. He obtained Ext.P9 ownership certificate of the line room from where the first act of intercourse was committed, which was issued by PW12, the Special Grade Secretary of the Panchayat, which will go to show that it belongs to Tata Tea Company. He also obtained Ext.P10 certificate issued by PW13, the Manager of the Lakshmi estate to prove that the room was originally given to one Kali and subsequently given

to one Shankerlal, who is the former husband of the prosecutrix and after his death the prosecutrix was residing in that house with her family. He completed the investigation and submitted final report in the case.

13. The prime witnesses relied on by the prosecution to prove their case was that of PW1, the prosecutrix, PW2- her father, PW5- Shaji, an auto rickshaw driver and PW6- Ashok Kumar, a relative of the prosecutrix. The evidence of Pws 2, 5 and 6 are not much relevant as the facts spoken to them were not in dispute. Further the fact that the appellant had promised to marry the prosecutrix and he had intercourse with her from the line room in Lakshmi estate where she was residing with her family were also not in dispute. The case of the appellant was that he was willing to marry the prosecutrix even now and as requested by the prosecutrix, he came to the house on 2.7.2011 and stayed there and as consented by the prosecutrix, he had intercourse with her. Further, his case was that it was at the instance of the prosecutrix that they went to Rajapalayam and stayed in the house of PW6. But he denied having intercourse with the prosecutrix from there. He had also stated that but for the

arrest, he could have married her and he denied that he had married Smt. Surabhi Das and that fact was suppressed. He had also denied that he had misrepresented that he was working in Crime Branch but he had only stated that he is working in Crime magazine belongs to one Nandhakumar.

14 Though the prosecution had a case that prior to this, the appellant had married one Smt. Surabhi Das who had come to Rajapalayam and at whose instance he was arrested from there on the basis of the complaint given by her, no evidence was collected by the prosecution to prove that he married the said Smt. Surabhi Das. She was not even cited as a witness in the case to prove her relationship with the appellant. So the prosecution has failed to prove that he had married Smt. Surabhi Das and that fact was suppressed before making the promise to marry PW1- the prosecutrix and that was one of the misrepresentation said to have been made by the appellant to procure the consent of the prosecutrix to make her to believe that he would marry her and had intercourse with her for the first time on 2.7.2011 from the line room in Lakshmi estate where the prosecutrix was residing at that time.

15. The question as to whether he had intention to defraud her and misrepresenting that, he would marry her and on the basis of that misrepresentation, he had obtained the consent has to be analysed from the evidence of PW1. PW1 is a widow of one Shankerlal and in that marriage, she was having two female children and it cannot be said that the children were too small children also as her husband died seven years ago and the children were born to them some time prior to that. Further it was brought out in evidence that she was a Panchayath President of that panchayath for some time and she was still a member of the panchayth even at that time when the alleged incident happened. It is also brought out in evidence that she is an active political worker of communist party of India of that locality. So, it cannot be said that she was not aware of the consequences of the acts which she was doing when compared to other normal persons of that strata would have understood the impact of the consequences of such similar act.

16. It will be seen from the evidence of PW1 that it was as agreed between PW2-her father, the appellant and herself that she had agreed to marry the appellant. It is also in a way

admitted that they went to Devikulam Sub Registrar's office to register the marriage under the Special Marriage Act. Further occupation of the appellant was given as Journalist in Ext.D1 and not as officer in the Crime Branch as claimed by the prosecution as said to have been told by him to the prosecutrix. The fact that they went to the Registrar's office and submitted Ext.D1 was not in dispute. This was proved through DW1, Sub Registrar also. It was also admitted by PW1 that Pandiyamma, Velankanni and Sathyavelu were her relatives. It was also brought out in evidence by DW1 that after receiving Exts.D1, D2 and D3, objections were received.

17. It is seen from Ext.D1 that, though in the bottom of the notice, date was typed as 29.6.2011, in fact it was produced before the Sub Registrar (Marriage Officer) on 28.6.2011 itself as is clear from the initial put by the Marriage Officer. So the observation made by the court below that it was submitted before the Sub Registrar's Office only on 29.6.2011 and there was no possibility for the witnesses and the prosecutrix going there and presenting the same appears to be not correct. Further, except the bare assumptions by the court below that the signatures of Sathyavelu, Velankanni

and Pandiyamma could have been forged by the appellant, there is no evidence to prove the same. Further, it was admitted by PW1 that they are all her relatives. Further merely because the prosecutrix had not signed Ext.D1, it cannot be said that it was not submitted by her especially when she had admitted that she had written her name in the application Ext.D1. So, it cannot be said that she had not signed the same and she had not presented the application voluntarily along with the appellant and it was done by her as induced by the appellant as observed by the court below. She had no case through out when she was examined before the court also that the appellant had the intention to deceive her and he had no intention to marry her and with that fraudulent intention, he had intercourse with her.

18. Further, it was brought out in evidence of Pws 1 and 2 that when the appellant came there on 2.7.2011 evening and wanted to stay in their house, PW2 had objected the same on the ground that it was not proper for him to stay there before marriage. PW1 had admitted that in spite of objection made by her father, she had allowed him to reside there knowing that except herself none were in the house on that

day. Further, she had admitted that when he told her that they had already submitted the application for registration of marriage under the Special Marriage Act, she had agreed for intercourse with him when he wanted the same. She had no case that he had intercourse with her on the promise of marriage and he had rescinded from that promise later. Further the conduct of PW1, not informing the same to her father, also creates doubt regarding case of the prosecution that it was done without her consent and only on the basis of the inducement made by the appellant.

19. Further, the fact that she went along with the appellant to Rajapalayam and stayed in the house of PW6, her relative, without informing her parents also will go to show that the appellant alone was responsible for going away from the house without the knowledge of the parents and it was at her instance that she left the place with the children. That also shows that she had gone along with the appellant voluntarily without any inducement on the part of the appellant. She had no case that she had made any resistance at the time when he had intercourse with her from the house of PW6 on 4.7.2011 and she had no case that even at that time, he had made her to

have intercourse with her on the inducement of promise to marry her. Further, she is a widow having two children and having some position in the society as a member of the panchayath and as a President of the Panchayath for some time and before that, she was working as a SSA Co-ordinator. So all these things will go to show that she was active in the public life. It cannot be said that she was not aware of the consequences of having intercourse with a man before marriage and it cannot be said that she can be easily induced to have such an act as well.

20. Further, they have no case that because he had told that he was working in Crime Branch, they have agreed for marriage and it was using that position that he had dominated her and obtained her consent by fear or force. The only allegation was that he had intercourse with her on the promise of marriage and nothing else. She had admitted in her evidence that at no point of time, he had told that he would not marry her. Further though the incident happened on 2.7.2011 and on 4.7.2011 and in spite of the fact that he was arrested on 9.7.2011, she gave Ext.P1 only on 28.9.2011, nearly after more than two months of the alleged incident. Her explanation

that the delay occurred due to her mental condition, cannot be believed. So that gives an indication that she was reluctant to file a complaint, but due to some deliberation and pressure, she happened to file the complaint against the appellant. All these things probablise the case of the appellant that she had intercourse with him with consent and not due to any inducement made by the appellant on the promise of marriage as claimed by the prosecution.

21. Section 375 of the Indian Penal Code defines rape as follows:

“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 given consent.

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

Seventhly:- When she is unable to communicate
consent.

22. Section 90 of Indian penal Code deals with consent
obtained under fear or misconception 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; or

Consent of insane person:- if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child:- unless the contrary appears from the context, if the consent is given by a person who is under twelve years age”.

23. In the decision reported in **Pradeep Kumar Verma v. State of Bihar** (AIR 2007 SC 3059), the Hon'ble Supreme Court has considered the scope of misconception for obtaining consent and observed as follows:

“ 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 victim 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 S.375 clause second”.

24. That was a case where after having intercourse with the prosecutrix on the promise of marriage, the accused had attempted to marry another lady and when this was come to the knowledge of the prosecutrix, she immediately filed the complaint.

25. Further in the decision reported in **Jose Thettayil v. Station House Officer** (2013 (3) KLT 552), this Court has considered under what circumstances consent can be said to be obtained by misconception, which reads as follows:

'The essential ingredient is that the person concerned knows at the very inception itself that the representation made by him is false and he also knows that the victim yielded believing that representation is true'.

Further it has been observed in the decision that:

'Consent,in order to constitute as a defence of allegation of rape should require a voluntary participation after having weighed the pros and cons of

the act connected to and victim has made a conscious choice between resistance and assent'.

Further in the same decision it has been observed that :

'Test to ascertain whether there is consent depends upon the facts of each case. In several of the decisions, it has been held that the mere promise to marry itself is not a ground to lead to the conclusion that there is misconception of fact. The test appears to be that if the person concerned at the very inception itself had no idea to marry the victim and makes false promise of marriage forcing or compelling the victim to have sexual intercourse with him knowing fully well that consent so given by the victim was under the belief that he would marry her and later if the person concerned retracts from his promise or withdraws from his promise, it has been held that the consent so obtained is as a result of misconception of fact falling within the ambit of S.90 of I.P.C'.

It is further observed in the same decision that:

'It is said that consent is the *qua animo* of the act. Consent is an operation of the mind implying positive mental action. Mere absence of dissent or submission may not amount to consent. In Story's Equity Jurisprudence consent is defined as "consent is an act of reason

accompanied with deliberation, the mind weighing as in a balance the good and evil on each side." It is also well settled that consent obtained by fraud, misrepresentation, concealment of fact, mistake and fraud are also vitiated. However, misconception of fact envisaged under the Section must be of an existing fact and not of something which is to take place in future. If it is shown that the person, who promised to marry the victim and compelled her to sexual intercourse, had at the very inception itself no idea of marrying the victim, but made her to believe it to be so, and knowing fully well that the consent so obtained is on misrepresentation and the person concerned later retracts from the promise, he cannot be heard to say that sexual intercourse was with consent'.

26. In this case though the prosecution had a case that he had suppressed the earlier marriage with one Smt. Surabhi Das and also another lady by name Raji, who had come to Rajapalayam to the house of PW6, the same was not established by adducing proper evidence. Neither Smt. Surabhi Das nor Smt. Raji were examined or cited as witnesses by the prosecution to prove this fact. Ext.D2 given by PW2, the father of the victim, and Ext.D3 given by one Sam K. George, a public worker, were not accepted by the learned Sessions

Judge on its face value as they were not proved as evident from the discussions made in paragraph 20 of the judgment. Further, it is seen that Ext.D2 had reached the Sub Registrar's Office on 7.7.2011, though it was signed on 5.7.2011, only after the alleged incident of PW2 going to Rajapalayam along with smt. Surabhi Das and Smt. Raji. Ext.D3 shows that it was said to have been signed on 5.6.2011 and it is not known as to when it was received in the Sub Registrar's Office. Further, on 5.6.2011 not even the promise to marry had taken place even according to the prosecution. So, under the circumstances, the court below was perfectly justified in not relying on Exts.D2 and D3 for the purpose of coming to the conclusion that the contents mentioned therein were proved so as to use the same against the appellant.

27. Further on going through the discussions, the court below had come to the conclusion that the consent was obtained by misconception on certain aspects discussed in paragraph 31 of the judgment namely:

“1. The accused falsely claimed that he was working in Crime branch and Crime magazine so that the prosecutrix might agree to his proposal to marry the

prosecutrix.

2. The accused had no special reason to make the proposal to marry the prosecutrix who was a widow having two children and with whom he had no prior acquaintance and who was five years older than him.

3. He was fully aware that under the Special Marriage Act, 30 day's notice was mandatory before solemnisation of marriage. His taking the prosecutrix to the Devikulam Sub Registrar's Office (Marriage Officer) was an artifice to make her believe that he would marry her.

4. Knowing fully well that under the Special Marriage Act, 30 days notice was necessary before solemnization of marriage he made the prosecutrix believe that in Tamil Nadu marriage could be solemnized without 30 days notice, which compelled her to go with him to Tamil Nadu.

5. His conduct at the house of PW6 Asok Kumar leads to the conclusion that he had relationship with Surabhi which he did not want the prosecutrix to know because the disclosure would have inclined her not to accept the proposal."

In fact, those things were not supported by or established by the evidence of Pws 1 and 6 as observed by the court below

so as to come to such a conclusion that the prosecution has proved that consent was vitiated by misconception beyond reasonable doubt so as to conclude that the appellant had committed the offence under Section 376 of the Indian Penal Code. Even going by the evidence of Pw1, it cannot be said that she was not a consenting party to the intercourse and she was in fact induced by the appellant to have intercourse with her on the promise of marriage with an intention not to marry her even at that time. Her evidence will go to show that he never told her that he would not marry her and she had no case that she was convinced that he had married Smt.Surabhi Das or Smt. Raji and that fact was deliberately suppressed by him. Those facts were not proved by the prosecution in this case as well. So, under the circumstances and also in view of the discussions made above, the conclusion arrived at by the court below that the appellant had intercourse with the prosecutrix against her wish and the consent given by the prosecutrix as claimed by the appellant was not voluntarily but it was vitiated by misconception of facts assumed by the prosecutrix on the basis of the representation made by him to her so as to come to the conclusion that act of the appellant of having intercourse

with the prosecutrix will amount to rape so as to convict him for the said offence. So it cannot be said that the prosecution has proved beyond reasonable doubt that he had the intention even at the time when he had intercourse with her not to marry her and the consent given by the prosecutrix was misconception of facts and the conviction entered by the court below on the basis of such assumption without proof beyond reasonable doubt are unsustainable in law and the same is liable to be set aside. So it can be safely concluded that the prosecution has failed to prove beyond reasonable doubt that the appellant had committed the offence of rape as defined under Section 375 of the Indian Penal Code by obtaining consent by misconception and suppressing the fact of earlier marriage and thereby he had committed the offence punishable under Section 376 of the Indian Penal Code and that finding is unsustainable in law and the same is liable to be set aside and he is entitled to get acquittal of the charge levelled against him giving him the benefit of doubt.

28. In view of the finding that the appellant is entitled to get acquittal of the charge levelled against him, the sentence imposed by the court below is not sustainable in law and the

same is set aside.

In the result, the appeal is allowed. The order of conviction and sentence passed by the court below against the appellant under Section 376 of the Indian Penal Code are set aside and the appellant is acquitted of the charge levelled against him giving him the benefit of doubt. He is set at liberty.

Office is directed to inform the jail authorities to release him forthwith in this case, if his custody is not required in connection with any other case. This Court place the appreciation on records for the enthusiasm shown on sincere effort taken by Smt.Resmi Nandan, the legal aid counsel appointed in arguing the case in an effective manner on behalf of the appellant.

Office is directed to communicate this order to the concerned court immediately. Office is directed to send copy of this judgment to the appellant to be delivered to him through jail authorities and get acknowledgment of the appellant for receipt of the same.

Sd/-

K. RAMAKRISHNAN, JUDGE.

cl

/true copy/

P.S to Judge

