

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CRA-D-692-DB of 2015 (O&M)
Date of Decision: October 5, 2015

Mahapara Riyaz

.....Appellant

Versus

State of Haryana and another

.....Respondents

**CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE HARI PAL VERMA**

Present: Shri Atul Yadav, Advocate, for the appellant.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported?

Hemant Gupta, J.

The present appeal by the victim is directed against an order passed by the learned trial Court on 23.09.2014, whereby the respondent was acquitted of the charges for the offences under Sections 376 and 506 IPC.

The victim lodged a complaint to the Police on 29.4.2014 when she was working in Columbia Asia Hospital, Gurgaon. Her stand is that she met a boy, named, Arman in the year 2011 initially through telephone, but subsequently, this was converted into live-in-relationship from the year 2011-14. Her grievance is that the accused used her physically and financially under the promise of marriage and whenever she insisted for marriage, he used to torture her physically. Subsequently, he disclosed his real name as Muzafar Wani working as driver in the Air Force Department, Subroto Park, Delhi and

falsely revealed him as Flying Officer earlier. Even thereafter, the accused used to physically and sexually abuse her. It was on 30.03.2014, the accused asked her to resign and that he would get married to her. He assured to perform the Court marriage with her but every time harassed her in the name of media. She further stated that she was receiving calls from the accused who was threatening to put some video clips and was also physically and mentally torturing her and had been threatening her that she would be killed in case she disclosed this fact to anyone.

On the basis of the complaint, the victim was medico legally examined and her statement was recorded under Section 164 Cr.P.C. The accused was arrested on 13.04.2014 and was made to stand trial after completion of the investigation.

During trial, victim appeared as PW-3, apart from Dr. Priyaka Yadav as PW-4 and other formal witnesses of formal nature. The accused in his statement under Section 313 Cr.P.C. stated that he was living with the victim in live-in-relationship since 2012. The physical relations were established with the consent. They intended to get married and it was agreed that if their families agree, only then they would get married. An affidavit to this effect was executed by both of them in January, 2014. In April, 2014, it was mutually resolved by the families of both that they would part way and would not file cases against each other and a sum of Rs.80,000/- was paid to the victim at that time. But the victim raised her demand at Rs.3.00 lacs. On refusal to pay, she has filed the present false case.

The learned trial Court examined the statement of the appellant as PW3 that their relationship became sore in January, 2014 and that the accused lingered on marriage on one pretext or the other sometime by saying that his mother was not well and sometime that his father was not working or that his brother was not yet

married. She has also disclosed that she has gone the house of the accused in December, 2013 and came to know from the father and brother of the accused that he was having affair with another girl for the last seven years. The appellant visited the office of the accused in the year 2013, met his seniors and it was assured that the accused would marry her before 1.03.2014. It is her further stand that she resigned from her job in March, 2014, but the accused as promised did not send his parents with proposal of marriage to her parents. She further stated that some relatives of the accused forcibly obtained her signatures on the blank papers and that her parents confined her to home but she managed to come out to Gurgaon to lodge the complaint.

In cross-examination she admitted that the accused used to come her daily after duty hours and disclosed to the landlord as well as to the fellows in the vicinity that he was going to marry her. She admitted her signatures on agreement to be her (Mark-D), but denied the due execution of the same. She denied signatures of her father on Mark-DB. She denied the suggestion that the accused never promised to marry her. PW4-Dr. Priyanka Yadav found no injury marks on the person of appellant and did not rule out of any possibility of sexual intercourse with her.

On the basis of such evidence, the learned trial court found that the appellant and accused, both had been having live-in-relationship since May, 2012. The Court found that her stand that she was duped under the promise of marriage was not plausible as she is a major of 27 years of age and a working woman. The Court held that live-in-relationship nowhere carries any promise; therefore, it is quite improbable that the accused made any promise of marrying her or she was duped under the promise of marriage. The Court found that it cannot be said that the consent of the appellant was obtained

under misconception of facts. The Court concluded to the following effect:-

“25. From the entire circumstances of the case, it can be fairly concluded that accused never made a false promise of marriage with the prosecutrix rather they have initially entered into consensual relationship and owing to some circumstances they decided to part ways. Such like live in relationship maintained by the accused and prosecutrix cannot be termed as rape on false promise of marriage.”

Before, this Court, the Learned Counsel for the Appellant argued that the appellant consented to have live in relation in view of the promise of the accused to marry. Once, the accused has made promise to marry and thereafter, did not marry, the offence under Section 376 is made out as her consent was obtained by misrepresentation.

A Single Bench of this Court in Rao Harnarain Singh Sheoji Singh and others v. The State, AIR 1958 Punjab 128, examined the scope of the expression “consent” appearing in Section 375 IPC and as defined under Section 90 thereof. The Court held to the following effect:-

“7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be “consent” as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason,

accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

The said judgment was quoted with approval by the Hon'ble Supreme Court in Deelip Singh v. State of Bihar, (2005)1 SCC 88, when the Court examined the following questions:-

"19. 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 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. This is the scheme of Section 90 which is couched in negative terminology.

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24. There is a good analysis of the expression "consent" in the context of Section 375 IPC by Tekchand, J. in *Rao Harnarain Singh Sheoji Singh v. State*, AIR 1958 Punj 123. The learned Judge had evidently drawn inspiration from the above passages in the law dictionaries. The observation of the learned Judge that

“there is a difference between consent and submission [and] every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent”,

is quite apposite. The said proposition is virtually a repetition of what was said by Coleridge, J. in *R. v. Day*, (1841)9 C&P 722 in 1841 as quoted in *Words and Phrases* (Permanent Edn.) at p. 205. The following remarks in *Harnarain case* are also pertinent: (AIR p. 126, para 7)

Consent is an act of reason accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be consent.

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27. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, we have the decision of the Division Bench of the Calcutta High Court in *Jayanti Rani Panda v. State of W.B.*, 1984 Cri LJ 1535. The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in *Uday v. State of Karnataka*, (2003)4 SCC 46 approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7: (Cri LJ pp. 1537-38)

“Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her.”

The discussion that follows the above passage is important and is extracted hereunder: (Cri LJ p. 1538, para 7)

“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.*"

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After referring to the case-law on the subject, it was observed in *Uday v. State of Karnataka, (2003)4 SCC 46*, at para 21:-

"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 straitjacket 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."

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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.....”

In Deepak Gulati v. State of Haryana, (2013)7 SCC 675, the Hon’ble Supreme Court held to the following effect:-

“16. Admittedly, the prosecutrix has never raised any grievance before any person at any stage. In fact, she seems to have submitted to the will of the appellant, possibly in lieu of his promise to marry her. Thus, a question arises with respect to whether, in light of the facts and circumstances of the present case, the appellant had an intention to deceive her from the very beginning when he had asked the prosecutrix to leave for Kurukshetra with him from Karnal.

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19. This Court considered the issue involved herein at length in *Uday v. State of Karnataka*, *Deelip Singh v. State of Bihar*, *Yedla Srinivasa Rao v. State of A.P.*, (2006)11 SCC 615 and *Pradeep Kumar v. State of Bihar*, (2007)7 SCC 413 and came to the conclusion that in the event that the accused’s promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.

20. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it

shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.”

The allegations leveled by the prosecutrix are required to be examined in the light of the judgments cited above. The appellant developed friendship with the respondent as per her own saying in the year 2011 and converted the same into live-in-relationship soon thereafter for a period of three years. The stand of the prosecution is

not that the accused made false promise before the appellant established live in relationship. It is subsequently, the marriage did not fructify. The stand of the respondent is that they intended to get married but only if the families agreed. Since the marriage could not be performed may be for any reason, it cannot be said that there was a false promise of marriage when the parties entered into live-in-relationship.

In view of the said facts on record, we do not find any case is made out for interference in the present appeal against acquittal. There is no perversity or illegality in the order passed by the learned trial Court, which may warrant interference by this Court in the present appeal.

Hence, the appeal is dismissed.

(Hemant Gupta)
Judge

(Hari Pal Verma)
Judge

October 05, 2015
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