

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 24th May, 2016

+ CRL.A. 928/2015

ROHIT TIWARI

..... Appellant

Through

**Mr.Manoj Ohri, Sr.Advocate
with Mr.Kaushal Yadav &
Mr.Prashant Kumar, Advocates**

versus

STATE

..... Respondent

Through

**Ms.Neelam Sharma, APP for
the State.**

%

CORAM:

HON'BLE MS. JUSTICE SUNITA GUPTA

J U D G M E N T

: SUNITA GUPTA, J.

1. Challenge in this appeal is to a judgment dated 12.08.2015 of learned Addl. Sessions Judge, Delhi in Sessions Case No. 36/15 arising out of FIR No. 112/14 PS Palam Village by which the appellant Rohit Tiwari was convicted for committing offence under Section 376 IPC. By an order dated 20.08.2015, he was sentenced to undergo RI for ten years with fine of Rs.1.5 Lacs in default to undergo simple imprisonment for one year.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that from August 2013 to November 2013, the appellant

committed rape upon 'X' (assumed name) on the pretext of marrying her. Written complaint (Ex.PW-6/A) lodged by 'X' dated 14.12.2013 formed the basis of First Information Report registered on 09.03.2014. 'X' was medically examined; her statement under Section 164 Cr.P.C. was recorded. Statements of the witnesses conversant with the facts were recorded. After completion of investigation, a charge-sheet was filed against the appellant for commission of offences under Sections 376/420/406IPC. The prosecution examined eight witnesses to substantiate its case. In his statement recorded u/s 313 Cr.P.C., the appellant denied his involvement in the crime and pleaded false implication. He stated that prosecutrix herself used to give missed calls to him. They had physical relations. Relations were consensual. He told her that he was married and had two children. DW-1 Anjali Tiwari, his wife, appeared in defence. The Trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the appellant has filed the instant appeal.

3. I have heard the learned counsel for the parties and have examined the file.

4. Appellant's conviction is primarily based upon the solitary testimony of 'X'. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case, the court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

5. In her complaint (Ex. PW6/A), the prosecutrix stated that in the process of purchasing goods from the godown of the accused she

developed friendship with the accused which later on blossomed into the love affair. They used to talk on phone. He used to visit her house and stay there. On 12.12.2012 he came to her house alongwith his *Mami* and *Bhabhi* and proposed to marry her. They further asked her to obtain divorce from her husband Sanjay Sharma hence first motion for divorce was completed on 24.06.2013. On 12.12.2012 both of them went to Mehendipur Balaji for 'Darshan'. They spent the night together in the hotel and he established physical relations with her after pressurizing her. She was living separately from her husband for the last 17 years and it was at instance of accused, she obtained divorce from her husband. Accused established sexual relations with her between August 2013 to November 2013 on the promise of marriage. On 10.06.2013 they went to Mahakaal Mandir at Ujjain. She provided financial assistance to him. In November 2013 accused disappeared all of sudden and on enquiry she came to know that accused is already married. In her 164 Cr.P.C statement (Ex. PW 4/A) she reiterated the facts which she had stated in her complaint.

6. In her Court statement as PW-6, 'X' deposed that she had been residing separately from her husband for the last 17 years. About four years ago she came to know that household goods are being sold in the godown of accused at cheap price. She started buying goods from his godown. During the course of time, she and the accused became friends and accused started visiting her house. She deposed that accused told her that he is unmarried and is residing alone at Delhi in her maternal aunt's house. He took her to his

maternal aunt's house where she met his maternal aunt and his sister in law. She further deposed that on 12.12.2012 accused came to her house with his maternal aunt and sister in law. They suggested to her that she should marry the accused. She told them that she is already married to which maternal aunt of the accused asked her to obtain divorce from her husband. On the same day they went to Mehandipur Balaji and spent the night in Shiv Dham Ashram where sexual relations were established. She gave financial assistance to the accused to the tune of Rs. 3 Lacs. On 10.06.2013 they went to Mahakaleshwar Temple, Ujjain. After returning from the temple she filed a petition for mutual divorce from her husband. Accused continued to have sexual intercourse with her. On 01.11.2013 accused again came to her house and established physical relations with her. She further deposed that on 23.11.2013 when she visited the native village of the accused she found that accused was already married. He was having a child and person he introduced as his sister in law was in fact wife of the accused. In the cross examination she admitted that she had established physical relations with the accused twice before the marriage proposal was made to her. She also admitted that they have sexual relations in the hotel at Mehendipur Balaji.

7. It is not in dispute that complainant was 34 years of age while accused was 32 years at that time. Admitted position is that both the prosecutrix and the appellant were well acquainted with each other and had friendly relations. Even prior to the proposal for marriage on 12.12.12 they had physical relation with each other at her house

and accused also used to sleep in her house where her son and mother used to be present.

8. No cogent evidence has emerged on record to show that the physical relations were established with the prosecutrix on the false promise or assurance of marriage. Where was the compulsion for the prosecutrix to have physical relationship repeatedly without ensuring that the appellant and his family members were willing to perform marriage with her? She was mature enough to fully understand as to what was happening between the two. There is nothing in her evidence to demonstrate that she was incapable of understanding the nature and implications of the acts which she consented to. Her consent for physical relationship (if any) was an act of conscious reason. If a fully grown up lady consents to the act of sexual intercourse on a promise to marry and continues to indulge in such activity for long, it is an act of promiscuity on her part and not an act induced by misconception of fact. 'X' is not believed to allow the appellant to have physical relations repeatedly without first ensuring authenticity of the alleged promise to marriage particularly when they both were married.

9. In ***Sujit Ranjan vs. State*** 2011 Law Suit (Del) 601, this Court held :

"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."

10. In **Deepak Gulati vs. State of Haryana** 2013 Law Suit (SC) 442, the Supreme Court held :

"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 malafide 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 any 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 mis-representation 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 malafide, and that he had clandestine motives. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The " failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within

the meaning of the term misconception of fact, the fact must have an immediate relevance." Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."

10. In ***Uday vs. State of Karnataka***, AIR 2003 SC 1639, the Supreme Court held :

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

11. In the instant case, the prosecutrix has miserably failed to establish if her consent for physical relationship was obtained on assurance or promise of marriage. Physical relations between the two were consensual. It cannot be inferred with certainty that the prosecutrix was cheated and her consent was obtained for physical relationship on the false promise to marry.

12. Inordinate delay in lodging the FIR has not been explained. Relationship between the two started from 2012 but FIR has been lodged only on 09.03.2014.

13. Medical evidence does not in any manner enhances the case of prosecution. As per her MLC Ex.PW5/A, no fresh external injury was found on her person.

14. As submitted by learned senior counsel for appellant, a sum of Rs.1,50,000/- was returned to the 'X' at the time of hearing bail application.

15. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality.

16. In ***Abbas Ahmed Choudhury v. State of Assam*** (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon'ble Supreme Court held :

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."

17. In another case ***Raju v. State of Madhya Pradesh*** (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth.

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

18. In ***Rai Sandeep @ Deepu vs. State of NCT of Delhi*** (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :

"In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied,

it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

19. In ***Tameezuddin @ Tammu v. State (NCT of Delhi)*** (2009)

15 SCC 566, the Supreme Court held :

"It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

19. The delay in FIR, the testimony of the prosecutrix, the associated circumstances and the medical evidence, leave a mark of doubt to treat the testimony of the prosecutrix as so natural and truthful to inspire confidence. It can be stated with certitude that the evidence of the prosecutrix is not of such quality which can be placed reliance upon. True it is, the grammar of law permits the testimony of a prosecutrix can be accepted without any corroboration without material particulars, for she has to be placed on a higher pedestal than an injured witness, but, a pregnant one when a court, on studied scrutiny of the evidence find it difficult to accept the version of the prosecutrix, because it is not irreproachable, there is requirement for search of such direct or circumstantial evidence which would lent assurance to her testimony. As the prosecution case would show her testimony does not inspire confidence and the circumstantial evidence

do not lend any support to the same. In the absence of both, this Court is compelled to hold that the learned Trial Judge has erroneously convicted the appellant for the alleged offence.

20. The appeal filed by the appellant is accordingly allowed. Conviction and sentence of the appellant are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

21. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for compliance.

(SUNITA GUPTA)
JUDGE

MAY 24, 2016
mb

