

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL APPEAL NO. 106 OF 2002

Shri Balu s/o Mahadu Jagdhane,
Age : 20 years, Occu. Labour,
R/o Satana, Tal. and Dist.
Aurangabad

APPELLANT
(ORIG. ACCUSED)

VERSUS

The State of Maharashtra
through Police Station, Karmad,
Tal. and Dist. Aurangabad

RESPONDENT

Mr. N.S. Choudhari, Advocate for the Appellant
Mr. P.N. Kutti, A.P.P. for the respondent/State

CORAM : SANGITRAO S. PATIL, J.

DATE : 3rd AUGUST, 2017

ORAL JUDGMENT :

Heard the learned counsel for the appellant
and the learned A.P.P.

2. The appellant has challenged his conviction
and sentence for the offence punishable under section
376 of the Indian Penal Code ("IPC", for short),
recorded on 25th January, 2002 by the learned
Additional Sessions Judge, Aurangabad in Sessions Case

No. 206 of 2000.

3. It is alleged that since after six months prior to 20th January, 2000, the appellant committed rape on the prosecutrix aged about 20 years on the pretext of performing marriage with her and committed breach of that promise after she became pregnant from him.

4. The prosecutrix lodged report in Police Station, Karmad on 20th January, 2000. On the basis of that report, the Crime No. I-8/2000 came to be registered against the appellant for the above mentioned offence. The investigation followed. The statements of the witnesses were recorded. The medical examination of the appellant and that of the prosecutrix was conducted by the Medical Officer. After completion of the investigation, the appellant came to be prosecuted for the above mentioned offence.

5. The prosecution examined the prosecutrix and one Sakharam (PW2), the maternal uncle of the prosecutrix. The prosecution then examined the Investigating Officer and closed the evidence.

6. It is the defence of the appellant that he never promised the prosecutrix of performing marriage

with her and that she lodged false report against him.

7. The prosecutrix states that she is physically handicapped as both of her legs have been paralyzed since her childhood. She started residing at the house of her maternal uncle i.e. Sakharam (PW2) since before 1½ year prior to the incident in the hutment area of Satana, Taluka and District Aurangabad. The appellant was residing in the same area. She was in talking terms with him. Once, he expressed to have sexual intercourse with her. She was not ready for that. The appellant promised that he would marry to her. Therefore, she gave consent for sexual intercourse. He had sexual intercourse for about 4 to 5 times. She became pregnant out of the said intercourse. She disclosed the appellant about that fact and asked him to marry her, whereon he refused on the say that he would not marry a disabled person like her. Then she informed about her physical relations with the appellant to Sakharam (PW2). According to her, she had not given consent for sexual intercourse with the appellant, but he forcibly subjected her to sexual intercourse every time. She was carrying of six months from the appellant. Therefore, she lodged report (Exh-40). She states that she

delivered a female child which died within a month of her delivery.

8. It has come in the cross-examination of the prosecutrix that the appellant belongs to Matang community, while she is a Boudh. She states that the appellant was not her relative.

9. The learned counsel for the appellant submits that the evidence of the prosecutrix is not at all natural, probable and believable. There are material omissions in her evidence. The fact that she was not ready for intercourse with the appellant but she gave consent because he promised to marry her, was not stated by her before the police. Moreover, the fact that she had not given consent for sexual intercourse, but the appellant exercised force and had sexual intercourse with her every time, also is not stated by her before the police. He submits that had the appellant forced the prosecutrix to have sexual intercourse without her consent or had obtained her consent on the pretext of getting married to her, she certainly would have stated these facts before the police. She has stated these facts by way of improvements. He then submits that the prosecutrix was physically handicapped. She was aged

about 20 years. There was no reason for the appellant to promise her to perform marriage with her and on the strength of that promise, to have sexual intercourse with her. He then submits that the prosecutrix has admitted that there were houses of other persons and relatives of Sakharam (PW2) near his house, where the appellant is alleged to have raped her. The prosecutrix states that when the appellant forced her to have sexual intercourse with her, she had raised shouts. He submits that had the prosecutrix raised shouts, the relatives of Sakharam (PW2) and other persons residing in the vicinity certainly would have noticed that fact and would have come to the rescue of the prosecutrix. Nobody has been examined to establish that the appellant had any occasion to visit the house of Sakharam (PW2) for meeting the prosecutrix at any point of time. Even Sakharam (PW2) also does not state so. He further submits that there is no medical evidence to establish that the appellant had sexual intercourse with the prosecutrix. The child begotten by the prosecutrix also was not subjected to DNA test so as to establish its paternity. He, therefore, submits that the prosecution has totally failed to establish guilt of the appellant.

10. On the other hand, the learned A.P.P. submits that the appellant took undue advantage of the physical disability of the prosecutrix and committed sexual intercourse with her on the false pretext of performing marriage with her. He, therefore, submits that the Trial Court has rightly convicted the appellant.

11. The learned counsel for the appellant relied on the judgment in the case of **Uday Vs. State of Karnataka (2003) 4 SCC 46**. The facts of that case, as narrated in paragraph No. 23 of the judgment, are as under:-

"In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have

known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."

12. In the same judgment, in paragraph No.21, the Hon'ble the Apex Court observed as under:-

"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."

13. In the present case, the prosecutrix was aged about 20 years in the year 2000. She was quite competent to take decision that was in her interest. Though she was physically handicapped as both of her legs were paralyzed since her childhood, she was sufficiently intelligent to understand the consequences of her acts. The prosecutrix and the appellant were not belonging to the same community. There was least possibility of their getting married. Therefore, the contention of the prosecutrix that she consented to have sexual intercourse with the appellant since he promised to perform marriage with her, does not stand to reason.

14. The second version of the prosecutrix that the appellant forced her to have sexual intercourse with her

though she raised shouts is not at all natural and probable. Had the appellant committed sexual intercourse with her against her wish and resistance and had she raised shouts, attention of the persons residing in the vicinity certainly would have been attracted and the appellant certainly would have been questioned by them for his misdeeds. Nothing of that sort ever happened. Even Sakharam (PW2), the maternal uncle of the prosecutrix, with whom she was residing, does not state that the prosecutrix made any grievance at any point of time against the appellant until she lodged report after becoming pregnant of six months. The overall facts of the case clearly indicate that the prosecutrix was a consenting party to the sexual intercourse with the appellant.

15. The prosecutrix seems to be a willing party to have sexual intercourse with the appellant. There is no explanation given by the prosecutrix as to why she did not lodge report against the appellant or made any grievance against him for having sexual intercourse with her until she became pregnant of six months. This delay in lodging the report itself creates doubt about the case of the prosecution that the appellant had sexual

intercourse with the prosecutrix against her will.

16. The case of the prosecution that the appellant committed rape on the prosecutrix on the pretext of getting married with her is not at all believable. Except the bare words of the prosecutrix, there is no either direct or circumstantial evidence to show that the appellant had sexual intercourse with her on the false pretext of getting married with her or forced her to have sexual intercourse with her.

17. The learned Trial Judge did not appreciate the evidence of the prosecution properly and held the appellant guilty of the offence mentioned above, merely on surmises and conjectures. The finding recorded by the learned Trial Judge holding the appellant guilty of having committed rape on the prosecutrix is not sustainable. The prosecution has failed to prove guilt of the appellant for the above mentioned offence. He is liable to be acquitted. Hence, I pass the following order:-

O R D E R

(i) The Criminal Appeal is allowed.

(ii) The impugned judgment and order, dated 25th January, 2002 passed by the Additional Sessions Judge, Aurangabad in Sessions Case No. 206 of 2000, convicting the appellant for the offence punishable under Section 376 of the Indian Penal Code are quashed and set aside.

(iii) The appellant is acquitted of the offence punishable under Section 376 of the Indian Penal Code.

(iv) The bail bonds of the appellant are cancelled. He is set at liberty.

(v) The appeal stands disposed of accordingly.

[SANGITRAO S. PATIL]
JUDGE

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