

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

RESERVED ON : 11th JANUARY, 2017
DECIDED ON : 10th MARCH, 2017

+ **CRL.A.506/2014 & CRL.M.A.No.6454/2014**

‘X’ (Assumed name) Appellant

Through : Mr.Naresh K.Daksh, Advocate.

versus

VIKASH SHARMA & ANR. Respondents

Through : Ms.Neha Kapoor, Advocate for R1.
Ms.Meenakshi Dahiya, APP.

CORAM:

HON'BLE MR. JUSTICE S.P.GARG

S.P.GARG, J.

1. Aggrieved by a judgment dated 05.03.2014 of learned Addl. Sessions Judge in Sessions Case No.125/2013 arising out of FIR No.66/2013 registered under Section 376 IPC at PS Dabri whereby the respondent No.1 – Vikash Sharma (hereinafter referred as ‘the respondent’) was acquitted of the charge, the prosecutrix ‘X’ (assumed name) has preferred the instant appeal. It is contested by the respondent. Relevant to note is that State did not challenge the respondent’s acquittal.

2. Briefly stated, the prosecution case as set up in the charge-sheet was that on 07.03.2012 on the day of Holi, at House No.RZ-20A, Gali No.3, Dabri Extension Main at around 4 or 5 p.m. the respondent committed rape upon the prosecutrix. He thereafter continued to have physical relations with her on the pretext to marry.

3. The Investigating Officer lodged First Information Report on receipt of victim's written complaint (Ex.PW-4/A) on 03.02.2013. 'X' was medically examined. Statements of the witnesses conversant with the facts were recorded. The respondent was arrested and medically examined. Upon completion of investigation, a charge-sheet was filed under Sections 376/506 IPC against the respondent. To prove its case, the prosecution examined thirteen witnesses. In 313 Cr.P.C. statement, the respondent denied the allegations and pleaded false implication. The respondent examined DW-1 (Rajeev Sharma), DW-2 (Rajinder Sharma) and DW-3 (Dhanesh Kumar) in defence. The trial resulted in acquittal as mentioned previously.

4. I have heard the learned counsel for the parties and have examined the file. Admitted position is that the respondent is real brother-in-law (dever) of the prosecutrix married to PW-3 (Manoj) on 22.02.2008. A male child was born to her on 16.01.2011. It is also not in dispute that the prosecutrix and her husband - PW-3 (Manoj) had filed a petition for dissolution of their marriage by a decree of divorce under Section 13(B)(I) of Hindu Marriage Act and first motion was granted by an order dated 22.01.2013 (Ex.PW-4/D2).

5. The Trial Court in the impugned judgment has rightly noted position of law and this Court finds no valid reasons to deviate from it.

“Undoubtedly, in cases involving offence of rape, the testimony of the prosecutrix, if found to be worthy of credence as well as reliable and inspiring confidence requires no corroboration and court may convict the accused on the basis of her sole testimony. She is undoubtedly a competent witness u/s.118 of Evidence Act and her evidence

must receive the same weight as is attached to that of an injured in case of physical violence. However, if for some reason, the court is hesitant to place implicit reliance on the testimony of the prosecutrix, it may look for some other evidence on record, which may lend assurance to her testimony, short of corroboration required in case of accomplice. If the court finds it difficult to accept the version of the prosecutrix at its face value, it may search for evidence, direct or circumstantially which would lend assurance about her testimony. It also needs mention that even in cases of rape the onus is always on the prosecution to prove affirmatively all the ingredients of the offence which it seeks to establish and such onus never shifts. It is not the duty of the defence to explain why and how the victim and other witnesses have falsely implicated the accused. The prosecution case has to stand on its own legs and cannot take the support from the weakness of the case of defence. However, the great suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legally admissible evidence and the material on record, the conviction cannot be ordered. There is initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to benefit of every reasonable doubt.”

6. In the instant case, number of vital infirmities, inconsistencies and discrepancies have emerged making it unsafe to base conviction on the solitary statement of the prosecutrix who was a married lady aged around 29 years and was blessed with a male child. She was residing along with her husband and child in the matrimonial home prior to 07.03.2012. Nothing material has emerged on record to infer if relations between the prosecutrix and her husband were strained or that PW-3 (Manoj) had extended threats to divorce her. Nothing has come on record to show if any proceedings whatsoever was ever initiated by the prosecutrix against her husband Manoj or any other family member for harassment, torture and beatings etc. The petition to seek divorce by mutual consent was filed only on 21.01.2013. In the joint petition (Ex.PW-4/D1), it was averred that both of them were living separately from each other for the last more than one year i.e. October, 2011. It was further mentioned that they were not able to live together due to serious disputes regarding various aspects of married life and incompatibility of nature and thoughts. After recording their joint statement, first motion was granted by an order dated 22.01.2013 (Ex.PW-4/D2). Undisputedly, at present both the prosecutrix and her husband Manoj are living together and no second motion petition to seek divorce by mutual consent was filed thereafter. It is unclear as to what had prompted the prosecutrix and her husband Manoj to seek divorce by mutual consent and why subsequently it was not acted upon. The prosecutrix or her husband has not given any valid justification for it.

7. The respondent who was earlier working at Chittorgarh shifted to Alwar in August, 2011. Thereafter, he started regularly visiting the victim's residence since January, 2012. In the complaint (Ex.PW-4/A), the

prosecutrix alleged that on 07.03.2012 on Holi occasion taking advantage of her being alone in the house at around 4 or 5 p.m. the respondent started teasing her. When she objected to it, he forcibly made her to fall on the bed and established physical relations with her. When she threatened to disclose about it to her husband and family members, the respondent put vermilion on her 'forehead' and told that he had established physical relations as her relation with his brother were not cordial and he would divorce her any time. He suggested her to take divorce from her husband and he could take care of hers and the child.

8. In Court statement making a departure from her initial version given to the police in her complaint (Ex.PW-4/A) regarding the incident dated 07.03.2012, the prosecutrix introduced a new story and deposed that after his frequent visits to residence, the respondent came to know about her strained relations with her husband Manoj. The respondent used to tell her that Manoj would divorce her one day or the other and it would be difficult for her to spend rest of life. The respondent used to tell her that after divorce from Manoj, nobody would marry her and in case anybody married, he would not give proper fatherly love and affection to her son. He further told her that she should marry him after divorcing Manoj and he would take proper care of hers and the child. The prosecutrix further deposed that on 07.03.2012, the respondent came to her residence and started talking about his marriage with her. The respondent started teasing her and made sexual advancement towards her which she opposed saying that it was not proper. The respondent emotionally blackmailed her saying that he loved her intensely and would marry her at any cost. He told her that having physical relations being a part of love making, there was nothing wrong in it. She was

carried away by his talks and emotions and had sexual intercourse that day. Thereafter, the respondent used to visit her residence thrice in a month and each time he used to have sexual intercourse with her while assuring her that he loved her and would marry her.

9. As per initial complaint physical relations on 07.03.2012 with the respondent were against her consent. Prior to establishing physical relations, the respondent had not assured her to marry her. Only when the prosecutrix threatened to disclose the incident to her husband and family members, the respondent purportedly applied vermilion in her 'mang' and promised to take care of hers and her son. The prosecutrix did not state in the complaint if she had raised alarm or hue and cry during commission of sexual assault or any resistance was offered to ward off the crime. It is unclear as to why the prosecutrix permitted the respondent to have physical relations with her and did not report the incident to her husband or her family members promptly on the alleged promise to marry subsequent to the act. The prosecutrix maintained complete silence about the first incident of commission of rape and apparently agreed to condone it on subsequent promise to marry. The prosecutrix herself was a married lady and was mother of a child. No divorce had taken place between her and Manoj. There was no occasion for her to be under misconception of fact and to believe that the respondent would marry her in the absence of any dissolution of marriage with her husband. Instead of protecting her honour, the prosecutrix continued to have physical relations repeatedly on various occasions with the respondent with her consent.

10. In her Court statement, 'X' has made vital improvements and has come up with the plea that first physical relationship was on the promise

to marry her. The prosecution has failed to reconcile the conflicting versions.

11. Complainant's conduct throughout is unnatural and unacceptable. She continued to have physical relations with the respondent before lodging the FIR on 03.02.2013 on several occasions. In her testimony as PW-4, she disclosed that after a quarrel with her husband in December, 2012, she separated from him and started staying with the respondent at his residence in District Bhiwadi. On 14.12.2012, the respondent took her to a hotel in Manesar where they stayed for one night and had physical relations. Thereafter, the respondent shifted her to her residence at RZ-28, Gali No.3, Dabri Extension. On 15.12.2012, she, her husband, her brother and respondent had gone to the office of a lawyer and finally on 22.01.2013, divorce petition was filed. She even became pregnant twice and the pregnancies were terminated. No efforts seem to have been made by the prosecutrix to insist the respondent to marry her during the entire interregnum. There was no occasion for the prosecutrix to establish physical relations on the alleged promise to marry without seeking divorce from her husband first. An application dated 21.02.2013 (Mark 'A') was filed by the prosecutrix seeking status report before the Metropolitan Magistrate. Presence of the prosecutrix in the said proceedings has been recorded in various orders dated 26.02.2013 and 28.02.2013. It was averred therein that telephone call at 100 on 03.02.2013 was due to her being under severe depression and her complaint was at the dictation of police officials. When she realised the things properly, she came to know that her brother-in-law i.e. the respondent had been sent to jail. The Investigating Officer appearing as PW-13 (SI Beena) disclosed that the complaint dated

14.02.2013 (Ex.PW-13/B) was received from the prosecutrix in the Police Station. The prosecutrix did not explain as to why, where and in what circumstances, the complaint (Ex.PW-13/B) came into existence and why she wanted to change her earlier version. Bail order dated 18.03.2013 records complainant's presence with her husband. That time also the prosecutrix did not controvert the factual position. Apparently, after lodging of the FIR, the prosecutrix wanted to make a fresh statement to exonerate the accused but the Investigating Officer did not oblige her. 'X' did not divulge about this development.

12. DW-3 (Dhanesh Kumar) produced record from Tihar Jail to prove that 'X' had visited Tihar Jail to meet the respondent on 14.02.2013, 21.02.2013, 25.02.2013, 28.02.2013, 11.03.2013 and 14.03.2013. The prosecutrix did not explain as to what had prompted her to visit the respondent in Tihar Jail.

13. Conduct of victim's husband PW-3 (Manoj) is equally unnatural. In his examination-in-chief, he disclosed that 'X' had told her that the respondent used to visit her in his absence. He further deposed that the respondent used to tell her to separate so that both of them could stay together. 'X' had told him that the respondent had sexual intercourse with her regularly for the last one year. It is astonishing as to why PW-3 (Manoj) permitted the respondent to visit his house frequently after coming to know objectionable relations between them. No legal proceedings whatsoever were initiated by him either against his wife or the respondent. His silence for such a long period causes suspicion about the truthfulness of the statement of the prosecutrix. Apparently, the prosecutrix and her husband have not presented true facts. 'X' did not examine her father and brother

who were allegedly aware of the illicit relationship between her and the respondent. CrI.M.A.No.6454/2014 was moved to lead additional evidence during pendency of the instant appeal. I find no merit in the present application as the evidence to be adduced was available to the appellant during trial. After the Trial Court in the impugned judgment noted that the prosecutrix did not examine her father and brother, the instant application seems to have been filed to fill up the lacunas. Nothing has come on record to show if any sincere efforts whatsoever were ever made by them to solemnize their marriage after getting X's previous marriage dissolved.

14. Observations / findings of the Trial Court in para (36) can't be faulted :

“36. The assessment of the overall evidence on record in this case, as discussed herein-above, is indicative of the fact that there was no cohabitation between the prosecutrix and her husband for a very long time and in the meanwhile, she came close to her brother-in-law i.e. accused and engaged in voluntary sexual intercourse with him. It is during the course of these sexual relations that two decided that the prosecutrix would take divorce from her husband and they would marry each other. However, there is not an iota of evidence on record to suggest that the accused had deceived the prosecutrix by promising to marry her before taking her consent for sexual intercourse. The prosecutrix was about 29 years of age, already married and also having a son at that time when she started sexual liaison with the accused. The accused was

unmarried at that time. Therefore, it cannot be said that the accused could not have married her but on the contrary, it is evident that the prosecutrix, being already married at that time, could not have legally solemnized the marriage with the accused. It is also very difficult to believe that such a lady in her late 20's and already married would get deceived by any kind of promise or assurance from the accused, who was none other than her own brother-in-law."

15. The prosecutrix had established physical relations with the respondent intentionally knowing well that there was no chance of fulfilment of the so-called assurance of marriage. There was no scope of her being under 'misconception' of fact or being misled by any so called promise or misrepresentation of the respondent.

16. In '*Deelip Singh @ Dilip Kumar vs. State of Bihar*', AIR 2005 SC 203, it has been observed :

"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.”

17. The Supreme Court again in ‘Deepak Gulati vs. State of Haryana’, Criminal Appeal No. 2322/10 decided on 20.5.2013, held as under :

“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.”

18. In view of the above discussion, I am of the view that the prosecution was unable to establish if there was any promise to marry by the respondent or that victim's consent for physical relations was obtained on a false promise to marry. Physical relations between the two (if any) were consensual. It cannot be inferred with certainty that 'X' was cheated and her consent was procured for physical relationship on the false pretext to marry.

19. Impugned judgment based upon fair appreciation of the evidence deserves no intervention.

20. The appeal lacks in merits and is dismissed.

21. Trial Court record be sent back forthwith with the copy of the order.

(S.P.GARG)
JUDGE

MARCH 10, 2017 / tr