

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

**RESERVED ON : 21st NOVEMBER, 2016
DECIDED ON : 16th MARCH, 2017**

+ CRL.A.430/2015 & CRL.M.B. 3265/2015

AKSHAY KUMAR Appellant

Through : Mr.Sachin Sangwan, Advocate.

versus

STATE Respondent

**Through : Mr.Amit Gupta, APP.
Complainant in person.**

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. The appellant – Akshay Kumar impugns a judgment dated 15.01.2015 of learned Addl. Sessions Judge in Sessions Case No.179/2013 arising out of FIR No.224/2013 PS Dabri by which he was held guilty for committing offence punishable under Section 376 IPC. By an order dated 22.01.2015, he was sentenced to undergo RI for seven years with fine ₹1 lac.
2. In nutshell, the prosecution case as reflected in the charge-sheet was that in the year 2010 – 2011, the appellant committed rape upon the prosecutrix 'X' (changed name) after administering a stupefying substance. Subsequently, he continued to have physical relationship with her on the false pretext to marry.

3. The Investigating Officer on receipt of victim's written complaint (Ex.PW-1/A) lodged First Information Report on 01.05.2013. 'X' was medically examined; she recorded her 164 Cr.P.C. statement. The appellant was arrested and medically examined. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was laid before the Court against the appellant. In order to establish its case, the prosecution examined seventeen witnesses. In 313 Cr.P.C. statement, the appellant denied his involvement in the crime; pleaded false implication; and examined twenty-five witnesses in defence. The trial resulted in conviction as aforesaid. Being aggrieved and dissatisfied, the instant appeal has been filed.

4. I have heard the learned counsel for the parties and have examined the file minutely. Admitted position is that the appellant was a married man prior to the incident and the said marriage was subsisting. The prosecutrix while in employment with Dada Dev Hospital in the year 2010, came into contact with the appellant, Junior Engineer, having office at Dada Dev Hospital besides the one at Dwarka Court Complex. 'X' was previously married to one Yogesh in 2004 and the said relationship came to an end in 2007 by a decree of divorce by mutual consent. Apparently, the prosecutrix was divorcee on the day of occurrence.

5. It is also undisputed that intimacy / friendship developed between the prosecutrix and the appellant in 2010 – 2011. Physical relationship with consent took place between the two on several occasions. 'X' became pregnant and finally delivered twins on 07.07.2012; they are in her custody.

6. In the complaint (Ex.PW-1/A) dated 30.04.2013, the victim gave detailed account as to how and in what manner, she came into contact with the appellant; how she was duped by him to give consent for physical relationship on several occasions on the false pretext to marry her. When she became pregnant and delivered twins, the appellant started ignoring her and flatly declined to marry. Subsequently, she came to know that the appellant was already married and had given false assurance to marry her claiming that his wife had expired long back.

7. In 164 Cr.P.C. statement (Ex.PW-1/B) recorded on 02.05.2013, the victim reiterated the version given in her comprehensive complaint (Ex.PW-1/A) and involved the appellant by name to have cheated her on the false promise to marry.

8. In her Court statement as PW-1, the victim proved the versions given to the police and before the Metropolitan Magistrate in entirety without major variations. She deposed that in 2010, her friend Baby introduced her to the appellant who agreed to provide her a private job. She was kept by the appellant in his employment on a monthly salary of ₹4,000/- which was later enhanced to ₹6,000/- per month. She further deposed that after about a month, when she was present alone along with accused in the office at Dada Dev Hospital, he offered her 'fruity', on consumption of which she started feeling 'sleepy'. On regaining consciousness, she found that the appellant had sexually assaulted her in her state of intoxication. On being confronted, the appellant replied in the affirmative pleading that he had desired to have sexual intercourse due to death of his wife. When she became angry, the accused pacified her by promising to marry her. Since the accused had offered to marry her, she remained quiet with the hope that

he would marry her. Thereafter, the accused made sexual intercourse with her three or four times at his office at Dada Dev Hospital and every time he assured her to marry. Whenever she insisted to solemnize the marriage, the accused avoided it for one or the other reason. She further deposed that on 06.06.2011 the accused called her to take her to the office of a lawyer for court marriage. However, she was taken in a car to Ram temple in Janakpuri where the appellant applied vermilion on her head and put mangalsutra; she was also given a pair of toe rings 'bicchhu'. The appellant took her to his house at Uttam Nagar to live. She used to stay with the accused sometimes at his house at Uttam Nagar and sometimes at his official accommodation at Kalkaji. After she conceived, she apprised the appellant about her pregnancy. The accused took her to various doctors to get the pregnancy terminated but the concerned doctors advised not to go for termination as the foetus was quite healthy. When date of her delivery came close, the accused leaving her at Uttam Nagar house went to his native place pretending some urgent work there. Various efforts to contact him did not yield any result and finally she gave birth to twins (daughters). The accused never came to see her and the newly born children; she remained in trauma for about a month in the hospital. Finally, she lodged her complaint (Ex.PW-1/A).

9. In the cross-examination, she denied to have been working at Dada Dev Hospital at a stretch from 01.02.2008 to 08.02.2011. She fairly admitted that no complaint was lodged by her with the police when she was initially defiled during her state of unconsciousness. She denied if she used to assist the appellant to move around at his residence due to his having difficulty to walk properly on account of excess uric acid. She elaborated that this happened in the office of the accused only and not at his residence.

She further disclosed that she used to arrange food and give medicines to him. She further denied that due to intimacy, she had physical relations with him with consent. She denied the suggestion that she herself withdrew from the appellant's company after extracting huge money and purchase of a house in her name.

10. On close analysis of the statement of the prosecutrix, it can well be inferred that physical relations were established by the accused, a married man, with the prosecutrix, a divorcee, on several occasions as a result of which, she became pregnant and gave birth to twins. By putting her various suggestions in the cross-examination, the accused did not deny to have sexual intercourse with the prosecutrix albeit with her consent. DNA report (Ex.PA) lends credence to the victim's version. DNA profiling (STR analysis) performed on the source of Exhibits '1' (Gauze cloth piece of accused), '3' (Gauze cloth piece of baby Gunjan) and '4' (Blood sample of baby Gauri) was sufficient to conclude that one set of allelic data of DNA profile from the source of Ex. '1' (Gauze cloth piece of accused) was accounted in allelic data of DNA profile from the source of Ex. '3' (Gauze cloth piece of baby Gunjan) and '4' (Blood sample of baby Gauri).

11. The appellant was a married man whereas the prosecutrix was a divorcee aged around 26 years. She had come into contact with the accused during the course of her employment with him. Friendship / intimacy developed between the two and physical relations were established. The Court has no valid reasons to disbelieve 'X's version that physical relations were established on the assurance of the accused to marry her as he had proclaimed himself to be a widower. No other reason / consideration has surfaced on record forcing the prosecutrix to have physical relations with a

married man and to give birth to twins. Throughout, the complainant's version was that physical relations with the accused were on his assurance of marriage which he did not fulfil. The accused had made a false representation about his wife's death whereas she was alive. Apparently, the accused had no intention from its very inception to marry her as the previous marriage was subsisting at the relevant time and no proceedings whatsoever for dissolution of the said marriage had taken place / initiated. The appellant had deliberately concealed the factum of his earlier marriage.

12. As per prosecution case, the appellant had established physical relationship with the prosecutrix in 2010, allegedly, after administering an intoxicating substance. When he was confronted as to why it was so done, the accused promised to marry her. The Trial Court was of the view that initially physical relationship with the prosecutrix was not forceful and against her wishes after administering stupefying substance as alleged. This Court finds no sound reasons to deviate from these findings as nothing has emerged on record to show if any stupefying substance was administered to the prosecutrix in a 'fruity' or that sexual assault took place during her state of intoxication. The victim did not raise alarm or hue and cry after coming to know that the appellant had allegedly established physical relations with her. She rather exonerated the appellant on the alleged promise to marry.

13. The Trial Court was, however, of the view that subsequent consent obtained by the appellant to have physical relations with the prosecutrix was under misconception of facts as the appellant had represented her that his previous wife had expired and he would marry her. In fact appellant's previous wife had not expired and their marriage was valid. The appellant continued to maintain physical relationship with the

prosecutrix. The consent thus obtained was not free consent and was vitiated. After the birth of the girls, the appellant began to distance himself from 'X' and finally abandoned her in lurch.

14. The prosecutrix was assured on several occasions. She was taken to Ram temple in Janakpuri on 06.06.2011 to perform marriage; vermilion on her head and 'mangalsutra' around her neck were put. Not only that, the victim and the accused started living together at his house at Uttam Nagar as a married couple. 'X' did not conceal her pregnancy and opted to deliver twins despite attempts made by the accused to terminate the pregnancy. Apparently, the prosecutrix had believed the accused's representation and continued to have physical relationship with him with the hope that he would marry her. The accused had performed certain rituals to create an impression that he had married her. The prosecutrix claimed that the neighbours and her family members were aware that she was the accused's wife. It seems so, otherwise victim's parents who had assisted her in the hospital at the time of delivery would not have kept silent. No complaint whatsoever was lodged by them against the accused prior to lodging of the complaint (Ex.PW-1/A) for violating X's body.

15. It has further come on record that to pacify the victim and to instil confidence in her, the accused had opened an account at Vijaya Bank, R.K.Puram in her name. The accused claimed to have purchased a house in the victim's name.

16. PW-7 (Maya) – victim's mother, in her Court statement, deposed that 'X' had married to the accused and had given birth to two daughters. In the cross-examination, she disclosed about her visit to the accused's house after his marriage. She further disclosed that 'X' had told

her 15 days before delivery that they were planning to purchase a house in Uttam Nagar. PW-10 (Mehtar Singh), accused's colleague informed that 'X' used to come to the office along with accused once in a month. In the cross-examination, he revealed that he had seen both of them together in the office; 'X' was not employed and did not mark her attendance. He denied the suggestion to have arranged a house in Uttam Nagar for its purchase by the appellant. He volunteered to add that he had only introduced the appellant to a property dealer for the said purpose. PW-17 (SI Parmila) is the Investigating Officer. The investigation conducted by her is, however, not up-to-mark. She did not examine any individual from Ram temple in Janakpuri; did not collect any record from Dada Dev Hospital to show X's employment there for a particular duration; did not examine any neighbour at Uttam Nagar and Kalkaji where both the prosecutrix and the victim lived together. She informed in the cross-examination that the neighbours at Uttam Nagar had told her that the appellant's flat was lying locked since long and prior to that the appellant and the prosecutrix used to stay there. She did not collect any document from Vijaya Bank to ascertain as to who had opened the bank account in X's name and what were various transactions in it; she did not collect Call Details Record of the victim or the accused. In the cross-examination, she disclosed that the neighbours at official residence of the accused at Kalkaji had informed her that the prosecutrix was residing with the appellant in the said flat. She denied the suggestion that the neighbours had informed that 'X' was living in a live-in-relationship with the accused.

17. On scrutinising the testimonies of various witnesses referred above it can be inferred with certainty that consent for physical relationship

was given by the prosecutrix on the assurance of the accused to perform legal marriage with her as he had posed himself to be a widower. The accused never informed the prosecutrix the correct and true fact about his wife who was alive at the relevant time. Needless to say, consent given by the prosecutrix to have physical relationship was under misconception of fact and it cannot be termed 'voluntary'.

18. One more pertinent fact to note is that at the time of hearing of bail application on 10.05.2013, the accused had offered to solemnize court marriage with the prosecutrix. Keeping the offer in view, the accused was granted interim bail for one month to solemnize marriage. The accused, however, did not perform the marriage with the prosecutrix after release on interim bail. This offer reflects accused's guilty mind and his post-event conduct.

19. 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.”

20. 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.”

21. In 313 Cr.P.C. statement, the appellant did not furnish any explanation whatsoever as to what had prompted him to betray his legally wedded wife and to indulge in extramarital affairs with the prosecutrix on the false promise to marry her. In 313 Cr.P.C. statement, he admitted that though ‘X’ was pregnant but he was unaware if he was responsible for it. He admitted that he had advised ‘X’ to visit a doctor to get the pregnancy test conducted. Later on, after an ultrasound test, it was confirmed that ‘X’ was carrying twins. He further admitted that ‘X’ was admitted by him at Mata Chanan Devi Hospital for delivery and all the expenses were borne by him. He denied to have ignored the prosecutrix and claimed that after getting information from ‘X’ about the birth, he had reached Mata Chanan Devi Hospital at 02.00 p.m.

22. He further stated in 313 Cr.P.C. statement that he had met the prosecutrix for the first time in August, 2009 in the office of A.E. Ambedkar University, Sector-9, Dwarka, where she was working under a contractor. In November, 2009 he had taken his mother, sister, sister-in-law and nephew to Pragati Maidan. Since ‘X’ was helpful in search of his lost nephew in the trade fair, she became familiar to his family members. She enquired from his mother about his wife and she told ‘X’ that divorce proceedings were going on between the two. After about 20 days when her family members

left, she came at his Kalkaji residence at 08.30 a.m. on the pretext to meet her friend. In January, 2010, he had assisted her to apply for a plot in HUDA. In the application form, she had described herself 'unmarried'. On 14.02.2010 when she proposed for marriage, he expressed his inability as he was already married and had two children. In June, 2010 they had consensual physical relations when 'X' visited him at Kalkaji residence. Thereafter, 'X' used to visit his residence frequently and they both used to have physical relations with consent. She used to come to the house once in a week to have sexual intercourse. Sometimes she used to stay for two or three days at a stretch at his house. No promise or assurance to marry her was ever made. He further claimed that house No.B-41, Uttam Nagar for a sum of ₹16.5 lacs was purchased by him in her name and he continued to help her financially. Subsequently, 'X' started blackmailing her with the demands of ₹40 lacs and on its non-compliance, she lodged various complaints.

23. To prove his defence, the appellant examined 25 witnesses. Various documents obtained through RTI by his brother Ashok Kumar were exhibited.

24. The Trial Court in the impugned judgment has discussed the defence evidence but did not find it worthwhile to disbelieve the statement of the prosecutrix. On perusal of their statements, it can be inferred that victim's close relatives were aware of the intimate relationship between the appellant and the prosecutrix. They did not object to it at any stage despite knowing that such relationship was to the detrimental of his previous wife Poonam. DW-19 (Manki Devi) - appellant's mother informed that on enquiry by the prosecutrix, she had revealed that divorce proceedings were

pending between the appellant and his wife Poonam. The appellant has failed to produce on record any document to show if at any stage any divorce proceedings were initiated, and if so, on what ground and what was its final result. Apparently, appellant's mother had even attempted to mislead the prosecutrix to believe that the appellant was to marry her after obtaining divorce from his wife. DW-24 (Ashok Kumar) in his examination-in-chief even disclosed when he had made a telephone call at 06.00 a.m. on the day of concluding ceremony of Commonwealth Games to the appellant, it was attended to by the prosecutrix. On enquiry from the appellant, he was informed that after witnessing the Commonwealth Games, 'X' had stayed at night in his house at Kalkaji. When he enquired as to what was X's status, the appellant maintained silence.

25. The impugned judgment based upon fair appreciation of evidence deserves no intervention. Conviction under Section 376 IPC is affirmed.

26. The appellant was sentenced to undergo RI for seven years with fine ₹1 lac. Nominal roll dated 31.07.2015 reflects that he has already undergone one year, nine months and twenty-eight days incarceration besides remission for twenty-five days as on 30.07.2015. The appellant is not a previous convict and is not involved in any other criminal case. He has the responsibility to take care of his aged mother and family. He claims to have purchased a house in the name of the complainant and to have paid a sum of ₹10 lacs to her. Denying it, 'X' informed that the house where she is residing at present was purchased by her father. She, however, did not give detailed particulars as to how and in what manner her father had purchased the house and from where the money was arranged. Seemingly, the

prosecutrix has not presented true facts regarding the financial assistance provided to her by the appellant before lodging of the FIR.

27. Custody of the twins is with the prosecutrix and she has the responsibility to maintain and take care of them. The appellant cannot shirk or avoid responsibility to provide financial assistance to them.

28. It is also to be noted that 'X', a divorcee, was not victim of sexual assault against her wishes initially. Apparently, both the prosecutrix and the appellant came into contact during X's employment and intimacy / friendship developed between the two. Physical relationships were with consent and 'X' was well aware of its consequence. She was, however, under the impression that the appellant was a widower and gave her consent to the coitus with the hope that he would marry her. This did not happen. In fact, in the presence of the appellant's previous wife, solemnization of the marriage with the prosecutrix was beyond his control even if he wanted to do so.

29. The appellant's conduct in the episode is unfair / unreasonable. Poonam, his previous wife, is the real victim who was cheated by the appellant. Observations of Hon'ble Supreme Court in similar circumstances in '*Vinod Kumar vs. State of Kerala*', 2014 (5) SCC 678 are worth-noting :

"The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realize that retribution in another form has duly visited him. It can only be hoped that his wife

Chitralekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found.”

30. Considering all the circumstances referred above, Sentence Order is modified to the extent that substantive sentence under Section 376 IPC shall be RI for five years with fine ₹10,000/-; default sentence being SI for one month.

31. The appellant shall, however, pay ₹5 (Five) lacs as compensation to the victim within one month. This payment shall be adjustable, in case any other amount is ordered to be given to the prosecutrix / twins in any other proceedings.

32. The appeal stands disposed of in the above terms. Trial Court record be sent back forthwith with the copy of the order. Intimation be sent to the Superintendent Jail.

(S.P.GARG)
JUDGE

MARCH 16, 2017 / tr