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

+ CRL.A. 1117/2019

ROSI alias ROSY

..... Appellant

Through

Ms. Manika Tripathy Pandey,
Advocate with Mr. Ashutosh Kaushik
and Mr. Brahm Pandey, Advocates.

versus

STATE & ANR.

..... Respondents

Through

Ms. Aashaa Tiwari, APP for the State
with SI Shallu, P.S.: Krishna Nagar.

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Date of Decision: 22nd October, 2019

CORAM:

HON'BLE MR. JUSTICE MANMOHAN

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

J U D G M E N T

MANMOHAN, J:(Oral)

CRL.M.A. 36994/2019

Keeping in view the averments in the application, the delay in filing the appeal is condoned.

Accordingly, present application stands disposed of.

CRL.A. 1117/2019

1. Present appeal has been filed by the appellant-prosecutrix challenging the judgment and order dated 31st May, 2019 passed by the Additional Sessions Judge (SFTC), Karkardooma Courts, Delhi in Session Case No.122/2018 arising out of FIR No.400/2017 under Section 376(2)(n)/

313/506 IPC registered with Police Station Krishna Nagar, whereby the respondent-accused had been acquitted of all charges.

2. The case of the appellant-prosecutrix in brief is that the respondent-accused established physical relations with the appellant-prosecutrix under the false pretext of marriage and that the appellant-prosecutrix and the respondent-accused were living together for about five years before the complaint was lodged by the appellant-prosecutrix on 22nd July, 2017.

3. The relevant portion of the trial court judgement is reproduced herein below:-

“31. For the reasons best known to her the Investigating Officer has not brought any witness or independent evidence about the divorce of the prosecutrix from her (previous) husband. Thus, the only evidence on this aspect is the oral testimony of the prosecutrix. Her evidence on this aspect is clear as she has stated that she has no proof of her divorce. The factum of her husband (previous or otherwise) visiting her home to pay money to children does not in any way affect her marital status as the children biologically belong to him too.

32. However, there is no independent evidence of the divorce of the prosecutrix with her husband except her own self-serving statement. Her statement is not un-equivocal or consistent. She has also stated that it was decided that she and her husband Gxxxu shall live separately from each other. This kind of divorce, without recording any Memorandum of divorce or execution of any other document does not inspire confidence as to the veracity of the statement of the prosecutrix. It is not the case of the Prosecution that independent witness of the same were not available or dead or could not be brought before the Court for certain legally admissible reason. Hence on this count, an adverse inference is liable to be drawn against the Prosecution on the dictum that the evidence which could be produced and not produced would have been unfavourable to the person withholding it.

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36. PW-1 sated in her cross examination that she came to know in the year 2012 that the accused was married and was having three children. She denied the suggestion that the accused never told her that he had divorced his wife. She also denied the suggestion that the accused never made any promise of marriage to her. She further denied the suggestion that the relatives of the accused had visited her house to advise her that she should remain away from the accused since neither she nor the accused had been divorced from their (respective) spouses and it was a sin as per their religion. Further in her cross examination PW1 stated that accused and Gxxxu had fight with each other also because of her relation with accused. She also stated that Gxxxu caught her red-handed sleeping with the accused and therefore, there was a fight between the accused and Gxxxu. This goes to show that the said person still held the prosecutrix as his wife which belies the divorce plea of the prosecutrix

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38. In her cross examination by accused she stated that that she had stated to the police in her complaint Ex. PW1/A that she became pregnant from the accused four times. On this aspect she was confronted with Ex. PW1/A. In her cross examination by the accused she denied the suggestion that sine she have never become pregnant from the accused and for this reason, she did not mention this fact in her complaint Ex. PW1/A. She denied the suggestion that accused Wasim never provided her the medicine to terminate the pregnancy. It appears from the evidence that the prosecutrix herself was a party in terminating her pregnancy at various occasion by her own admissions.

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56. The prosecutrix, by accepting the promise to marry as propounded by the accused, was going to take a very significant and milestone decision of her life. Her circumstances was peculiar, she had five (or six) children to look after and their welfare would have been very dear to her

heart. So before plunging in to marriage it was incumbent upon her to satisfy that her would be life partner would accept her with her children. Under such circumstances, being an ordinary prudent person, she would have inquired into the marital status of the accused. If she had chosen to throw caution to the winds, then she must be prepared to bear the storm. In so many words she has not stated as to what prompted her to take the words of the accused that he was bachelor or divorcee at face value. With five or six children to look after she cannot be expected to be so naïve. Though she may be illiterate, but one does not learn the life skills by going to school. Even an illiterate person has developed many life skills from the good and bad experience in life. Thus the prosecutrix cannot take any shelter under the plea of being taken for a ride by the accused.

57. Then it is not explained as to what was the pressing force that made her submit to the sexual intercourse before performance of the marriage of her with the accused. If the accused was insisting on such demands, she should have suspected his intentions rather than flowing with the tide. Thus there are indications from the meaningful reading of the statement of PW1 that the sexual intercourse with the prosecutrix by the accused was not a forced one or against her will and consent. Ostensibly it was out of mutual choice and consensual.

58. The prosecutrix kept on suffering a series of abortions, some on her own and some at the instance of the accused, yet continued to have her faith and trust in the accused that he would eventually marry her. The adage is 'once bitten, twice shy'. Here, in the present case, the circumstances go to suggest that the prosecutrix was akin to a willing party.

59. The prosecutrix going to meet the accused in Jail also goes to speak against her. It was not once but twice. This goes to show that there was something more than what she had pressed into service to meet the eyes.

60. PW1 has stated that she had been medically examined at SDN Hospital vide MLC Ex.PW1/B which bears her thumb impression at point A. However, she had refused her internal medical examination. The medical report neither helps nor harms the prosecution in any material way. She being in her middle age and having given birth to many children and having undergone a series of abortion and also due to delay issue the medical report does not cut any ice in the favour of the prosecution.

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79. In view of the above discussion, there is no incriminating evidence against the accused Wasim and accordingly he is acquitted of the offence under section 376(2)(n)/313/506 of the Indian Penal Code for which he had been charged in this trial.”

(emphasis supplied)

4. On 26th September, 2019, the trial court record was summoned. With the consent of parties, the matter has been taken up for hearing and disposal.

5. Ms. Manika Tripathy Pandey, learned counsel for the appellant-prosecutrix states that the appellant-prosecutrix in her statement under Section 164 Cr.P.C. had clearly stated that her first husband had divorced her in the presence of the appellant-prosecutrix’ parents as well as his own parents. Though she admits that the prosecution had neither examined the parents of the appellant-prosecutrix nor those of her alleged husband, yet she states that the appellant-prosecutrix had been divorced by her first husband by way of an oral triple *talaq* and hence she had no documents to support the same. She submits that the appellant-prosecutrix cannot be blamed for the lapse on the part of the prosecution.

6. Learned counsel for the appellant contends that the respondent-accused himself admitted the fact that the appellant-prosecutrix and the

respondent-accused were in a relationship for five years. She emphasises that the appellant-prosecutrix had given her consent for sexual-intercourse only on the basis of a promise of marriage made by the respondent-accused.

7. Having heard learned counsel for the appellant-prosecutrix, this Court is of the view that it is settled law that the onus is on the prosecution to prove its case beyond reasonable doubt. The respondent-accused can be held guilty of rape in the present case if the prosecution proves beyond doubt that he had established sexual relations with the appellant-prosecutrix on the basis of false promise of marriage given in bad faith and with no intent of being adhered to at the time it was given. Further, the false promise should have had a direct nexus to the appellant-prosecutrix' decision to engage in the sexual act. (See *Pramod Suryabhan Pawar Vs. State of Maharashtra and Anr.*, 2019 SCC OnLine SC 1073).

8. Since in the present case the appellant-prosecutrix was admittedly married to someone else in 2001 and had six children from the said wedlock and she had been cross-examined on her status as a divorcee, this Court is of the view that it was imperative for the prosecution to prove that appellant-prosecutrix was divorced from her first husband and was eligible for re-marriage.

9. A perusal of the testimony of the appellant-prosecutrix reveals that she has no documentary evidence to prove her divorce.

10. Though learned counsel for the appellant-prosecutrix has argued that her client had been given triple *talaq* orally in the presence of her parents and in-laws, yet no evidence of the said parties had been led by the prosecution. It is settled law that a party in possession of best evidence has

to produce the same. [See *S.V.R. Mudaliar (Dead) By LRs. And Others Vs. Rajabu F. Buhari (Mrs.) (Dead) by LRs. And Others, (1995) 4 SCC 15*]

11. Even along with the present appeal, no application to lead additional evidence under Section 391 Cr. P.C. has been filed. Consequently, this Court is in agreement with the finding of the trial court that the appellant-prosecutrix had failed to prove that she was a divorcee and was eligible for re-marriage.

12. Further, the appellant-prosecutrix' allegation that the respondent-accused neither married her nor allowed anybody else to marry her, does not inspire confidence since neither the 2015 marriage proposal had been proved nor the alleged obscene photos and videos shown by the respondent-accused to the prospective groom had been placed on record.

13. In any event, if the said allegation was true, then any reasonable person would have been weary of respondent-accused and would not have continued any relation, leave alone physical relation, with him.

14. This Court is in agreement with the finding of the trial court that the appellant-prosecutrix' conduct of voluntary meeting the respondent-accused in Rohini Jail three times after filing of the present complaint lends credence to the respondent-accused' defence that the real intent behind the present proceeding was to force him to marry the appellant-prosecutrix.

15. Also, the submissions by appellant-prosecutrix in her testimony that she had sexual relations with the respondent-accused for five years before lodging of the complaint on 22nd July, 2017, she got four pregnancies terminated namely in 2012, 2013, 2015 and 2017, the respondent-accused was her employee and that she knew since 2012 that the respondent-accused was married and had three children, proves beyond doubt that the alleged

false promise of marriage, if any, was not of immediate relevance or bore a direct nexus of the appellant-prosecutrix' decision to engage in repeated sexual acts.

16. Consequently this Court is of the opinion that the appellant-prosecutrix' testimony read in its entirety is neither credible nor believable or trustworthy. Accordingly, the present appeal being bereft of merits is dismissed.

MANMOHAN, J

SANGITA DHINGRA SEHGAL, J

OCTOBER 22, 2019

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