IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 310 of 2018

Devendra Singh Khinchiyal ..... Appellant

Versus

State of Uttarakhand .....Respondent

Mr. K.K. Tiwari, Advocate, for the appellant.
Mr. V.S. Rathore, AGA, for the State.

Judgment reserved on : 20.11.2020
Judgment delivered on : 31.12.2020

Hon'ble N.S. Dhanik, J.

This appeal is directed against the judgment and order dated 6/10.9.2018, passed by the Additional Sessions Judge, Bageshwar whereby the appellant has been convicted for the offence under Section 376(2)(n) of the IPC and sentenced to undergo R.I. for ten years and to pay a fine of Rs. 20,000/-.

Facts of the case are that on 5.9.2017, the prosecutrix lodged a written report against the appellant wherein she alleged that she and the appellant had been in relationship since the last three years and the appellant had assured her that he would marry her and on this assurance, the appellant made sexual relations with her. The prosecutrix further alleged that the appellant cheated on her as he refused to marry her and he is in relationship with some other girl.

After investigation, police submitted the chargesheet against the accused, who was convicted and sentenced by the trial court as mentioned hereinabove.

In the present case, the prosecution examined as many as seven witnesses. PW1 is Head Constable Harish Chandra, PW2 is the prosecutrix, PW3 is Dr. Ajay Mohan Sharma, PW4 is the cousin sister of the prosecutrix/victim, PW5 is Dr. Reema Upadhyaya, PW6 is Constable Champa Tiwari and PW7 is the Investigation Officer Satya Prakash Raypa.

PW1 has prepared the Chick FIR and made the necessary entries in the G.D.

PW2 is the victim/prosecutrix, who in her examination-in-chief has stated that she knew the accused appellant since the year 2015. On the pretext of marrying her, the accused appellant made sexual relations with her. She became pregnant and in 2016, she underwent abortion. She had sexual intercourse with the accused appellant even after the abortion as the accused appellant had assured her that he would marry her. The prosecutrix has further stated that though the appellant did not marry her, but he always behaved like her husband. In September 2017, the accused appellant brought some other girl and when this fact came to her knowledge, she lodged the report against the accused appellant. The prosecutrix has further stated that sexual intercourse with the appellant took place at the residence of her cousin

sister (PW4), who was well aware of her relationship with the accused appellant.

PW3 and PW5 are the doctors who medically examined the prosecutrix and prepared the medical reports.

PW4 is the cousin sister of the prosecutrix. This witness has corroborated the testimony of the prosecutrix to the extent that they were deeply in love with each other and visited her place of residence and shared some private moments there. PW4 has also stated that the prosecutrix told her that the accused appellant would marry her. However, in his cross-examination, this witness has stated that the accused appellant did not ever tell her that he would marry her.

I gave thoughtful consideration to the rival contentions and carefully perused the materials on record.

The learned trial court was of the opinion that though the prosecutrix consented to have sexual intercourse with the accused appellant, but the said consent was not consent within the meaning of Section 375 read with Section 90 of the IPC as the consent of the prosecutrix was obtained on misconception of fact that the appellant would marry her on some later date and later he disowned his promise.

From the evidence on record, it is proved that the prosecutrix and the accused appellant were

in relationship with each other and had sexual intercourse many a times. The sexual intercourse happened with the consent of the prosecutrix. The only thing that needs examination is whether the said consent was obtained by misconception of fact i.e. on false promise of marrying the prosecutrix and, therefore, the consent was vitiated in view of the provisions contained under Section 90 of the IPC?

Section 375 and Section 90 of the Indian Penal Code read as follows:

"**375. Rape**. - A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First.— Against her will.

Secondly. — Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.— With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is

unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.— Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

"**90. Consent known to be given under fear or misconception**.— A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear of misconception; or

(Consent of insane person). if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

(Consent of child) unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

It is not in dispute that on the date of occurrence, the prosecutrix was a major, around 25 years of age and she was working as a guest teacher. Accused appellant was also major and was around 25 years of age when the occurrence took place and was

working on the post of Junior Engineer. Affairs were continuing between the prosecutrix and the appellant since three years and meanwhile the prosecutrix underwent abortion and thereafter also the relationship between the two continued. It has not come anywhere in the evidence that the appellant had given any definite date or any timeline to marry the prosecutrix. It is only when the prosecutrix allegedly came to the knowledge that the appellant brought some other girl in his house that she realized that the appellant has disowned his promise of marrying her and thereafter she lodged the report.

Learned Counsel for the appellant placed reliance on a verdict of Hon'ble Apex Court rendered in *Uday v. State of Karnataka*, **(2003) 4 SCC 46**. In the said case, consent was given by the prosecutrix to sexual intercourse with the accused, with whom she was deeply in love, on a promise that he would marry her on a later date. Prosecutrix continued to meet each other and often having sexual intercourse and became pregnant. Complaint was lodged on failure of the accused appellant to marry her. In such a case, it was held by the Hon'ble Apex Court that the consent cannot be said to be given under a misconception of fact.

In the aforementioned authority, the Hon'ble Apex Court referred to a judgment of Calcutta High Court and observed as under:

"The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not

always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. In *Jayanti Rani Panda vs. State of West Bengal and another*: **1984 Crl. L.J. 1535**, the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded :-

"The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were

already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."

After discussing the views of various High Courts, the Hon'ble Apex Court held 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 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."

In the said case (*Uday v. State of Karnataka*), the Hon'ble Apex Court further held as under:

"Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. 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 it. 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."

The facts of the case referred to above are similar to the case in hand. It has not come anywhere in the evidence that the appellant had given any definite date or any timeline to marry the prosecutrix, or the prosecutrix insisted or pressurized the appellant to marry her. It is only when the prosecutrix allegedly came to the knowledge that the appellant brought some other girl in his house that she realized that the appellant has disowned his promise of marrying her. She was intelligent enough to understand the significance and moral quality of the act she was consenting to. She even became pregnant and underwent abortion, yet she did not resist the overtures of the appellant nor insisted to marry her.

The upshot of the above discussion of the facts and evidence of the case and the legal proposition is that the consent given by the prosecutrix cannot be said to be given under a misconception of fact.

Consequently, the appeal is allowed. The impugned judgment and order is set aside. Conviction and sentence imposed on the appellant are quashed. The appellant is on bail. His personal bond is cancelled and sureties are discharged. He need not

surrender unless wanted in connection with any other case.

Let a copy of this judgment, along with the LCR, be sent to the Court below to ensure its compliance. Trial court to also ensure compliance of Section 437-A of the CrPC.

(N.S. Dhanik, J.)

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