

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.

CRIMINAL APPEAL NO. 790 OF 2019

Sanjay Jaywantrao Sakhare,
Aged about 29 years,
R/o. Korta, Tah. Umarkhed,
District : Yavatmal.

.... **APPELLANT.**

// VERSUS //

State of Maharashtra,
Through Police Station Officer,
Police Station, Darati,
Tq. Umarkhed, District: Yavatmal.

.... **RESPONDENT.**

Shri J.S.Wankhede, Advocate for Appellant.
Shri S.D.Sirpurkar, A.P.P. for Respondent/State.

CORAM : ANIL S. KILOR, J.
DATED : DECEMBER 08, 2022.

ORAL JUDGMENT :

1. This appeal takes exception to the judgment and order dated 23/08/2019 passed by the Additional Sessions Judge, Pusad in Sessions Trial Case No.44 of 2010, convicting the Appellant /Accused for the offence punishable under Sections 376(1) of the Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for Seven

years and to pay a fine of Rupees Seven Thousand, in default to undergo simple imprisonment for one month. The appellant is further convicted for the offence punishable under Section 417 of the IPC and sentenced to undergo simple imprisonment for one month and to pay a fine of Rupees Five Hundred, in default to undergo simple imprisonment for fifteen days.

2. The prosecution case, in short, is as under:

The victim is deaf and dumb and is sister of the informant. The victim was aged about 19 years on the date of the incident. It is the case of the prosecution that the accused established sexual relations with the victim during the period from 2009 to 2010. On the date of the complaint she was pregnant of two months and the complaint was lodged after refusal by the accused to marry the victim.

3. I have heard the learned counsel for the appellant and learned A.P.P. for the respondent/State.

4. Shri Wankhede, learned counsel for the appellant submits that the learned trial Court has committed an error in convicting the appellant/accused. It is submitted that there were consensual relations

between the appellant and the victim and as there was a consent, no offence under Section 376 of the IPC would attract in this case. However, the learned trial Court, discarding the fact of consent, convicted the appellant.

5. Shri Wankhede, learned counsel for the appellant submits that in the oral evidence of the victim, she has admitted that she has sufficient understanding to know the consequences in life. It is submitted that this statement of the victim is sufficient to hold that she was capable of understanding the consequences as well as whether the promise was false and after understanding it she permitted the accused to establish physical relations with her and as such it cannot be said that there was misconception of fact while giving consent and accordingly, no offence would attract under Section 376 of the IPC. In support of his contention he has placed reliance on the judgments of the Hon'ble Supreme Court of India in the case of *Uday ..vs.. State of Karnataka*, reported in (2003) 4 SCC 46 and in the case of *Deepak Gulati ..vs.. State of Haryana*, reported in (2013) 7 SCC 675.

6. On the other hand, the learned A.P.P. strongly opposed the

present appeal and submits that it is a heinous crime and the appellant has committed rape on a girl who is deaf and dumb by giving false promise of marriage.

7. It is submitted that in this case it cannot be said that the promise of marriage at the inception was well intended and the accused was really wanted to marry the victim. But, subsequently, because of change in circumstances and some prevailing conditions he could not marry the victim. It is therefore, submitted that this is a clear case of consent obtained under the misconception of fact and therefore, it is not the consent under Section 90 of the IPC. He, therefore, submits that the learned trial Court has rightly held that the accused has committed offence under Section 375, punishable under Section 376 of the IPC.

8. The learned APP submits that the suggestion given in the cross-examination to the victim suggests that the accused was never intended to marry the victim but to establish physical relations with the victim and to exploit her by giving a false promise of marriage. Accordingly, he prays for dismissal of the present appeal.

9. In the light of rival submissions, the question, which fell for consideration is that whether there was a valid consent of the victim or

not?

10. Before examining the oral as well as documentary evidence, I am of the opinion that it would be proper to reiterate the law as regards consent in the case of sexual assault. The Hon'ble Supreme Court of India in the case of *Uday* (supra), has held thus:

"12. The Courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In Rao Harnarain Singh vs. State it was observed : (AIR p. 126, para 7)

" 7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non- resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be 'consent' as understood in law. Consent, on the part of a woman as a defence to an allegation of a rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure."

13. ...

14. In *Anthony, in re, Ramaswami, J.* in his concurring opinion fully agreed with the principle laid down in *Rao Harnarain Singh's* case and went on to observe :

"A woman is said to consent only when she agrees to submit herself while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

11. Similarly in the case of *Deepak Gulati* (supra) the Hon'ble Supreme Court of India has held thus:

"21. 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 mis-

representation 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.

22. In Deelip Singh, it has been observed as under: (SCC p. 99, para 19)

“19. 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.”

23. This Court, while deciding Pradeep Kumar, placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, In re, wherein it has been observed: (Pradeep Kumar case, SCC pp. 418-19, para 11)

“11. ‘26. ... “...We are of opinion that the expression “under a misconception of fact” is broad enough to include all cases where the consent is obtained by

misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) (states) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married... ‘thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person’ ... Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.”(N. Jaladu, In re case, ILR pp 456-57) (Deelip Singh case, SCC pp 101-02, para 26)”

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The “failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term “misconception of fact”, the fact must have an immediate relevance.” Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her.”

12. From the above referred observations, it is evident that on the part of a woman as a defence to allegation of rape, requires voluntary participation, not only after the exercise of indulgence, based on the knowledge of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent. The consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure. The consent may be express or implied, coerced or misguided, obtained willingly or through deceit.

13. It is further evident that, there is a clear distinction between rape and consensual sex. In a case of consensual sex, the Court must 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.

14. It is also evident from the above referred observations that

there is a distinction between the mere breach of promise and not fulfilling a false promise.

15. 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.

16. Where the prosecutrix agrees to have sexual intercourse on account of her love and passion for 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 malafide and that he had clandestine motives.

17. In the teeth of the above referred well settled law, I proceed to examine the oral evidence led by the prosecution.

18. P.W. 4 is the victim, who in her deposition, has stated that she knows the accused because he belongs to her caste and both are residents of the same village. The accused always used to make gestures by eyes to her. When she went out for nature's call the accused came following her and grabbed her in his arms. At that time, she jerked his hand and refused to do so. But he promised to marry her so she let him to maintain physical relationship with her. The accused had physical relationship nearly 10 times at dilapidated house, in the stream, under tree and like such places. Then she realized that she was pregnant so she told the accused about the same and asked him when he will marry her. However, he was avoiding.

19. P.W. 4 further stated that when she had been to the house of accused to tell the incident to his father, his father did not allow her to enter the house, shut the door and brought back her to her house. Her parents came to know this as she was crying and also told them about the said mishap. She told her parents that accused made sexual intercourse on promise to marry and about her pregnancy.

20. It is clear that in the ocular evidence of the victim it has

come that she allowed the accused to maintain the physical relations with her as he promised to marry her. It has further come in her evidence that she informed the accused that she was pregnant and asked him to marry her, but he avoided and therefore, the victim went to his house to tell the incidence. However, father of the accused did not allow her to enter the house and shut the door.

21. The fact of informing about pregnancy by the victim to the accused, thereafter avoidance of the accused to marry her and then visit of the victim to the house of the accused, sufficiently show that under misconception she had permitted the accused to establish physical relations with her.

22. In cross-examination, nothing has been brought on record by the accused to suggest that the victim agreed to have sexual intercourse on account of her love and passion for the accused. Further nothing is brought on record to suggest that he was intended to marry her. However, on account of the 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.

23. The learned counsel for the appellant tried to take advantage of the statement made by the victim in cross-examination that she knows the difference between good and bad and the thing happened with her is bad.

24. It is submitted that knowing well the consequences she indulged with the accused in sexual relationship and therefore, it amounts to consent under Section 90 of the IPC.

25. The said submission of the learned counsel for the appellant cannot be accepted as the accused has failed to brought on record, through cross-examination, anything that would suggest that there was no misconception of fact and the consent was voluntary. On the contrary, a suggestion was given to the victim in the cross-examination that the accused never promised her for marriage.

26. In this case, the medical evidence also corroborates the prosecution case. There is a conclusive proof of DNA (Exh.38) that the

child born to the victim girl was out of the sexual relations with the appellant/accused.

27. The cross-examination of the victim was mainly on the point of love relations and consent, however, as I have observed that nothing has been brought on record by the defence to show and establish that not because of any promise of marriage, but on account of victim's love and passion for the accused, she permitted the accused to establish physical relations with her.

28. As far as promise of marriage is concerned, no evidence is there to suggest that the appellant was intended to marry the victim and on account of the circumstances, subsequently developed and which were beyond the control of the accused, he was unable to marry her. Thus, the only conclusion in this case could be that from the inception the promise made by the appellant/ accused to the victim to marry her was a false promise and it was with an intention to obtain consent of the victim to establish physical relations with her. Since the promise itself was false and it was not given with an intention to fulfill the same, the consent given by the victim to establish physical relations was under misconception of fact and therefore, it cannot be termed as 'consent' and

therefore, the offence under Section 375 punishable under Section 376 of IPC is completed.

29. In the backdrop of the above referred findings recorded by this Court, I do not find any error committed by the learned trial Court in convicting the appellant/ accused. Accordingly, I pass the following order:

The Criminal Appeal is **dismissed**.

JUDGE

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