

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

206

CRA-AD-708-2019

Reserved on:12.09.2022

Date of Decision: 21.09. 2022

Amandeep Kaur

...Applicant

Versus

State of Punjab and another

... Respondents

**CORAM : HON'BLE MR. JUSTICE SURESHWAR THAKUR
HON'BLE MR. JUSTICE N.S.SHEKHAWAT**

Present : Ms. Sukhpreet Kaur, Advocate
for the appellant.

Ms.Monika Jalota, Sr. DAG, Punjab.

N.S.SHEKHAWAT, J.

The present appeal is directed against the judgment dated 01.08.2019 passed by the Special Court, Shaheed Bhagat Singh Nagar, whereby, respondent No. 2 was acquitted of the charge framed under Section 376 IPC. The trial Court categorically held that the victim (the name of the prosecutrix/victim has been withheld in view of the provisions of Section 228A IPC and has been referred to as '**the victim**') had made material improvements in her version, which showed that her story has been manipulated after due deliberations and existence of the aforesaid circumstances made the Court to believe that the prosecutrix had tacit consent and which was later motivated to foist a case against the accused for the aforesaid reasons. Challenging the said findings of the trial Court, the instant appeal has been filed under Section 372 Cr.P.C., by the victim.

During the pendency of the petition, the lower Court record was summoned and has been carefully perused by this Court and even we have heard learned counsel for both the sides and we have been taken through various testimonies of the prosecution witnesses.

Learned counsel for the appellant has vehemently contended that the trial Court committed grave error by brushing aside the material evidence led by the prosecution. While referring to the testimony of PW1, the victim, she contended that the physical relations were developed by the respondent No. 2/accused on the false promise of marriage and the trial Court had misread the evidence in this regard. Still further, the contents of the initial complaint Ex.PW1/A were completely misinterpreted by the trial Court and the reading in between the lines clearly suggested that the physical relations were developed by respondent No. 2 on the false pretext of marriage. The learned Court also did not appreciate the medical evidence in the shape of Ex.PW3/M and PW7/D and the consent of the victim was obtained by misconception of the fact. The learned counsel for the appellant referred to the testimony of PW2 Kulwinder Kaur, mother of the victim and PW7 Dr. Manpreet Kaur to contend that the prosecution had successfully proved the charge against respondent No. 2 and the impugned judgment was liable to be set-aside.

We have scanned and scrutinized the evidence led by the prosecution, in the light of the submissions made by the learned counsel for the parties and we find no reasons to interfere with the findings recorded by the trial Court. The trial Court extensively referred to the testimony of PW1, the victim herself, who demolished the case of the prosecution and proved conclusively that the FIR in the instant case was got registered after confabulations and due deliberations.

The case set up by the prosecutrix/victim is that the victim had studied up to 10+2 standard and was aged about 29 years at the time of the alleged occurrence. She and the respondent No. 2 Ashish Soni knew each other very well for the last 12 years and had been talking to each other on phone. They had been going out freely and had physical relations with each other. It was alleged that the respondent No. 2 had promised that he would solemnize marriage with the victim. They had meeting at Ropar for a talk in this regard and she made her efforts to make the accused understand, but the accused refused to perform the marriage with the victim on the ground that this would lead to a problem in his family. The parents and other family members of the victim went to the house of respondent No. 2/accused and requested them to arrange marriage of the victim and respondent No. 2, but their requests fell on deaf ears. With these broad allegations, FIR was got registered by the victim on

21.05.2018, which led to the presentation of challan under Section 173 Cr.P.C. against respondent No. 2/accused, namely, Ashish Soni.

After hearing learned counsel for the parties and analyzing the evidence placed on the file, we are of the considered opinion that the victim, i.e. PW1 had demolished the entire case of the prosecution. The victim is an educated grown up girl, who was admittedly in live-in-relationship with respondent No. 2 for the last about 12 years. She admitted the suggestion that they were living in a live-in-relationship as per their own desire and were on beck and call to each other. The victim has levelled the allegations with regard to commission of rape on her on 16.02.2018, when the respondent No. 2/accused took her to Ludhiana, where he had taken a room on rent and when she asked the accused about the proposal of marriage, he slapped her and then he did sexual intercourse with her without her consent. With this main allegation, the criminal prosecution was launched. However, in her testimony, she admitted that she did not opt for any medical test regarding the incident dated 16.02.2018. There was no one in that house and after coming out of that place on 16.02.2018, she did not make any call from her mobile to her mother. She further admitted that she had gone through her complaint Ex.PW1/A as well as her statement recorded before the Investigating Officer Ex.PW1/C, where she had not mentioned anything about forcible sexual intercourse on 16.02.2018, beating her on 16.02.2018

and doing sex with the consent of the family. Still further, she did not raise any hue and cry on 16.02.2018 and the respondent No. 2 himself had dropped her in the house of her cousin. Again said, she was struck at Bus Stand Gobindgarh on 16.02.2018, where many people were there and she again did not raise any hue and cry even at that place. This clearly shows the allegations with regard to the alleged incident dated 16.02.2018 were false and motivated.

Further, the victim had alleged that the accused had promised in a love affair to celebrate marriage with her and the family members of respondent No. 2/accused had also consented to their relationship. She is stated to have made a complaint Ex.PW1/A to the police and she admitted in her cross-examination that the complaint Ex.PW1/A was duly signed by her. However, in cross-examination she admitted that for the first time, she met respondent No. 2 in the relation of a boyfriend and a girlfriend in the year 2008. The first meeting was at Bus Stand Nawanshahar, where respondent No. 2 had called her at the bus-stand. For the first time, they had physical relationship at Ropar and this physical relationship was made in a cinema hall. They had arranged a cabin where both were sitting and it had happened in year 2015. As per her, there were dozens of people, which included manager, ticket collector, kitchen boy etc., in the cinema hall. She further admitted when she had first physical relationship with respondent No. 2, at that time, she was not a virgin. However, she stated that she was not

having any physical relationship with any other person prior to that. Still further, she admitted that in the complaint Ex.PW1/A, there is no allegation from her side that their sexual relationship started, only because respondent No. 1 had allured, induced or promised her of marriage. Their phone calls were exchanged since year 2008 and they used to go to hotel in Ludhiana and the system of visiting the hotels continued till the end of the relationship. She further admitted that she shared very good relations with the respondent No. 2 for the last 12 years and she had entered into physical relations with respondent No. 2 dozens of times before 16.02.2018. Even, she stated in her cross-examination that she had gone through her examination-in-chief, where it was mentioned that she had entered into physical relationship only under the reason of promise of marriage. Still further, it was admitted by her that there was no writing of marriage proposal between her and respondent No. 2/accused. Even, they had been chatting on Whatsapp admittedly and the accused had never sent any kind of message to her or her family ever showing his desire to marry her.

Not only this, even the family members of the victim/prosecutrix were aware of all the developments. PW2 Kulwinder Kaur, mother of the prosecutrix admitted in her cross-examination that she was aware of the fact that her daughter used to go to Ludhiana to meet respondent No. 2 and did not return

back for hours together. Even her daughter, i.e. the victim used to go with respondent No. 2 and even did not return back in the night. Even her daughter for the last 5/6 years used to remain outside the house in night time and she had knowledge that her daughter used to go with respondent No. 2 during night time. Even, she also admitted the fact relating to the love affair between the victim and respondent No. 2. She admitted that even her daughter was having a crush upon respondent No. 2/accused. However, they belonged to different castes (Biraadaries), the victim belonged to Jatt caste whereas the respondent No. 2 belonged to Sunyaara caste. She further admitted that about 5/6 years ago, her daughter, i.e. the victim introduced respondent No. 2 with her while disclosing the fact that they were having love affair with each other. She also submitted that there was no such text message upon Whatsapp or chatting to demonstrate that there was any writing of proposal of any marriage by respondent No. 2/accused to the complainant. Consequently, it is well established that the entire story regarding false promise of marriage by respondent No. 2 was a sheer concoction.

At this state, it would be necessary to refer to the relevant provisions of the Indian Penal Code, i.e. Sections 90 and 375 IPC, which have been reproduced as under:-

Section 90 IPC

“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 or 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. ”

Section 375 IPC

375. Rape.—A man is said to commit “rape” if he--

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven 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 eighteen years of age.

(Seventhly)—When she is unable to communicate consent.

Section 90 of the IPC does not define “**consent**”, but describes what is not “**consent**”. Consent may be expressed or implied, coerced or misguided, obtained willingly or through deceit.

If the consent given by the complainant is under the misconception of fact, then in that eventuality, it is vitiated.

Section 375 of the Indian Penal Code is a special provision, whereas Section 90 of the Indian Penal Code is a general provision and here in the facts of the case, the general provision of Section 90 IPC is not of much help to the case of the prosecution. Section 375 clearly states that the sexual intercourse with a woman without her consent will constitute the offence of rape. Section 375 IPC, thirdly, fourthly and fifthly exhaustively enumerate the circumstances, in which, the consent given by the prosecutrix is vitiated and does not amount to consent in law. One has to look at the provision of Section 375 IPC alone to find out whether the offence of rape is committed. Secondly, even under Section 90 IPC, the consent is vitiated only if it is given under the misconception of a fact. A belief that promise of marriage was meant to be fulfilled is not a misconception of fact. The question of misconception of fact will arise only if the act consented to, is believed by the person consenting to be something else, and on that pretext sexual intercourse is committed. In such cases, it cannot be said that she had consented to sexual intercourse. The consent for the purpose of Section 375 IPC requires voluntary participation not only after the exercise of intelligence based on the knowledge of significance and moral quality of the fact, but also after having fully exercised choice between the

resistance and the assent. In the facts and the circumstances of the instant case, as explained above, the consent on the part of PW1, the victim is clearly spelled out.

It has been held by the Hon'ble Supreme Court in **Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and others**, 2019(1) R.C.R. (Criminal) 674, as follows:-

“16. In Uday v. State of Karnataka 2003 (2) RCR (Criminal)99: (2003) 4 SCC 46, this Court was considering a case where the prosecutrix, aged about 19 years, had given consent 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. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held that consent cannot be said to be given under a misconception of fact. It was held thus:-

"21. 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 straitjacket 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.

23. 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 them. 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."

It was further held as follows:-

"18. In Deepak Gulati v. State of Haryana, 2013 (3) RCR (Criminal) 96: (2013) 7 SCC 675, the Court has drawn a distinction between rape and consensual sex. This is a case of a prosecutrix aged 19 years at the time of the incident. She had an inclination towards the accused. The accused had been giving her assurances of the fact that he would get married to her. The prosecutrix, therefore, left her home voluntarily and of her own free will to go with the accused to get married to him. She called the accused on a phone number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived, she went with him to a place called Karna Lake where they indulged in sexual intercourse. She did not raise any objection at that stage and made no complaints to anyone. Thereafter, she went to Kurukshetra with the accused, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the accused. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the accused at Birla Mandir there. Thereafter, she even proceeded with the accused to the old bus-stand in

Kurukshetra, to leave for Ambala so that the two of them could get married at the court in Ambala. At the bus station, the accused was arrested by the police. The Court held that the physical relationship between the parties had clearly developed with the consent of the prosecutrix as there was neither a case of any resistance nor had she raised any complaint anywhere at any time, despite the fact that she had been living with the accused for several days and had travelled with him from one place to another. The Court further held that it is not possible to apprehend the circumstances in which a charge of deceit/rape can be leveled against the accused.

19. Recently, this Court, in *Shivashankar @ Shiva v. State of Karnataka & Anr.*, in Criminal Appeal No.504 of 2018, disposed of on 6th April, 2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is 'rape', especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under:-

"In the facts and circumstances of the present case, it is difficult to sustain the charges leveled against the appellant who may have possibly, made a false promise of marriage to the complainant.

It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as 'rape' especially in the face of the complainant's own allegation that they lived together as man and wife".

20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had malafide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by 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. Such cases must be treated differently. If the complainant had any malafide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under [Section 376](#) of the IPC”.

In view of the findings recorded above and the law laid down by the Hon'ble Supreme Court, we are of the opinion that the appeal in the instant case sans merit and deserves dismissal. As a consequence, we uphold the judgment dated 01.08.2019.

The appeal is, accordingly, dismissed.

The case property, if any, may be dealt with in accordance with law after the expiry of the period of limitation.

The trial Court record be transmitted back.

All pending applications, if any, stand disposed off.

(SURESHWAR THAKUR)
JUDGE

21. 09.2022
amit rana

(N.S.SHEKHAWAT)
JUDGE

Whether reasoned/speaking : Yes/No
Whether reportable : Yes/No