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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of decision: 20th September, 2023

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CRL.L.P. 476/2023 & CRL.M.As. 25475/2023, 25476/2023

THE STATE (GNCT OF DELHI)

..... Petitioner

Through: Mr. Manjeet Arya, APP for State with
Insp. Amit Kumar & WSI Anajan, PS
Palam Village.

versus

PAWAN KUMAR

..... Respondent

Through: None.

CORAM:**HON'BLE MR. JUSTICE SURESH KUMAR KAIT****HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA****J U D G M E N T (oral)**

1. An application under Section 378 (3) of the Code of Criminal Procedure, 1973 has been filed seeking Leave to Appeal against the judgment dated 04.10.2021 acquitting the respondent Pawan Kumar in case FIR No.250/2019 registered under Section 376(2)(n)/ 323 IPC registered at Police Station Palam Village, Delhi.
2. On the complaint of the prosecutrix that she had been raped by the respondent/ accused Pawan Kumar, he was Charge Sheeted for the offence under Section 376 (2)(n) and 323 IPC.
3. The charges under Section 376 (2)(n) and 323 IPC were framed against the respondent/ accused on 30.09.2019 to which he pleaded not



guilty.

4. The prosecution in support of its case examined five witnesses. The most material being PW1 the prosecutrix 'M', PW2 'D' the mother of the prosecutrix and PW3 'R' the brother of the prosecutrix. PW4 Vikas Kumar Tiwari is the neighbour and PW5 was W.SI Saroj the I.O of the case.

5. According to the testimony of prosecutrix 'M' as PW1 the respondent/ accused was known to her since last 5-6 years as he was the friend of her brother and used to visit their house. They exchanged mobile numbers and used to talk to each other and gradually became friends. They started going out and at times he would take her to the house of his friend Vikas at Raj Nagar, where the respondent established physical relationship with her on the pretext of marriage. The respondent used to establish relationship with her at least four times in a month and this continued for a period of four years. Thereafter, the prosecutrix got married on 30.11.2017 and went to reside with her husband at Gautampuri, Shahdara. After about 8 months the accused came to her house and told her that he wanted to marry her and sought two years time. The prosecutrix took divorce from her husband in *Panchayat*. Thereafter, she again established physical relations with the respondent/ accused at different places. According to her, the respondent established the physical relationship on a promise to marry. On 28.06.2019 at about 06:30 P.M the respondent came to their house and threatened her and her brother that he would kill them. Thereafter, on the same day the prosecutrix with her brother went to his house at 07:00/ 07:30 P.M, where they were beaten up by the respondent and his brother. Thereafter, the complaint Ex.PW1/A was made on 29.06.2019. The statement of the prosecutrix under Section 164 Cr.P.C. Ex.PW1/E was



recorded on 29.06.2019 by the learned M.M. in Dwarka Courts.

6. PW4 Vikas Tiwari in his testimony had deposed that he knew the prosecutrix as he resided in the vicinity. In the year 2017, he was working in Groffers as delivery boy where the respondent was also working. He became familiar with the respondent through the prosecutrix as he used to visit her house. Vikas Kumar Tiwari took accommodation on rent at Raj Nagar-II, where the respondent used to visit him of and on. He deposed that the respondent used to keep his bag of Groffers Company at his house and also to collect it in his absence and for that reason, he had the keys of his house. At that time PW4 was living alone as his wife was residing in her parental home in Shahdara. PW4 Vikas Tiwari, however, deposed that the respondent never brought the prosecutrix to his house.

7. The Statement of the Accused was recorded under Section 313 Cr.P.C, wherein he pleaded that he had been implicated falsely.

8. The learned Addl. Sessions Judge in the impugned judgment disbelieved the testimony of the prosecutrix that there was any false promise of marriage when the respondent first established physical relationship with her or continued thereafter and acquitted the respondents. Being aggrieved, the present Leave to Appeal has been filed by the State.

9. The Submissions were heard as advanced by the learned Counsel for the parties.

10. The alleged incident may be categorized in two parts; some incidents happened before the date of marriage of the prosecutrix i.e. 30.11.2017 and certain incidents happened post marriage and divorce. According to the prosecutrix, she had developed intimacy and had physical relationship before she got married on 30.11.2017. The respondent first established the relationship with her at the house of his friend on 27.04.2017 on a false



pretext of marriage and he continued to do so. The assertions of the prosecutrix that they used to frequently visit the house of his friend Vikas at Raj Nagar does not find any corroboration from the testimony of PW4 Vikas Kumar Tiwari. Be that as it may, even if the testimony of the prosecutrix is accepted that she used to go with the respondent to the house of Vikas and had physical relationship with the respondent, it is evident that she was doing so consensually. The claim of the prosecutrix that the respondent had established physical relationship with her by making a false promise of marriage, did not appeal to the reason that as about four months thereafter she got married to another person Kuldeep on 30.11.2017. She has admitted that she never disclosed to her family members about her relationship with the respondent. Had there been any force, coercion or non-consensual relationship or any promise of marriage, the prosecutrix would not have agreed to her marriage to Kuldeep within four months.

11. Significantly, as per the testimony of PW-1, the prosecutrix got married to Kuldeep on 30.11.2017, but even thereafter she continued having conversations daily with the respondent on the phone. After about 8 months, the respondent came to her matrimonial home and told her husband that he wanted to marry the prosecutrix and sought **two years time**. The prosecutrix got divorced in *Panchayat* from Kuldeep and she returned to her parental home. However, even thereafter she continued to meet the respondent at different places and established physical relationship, but she again asserted that it was on the false pretext of marriage. This assertion is patently false as she herself had deposed that when the respondent came to the house of her 1st husband Kuldeep on 30.11.2017 he had stated that he needed two years' time to marry. If he had already indicated that he would



need two years' time, where is the question of having to continue physical relationship under the false promise of marriage. The prosecutrix was well aware that the respondent did not have any intention to marry at least for next two years. There is not an iota of evidence to suggest that she had ever asked the respondent to marry or that he had refused to marry her.

12. Pertinently, she had deposed that she became pregnant twice from the respondent, but she was given pills by the respondent to terminate her pregnancy. However, there is neither any specific dates given nor any document produced to show that she ever got pregnant.

13. Further, in her MLC Ex.PW1/B conducted at DDU Hospital, after the registration of FIR, it is recorded that she had stated her relationship with the respondent to be consensual. She also admitted in her cross-examination that she had physical relations with the respondent even after her marriage as she used to like him. The prosecutrix had deposed that she had divorced her husband in a *Panchayat* vide document Ex.PW1/G which was a Notarized Agreement between the prosecutrix and her husband but it had no legal validity and her marital status continued to be a married woman and not that of a divorcee. The learned ASJ rightly observed that merely by entering into the Agreement, the marriage did not get dissolved and her marital status continuing to be that of a married woman. She could not have legally got married to the respondent and thus, there was no question of their being any false promise to marry. The relationship between the prosecutrix and the respondent spanned over more than four years and it was difficult to accept that in such a long period of time she was allured by the respondent for a physical relationship on the pretext of marriage.

14. We find that from the testimony of the prosecutrix herself it is evident



that she was in a consensual physical relationship with the respondent.

15. The Apex Court in the case of Sonu @ Subhash Kumar vs. State of Uttar Pradesh 2021 SCC OnLine SC 181 referred to its earlier decision in Pramod Suryabhan Pawar vs. State of Maharashtra and Another (2019) SCC OnLine SC 1073 to establish whether the consent was vitiated by a misconception of fact arising out of a promise to marry, two propositions must be established; the promise of marriage must have been given in bad faith with no intention of being adhere at the time it was given; and the second condition is it must be of immediate relevance or bear a direct nexus to the woman's decision to exchange in the sexual act.

16. The Apex Court in Deepak Gulati vs. State of Haryana (2013) 7 SCC 675 observed that “*consent may be expressed or implied, coarse or misguided or 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 of each side.*”

17. The consent has to be directly connected to “misrepresentation of facts” and the “consent of physical relationship must be prompted and induced by a promise of marriage”. As discussed above, we find that the prosecutrix had been in a relationship with the respondent for over a period of four years as she liked the respondent and it was with her free consent and will. There could not have been any false promise to marry or else the prosecutrix would not have got married to another person Kuldeep on 30.11.2017 and post her marriage before and after the alleged divorce, would not have continued in the physical relationship without first insisting on marriage with the respondent.

18. We conclude that the learned ASJ for well reasoned and cogent



reasons, has held that no offence under Section 376 (2) (n) and 323 IPC is made out. There is no merit in the Leave to Appeal, which along with the pending applications is hereby dismissed.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

SEPTEMBER 20, 2023

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