
(2019) 04 UK CK 0073

In the Uttarakhand High Court

Case No : Criminal Appeal No. 26 Of 2018

Anand Kumar @ Anant Kumar Pandey APPELLANT

Vs

State Of Uttaranchal (Now Uttarakhand) RESPONDENT

Date of Decision : 12-04-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 313, 357, 357(3), 374
Indian Penal Code, 1860 — Section 90, 302, 375, 376, 376(1), 504, 506
Evidence Act, 1872 — Section 3

Citation : (2019) 04 UK CK 0073

Hon'ble Judges : Lok Pal Singh, J

Bench : Single Bench

Advocate : S.S. Yadav, Sandeep Tandon, Lalit Miglani

Final Decision : Allowed

Judgement

Lok Pal Singh, J

1. This appeal, under section 374 of Code of Criminal Procedure, 1973 (for short Cr.P.C) is directed against the judgment and order dated 23.11.2017 passed by 2nd Additional Sessions Judge, Dehradun in Sessions Trial No. 10 of 2017, whereby the appellant was convicted under section 376 of Indian Penal Code, 1860 (for short IPC), and sentenced to rigorous imprisonment for a period of 7 years with fine of Rs.10,000/- . Further, a penalty of Rs.2,50,000/- under section 357 (3) Cr.P.C. was also imposed upon the appellant.

2. It would be necessary to set out the brief facts of the case which gave rise to the present criminal appeal. The brief facts are extracted hereunder:-

Complainant/prosecutrix lodged an FIR (Ex. A1) before the Mahila Help Line, Dehradun with the averments that she was undergoing coaching for civil services from Education Academy, Nehru Colony, Dehradun. She met accused-appellant Anand Kumar @ Anant Kumar Pandey, who was posted as attendant at A.C. passenger Coach, in the Link Express. After some time, they fell in love. Accused-

appellant also used to visit the house of the prosecutrix at Krishna Niwas, thereafter physical relations developed between them. It is also stated that the accused appellant on false pretext of marriage made physical relations with the prosecutrix on many occasion, after sometime she discovered that she was pregnant, then she disclosed to the accused appellant about her pregnancy and requested him to marry her but accused appellant merely held out assurance but did not carry out his promise. After some time, prosecutrix came to know that accused appellant got married to another girl on 02.03.2016. On the basis of the said report, case crime no. 167 of 2016 under sections 376, 504 and 506 IPC was registered and investigation was conducted by S.I. Preeti Sharma (P.W.4), who inspected the spot, prepared site plan (Ex. A6), prepared arrest memo (Ex. A7). The prosecutrix was medically examined on 05.10.2016 and her statement under section 164 of Cr.P.C. was recorded before the Magistrate concerned. After recording the statement of the witnesses submitted charge sheet (Ex. A12) under sections 376, 504 and 506 IPC against the appellant.

3. The case was committed to the Court of Session for trial. The trial court framed charges against the appellant under sections 376, 504 and 506 IPC. To the said charges, appellant pleaded not guilty and claimed to be tried.

4. To bring home the guilt of the appellant, prosecution got examined as many as 5 witnesses P.W. 1 complainant/prosecutrix, P.W. 2 Shabnam Jahan, P.W. 3 Const. Pradeep Singh. P.W. 4 S.I. Preeti Singh and P.W.5 Dr. Aruna Dobhal. Thereafter, statement of the appellant under section 313 Cr.P.C. was recorded wherein the appellant denied all the incriminating evidence and his involvement in the commission of the said offence. It is further stated that the physical relations was developed with the accused appellant and prosecutrix with their own consent and he never commit to marry with the complainant/prosecutrix and he has falsely been implicated by the prosecutrix on account of demand of money. The accused appellant examined four witnesses to substantiate his defence.

5. The learned trial court, after scrutinizing the arguments addressed by the counsel for the parties and evidence adduced by them, concluded that the prosecution has been successful in establishing the guilt of the accused person beyond reasonable doubt and held him guilty for the offences mentioned above and sentenced him accordingly. Aggrieved by the judgment and order dated 23.11.2017 the appellant is before this Court.

6. The statement of the prosecutrix (P.W.1) was recorded under section 164 Cr.P.C. on 27.10.2016 wherein she states that she met the accused appellant in the train and they have exchanged their phone numbers. Thereafter, accused appellant used to visit the house of the prosecutrix at Aaragarh Chowk. She further deposed that in the month of December she and accused appellant Anant stayed at Brij Hotel in Haridwar, where accused appellant had asked her to have physical relations but she did not agree, as she was not well at that point of time, but accused appellant made physical relations with her forcefully. She

further deposed that accused appellant on the pretext of marriage, made physical relations with the complainant. She further deposed that on 02.03.2016 accused appellant married to another girl and after five and half month she came to know that she was pregnant then she disclosed about her pregnancy to the accused appellant to which accused appellant got annoyed and threatened her of dire consequences.

7. The prosecutrix was examined before the trial court as P.W.1. In her statement, she corroborated the version of the FIR and also her statement recorded under section 164 Cr.P.C. In her cross examination P.W.1 admits the fact that the physical relations has been established between her and accused appellant on their free will. Initially their relationship was consensual; however, she improved her case that the accused appellant established physical relations with her on the pretext to marry her.

8. P.W. 2, sister of the prosecutrix (name withheld) also supported the version of P.W.1 and further states that when she came to know about the pregnancy of her sister, then prosecutrix disclosed that she got impregnated by accused appellant.

9. P.W.3 Const. Pradeep Singh deposed that he prepared chick FIR (Ex. A3).

10. P.W. 4 S.I. Preeti Sharma deposed that after lodging of the FIR she started investigation, prepared site plan and arrest memo of the accused appellant. She further deposed on 17.10.2016 she obtained permission from the court for DNA examination of the accused appellant with the baby of the prosecutrix. After recording the statement of the witnesses and medical examination of the prosecutrix , she filed the charge sheet against the accused appellant.

11. P.W.5 Dr. Aruna Dabral, Medical Officer, Pandit Deen Dayat Upadhyay Govt. Combined Hospital Dehradun, who examined the prosecutrix, has deposed that at the time of examination prosecutrix was 32 weeks pregnant.

12. Accused appellant Anand Kumar @ Anant Kumar Pandey examined himself as D.W.1. D.W.1 deposed that he was posted as attendant in A.C Coach. He met prosecutrix in the month of July 2015 in Link Express. She was known to Mr. Rajendra Sing Yadav T.T. and used to travel in the AC coach without ticket and he never asked her about the ticket. He further deposed that they both exchanged their mobile numbers; they both established the physical relations on their own free will. He further deposed that on the pretext of marriage, he never made relations with the prosecutrix. He also informed the prosecutrix about his marriage, after marriage there were friendly relations with both of them. In the month of August 2016 he received call from Parshad Dehradun to visit Dehradun for settlement. He also received call from Mahila Police Help Line that prosecutrix has moved an application and he has to visit for counseling in the month of October. He visit Mahila Helpline for counseling, prosecutrix along with her sister and Parshad Mr. Arun Khanna and other were present there and they had pressurized the accused appellant to settle the dispute with the prosecutrix on payment of Rs. 25-30 lakhs but due to his poor financial condition he did not

enter into compromise, and, thereafter the case was sent to P.S. Dalanwala and the accused appellant was sent to jail. In the month of December, prosecutrix came to the jail and demanded Rs. 25 lakhs for settlement. In his cross-examination he deposed that on the pretext of marriage, he never made physical relations with the prosecutrix. He also deposed that it is wrong to say when he came to know that prosecutrix was pregnant he threatened her of dire consequences. He further deposed that he is ready to adopt the child.

13. D.W. 2 Smt. Radha Rani, mother of the accused appellant also corroborated the version of the accused appellant.

14. D.W. 3 Arun Khanna and D.W.4 Sanjay Singh are the formal witness.

15. Heard learned counsel for the appellant and learned Deputy Advocate General for the State and perused the entire material available on record.

16. Learned counsel for the accused appellant would contend that there are serious contradictions and discrepancies in the statement of the prosecutrix. He further stated that prosecutrix is a consenting party. Learned counsel for the appellant placed reliance upon the judgment of Hon'ble Apex Court in the case of Deepak Gulati Deepak Gulati vs. State of Haryana 2013 (7) SCC 675 wherein the Hon'ble Court has held as under:-

"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 (supra), it has been observed as under:

"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, wherein it has been observed:

"11. 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."

17. Chapter XVI of the Code of Criminal Procedure 1860 defines 'sexual offences'. It is apt to mention here provisions contained in section 375 of the IPC. The same reads as under-

[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 a 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.

Explanation: 1 For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2:- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exceptions

Exception 1:- A medical procedure or intervention shall not constitute rape.

Exception 2:- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

18. None of the ingredients, as mentioned above, is fulfilled in the present case. However, the prosecution case is that initially the appellant and the prosecutrix fell in love and established physical relationship. Subsequently, prosecution developed its case that on the false pretext/promise of marriage, the appellant established physical relations with her and later on declined to fulfill the promise and got married to another lady. Prosecutrix got impregnated and after 5 ½ months when she came to know of said fact, she requested the appellant to marry her but appellant declined and threatened with dire consequences.

19. Their Lordships of the Hon'ble Apex Court in the case of Tilak Raj vs. State of Himachal Pradesh (2016) 4SCC 140 held as under:-

17. The evidence as a whole including FIR, testimony of prosecutrix and MLC report prepared by medical practitioner clearly indicate that the story of

prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the Appellant seems to be consensual in nature. The trial court has rightly held thus:

"23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bed room at night.

24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.

25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her testimony itself shows that the entire story of marriage has unfolded after 05.01.2010 when the accused was stated to have been summoned to the office of the Dy. S.P. Prior to 05.01.2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but her cross-examination shows that no doubt the two were in relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, come talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage."

20. Their Lordships of Hon'ble Apex Court in the case of Varkey Joseph vs. State of Kerala 1993 Supp. (3) 745 has held that prosecution has to prove its case beyond reasonable doubt but that does not mean that the prosecution case may be proved, rather it must be proved. Unless, prosecution prove its case in the decree of must be true, conviction should not be made. Paragraph no. 12 of said judgment is reproduced hereunder:-

"Suspicion is not the substitute for proof. There is a long distance between 'may be true' and 'must be true' and the prosecution has to travel all the way to prove its case beyond all reasonable doubt. We have already seen that the prosecution not only has not proved its case but palpably produced false evidence and the prosecution has miserably failed to prove its case against the appellant let alone beyond all reasonable doubt that the appellant and he alone committed the offence. We had already allowed the appeal and acquitted him by our order dated April 12, 1993 and set the appellant at liberty which we have little doubt that it

was carried out by date. The appeal is allowed and the appellant stands acquitted of the offence under section 302 I.P.C."

21. Admittedly, the prosecutrix has never raised grievance before any person at any stage. In fact, she seems to have submitted to the will of the appellant, possibly in lieu of his promise to marry her. The prosecutrix was aged about 22 years at the time of the incident. 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 appellant for several days, and had travelled with him from one place to another. The prosecutrix was 22 years of age and had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to. She was conscious of the fact that her marriage may not take place owing to various considerations, including the fact that they both are from different religion. During trial,

22. The facts of the present case are very similar to the ratio of the judgment (supra). This Court is of the view that none of the ingredients of section 375 IPC is made out against the accused appellant in the present case, as the case in hand is of consensual sex between the prosecutrix and accused appellant and the prosecution has utterly failed to prove its case beyond reasonable doubt.

23. In view of the forgoing discussion, the order of conviction is liable to be set aside. Thus, the appeal is allowed. Judgment and order dated 23.11.2017 passed by the 2nd Additional Sessions Judge, Dehradun is hereby set aside. The appellant is acquitted of the charge of offence punishable under section 376 (1) IPC. The accused appellant Anand Kumar @ Anant Kumar Pandey is in jail. He be released from jail forthwith, if not required to be detained in connection with any other case.

24. In the Scheme of Section 357 Cr.P.C., the victim or injured is entitled to get compensation when the convict is sentenced, but the Scheme does not reflect that compensation is to be paid to a child born from such relationship. However, such child has a right to claim maintenance and shall have a right in the property of his/ her biological father.

25. Let a copy of this judgment along with lower court record be sent back to the court below for ensuring compliance of the order.