
(2016) 01 DEL CK 0246
In the Delhi High Court
Case No : Crl. A. 135/2014

Hari Mohan Sharma

APPELLANT

Vs

State of NCT of Delhi

RESPONDENT

Date of Decision : 07-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 164
Penal Code, 1860 (IPC) — Section 376, Section 90

Citation : (2016) 2 ADDelhi 49 : (2016) CriLJ 1218 : (2016) 2 Crimes 385 :
(2016) 1 JCC 362 : (2016) 5 RCRCriminal 471

Hon'ble Judges : S.P. Garg, J.

Bench : Single Bench

Advocate : B.K. Singh, Advocate, for the Appellant; Amit Ahlawat, APP, for the Respondent

Final Decision : Allowed

Judgement

S.P. Garg, J.—1. The appellant - Hari Mohan Sharma has preferred the instant appeal to challenge the legality and correctness of a judgment dated 25.11.2013 of learned Addl. Sessions Judge in Sessions Case No. 33/2013 arising out of FIR No. 197/2011 PS New Friends Colony by which he was held guilty for committing offence punishable under Section 376 IPC. By an order dated 13.12.2013, he was awarded RI for seven years with fine Rs. 5,000/-.

2. Briefly stated, the prosecution case as reflected in the charge- sheet was that in December, 2010 or January, 2011 at House No. 102, Bharat Nagar, New Friends Colony, New Delhi, the appellant committed rape upon the prosecutrix "X" (assumed name) during night time. The complainant lodged complaint (Ex.PW-4/A) dated 25.07.2011 before Chairperson SC / ST Commission, Khan Market implicating the accused for commission of rape upon her. She further informed that thereafter the accused established physical relations with her several times on the promise to marry as a result of which she became pregnant. When she informed the accused about her pregnancy, on 24.07.2011 at around

07.30 p.m., his father - Ved Prakash Sharma, brother - Gopal Sharma and mother arrived at her residence and gave her severe beatings. She was threatened to abort the child. On the intervention of one Manvir Singh Kohli, the assailants left the spot threatening her to abort the child within a week. On the basis of the said complaint, the Investigating Officer lodged First Information Report on 29.08.2011. During investigation, "X" recorded her statement under Section 164 Cr.P.C; she was medically examined. Statements of the witnesses conversant with the facts were recorded. Upon completion of investigation, a charge-sheet was filed against the appellant for commission of the offence under Section 376 IPC. The prosecution examined ten witnesses to prove its case. In 313 Cr.P.C. statement, the appellant denied the allegations and pleaded false implication. No evidence in defence was produced. The trial resulted in his conviction as mentioned previously. Being aggrieved and dissatisfied, the instant appeal has been preferred.

3. I have heard the learned counsel for the parties and have examined the file. Appellant's conviction is primarily based upon the solitary statement of the prosecutrix "X" which has not been corroborated by any other independent source. Needless to say, conviction can be based on the sole testimony of the prosecutrix provided it lends assurance of her testimony. In case, the Court has reasons not to accept the version of the prosecutrix on its face value, it may look for corroboration.

4. Undisputably, "X", a permanent resident of Shiv Nagar, Rudrapur (Uttarakhand) and was pursuing LL.B. from Chankya Law College, Rudrapur, while the accused was doing MBA. It is also not in dispute that both the prosecutrix and the accused were acquainted with each other for the last about three years before the incident and used to have conversation on phone. In 2010, the prosecutrix came to Delhi and lived in a rented accommodation at Shiv Nagar. The friendship between the two continued even thereafter.

5. In her complaint (Ex.PW-4/A), the prosecutrix did not reveal the exact date when for the first time, she was sexually assaulted by the accused at Delhi. She merely stated that after her coming to Delhi, the accused started visiting her at her Friends Colony residence and "one" day after putting her in fear and pressing her throat, he committed rape upon her. Thereafter, he established physical relations with her several times after enticing her on promise to marry her. In her 164 Cr.P.C. statement (Ex.PW-4/A), she disclosed that the accused was well known to her since 2010 as he lived as a tenant in their house. She got a job in Delhi. In January, 2011, the accused called her at New Delhi Railway Station. When she went there, the accused intended to take her to a hotel which offer she declined and returned to her residence. The accused followed her to her house and noted her residence. On that day, in December, 2010 or January, 2011, the accused entered inside her house and attempted to caught hold of her. When she raised alarm, the accused pressed her neck. He, thereafter, put off her salwar and forcibly established physical relations with her, as a result of which

she became unconscious. When she came to senses, the accused took an "oath" that he would marry her. The accused often used to visit her and they had consensual sex. The accused, however, did not perform marriage with her. On 22.07.2011, she came to know that she was pregnant. On 23.07.2011, his parents and brother came and gave beatings to her with fists and blows. On 24.07.2011, she decided to lodge complaint with the police.

In her Court statement as PW-4, "X", deposed that after she came to Delhi in 2010, the accused remained on regular contact with her on phone. In December, 2010 or January, 2011 the accused after coming to Delhi called her on phone at New Delhi Railway Station on the pretext that he had a message for her from her family and also wanted to talk about his job. When she went to New Delhi Railway Station and talked with the accused, he offered her to go to some hotel to take tea together. They went to a hotel near the railway station, took tea and she returned to her house by taking a bus. She further deposed that on that evening, the accused came to her house, knocked at the door and she opened it. After the accused entered inside the house, he started forcing upon her. She pushed him aside and he fell down. As he got up, he strangled her by hands. He, thereafter, opened her salwar by opening the string and did forcibly intercourse with her as a result of which she lost her senses. When she regained senses, she found the accused present there. He informed her that as he wanted to marry her, he had committed sexual intercourse with her. He undertook to marry her and remained with her in the house for 2/3 days. During this period, physical relations were established. When she asked the accused to marry her, the accused told her to come to Rudrapur so that they could marry there. After about fifteen days, she went to Rudrapur and insisted the accused to marry her. The accused told her that he wanted to get fee and other expenses from his father to complete MBA. Despite her insistence, the accused did not marry and promised to marry after MBA was complete. She returned to Delhi. The accused used to visit her there. They used to stay at hotels in between and had physical relations. The accused used to beat her whenever she did not obey his instructions.

6. In her further statement, she deposed that on 22.07.2011 over phone, she informed the accused and his father about her pregnancy. On 23.07.2011, the accused accompanied by his parents came to Delhi at about 04.00-05.00 p.m. and she was given beatings resulting in her fall. The assailants went away after bolting the door from outside. She went to the police station next day to lodge complaint but the police did not accept it. She sent a copy of the complaint to SC / ST Commission and Women Commission. Since she was bleeding profusely she went to Dr.Kukreja at Bharat Nagar where her pregnancy was finally aborted. In the cross- examination, she admitted that she had two brothers and two sisters. She admitted to have gone to see the accused at New Delhi Railway Station on her sweet will. She also admitted that she wanted to marry the accused after the incident. She disclosed that abortion took place on 24.07.2011 after she took medicines from Dr.Kukreja's clinic. She volunteered to add that

the doctor had advised her for abortion or else it could be a risk for her life. No sample for DNA from foetus was preserved.

7. On scanning the various statements given by the prosecutrix at various stages of investigation / trial, it reveals that she is not consistent. She has made vital improvements at different stages of investigation / trial. Admitted position is that both the prosecutrix and the appellant were well acquainted with each other before the incident and had friendly relations. Both were aged about 30 years and belonged to different "castes". The prosecutrix attempted to implicate the appellant's parents and brother accusing them of giving beatings to her on 24.07.2011 at around 07.30 p.m. She even alleged that the appellant's mother had kicked on her stomach with an intention to abort the pregnancy and all of them had left the spot threatening her to abort the pregnancy within a week. Soon thereafter on 25.07.2011, a written-typed complaint was lodged by her before SC / ST Commission, Khan Market. The Trial Court did not accept X's version regarding this incident. It came to the conclusion that the visit of the appellant's parents on 23.07.2011 was not a cause of bleeding on 24.07.2011. The prosecutrix did not produce cogent evidence if the appellant's parents and brother had visited on 24.07.2011 at around 07.30 p.m. as alleged in the complaint (Ex.PW-4/A). She did not get herself medically examined that time for the beatings allegedly given to her; she did not lodge any complaint with the police; no PCR call was made that time. Even after the departure of the alleged assailants, the prosecutrix did not report the incident to the police. In the complaint (Ex.PW-4/A), there is mention that on hearing her cries, Manvir Singh Kohli residing in her neighbourhood at D-807, New Friends Colony arrived at the spot and intervened in the incident. Manvir Singh Kohli did not corroborate X's version on this aspect. In his statement (Ex.PW-7/DA) under Section 161 Cr.P.C., he did not claim if any such incident had taken place in his presence or he had intervened in that. He rather informed the police that he had declined to give a false statement at the asking of the prosecutrix. Manvir Singh Kohli in his deposition before the Court as PW- 7 did not state if any incident whereby "X" was given beatings by the appellant's relatives or he had intervened to save the prosecutrix that time had taken place in his presence. He introduced a different story alleging that in June, 2011, the prosecutrix and the appellant had come to him disclosing their intention to marry and he had advised them to bring all the materials needed for performing marriage on that day itself. The prosecutrix in her deposition did not state these facts. The fact remains that X's statement regarding incident dated 24.07.2011 has remained uncorroborated.

8. It is unclear when the prosecutrix became pregnant and when the pregnancy was aborted / terminated. PW-10 (Dr.Kiran Kukreja), General Physician, informed the Court that on 22.07.2011 "X" had come to her clinic with the complaint of bleeding from vagina and delayed menstruation. She got her urine tested for pregnancy at her clinic and it was found "positive" vide report (Ex.PW-10/A). On her advice, the patient had also undergone an ultrasound examination vide report (Ex.PW-10/B). As per ultrasound report, "X" was found to have ruptured

ectopic pregnancy. She was referred to gynaecologist for further management to any hospital of her choice. PW-10 did not reveal if she had prescribed any medicines to abort the pregnancy. The prosecutrix did not produce on record any medical document to show on any specific date the pregnancy was aborted at a particular hospital. Contents of statement (Ex.PW-4/A) reveal that till the lodging of the complaint on 25.07.2011, no such abortion had taken place. PW-2 (Dr.Saloni Bansal) medically examined the prosecutrix on 29.08.2011 vide MLC (Ex.PW-2/A). In the cross- examination, she admitted that at that time there was no sign of recent abortion. The prosecutrix had not shown her any medical record in relation to any abortion. It is thus unclear if the prosecutrix became pregnant due to sexual relationship with the appellant or that the pregnancy was aborted / terminated. No DNA of the foetus was preserved. "X" did not give plausible explanation as to why she had undergone abortion.

9. The prosecution has further failed to prove beyond reasonable doubt if at the time of first encounter in December, 2010 or January, 2011, the prosecutrix was raped "forcibly" by the appellant against her wishes inside her house. As per X's version, she had gone to meet the appellant at New Delhi Railway Station on that day. From there, they had gone to a hotel and had taken tea together. The alleged incident of rape took place at around 07.30 p.m. soon after return to her room. She alleged that the accused entered inside her room and started forcing upon her. She pushed him aside as a result of which he fell down. Thereafter, he got up and strangulated her by hands and committed forcible intercourse with her. "X" did not raise any alarm at that time and no person from the neighbourhood collected. She did not lodge any report with the police for the forcible rape committed upon her; she did not get herself medically examined. Her plea that she did not lodge the report with the police as the appellant had promised to marry her does not appeal to mind. The appellant had not made any such promise to marry with the prosecutrix before having alleged physical relationship. If the prosecutrix was not a consenting party, there was no occasion or reason not to report the incident to the police or her family members for the heinous crime committed by the appellant to have physical relations forcibly against her wishes that time. It has come on record that the accused did not abscond from the spot and remained with the prosecutrix in her house thereafter for 2/3 days. During this period also physical relationship took place between the two. She herself has admitted that despite her insistence, the accused did not marry during her visit to Rudrapur after about fifteen days of the incident. Thereafter, she returned to Delhi. The accused continued to visit her and they stayed at hotels in between and had sexual intercourse. Apparently, the prosecutrix had no reasons to have physical relationship with the accused once she had come to know that there was no intention of the appellant to marry her.

10. No cogent evidence has emerged on record to show that the physical relations were established with the prosecutrix on the false promise or assurance of marriage. At no stage, the prosecutrix brought it to the notice of her brothers and sisters and never prompted them to approach the appellant and his family

members for the marriage. There is no clinching evidence on record if the matter was brought to the notice of the parents and relatives of the appellant. The prosecutrix did not examine her brother/sister or any other relative who was aware of this relationship between the two. It is unclear as to why "X" concealed the factum of promise to marry by the appellant and did not make it public. Where was the compulsion for the prosecutrix to have physical relationship repeatedly without ensuring that the appellant and his family members were willing to perform marriage with her? She was mature enough to fully understand as to what was happening between the two. There is nothing in her evidence to demonstrate that she was incapable of understanding the nature and implications of the act which she consented to. Her consent for physical relationship (if any) was an act of conscious reason. If a fully grown up lady consents to the act of sexual intercourse on a promise to marry and continues to indulge in such activity for long, it is an act of promiscuity on her part and not an act induced by misconception of fact. At no stage, "X" approached the appellant's family members to apprise them his intention to marry her.

11. "X" is not believed to allow the appellant to have physical relations repeatedly without first ensuring authenticity of the alleged promise to marriage particularly when they both belonged to different castes.

12. X's statement is full of contradictions and inconsistencies. In her deposition before the Court, she stated that Manvir Singh Kohli's servant had arrived by chance at the spot when she was being beaten by the appellant's relatives. No such servant has been named or examined. In complaint (Ex.PW-4/A), she had claimed arrival of Manvir Singh Kohli and not his servant. In her 164 Cr.P.C. statement (Ex.PW-4/A), she claimed that when the appellant called her at New Delhi Railway Station, he wanted to take her to a hotel to which she declined. However, in her Court statement, she admitted that they had gone to a hotel and had taken tea together. Inordinate delay in lodging the FIR has not been explained. Instead of reporting the matter to the concerned local police station promptly, on 25.07.2011, the prosecutrix approached SC / ST Commission, Khan Market. The instant FIR was lodged on 29.08.2011. It is unclear as to what proceedings were conducted at the said Commission.

13. In "Sujit Ranjan vs. State", , 2011 Law Suit (Del) 601, this Court held :

"Legal position which can be culled out from the judicial pronouncements referred above is that the consent given by the prosecutrix to have sexual intercourse with whom she is in love, on a promise that he would marry her on a later date, cannot be considered as given under "misconception of fact". Whether consent given by the prosecutrix to sexual intercourse is voluntary or whether it is given under "misconception of fact" depends on the facts of each case. While considering the question of consent, the Court must consider the evidence before it and the surrounding circumstances before reaching a conclusion. Evidence adduced by the prosecution has to be weighed keeping in mind that the burden is on the prosecution to prove each and every ingredient of the offence

Prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from inception and that promise made was false to his knowledge. The failure to keep the promise on a future uncertain date may be on account of variety of reasons and could not always amount to "misconception of fact" right from the inception."

14. In "Deepak Gulati vs. State of Haryana", , 2013 Law Suit (SC) 442, the Supreme Court held :

"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 malafide 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 any 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 malafide, and that he had clandestine motives. 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."

15. In "Uday vs. State of Karnataka", , AIR 2003 SC 1639, the Supreme Court held :

" 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."

16. The Trial Court in its judgment has observed that in Uday's case (supra) and Deepak Gulati's case (supra), the Hon"ble Supreme Court laid down the law :

"That if the prosecutrix is matured to understand the significance and morality associated with the act, she was consenting to and that she was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor and also that if it is difficult to impute to the accused, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact, that had arisen from his promise to marry her and further that if there is any evidence to prove conclusively, that the appellant never intended to marry with the prosecutrix, the accused be given benefit of doubt."

17. In the instant case, the prosecutrix has miserably failed to establish if any promise to marry was ever made by the appellant and her consent for physical relationship was obtained on that assurance or promise. Physical relations (if any) between the two were consensual. It cannot be inferred with certainty that the prosecutrix was cheated and her consent was obtained for physical relationship on the false promise to marry or that the appellant had no intention to marry her from the very inception.

18. Settled legal position is that conviction can be based upon the sole testimony of the prosecutrix provided it is reliable and is of sterling quality.

19. In "Abbas Ahmed Choudhury v. State of Assam", , (2010) 12 SCC 115, observing that a case of sexual assault has to be proved beyond reasonable doubt as any other case and that there is no presumption that a prosecutrix would always tell the entire story truthfully, the Hon"ble Supreme Court held :

"Though the statement of prosecutrix must be given prime consideration, at the same time, broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there could be no presumption that a prosecutrix would always tell the entire story truthfully. In the instant case, not only the testimony of the victim woman is highly disputed

and unreliable, her testimony has been thoroughly demolished by the deposition of DW-1."

20. In another case "Raju v. State of Madhya Pradesh", , (2008) 15 SCC 133, the Supreme Court stated that the testimony of a victim of rape has to be tested as if she is an injured witness but cannot be presumed to be a gospel truth.

"It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."

21. In "Rai Sandeep @ Deepu vs. State of NCT of Delhi", , (2012) 8 SCC 21, the Supreme Court commented about the quality of the sole testimony of the prosecutrix which could be made basis to convict the accused. It held :

"In our considered opinion, the "sterling witness" should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross- examination of any length and strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a "sterling witness" whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said

witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

22. In "Tameezuddin @ Tammu v. State (NCT of Delhi) ", , (2009) 15 SCC 566, the Supreme Court held :

"It is true that in a case of rape the evidence of the Prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter."

23. X's testimony tested on the above settled principles, is wholly unreliable due to inherent infirmities therein.

24. The prosecution has miserably failed to establish that physical relations with the prosecutrix were on the false promise to marry. The appeal filed by the appellant is accordingly allowed. Conviction and sentence of the appellant are set aside. The appellant shall be released forthwith if not required to be detained in any other criminal case.

25. Trial Court record be sent back forthwith with the copy of the order. A copy of the order be sent to the Superintendent Jail for compliance.