
(2015) 07 BOM CK 0325
In the Bombay High Court
Case No : Criminal Appeal No. 185 of 2015

T.B.P.

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 03-07-2015

Acts Referred:

Penal Code, 1860 (IPC) — Section 109, 375, 376

Citation : (2015) 07 BOM CK 0325

Hon'ble Judges : S.S. Shinde, J;A.I.S. Cheema, J

Bench : Division Bench

Advocate : S.N. Patil, Advocate h/f. N.V. Gaware, for the Appellant; B.L. Dhus, APP, Advocates for the Respondent

Final Decision : Dismissed

Judgement

A.I.S. Cheema, J—We have heard counsel for the Appellant (original complainant) and the learned A.P.P. for State.

2. The Appeal is against acquittal in Sessions Case No. 396 of 2012 for offence punishable under Section 376 and 109 of the Indian Penal Code, 1860 ("I.P.C." in brief), which was brought against the Respondent No. 2 - original accused.

3. The learned counsel for the Appellant - original complainant has submitted that the Judgment of the trial Court needs to be interfered with as it is not maintainable. The counsel submitted that the complainant -prosecutrix was lured into sexual relationship on the promise of marriage and the trial Court could not have acquitted the accused for the reasons that it was consensual act.

4. We have gone through the original record which has been called, as well as the Judgment of the trial Court. Before advertng to the facts of the present matter, it would be appropriate to refer to the observations of the Hon"ble the Supreme Court of India regarding "consent" with reference to Section 375 of the Indian Penal Code. The Hon"ble Supreme Court in the matter of Deepak Gulati Vs. State of Haryana, (2013) 6 AD 233 : AIR 2013 SC 2071 : (2013) CriLJ

2990 : (2013) 2 Crimes 311 : (2013) 3 CTC 567 : (2013) 4 JCC 2680 : (2013) 9 JT 105 : (2013) 3 RCR(Criminal) 96 : (2013) 7 SCALE 383 : (2013) 7 SCC 675 , observed in Para 18 as under:

"18. 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."

? Keeping the above observations of the Hon"ble Supreme Court in view, when we have looked into the record of the present matter, the following is noticed.

5. The date of birth of complainant is 13th June 1994. She filed F.I.R. on 25th June 2012 claiming that she was knowing the accused for two years before the date of F.I.R. and that he had proposed to marry with her and so she was having love affair with him. The F.I.R. mentions that since one year before the filing of F.I.R., they had physical relations also. She claimed that as the accused was going to marry with her, they entered into physical relationship and they were living the life as husband and wife and their family members were knowing about the same. The F.I.R. claims that eight days before the F.I.R., the accused called her on Mobile that he has got service and he will not marry her. She got a shock and lost her mental balance and inspite of efforts when accused did not meet her, on 22nd June 2012 she tried to commit suicide by consuming "Roger" used for pesticides.

6. The F.I.R. itself mentions the complainant telling her age as 19 years. Section 376 of I.P.C. as it stood before the Criminal Law (Amendment) Act, 2013, made it an offence of rape when the girl was under 16 years of age, in which situation her consent was immaterial. If the F.I.R. is seen and considered along with the evidence of the complainant, she was clearly more than 16 years of age when she entered into the sexual relationship. F.I.R. itself claims that the accused had proposed to marry the complainant and then they entered into love affair and

after one year of such relationship, entered into physical relationship. In this view of the matter, it cannot be said that on the pretext of having physical relationship, the promise of marriage was made.

7. There is evidence of complainant claiming that on 22nd June 2012 she tried to commit suicide as the accused had refused to marry her. If the evidence of Doctor Nirmala Palekar, PW-4 is perused and read along with the medical evidence as available in the record, what appears is that the prosecutrix was admitted in the hospital on 23rd June 2012 with history of consumption of organo-phosphorous component 3-4 M.L., half an hour before being brought to the hospital. It appears that the doctor by error wrote the date of 22nd June 2012 in the record. The case-paper of the complainant also is of 23rd June 2012. The original document shows on the first page the lower portion having been torn off where diagnosis is recorded. The document marked Exhibit 35 from the record of the hospital shows that entry regarding complainant is on the lower part of the page with the date shown as 22nd June 2012, whereas on the upper side of the same page, there is entry regarding examination of another person in the date of 23rd June 2012. The trial Court has gone through all this evidence and referred to the contradictions in the evidence and the medical record and has also found that the deposition of the complainant and her sister was doubtful regarding to the alleged incident claimed to be of 22nd June 2012. It also found that the complaint itself showed that prosecutrix had failed in the examination and the defence was probable that because of the failure in the examination, she may have consumed poisonous substance, and the act could not be connected to the accused. The trial Court referred to the evidence of the complainant where she claims that for the two years concerned, the complainant was saying "Yes" and "No" to the accused and considering all the evidence, trial Court concluded that the complainant was consenting party to the sexual intercourse. The trial Court referred to the Judgment in the matter of Anwar Khan Iqbal Khan Vs. State of Maharashtra, (2010) CriLJ 3597 and the Judgment in the matter of Uday Vs. State of Karnataka, AIR 2003 SC 1639 : (2003) CriLJ 1539 : (2003) 2 JT 243 : (2003) 2 SCALE 329 : (2003) 4 SCC 46 : (2003) 2 SCR 231 : (2003) AIRSCW 1035 : (2003) 2 Supreme 145 . Relying on such Judgments and reasonings, the trial Court acquitted the accused.

8. We have considered the submissions at Bar and the observations of the Hon'ble Supreme Court in the case of Deepak Gulati, cited supra, and we have considered the oral evidence available. As already discussed, it is quite clear that in a love affair, which according to the prosecutrix began two years before the incident on the assurance of the accused that he will marry, nothing happened for one year. Her evidence is that after one year they developed physical relationship. Her own evidence shows that she was sometime saying yes and sometime saying no to the relationship. Thus, she was quite conscious and it is clear that she had no misconception of facts. Taking over-all conspectus of the matter, we find that the reasons recorded by the trial Court and the conclusions drawn for acquittal, are possible view of the evidence. Thus, there is no reason to

entertain the present Appeal against acquittal.

9. The Appeal stands dismissed.