
(2009) 10 BOM CK 0041
In the Bombay High Court
Case No : Criminal Appeal No. 761 of 2008

Vanraj @ Sunil Masram

APPELLANT

Vs

The State of Maharashtra

RESPONDENT

Date of Decision : 06-10-2009

Acts Referred:

Evidence Act, 1872 — Section 114A
Penal Code, 1860 (IPC) — Section 376, 506, 90

Citation : (2009) 10 BOM CK 0041

Hon'ble Judges : A.P. Bhangale, J

Bench : Single Bench

Advocate : R M Daga, for the Appellant; D.P. Thakare Addl. Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

A.P. Bhangale, J.—By means of this Criminal Appeal, the appellant/convict questions the validity, legality and correctness of the judgment and order dated 4th April, 2008 passed by learned Additional Sessions Judge 3, Nagpur in Sessions Trial No. 263/2007. The appellant was convicted for the offence punishable under Sections 376 and 506II of the Indian Penal Code and sentenced for offence of rape, to suffer RI for seven years and to pay fine in the sum of Rs. 1000/in default, to suffer RI for six months; and, for offence of criminal intimidation, to suffer RI for six months. The substantive sentences of imprisonment were directed to run concurrently, with benefit of set off for period undergone in jail.

2. The facts in brief are: The appellant is a neighbour of the prosecutrix. On the date of the incident, the appellant, taking advantage of the fact that she was all alone in the house, had entered her house at about 9.00 p.m. and pressed her breasts. When she tried to raise alarm, he had pressed her mouth and gave threat to kill her. She was asked to remove her clothes, which she did under duress and fear. He made her to lie down on ground and committed sexual

intercourse with her. The prosecutrix was warned by appellant not to disclose the incident to anybody and thereafter used to commit intercourse with her. As a result, the prosecutrix became pregnant. By passage of time, people in the village came to know about the pregnancy of prosecutrix. The appellant and prosecutrix garlanded each other in the temple of Lord Hanuman in the village and then prosecutrix stayed with the appellant, at his house. The appellant left his house after 23 months. As he left the house and did not return nor maintained her, the prosecutrix reported the matter to the Police Station, Kondhali. An offence punishable under Sections 376 and 506II of the IPC were registered and police investigation commenced. Statements of various witnesses were recorded. The prosecutrix was referred for medical examination. Her clothes, underwear were seized. Samples of blood, vaginal swam, pubic hairs of prosecutrix were collected. School leaving certificate of the prosecutrix was also collected. The appellant was zeroed down. He was also referred for medical examination and his clothes were seized and samples of blood, semen, public hair were collected. The articles seized were referred for Expert's opinion.

3. The appellant was chargesheeted before learned Judicial Magistrate, First Class, Katol who committed the case to the Court of Sessions, Nagpur, for trial. Charge was framed on 1.10.2007 in Sessions Trial No. 263/2007 before learned Additional Sessions Judge, Nagpur against the appellant Under Sections 376 & 506II IPC, to which he pleaded "not guilty" and claimed to be tried.

4. The prosecution examined a total of eight witnesses. The appellant/accused pleaded innocence saying that he had gone for labour work and returned to his village after ten months. Seema's parents spread rumors about her pregnancy from him and the villagers performed his marriage with Seema in the temple and thereafter appellant brought prosecutrix at his house and stayed for eight days, living like husband and wife and then he went out of village in order to find out labour work. When he returned to village after 15 days, Police arrested him as prosecutrix had lodged a report to Police against him.

5. Looking in to the evidence led by the prosecution in the trial Court: the prosecutrix, studying in V standard, examined as PW 2 stated her age to be of 16 years as on 26.12.2007 when she deposed. According to her, about one year prior to her deposing, the incident occurred in summer on Wednesday, at about 9.00 p.m. when she was all alone in the house, the appellant, came there, started teasing her, pressed her breasts with both his hands. He removed her clothes and his own clothes and committed forcible intercourse with under the threat of killing her if she discloses the incident to anybody. After one month, she became pregnant. The appellant told her that he would perform marriage with her. Appellant then performed marriage with prosecutrix in the temple of Lord Hanuman in the village, by garlanding her. The appellant was in the village only for a day and did not return for about a month and then he absconded. Thus prosecutrix also deposed that two months before the date she deposed, she had delivered a male child. Mother of prosecutrix who is a rustic, illiterate lady, was

examined to corroborate the evidence of prosecutrix that she is studying in V standard and might be of 16 years of age, though she could not tell the exact date of birth. Prosecutrix had informed her mother about her pregnancy of eight months from accused, who had came in the night, gagged the mouth of the prosecutrix and committed forcible sexual intercourse .Father of prosecutrix (PW 3) also deposed that prosecutrix is studying in V standard and might be sixteen years old. When the prosecutrix was running eight month pregnancy from accused told about the accused having committed forcible sexual intercourse with her when she was alone in the house at night time. It is also in the cross-examination of PW 3 that he came to know about the marriage of appellant with prosecutrix in temple of Lord Hanuman, in the presence of father of appellant and villagers, Ganesh, Namdeo etc. and Seema (prosecutrix) and appellant stayed together at his house for about two to four days (before he absconded).

6. Learned Counsel for the appellant argued that the prosecutrix had consented for the sexual intercourse, after prosecutrix and accused had decided to marry by garlanding each other in Lord Hanuman's temple. The argument is of vital consideration. The consent may be express or implied under the circumstances if it is express consent, there may be no complaint at all, if it is case of consent by a major girl, according to law. Because if consent in such a case is obtained before the act of sexual intercourse, it is not an offence. At the same time, consent is obtained subsequent to the act of sexual intercourse amounting to rape, it cannot be considered as a valid consent in the eye of law. If consent is obtained by playing fraud or consent given by victim under mistaken belief that she is lawfully married wife of accused, would not be considered as valid and lawful consent. If victim is unable to understand the nature of act there could be no valid consent. Similarly consent by minor girl below the age of 16 years, is not valid consent in the eye of law. A victim who is terrorized or threatened with dire consequences with or without weapon, making her to submit to the carnal pleasure of rapist, even if she gives her consent by passive submission under cloud of fear or terror, her consent is not valid consent. Consent means voluntary participation by a woman who has attained the age of discretion, according to law. When two young male and female due to love affair between them, having attained the age of discretion, are attracted to each other and due to emotional and passionate attachment succumb to the temptation of sexual relationship, then such mutual and voluntary participation is not an offence. Section 90 of the Indian Penal Code explains that a consent is not such a consent as it is intended by any section of the Code, if the consent is given by a person under fear or injury or under 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 by insane person unable to understand the nature and consequences of the act due to unsoundness of mind or intoxication or consent given by child below twelve of years unless the contrary appears from the context can not be treated as valid and lawful consent.

7. Learned Advocate for the appellant made reference to ruling in Uday Vs. State

of Karnataka, to urge that consent given by 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 "misconception of fact". A false promise is not fact within the meaning of the Code. Admittedly in Uday's case, prosecutrix was 19 years old College girl, deeply in love with 20-21 years young man, friend of her elder brother. The accused had reason to believe in that case that the consent given by prosecutrix was the result of their deep love for each other. They met often and it did appear that the prosecutrix had permitted him liberties which if at all is permitted only to a person with whom one is in deep love. Prosecutrix had also stealthily went out with appellant to a lonely place at 12 o'clock in the night. The Apex Court observed "in such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment succumb to the temptation of having sexual relationship". In the peculiar facts and circumstances the accused was acquitted of the charge.

8. Learned Advocate for the appellant placed reliance on the ruling in *Ashok Bhaurao Gaikwad v. State of Maharashtra* 2009 All M R (Cri) 131 (Bombay High Court), in order to urge that prosecutrix had on her own volition travelled with accused by night train from Bhusawal to Mumbai and stayed with the accused at Gowandi; Ambarnath, without raising any alarm or without any protest during transit nor she tried to flee away from the company of the accused. There was no evidence to positively show that prosecutrix was aged below 16 years at the relevant time. There was no substantial reason to hold that she was enticed by the accused to accompany with her from Bhusawal to Mumbai. Under these circumstances, accused was acquitted.

9. Learned Counsel for the appellant further contended that the prosecutrix had admitted in her cross-examination that there was love affair between her and the appellant and, therefore, above rulings are attracted as there was no evidence beyond reasonable doubt to prove that the prosecutrix was below 16 years of age at the time of the incident.

10. Per contra, learned APP contended that an isolated admission elicited from the prosecutrix in the course of crossexamination that there was love affair between her and the appellant, cannot save the appellant/accused because it is in evidence that the prosecutrix was first subjected to forcible sexual intercourse by the accused when he had entered in her house, taking advantage of fact that she was all alone in the house. The appellant had threatened to kill her if she discloses his name to anybody. The appellant having impregnated the prosecutrix and subsequently garlanding her in the temple, and taking her to his house to cohabit and then absconding, leaving her in lurch, are tell a tale facts that appellant had no intention whatsoever to perform marriage with prosecutrix. Mere act of garlanding the prosecutrix in a temple can not absolve the appellant of earlier heinous act of forcible rape under threat of killing her. The appellant had told prosecutrix not to disclose the incident to anybody, otherwise he would

kill her. Learned APP thus submitted that the trial Court had correctly concluded that the accused had committed rape on prosecutrix under threat to kill her.

11. The evidence led in the present case do indicate that the appellant had entered the house of prosecutrix and under threat committed sexual intercourse with her, subsequently garlanded in the temple in presence of some villagers and then making show of marriage and continuing sexual intercourse with her, cannot absolve the appellant from penal liability for offence punishable under Sections 376 and 506 (II) of the IPC. Intention of the appellant to leave the prosecutrix alone and leave house indefinitely without maintaining her is mala fide. A prosecutrix consenting for sexual intercourse subsequent to garlanding her in temple under total misconception of marriage, can not be treated as a valid consent from her as it was merely a show of marriage without bona fide intention on the part of appellant to marry with the prosecutrix. Consent obtained on the premise that appellant had promised to marry her which he never intended to fulfill, is consent given under misconception of fact, not really voluntary; hence such consent obtained, cannot condone the offence of rape and criminal intimidation.

12. The Apex Court in the ruling Yedlu Srinivasa Rao v. State of A.P. Criminal Appeal No. 136/2004 decided on 29.09.2006, made reference to Section 114A of the Indian Evidence Act and observed thus:

If sexual intercourse has been committed by the accused and if it is proved that it was without consent of the prosecutrix and she states in her evidence before the court that she did not consent the Court shall presume that she did not consent. Presumption has been introduced by the legislature in the Evidence Act looking to atrocities committed against women and in the instant case as per statement of P.W. she resisted and she did not give consent to the accused at the first instance and he committed rape on her. The accused gave her assurance that he would marry her and continued to satisfy his lust till she became pregnant and it became clear that the accused did not wish to marry her.

The observations by the Apex Court indicate that if consent is given by the prosecutrix acting upon false promise by the accused to marry her, such consent is totally under misconception on the part of the victim that the accused is likely to marry her, therefore, she submitted to the lust of the accused. Such fraudulently obtained consent cannot condone the offence of the accused. The accused first committing rape on victim against her will and without her consent but subsequently held out a fond hope for the prosecutrix that he would marry her and continued to satisfy his lust without bona fide intention to marry and maintain her is conduct which stands out to hold him guilty. A consent obtained by misconception while playing a fraud is not a valid consent. Therefore, if the accused who took disadvantage of the prosecutrix being alone in her house, subjected her to forcible sexual intercourse and then holds out a promise to marry her without genuine intention right from beginning to marry and maintain her, indulging in continuing sexual relationship with her, commits offence of rape

within with in the meaning of Sec. 375 IPC "without her consent".

Unlike Uday's case (supra), this is not a case wherein it can be said that accused was deeply in love with prosecutrix. In the present case, considering the events in evidence, the appellant had no honest intention to marry with the prosecutrix otherwise he would not have absconded, leaving prosecutrix to her fate, that too after making a show of marriage with her. The accused had no genuine and honest intention to marry and maintain prosecutrix right from the beginning and he had committed sexual intercourse with the prosecutrix, obtaining her consent fraudulently by making a show of marriage in the temple. Such consent by the prosecutrix totally under misconception of fact that he would marry and maintain her can not be a valid consent in the eye of law. Therefore, it must be concluded in the background of facts and principles mentioned above that no case is made out to interfere with judgment of conviction and sentence by the trial Court. The Appeal is thus dismissed.