

CASE NO.:
Appeal (crl.) 1369 of 2004

PETITIONER:
Yedla Srinivasa Rao

RESPONDENT:
State of A.P.

DATE OF JUDGMENT: 29/09/2006

BENCH:
A.K. Mathur & Altamas Kabir

JUDGMENT:
JUDGMENT

A.K. MATHUR, J.

Both these appeals arise out of two orders passed on 25.2.2004 and 18.6.2004 by the High Court of Andhra Pradesh convicting and sentencing accused - appellant under Section 376 of the Indian Penal Code (for short, IPC) to undergo rigorous imprisonment for 7 years and fine of Rs. 100/-, in default, to further undergo simple imprisonment for one week and under Section 417, IPC a fine of Rs. 100/-, in default, to further undergo simple imprisonment for one week, therefore, they are disposed of by this common order.

Brief facts giving rise to both these appeals are that prosecutrix (PW1) used to attend cooking in her sister's (PW2) house in day time, as her sister was attending to agricultural operations. The accused used to visit the house of P.W 2 during day time between 11.00 a.m. and 12.00 noon regularly while PW 1 was alone and persuaded her to have sexual intercourse by telling her that he would marry her. PW1 resisted for this for sometime but later on one day, the accused came to the house of PW2 in her absence, closed the doors and committed forcible sexual intercourse with PW1 against her will and consent. When she protested as to why he spoiled her life, accused promised that he would marry her. Subsequently, the process continued for some time. Accused used to come in the noon and had sexual intercourse with PW1. When she became pregnant she informed the accused and he gave tablets for abortion in order to get rid of pregnancy which did not work. Subsequently, PW1 insisted the accused to marry her. The accused informed PW1 that as his parents were not agreeing for the marriage, he would not marry her. PW1 brought this fact to the notice of her sister - PW2. Thereafter, the matter was reported to the Panchayat. The accused accepted the guilt and promised to marry PW1 but subsequently, he absconded from the village. Since the persuasion could not fructify, PW1 lodged a report against the accused to police and, therefore, the police registered a case as per the prosecutrix report for the offences punishable under Sections 376 and 417. IPC. After completion of investigation, police filed a challan against the accused. The accused denied the charges. Prosecution in support of its case examined PW1 - Prosecutrix, PW2 -sister of Prosecutrix and other witnesses. Prosecutrix was sent for medical examination and PW9 - Smt. G. Pushpavalli -examined PW1. She found that PW1 was pregnant at the time of examination and the age of pregnancy is 20-22 weeks. She was also examined by Dr. Y.Jagannadha Rao - PW10 who was working as a Professor of Forensic Medicines. He confirmed about the pregnancy. He also examined the age of the prosecutrix and on the basis of X-Ray examination and other physical features opined that the age of PW1 was not less than 15 years and not more than 17 years at the time of examination.

Learned Assistant Sessions Judge after recording all the necessary evidence and after hearing the parties acquitted the accused for the offences under Section 417 as well as 376 of IPC. Aggrieved against the order of acquittal

appeal was preferred by the State before the High Court. The High Court after examining the evidence came to the conclusion that so far as the age of prosecutrix is concerned, in view of the testimony of PW10 who conducted the physical examination of the prosecutrix and has opined that she is not less than 15 years and not more than 17 years at the time of examination and there can be error of age as -1 or +1 in either way, it is highly doubtful whether the age of PW1 is below 16 years and opined that she is more than 16 years of age. So far as the age of the prosecutrix was concerned, she cannot be said to be below 16 years.

However, the High Court found that testimony of PW1 being truthful that she had sexual intercourse with the accused with the promise to marry attracts the category of the offence punishable under Section 376 as well as 417 of IPC. The High Court further found that in view of the statement of prosecutrix, the accused gave a promise which was false right from the beginning and under the misconception of fact the prosecutrix submitted to the lust of the accused and, therefore, the High Court found the accused guilty under Sections 376 and 417 of IPC.

Since the acquittal was being reversed and accused was found guilty the High Court deferred the imposition of sentence till the examination of the accused as to the quantum of sentence. The High Court, however, directed the learned Sessions Judge to summon the accused for examining about the quantum of sentence, therefore, record was sent back to the Sessions Judge for necessary evidence to be recorded for imposition of sentence. The Sessions Judge took up the matter and after recording necessary findings sent the record back to the High Court and the High Court by order dated 18.6.2004, on the basis of the evidence recorded by the Sessions Judge, convicted the accused - appellant under Sections 376 and 417 of IPC and sentenced the accused to undergo rigorous imprisonment for a period of seven years for the offence punishable under Section 376 IPC and also sentenced to pay a fine of Rs. 100/-, in default, to suffer simple imprisonment for one week. The accused was also convicted and sentenced to pay a fine of Rs. 1007 for the offence punishable under Section 417 of IPC in default, to suffer simple imprisonment for one week.

Being aggrieved against both the orders i.e. one dated 25.2.2004 whereby he was found guilty and the second dated 18.6.2004 whereby he was sentenced as aforesaid, the accused filed these two appeals. Hence both these appeals are now being disposed of by a common judgment.

The question that falls for our consideration is that when the accused committed sexual intercourse with the prosecutrix holding out a promise for marriage whether this will amount to a consent or not? Section 375 of IPC enumerates six circumstances wherein the sexual intercourse committed amounts to rape which read as under:

"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 sixteen years of

age."

It is admitted fact that the sexual intercourse was committed with the prosecutrix by the accused. She had deposed unequivocally in her statement that after the death of her father she and her mother started residing at Neelavathi Village. PW2 is her elder sister. She studied upto 4th class. She obtained puberty at the age of 12 years. She went to her sister's (PW2) house for giving help as her sister and brother-in-law used to go for agricultural operations in the fields and used to return back in the evening. During this time she used to remain alone. She deposed that the accused used to come to her sister's house in between 11 a.m. and 12 noon daily and asked her for sexual intercourse with him. She refused to participate in the said act but the accused kept on persisting and persuading her. She resisted for about 3 months. She deposed that one day the accused came to her sister's house at about 12 noon and closed the doors and had sexual intercourse forcibly without her consent and against her will. When she asked the accused as to why he spoiled her life he gave assurance that he would marry her and asked not to cry though, his parents are not agreeing for the marriage. But on the basis of the assurance given by the accused this process of sexual intercourse continued and he kept on assuring that he would marry her. This state of affair was not disclosed by the prosecutrix to her sister. When she became pregnant she informed about the pregnancy to the accused. He got certain tablets for abortion but they did not work. When she was in the third month of pregnancy, she again insisted for the marriage and the accused answered that his parents are not agreeable. She also deposed that had he not promised, she would not have allowed him sexual intercourse with her. Thereafter she informed her sister (PW2) and her husband (PW3) and they asked the accused to marry her and the accused informed that he would not marry with the prosecutrix. The question was raised before the Panchayat of elders and the prosecutrix was present in the Panchayat along with her sister and brother-in-law. Accused and his father both attended the Panchayat and accused admitted about the illegal contacts with the prosecutrix and causing pregnancy. Accused asked for two days' time for marrying prosecutrix and the Panchayat accordingly granted time. But after Panchayat meeting accused absconded from the village and when the accused did not fulfil his promise which was made before the Panchayat exhibit P-1 was lodged at the Police Station.

The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of Section 375 of IPC as mentioned above. It is clear that the prsoecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90 of the Indian Penal Code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be valid consent. Section 90 reads as under:

"Section 90 - Consent known to be given under fear or misconception.- A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a 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 of insane person - if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age."

It appears that the intention of the accused as per the testimony of PW1

was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before Panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent. In this connection, reference may be made to a decision of the Calcutta High Court in the case of Jayanti Rani Panda v. State of West Bengal & Anr., (1984) Cri.L.J.1535. In that case it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown up girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact and it was held that Section 90 IPC cannot be invoked unless the court can be assured that from the inception accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the matter. If it is fully grown up girl who gave the consent then it is different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be invoked. Therefore, so far as Jayanti Rani Panda (supra) is concerned, the prosecutrix was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda's case is fully distinguishable on facts. It is always matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts come to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise. Such consent cannot condone the offence. Reliance can also be made in the case of Emperor v. Mussamat Soma reported in (1917) CrL. Law Journal Reports 18 (Vol.18). In that case the question of consent arose in the context of an allegation of kidnapping of a minor girl. It was held that the intention of the accused was to marry the girl to one Dayaram and she obtained Kujan's consent to take away the girl by misrepresenting her intention. In that context it was held that at the time of taking away the girl there was a positive misrepresentation i.e. taking the girls to the temple at Jawala Mukhi and thereafter they halted for the night in Kutuya (hut) some three miles distance from Pragpur and met Daya Ram, Bhag Mal and Musammam Mansa and Musammam Sarasti was forced into marrying Daya Ram. This act was found to be act of kidnapping without consent. But, in the instant case, a girl though aged 16 years was persuaded to sexual intercourse with the assurance of marriage which the accused never intended to fulfil and it was 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 fraudulent consent cannot be said to be a consent so as to condone the offence of the accused. Our attention was also invited to the decision of this Court in the case of Deelip Singh Alias Dilip Kumar v. State of Bihar, [2005] 1 SCC 88 wherein this Court took the view that prosecutrix had taken a conscious decision to participate in the sexual act only on being impressed by the accused who promised to marry her. But accused's promise was not false from its

inception with the intention to seduce her to sexual act. Therefore, this case is fully distinguished from the facts as this Court found that the accused promise was not false from its inception. But in the present case we found that first accused committed rape on victim against her will and consent but subsequently, he held out a hope of marrying her and continued to satisfy his lust. Therefore, it is apparent in this case that the accused had no intention to marry and it became further evident when Panchayat was convened and he admitted that he had committed sexual intercourse with the victim and also assured her to marry within 2 days but did not turn up to fulfil his promise before the Panchayat. This conduct of the accused stands out to hold him guilty. What is a voluntary consent and what is not a voluntary consent depends on the facts of each case. In order to appreciate the testimony, one has to see the factors like the age of the girl, her education and her status in the society and likewise the social status of the boy. If the attending circumstances lead to the conclusion that it was not only the accused but prosecutrix was also equally keen, then in that case the offence is condoned. But in case a poor girl placed in a peculiar circumstance where her father has died and she does not understand what the consequences may result for indulging into such acts and when the accused promised to marry but he never intended to marry right from the beginning then the consent of the girl is of no consequence and falls in the second category as enumerated in Section 375 -"without her consent". A consent obtained by misconception while playing a fraud is not a consent.

In this connection our attention was also invited to the decision of this Court in the case of *Udav v. State of Karnataka*, [2003] 4 SCC 46. In this case also this Court held that for determining whether consent given by the prosecutrix was voluntary or under a misconception of fact, no straitjacket formula can be laid down but following factors stand out; (i) where a girl was of 19 years of age and had sufficient intelligence to understand the significance and moral quality of the act she was consenting to; (ii) she was conscious of the fact that her marriage was difficult on account of caste considerations; (iii) it was difficult to impute to the appellant knowledge the prosecutrix had consented in consequence of a misconception of fact arising from his promise, and (iv) there was no evidence to prove conclusively that the appellant never intended to marry the prosecutrix. On the basis of the above factors this Court did not feel persuaded to hold that consent was obtained by misconception of facts on the part of the victim. But as already mentioned above, in the present case we are satisfied that looking to the antecedent and subsequent events that the accused never intended to fulfil the promise of marriage, this was not a case where the accused was deeply in love. In the present case in our hand the accused persuaded her for couple of months but she resisted it throughout. But, on one day he came to the house of her sister and closed the doors and committed forcible sexual intercourse against her will and consent, holding out a promise for marriage and continued to satisfy his lust. Therefore, this case stands entirely on different footing. We may add a word of caution that the court of fact while appreciating evidence in such cases should closely scrutinize evidence while taking into consideration the factors like the age of the girl, her education, her social status and likewise the social status of the boy.

In the case of *Reg. v. William Case*, (a) (1850) CrL. Law Cases 220 (Vol. IV) if a girl does not resist intercourse in consequence of misapprehension, this will not amount to a consent on her part. It was held that where a medical man, to whom a girl of fourteen years of age was sent for professional advice, had criminal connection with her, she making no resistance from a bona fide belief that he was treating her medically, he could be convicted for rape.

Similarly, in the case of *The Queen v. Flattery* (1877) 2 QBD 410 where the accused professed to give medical advice for money, and a girl of nineteen consulted him with respect to illness from which she was suffering, and he advised that a surgical operation should be performed and, under pretence

of performing it, had carnal intercourse with her, it was held that he was guilty of rape.

Likewise, in the case of *The King v. Williams* (1923)1 KB 340 the accused was engaged to give lessons in singing and voice production to the girl of sixteen years of age had sexual intercourse with her under the pretence that her breathing was not quite right and he had to perform an operation to enable her to produce her voice properly. The girl submitted to what was done under the belief, wilfully and fraudulently induced by the accused that she was being medically and surgically treated by the accused and not with any intention that he should have sexual intercourse with her. It was held that the accused was guilty of rape.

In this connection reference may be made to the amendment made in the Indian Evidence Act. Section 114 A was introduced and the presumption has been raised as to the absence of consent in certain prosecutions for rape. Section 114-A reads as under:

'Section 114 A- Presumption as to the absence of consent in certain prosecutions for rape.- In a prosecution for rape under Cl. (a) or Cl.(b) or Cl.(c) or Cl. (d) or Cl. (e) or Cl. (g) of sub-section (2) of Section 376 of the Indian Penal Code (45 of 1860), where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the court that she did not consent, the Court shall presume that she did not consent.'

If sexual intercourse has been committed by the accused and if it is proved that it was without the 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 the statement of PW, she resisted and she did not give consent to the accused at the first instance and he committed the 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.

In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law. This is more evident from the testimony of PW1 as well as PW6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her but he absconded despite the promise made before the Panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact by prosecutrix that he would marry her. Therefore, we are satisfied that the conviction and sentence awarded to the appellants is correct and no case is made out for our interference. The appeals are dismissed.