WWW.LIVELAW.IN

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 16 OF 2015

Mr. Yogesh s/o Sadu Palekar, 32 years of age, Indian National, r/o GMC Quarters No. 86, Type II, Bambolim, Tiswadi, Goa. .... Appellant

Versus

State, Through Agassaim Police Station, Agassaim, Goa. .... Respondent

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Shri Arun De Sa with Shri Siddesh Shet, Advocates for the Appellant.

Shri Pravin Faldessai, Additional Public Prosecutor for the Respondent.

CORAM:- C.V. BHADANG, J.

DATE:- 17th FEBRUARY, 2018.

ORAL JUDGMENT:

By this appeal, the appellant/accused is challenging his conviction under Section 376 of the Indian Penal Code (IPC, for short) read with Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Act of 1989, for short), as it stood prior to its amendment by Act no.1 of 2016. For the offence punishable under Section 376 of IPC, the appellant has been sentenced to suffer imprisonment for a period of seven years and to pay a fine of Rs.10,000/- and in default to undergo imprisonment for three

WWW.LIVELAW.IN

months, while under Section 3(1)(xii) of the Act of 1989, the appellant has been sentenced to suffer imprisonment for six months and to pay a fine of Rs.10,000/- and in default to undergo imprisonment for two months.

2. The prosecution case in brief, may be stated thus:

That, the prosecutrix, (PW-1) was working as a dealer in 'Casino Carnival', since 2011. The appellant was working in the said 'Casino Carnival' as a Chef. The appellant and PW-1 developed friendship. Somewhere in the month of July, 2013, the appellant is said to have proposed PW-1 for marriage. PW-1 apprised the appellant about her family background and that she belonged to a schedule caste community. PW-1 asked the appellant to think over again and take his own time, while finalizing the proposal. According to PW-1, the appellant also apprised her about his family background and in particular, about his delicate financial background, as he was serving a loan. The appellant also told PW-1 that he is not having his own house and that, he is staying in Government Quarters, as the mother of the appellant was serving in Goa Medical College, Bambolim. According to PW-1, she told the appellant that his family background and his

WWW.LIVELAW.IN

financial condition, would not come in the way of the marriage and the relationship continued.

Further, according to PW-1, she was getting around Rs.25,000/- salary per month and was staying in the Company accommodation and out of her own savings, she had helped the appellant.

3. The material case is that somewhere in the month of November, 2013, the appellant took PW-1 to his house to meet the family members, as PW-1 was insisting that she should be introduced to the family members of the appellant. The appellant took PW-1 from her residence at Campal to his residence at Bambolim, informing that his mother and sister are present in the house. On reaching the house of the appellant, PW-1 noticed that there were no family members present in the house. However, PW-1 continued to stay there through the evening. The appellant and PW-1 had dinner and were sitting in the hall, when according to PW-1, the appellant invited her to the bedroom. PW-1 claimed that she showed reservations as they were not married. However, the appellant informed that he wants to show her the bedroom and after taking her to the bedroom, he came close to her physically, when PW-1 told the

WWW.LIVELAW.IN

appellant that she is not ready for any physical relationship, unless they are married. According to PW-1, the appellant promised her that he will marry her and will not cheat on her and on such a promise had sexual intercourse with her. After the incident, she felt depressed, however, continued to stay with the appellant through the night, until she was dropped to her place at Campal, somewhere between 3:00 to 5:00 a.m.

4. According to the prosecutrix, even after this incident, the relationship between the appellant and PW-1 continued and the appellant had sexual intercourse with her on three to four occasions in his quarter at Bambolim, whenever the mother of the appellant was on night shift. According to PW-1, on each of such occasions, the appellant promised to marry her and used to drop her at her residence before the mother of the appellant returned home from duty. The last of such incident between the appellant and PW-1 was somewhere in November/December, 2013.

5. According to PW-1, in January 2014, 'Casino Carnival' was taken over by 'Casino Pride' and she was required to vacate the Company accommodation and she was required to go to her native place. It is at this time that the appellant

WWW.LIVELAW.IN

started ignoring her. Somewhere in February 2014, PW-1 faced an interview and got an appointment in Casino Pride. However, in 4 to 5 days, PW-1 left the job as she was not comfortable there. When PW-1 asked the appellant about their marriage, the appellant told her that his mother would not agree to the marriage as PW-1 was belonging to the schedule caste community (chambhar). PW-1 obtained the phone number of the mother of the appellant and apprised her about the relationship. On hearing this, the mother of the appellant told her to wait for two days so that she can discuss the matter with the other family members. However, there was no response from the mother of the appellant, which led PW-1 to file the complaint on 28.03.2014 (Exhibit-25), against the appellant with P.S. Porvorim.

6. On the basis of the said complaint, an offence at Crime No. 00/2014 was registered with P.S. Porvorim, initially under Section 376 read with Section 506 of IPC. It appears that initially, the investigation was conducted by Devendra Gad (PW-4), however, on account of the fact that the offence under Section 3(1)(xii) of the Act of 1989, was added, the investigation came to be transferred to Serafin Dias, Dy.S.P. (PW-5). During the course of the investigation, the appellant

WWW.LIVELAW.IN

and PW-1 were sent for medical examination. Statement of the witnesses came to be recorded and on completion of investigation, a charge sheet was filed before the learned Special Judge, which was registered as Special Case No.6/2014.

7. The learned Special Judge framed a charge against the appellant for the offence as aforesaid, to which the appellant pleaded not guilty and claimed to be tried.

8. At the trial, the prosecution examined in all five witnesses, including the complainant (PW-1). The medical report (Exhibit-17) was not disputed on behalf of the appellant.

9. The appellant did not lead any evidence in defence.

10. The learned Special Judge on appreciation of evidence found that the appellant had sexual intercourse with PW-1, without her consent, in as much as the consent was obtained on the basis of 'a misrepresentation of fact', as to promise of marriage. It was also found that the appellant being in a position to dominate the will of PW-1, who belonged to the schedule caste, used her physically and exploited her sexually, which she otherwise, would not have agreed to. As such, by a

WWW.LIVELAW.IN

judgment and order dated 31.03.2015, the learned Special Judge convicted and sentenced the appellant as aforesaid. Feeling aggrieved, the appellant is before this Court.

11. I have heard Shri De Sa, the learned Counsel for the appellant and Shri Faldessai, the learned Additional Public Prosecutor for the respondent. With the assistance of the learned Counsel for the parties, I have gone through the record and the impugned judgment.

12. It is submitted by Shri De Sa, the learned Counsel for the appellant that the evidence of PW-1 is not of an impeccable or sterling quality, so as to place implicit reliance on the same. It is submitted that in any case, the evidence would show that there was a love affair between the appellant and PW-1 and the consent by PW-1, who was then aged 25 years, cannot be said to be under any misconception of fact, within the meaning of Section 90 of IPC. It is submitted that the conduct of PW-1 would show that she continued to stay with the appellant through the evening although, she found that there were no other inmates in the house and she was at the house of the appellant till the morning of the next day, when she was dropped by the appellant to her residence and even thereafter,

WWW.LIVELAW.IN

she continued with the relationship. The learned Counsel has pointed out that during the course of the investigation, PW-1 filed an affidavit (Exhibit-26) stating that she does not want to pursue the complaint as she cannot see the appellant behind the bars. He therefore, submitted that the appellant after having withdrawn the complaint, has again claimed that the appellant had forcible sexual intercourse with her.

13. On behalf of the appellant, reliance is placed on the decision of the Supreme Court in the case of **Tilak Raj Vs. State of Himachal Pradesh, (2016) 4 SCC 140**, **Kaini Rajan Vs. State of Kerala, (2013) 9 SCC 113**, **Deepak Gulati Vs. State of Haryana, (2013) 7 SCC 675** and **Uday Vs. State of Karnataka, AIR 2003 SC 1639**. It is submitted that the Hon'ble Supreme Court in similar facts and circumstances, where the alleged sexual intercourse is stated to be on promise of marriage, has held that such an act, cannot be said to be consented on " a misconception of fact".

14. Insofar as the offence under Section 3(1)(xii) of the Act of 1989 is concerned, it is submitted that the prosecution has failed to produce the notification, by which, Serafin Dias, Dy.S.P. (PW-5) was conferred with the powers to investigate

WWW.LIVELAW.IN

under the Act of 1989. In this regard, reliance is placed on the decision of the Supreme Court in the case of **State of Madhya Pradesh Vs. Chunnilal @ Chunni Singh, (2009) 12 SCC 649**.

15. On the other hand, the learned Additional Public Prosecutor has supported the impugned judgment. It is submitted that the evidence of PW-1 would clearly show that the consent was obtained, on the basis of a misconception of fact, namely, promise of marriage, on which, the appellant subsequently resiled. It is submitted that the consent cannot be said to be a free consent, within the meaning of Section 90 of IPC. The learned Additional Public Prosecutor has taken me through the evidence of PW-1, in order to submit that on the first occasion i.e. in November, 2013, the appellant had taken PW-1 to his house, on the pretext that she can meet the family members of the appellant. He then pointed out that PW-1 on reaching the house of the appellant, found that there were no other inmates in the house of the appellant and this would clearly show that the appellant took PW-1 to his house under a false pretext and thereafter, had forcible sexual intercourse with her on the promise of marriage, from which he subsequently resiled. It is submitted that the learned Special

WWW.LIVELAW.IN

Judge has rightly appreciated the evidence of PW-1, in the context of Section 114-A of the Evidence Act and the law laid down by the Hon'ble Supreme Court in the case of **State of U.P. Vs. Naushad, 2014 Cri.L.J. 540**, has rightly come to the conclusion that no consent on the part of PW-1 can be inferred, in this case.

16. I have carefully considered the rival circumstances and the submissions made. Admittedly, PW-1 was aged about 25 years and had attained the age of consent, on the date of the first incident, which is alleged to have happened somewhere in November, 2013. It has further come on record that the appellant and PW-1 were both serving together in Casino Carnival and it was at Casino Carnival, where they developed acquaintance. It has come in the evidence of PW-1 that somewhere in July, 2013, the appellant had proposed her for marriage and both, the appellant as well as PW-1 had apprised each other of their family background and financial condition. It is the specific evidence of PW-1 that she also apprised the appellant of her caste and the possible implication of her caste in their relationship, culminating into a marriage.

17. The material question is however, whether, the act of

WWW.LIVELAW.IN

the appellant can be said to be consensual in nature or whether, it was on account of some misconception of fact, namely, the promise of marriage given by the appellant. The evidence of PW-1 would clearly show that the consent could not be said to be based only on the promise made by the appellant, but, was out of the love affair between the appellant and PW-1. It would be significant to note that although, PW-1 has claimed that on the first occasion i.e. in November, 2013, she was taken by the appellant to his house on the pretext that she can meet the mother and the sister of the appellant, the complaint (Exhibit 25) is totally silent on this aspect. In the complaint (Exhibit-25), PW-1 has not claimed that the appellant had taken PW-1 on the ground that she could meet the mother and the sister of the appellant. Even assuming that such pretext was made by the appellant, the evidence is that PW-1 continued to stay with the appellant through the evening, although, she found that there were no other inmates in the house. Not only that, the appellant and PW-1 had dinner together and it is only when they were sitting in the hall, the appellant is alleged to have taken PW-1 to the bedroom, where the alleged incident happened. The evidence shows that even after the alleged incident, PW-1 continued to stay with the appellant till the morning of the next day, when she was dropped to her

WWW.LIVELAW.IN

residence by the appellant between 3:00 to 5:00 a.m. Not only this, it is the specific evidence of PW-1 that even after this incident, their relationship continued and PW-1 used to provide the appellant financial help for his daily needs and both of them had sexual intercourse on about 3 to 4 occasions at the residence of the appellant, when his mother was away on night duty. It can thus be clearly seen that there was a love affair between the appellant and PW-1 and there was a clear consent, on the basis of which, the appellant and PW-1 had physical relationship. The only question is whether, such a consent can be said to be on misconception of fact as to the promise of marriage by the appellant.

18. At this stage, it would be useful to refer to the decision in the case of **Deepak Gulati** (supra). In that case, the prosecutrix, who was then aged 19 years, accompanied the appellant to Kurukshetra to get married and both of them had stayed together for three to four days, during which period, the appellant is alleged to have forcible sexual intercourse with her. The Hon'ble Supreme Court after taking a note of the circumstances in para 17, came to the conclusion that the consent cannot be said to be on misconception of fact and Section 90 of IPC, cannot be called into aid in such a situation,

WWW.LIVELAW.IN

to pardon the act of a girl in entirety and fasten the criminal liability on the accused, unless the Court is assured of the fact that from the very beginning, the accused had never really intended to marry her. The fact as noticed in para 17 are as under:-

> *"17.1. The prosecutrix was 19 years of age at the time of the said incident.*
>
> *17.2. She had inclination towards the appellant, and had willingly gone with him to Kurukshetra to get married.*
>
> *17.3. The appellant had been giving her assurance of the fact that he would get married to her.*
>
> *17.4. 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.*
>
> *17.5. Even after leaving the hostel of Kurukshetra University, she agreed and proceeded to go with the appellant to Ambala, to get married to him there."*

19. The Hon'ble Supreme Court in the said decision also took note of the recent amendment, whereby Section 114-A is introduced in the Evidence Act. It has been held that in the

WWW.LIVELAW.IN

peculiar facts and circumstances of the case, the provisions of Section 114-A of the Evidence Act, cannot be pressed into service. The following observations in para 21 of the judgment are apposite:

> *"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*

WWW.LIVELAW.IN

> *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."*

20. A useful reference to the decision in the case of **Uday** (supra) can be made in this regard, which arose in similar facts and circumstances, in which the prosecutrix, who had attained the age of consent and was conscious about the nature of act, was a consenting party to the act of sexual intercourse and she was also conscious of the fact that her marriage may not take place on account of caste factor. The Hon'ble Supreme Court in the case of **Uday** (supra) held that in such circumstances, it would be difficult to impute the accused as the prosecutrix had not consented in consequence of a misconception of fact, arising from his promise of marriage. It was held that there was no evidence to prove that the appellant never intended to marry the prosecutrix.

21. Coming back to the present case, it is evident that PW-1 not only continued with the relationship with the appellant after the first incident, but, also went to the extent of withdrawing the complaint by filing an affidavit (Exhibit-26), in

WWW.LIVELAW.IN

which, she has stated that she could not see the appellant behind bars, who was then under depression and was undergoing treatment at IPHB hospital, Bambolim and was desirous of withdrawing the complaint due to her personal reasons and emotions. This would clearly show that there was deep love affair between the appellant and PW-1. It cannot be said that the consent given by PW-1 was on account of any promise of marriage made by the appellant.

22. The presumption under Section 114-A of the Evidence Act cannot take the case of the prosecution any further. It is true that the said presumption is a statutory presumption and the Court is obliged to draw such presumption, provided the foundational facts are established. However, the fact remains that such presumption is a rebuttable presumption. The accused can rebut such presumption on the basis of the evidence led by the prosecution and the attending circumstances, which have come on record. Here again, as noticed earlier, the evidence of PW-1 is replete with circumstances, to indicate that the consent was not based on any promise of marriage made by the appellant and even assuming that it was so, there is nothing to show that since inception, the appellant had no intention to marry PW-1, which

WWW.LIVELAW.IN

is one of the requirements for Section 90 of IPC to be attracted, to establish that the accused knew or had reason to believe that such consent is only on account of misconception of fact i.e. promise made by the accused. The evidence of prosecution is not sufficient to establish all these aspects. Had the intention of the appellant, since inception, been to exploit the prosecutrix, he would not have apprised her about his family background and particularly, about his delicate financial condition and the fact that he was not having a house of his own.

23. In the case of **Naushad** (supra), on which the learned Special Judge has placed reliance, the evidence shows that since beginning, the intention of the accused was not honest and he kept on holding out promise of marriage, till the prosecutrix got pregnant. It can thus be seen that in the facts and circumstances of that case, it was held that the kind of the consent obtained by the accused, cannot be said to be a valid consent in law, as the prosecutrix was under misconception that the accused intends to marry her.

24. This takes me to the offence under Section 3(1)(xii) of the Act of 1989. The Hon'ble Supreme Court in the case of **Chunnilal** (supra) has held that Section 9 of the Act of 1989

WWW.LIVELAW.IN

read with Rule 7 of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Rules, 1995 (Rules of 1995, for short) would show that under the enabling power, it is the duty and responsibility of the State Government to issue a notification conferring power of investigation of cases by notified Police Officer, not below the rank of Superintendent of Police. It has been held that the investigation by an Officer not so empowered, would be illegal and invalid.

25. In the present case, the prosecution has not produced any notification, by which Shri Serafin Dias, Dy.S.P. (PW-5) has been authorised to carry out the investigation for the offence under Section 3(1)(xii) of the Act of 1989. That apart, the prosecution has also not established that the appellant was in a position to dominate the will of PW-1 or that the appellant has used his position to exploit her sexually, to which she would have otherwise not agreed, which is the requirement of Section 3(1)(xii) of the Act of 1989. Here is a case where, according to PW-1 herself, the appellant had apprised her, about his family and financial background and also that he is not having a house of his own. Not only that, according to PW-1, she had helped the appellant financially. Thus, by no stretch of imagination, it can be accepted that the

WWW.LIVELAW.IN

appellant was in a position to dominate or that the appellant has used any such position to exploit PW-1 sexually.

26. It would be further significant to note that PW-1 claimed that the appellant refused to marry her as she was belonging to schedule caste community (chambhar), only in her supplementary statement recorded on 01.04.2014 and there was no such allegation made in the complaint lodged on 28.03.2004 (Exhibit-25). The learned Special Judge although, has recorded the contention based on Section 9 of the Act of 1989 and Rule 7 of the Rules of 1995, has failed to consider that there was no notification produced, authorising Shri Serafin Dias, Dy.S.P. (PW-5) to investigate the offence.

27. I have carefully gone through the impugned judgment and I do not find that the conviction of the appellant for the offence under Section 376 read with Section 3(1)(xii) of the Act of 1989 can be sustained.

28. In the result, the following order is passed:

(a) The appeal is allowed.

(b) The impugned judgment of conviction and sentence, is set aside.

WWW.LIVELAW.IN

(c) The appellant is acquitted of the offence punishable under Section 376 of IPC, read with Section 3(1)(xii) of the Schedule Castes and Schedule Tribes (Prevention of Atrocities) Act, 1989.

(d) The Bail Bonds of the accused stand cancelled.

(e) The order as regards disposal of the property, is maintained.

C. V. BHADANG, J.

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