
(2020) 09 SC CK 0043

Supreme Court Of India

Case No: Criminal Appeal No. 635 Of 2020

Maheshwar Tigga

APPELLANT

Vs

State Of Jharkhand

RESPONDENT

Date of Decision: Sept. 28, 2020

Acts Referred:

- Indian Penal Code, 1860 - Section 90, 323, 341, 375, 376, 420, 506
- Code Of Criminal Procedure, 1973 - Section 313, 482

Citation: AIR 2020 SC 4535 : (2020) 10 SCC 108 : (2020) 9 JT 504 : (2020) 11 Scale 176 : (2020) 4 Crimes 184

Hon'ble Judges: R.F. Nariman, J; Navin Sinha, J; Indira Banerjee, J

Bench: Full Bench

Advocate: V. Mohana, Anup Kumar, Nikita Capoor, Ankita Sharma, Varun Narang, Pragya Baghel, Pallavi Langar, Ritesh Khare

Final Decision: Allowed

Judgement

Navin Sinha, J

1. Leave granted.

2. The appellant assails his conviction under sections 376, 323 and 341 of the Indian Penal Code (in short, "IPC") sentencing him to seven years,

one year and one month respectively with fine and a default stipulation.

3. The prosecutrix, PW9 lodged FIR No. 25 of 1999 on 13.04.1999 alleging that four years ago the appellant had outraged her modesty at the point of

a knife. He had since been promising to marry her and on that pretext continued to establish physical relations with her as husband and wife. She had

also stayed at his house for fifteen days during which also he established physical relations with her. Five days prior to the lodging of the F.I.R, the

appellant had established physical relations with her on 09.04.1999. The appellant had cheated her as now he was going to solemnise his marriage with

another girl on 20.04.1999. All efforts at a compromise had failed.

4. The Additional Judicial Commissioner, Ranchi on consideration of the evidence convicted the appellant holding that the prosecutrix was 14 years of

age when the appellant had first committed rape upon her at the point of a knife. He did not abide by his promise to marry her. The High Court

dismissing the appeal opined that the letters written by the appellant to the prosecutrix, their photographs together, and the statement of the appellant

recorded under Section 313 Cr.P.C. were sufficient to sustain the conviction.

5. Learned senior counsel, Mrs. V. Mohana on behalf of the appellant, submits that the F.I.R lodged belatedly after four years was clearly an

afterthought. The entire genesis of the allegations is highly doubtful and suspect as the prosecutrix in her cross-examination admitted that the

appellant had not committed rape with her on 09.04.1999. The letters written by the appellant to the prosecutrix as also those written by her to the

appellant marked as Exhibits during trial, more than sufficiently established a deep love affair between them over a period of time. The prosecutrix

was aged approximately 25 years as opined by P.W.10, the Doctor who medically examined her on 14.04.1999. The physical relations between the

appellant and the prosecutrix were consensual in nature occasioned by their love affair. No offence under Section 375 IPC is therefore, made out.

The questions put to the appellant under Section 313 Cr.P.C. were very casual and perfunctory, leading to denial of proper opportunity of defence

causing serious prejudice to him by denial of the right to a fair trial. The marriage between them could not materialise due to societal reasons as the

appellant belonged to the Scheduled Tribe, while the prosecutrix was a Christian. Reliance was placed on Parkash Chand vs. State of Himachal

Pradesh, (2019) 5 SCC 628, Vijayan vs. State of Kerala, (2008) 4 SCC 763, 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, (2003) 4 SCC 46.

6. Ms. Pragya Baghel, learned counsel for the State, submitted that the prosecutrix stood by the allegations during trial. The delay in lodging the FIR

has been sufficiently explained by reason of the compromise efforts which failed to materialise. P.W. 7, the sister of the prosecutrix had also

confirmed that the latter was sexually assaulted by the appellant at the point of a knife and had come home crying. The appellant had told the

prosecutrix to keep quiet in his absence, revealing that his intentions were not bonafide. The defence of a consensual relationship is irrelevant

considering that the prosecutrix was fourteen years of age. The appellant had held out a false promise of marriage only to establish physical relations

with the prosecutrix. He never had any such intentions from the very inception, and he obtained the consent of the appellant by a false

misrepresentation, which is no consent in the eyes of the law. The evidence of the prosecutrix is reliable.

7. We have considered the submissions on behalf of the parties. The prosecutrix in her deposition dithered with regard to her age by first stating she

was sixteen years on the date of occurrence and then corrected herself to state she was thirteen. Though she alleged that the appellant outraged her

modesty at the point of a knife while she was on way to school, no name of the school has been disclosed either by the prosecutrix or her parents

P.W.5 and 6. If the prosecutrix was studying in a school there is no explanation why proof of age was not furnished on basis of documentary evidence

such as school register etc. P.W.10, in cross examination assessed the age of the prosecutrix to be approximately twenty-five years. P.W.2, the

cousin (brother) of the prosecutrix aged about 30 years deposed that she was six years younger to him. There is thus wide variation in the evidence

with regard to the age of the prosecutrix. The Additional Judicial Commissioner held the prosecutrix to be fourteen years of age applying the rule of

the thumb on basis of the age disclosed by her in deposition on 18.08.2001 as 20 years. In absence of positive evidence being led by the prosecution

with regard to the age of the prosecutrix on the date of occurrence, the possibility of her being above the age of eighteen years on the date cannot be

ruled out. The benefit of doubt therefore has to be given to the appellant.

8. A bare perusal of the examination of the accused under Section 313 Cr.P.C. reveals it to be extremely casual and perfunctory in nature. Three

capsuled questions only were asked to the appellant as follows which he denied: “

“Question 1. There is a witness against you that when the informant V. Anshumala Tigga was going to school you were hiding near Tomra canal

and after finding the informant in isolation you forced her to strip naked on knifepoint and raped her.

Question 2. After the rape when the informant ran to her home crying to inform her parents about the incident and when the parents of the informant

came to you to inquire about the incident, you told them that “if I have committed rape then I will keep her as my wife”.

Question 3. On your instruction, the informant’s parents performed the “Lota Paani” ceremony of the informant, in which the informant as

well as your parents were present, also in the said ceremony your parents had gifted the informant a Saree and a blouse and the informant’s

parents had also gifted you some clothes”.

9. It stands well settled that circumstances not put to an accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from

consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the

opportunity not only to furnish his defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is

sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt. This Court, time and again, has emphasised the

importance of putting all relevant questions to an accused under Section 313 Cr.P.C. In *Naval Kishore Singh v. State of Bihar*, (2004) 7 SCC 502, it

was held to an essential part of a fair trial observing as follows :“

“The questioning of the accused under Section 313 CrPC was done in the most unsatisfactory manner. Under Section 313 CrPC the

accused should have been given opportunity to explain any of the circumstances appearing in the evidence against him. At least, the various items of

evidence, which had been produced by the prosecution, should have been put to the accused in the form of questions and he should have been given

opportunity to give his explanation. No such opportunity was given to the accused in the instant case. We deprecate the practice of putting the entire

evidence against the accused put together in a single question and giving an opportunity to explain the same, as the accused may not be in a position to

give a rational and intelligent explanation. The trial Judge should have kept in mind the importance of giving an opportunity to the accused to explain

the adverse circumstances in the evidence and the Section 313 examination shall not be carried out as an empty formality. It is only after the entire

evidence is unfurled the accused would be in a position to articulate his defence and to give explanation to the circumstances appearing in evidence

against him. Such an opportunity being given to the accused is part of a fair trial and if it is done in a slipshod manner, it may result in imperfect

appreciation of evidence”

10. The appellant belonged to the Scheduled Tribe while the prosecutrix belonged to the Christian community. They professed different religious

beliefs in a traditional society. They both resided in the same village Basjadi and were known to each other. The nature and manner of allegations,

coupled with the letters exchanged between them, marked as Exhibits during the trial, make it apparent that their love for each other grew and

matured over a sufficient period of time. They were both smitten by each other and passions of youth ruled over their minds and emotions. The

physical relations that followed was not isolated or sporadic in nature, but regular over the years. The prosecutrix had even gone and resided in the

house of the appellant. In our opinion, the delay of four years in lodgement of the FIR, at an opportune time of seven days prior to the appellant

solemnising his marriage with another girl, on the pretext of a promise to the prosecutrix raises serious doubts about the truth and veracity of the

allegations levelled by the prosecutrix. The entire genesis of the case is in serious doubt in view of the admission of the prosecutrix in cross

examination that no incident had occurred on 09.04.1999.

11. The parents of the prosecutrix, P.Ws. 5 and 6 both acknowledged awareness of the relationship between appellant and the prosecutrix and that

they were informed after the first occurrence itself but offer no explanation why they did not report the matter to the police immediately. On the

contrary, P.W. 5 acknowledges that the appellant insisted on marrying in the Temple to which they were not agreeable and wanted the marriage to be

solemnised in the Church. They further acknowledged that the appellant and the prosecutrix were in love with each other. Contrary to the claim of the

prosecutrix, P.W. 6 stated that the prosecutrix was sexually assaulted in her own house.

12. The prosecutrix acknowledged that an engagement ceremony had also been performed. She further deposed that the marriage between them

could not be solemnised because they belonged to different religions. She was therefore conscious of this obstacle all along, even while she continued

to establish physical relations with the appellant. If the appellant had married her, she would not have lodged the case. She denied having written any

letters to the appellant, contrary to the evidence placed on record by the defence. The amorous language used by both in the letters exchanged reflect

that the appellant was serious about the relationship desiring to culminate the same into marriage. But unfortunately for societal reasons, the marriage

could not materialise as they belonged to different communities.

13. The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to

the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended

to keep since the very inception of the relationship. If we reach the conclusion that he intentionally made a fraudulent misrepresentation from the very

inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under Section 375 IPC is clearly made out. It is not

possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under

Section 90 IPC a consent given under fear of injury is not a consent in the eyes of law. In the facts of the present case we are not persuaded to

accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.

14. Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in

proximity of time to the occurrence and cannot be spread over a period of four years. It hardly needs any elaboration that the consent by the appellant

was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive

action not to protest. The prosecutrix in her letters to the appellant also mentions that there would often be quarrels at her home with her family

members with regard to the relationship, and beatings given to her.

15. In Uday (supra), the appellant and the prosecutrix resided in the same neighbourhood. As they belonged to different castes, a matrimonial

relationship could not fructify even while physical relations continued between them on the understanding and assurance of marriage. This Court

observed as follows:

“21. 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 straitjacket 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.Ã¢â€

16. The appellant, before the High Court, relied upon Kaini Rajan (supra) in his defence. The facts were akin to the present case. The physical

relationship between the parties was established on the foundation of a promise to marry. This Court set aside the conviction under Section 376 IPC

also noticing K.P. Thimmappa Gowda vs. State of Karnataka, (2011)14 SCC 475. Unfortunately, the High Court did not even consider it necessary to

deal with the same much less distinguish it, if it was possible. It is indeed unfortunate that despite a judicial precedent of a superior court having been

cited, the High Court after mere recitation of the facts and the respective arguments, cryptically in one paragraph opined that in the nature of the

evidence, the letters, the photograph of the appellant with the prosecutrix and the statement of the appellant under Section 313 Cr.P.C., his conviction

and sentence required no interference.

17. This court recently in Dhruvaram Murlidhar Sonar vs. The State of Maharashtra and Others, AIR 2019 SC 32 7and in Pramod Suryabhan Pawar

vs. State of Maharashtra and another, (2019) 9 SCC 608 arising out of an application under Section 482 Cr.P.C. in similar circumstances where the

relationship originated in a love affair, developed over a period of time accompanied by physical relations, consensual in nature, but the marriage could

not fructify because the parties belonged to different castes and communities, quashed the proceedings.

18. We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant

did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The

prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in

the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to be solemnised in

the Church or in a Temple and ultimately failed. It is not possible to hold on the evidence available that the appellant right from the inception did not

intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her

letters acknowledged that the appellant's family was always very nice to her.

19. The appellant has been acquitted of the charge under Sections 420 and 504 I.P.C. No appeal has been preferred against the acquittal. There is no

medical evidence on record to sustain the conviction under Section 323 I.P.C. No offence is made out against the appellant under Section 341 I.P.C.

considering the statement of prosecutrix that she had gone to live with the appellant for 15 days of her own volition.

20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary

action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him

liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations

in this regard in Uday (supra) are considered relevant:

"It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what

may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. 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. This is what appears to have happened in this case as well,

and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to

marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix

had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what

was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

21. In conclusion, we find the conviction of the appellant to be unsustainable and set aside the same. The appellant is acquitted. He is directed to be

set at liberty forthwith unless wanted in any other case. The appeal is allowed.