
Kuldeep Tyagi Vs The State NCT of Delhi

Criminal Appeal 957 of 2010 and Criminal M.B. No. 1971 of 2012

Court: Delhi High Court

Date of Decision: March 18, 2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) " Section 161, 164#Penal Code, 1860 (IPC) " Section 34, 364A, 365, 376, 90

Citation: (2013) 4 AD 327 : (2013) 135 DRJ 613 : (2013) 2 JCC 840

Hon'ble Judges: S.P. Garg, J

Bench: Single Bench

Advocate: K. Singhal with Mr. Siddharth Mittal, for the Appellant; M.N. Dudeja, APP, SI and Rakesh Kumar, PS I.P. Estate, for the Respondent

Final Decision: Allowed

Judgement

S.P. Garg, J.

The appellant-Kuldeep Tyagi impugns judgment dated 03.04.2010 in Sessions Case No. 64/2008 arising out of FIR No.

91/2008 registered at Police Station I.P. Estate by which he was convicted for committing offence punishable u/s 376 IPC and sentenced to

undergo RI for seven years with fine Rs. 10,000/-. Allegations against the appellant were that on 12.04.2008 at 02:45 P.M., he and Raj Kumar

(since acquitted) kidnapped "X" (assumed name) aged 17 years from ITO with intent to secretly confine her. It was further alleged that "X" was

wrongfully confined and demand of Rs. 15 lacs was made from her father Narvender Singh for her release. The appellant repeatedly committed

rape upon her at Mussoorie and Shimla on the false promise to perform marriage with her after she turned 18. The prosecution examined 14

witnesses. In 313 Cr.P.C. statement, the appellant pleaded false implication. He stated that physical relations with "X" were consensual and when

her parents came to know about it, they falsely implicated him. He was apprehended from his office at Khuleshra, Noida on 16.04.2008. DW-1

(Naveen Srivastava) and DW-2 (Raman Bhardwaj) appeared in defence. On appreciating the evidence and considering the rival contentions of the

parties, the Trial Court, by the impugned judgment, convicted the appellant u/s 376 IPC and acquitted co-accused Raj Kumar Sharma. Being

aggrieved, the appellant has preferred the appeal.

2. At the outset, it may be mentioned that appellant and his associate Raj Kumar Sharma were also charged for offences u/s 365/364A/34 IPC.

However, the prosecution failed to establish the charges and both the appellant and Raj Kumar Sharma were acquitted of the charges u/s

365/364A/34 IPC. It is significant to note that State did not challenge the said acquittal. It is further significant to note that 12.09.1990 was

ascertained the date of birth of the prosecutrix "X". Date of occurrence was 12.04.2008. The prosecutrix was admittedly 17 years and 7 months

of age at the time of incident. The Trial Court observed that "X" was a consenting party and had established physical relations with the appellant

without any fear or pressure. It, however, was of the view that her consent was obtained on the promise to marry and it was no consent in the eye

of law.

3. After analysis of evidence, it transpires that no credible evidence was adduced to prove that "X" was forcibly taken to

Shimla/Mussoorie/Nainital against her wishes after administering poisonous substance in juice as alleged earlier. The Trial Court did not believe that

the prosecutrix was not in her senses when she went with the appellant and others to Shimla. She had conversation with her sister on her mobile

No. 9818982905 for 59 seconds at 16:29:53. In her statement before the Court "X" gave clean chit to Raj Kumar Sharma and admitted that she

had no grievance against him as he had not done anything.

4. Statement of the prosecutrix is wavering. In her 164 Cr.P.C. statement (Ex.PW6/A) made on 19.04.2008, she revealed that she was having

friendship with Kuldeep Tyagi and had physical relations with him for some time. She, however, disclosed that the relationship was not with her

consent. She was forced in physical relationship by her friend Neha Manchanda. The physical relationship was established as Neha after

introducing her to Kuldeep and her friend Ashok blackmailed her and threatened to involve her elder sister and to cause physical and mental harm

to her. She further disclosed that she was offered a glass of juice on the day of incident and after taking juice, she felt drowsiness. Thereafter, she

was taken to Shimla as the appellant threatened her that on her refusal, he would tell about previous relations and will harm her sister and family.

When she regained consciousness, she found that they had come to Mussoorie. Kuldeep made physical relationship with her. He had told her on

previous occasion that he was unmarried and would marry her when she completed 18 years. Due to the inducement, she entered into physical

relations that night. Next date Kuldeep called her father and demanded Rs. 15 lacs for her release and it was disclosed to her by the police.

5. In her statement before the court, she deposed that when she was pursuing her 12th class from Open School, she met Kuldeep Tyagi through

her friend Neha Manchanda about one and a half year back. She used to have conversation with him as a friend. On the day of incident, Kuldeep

first called her to reach at Rajeev Chowk by 12:00 or 12:30 P.M., then asked her to reach and meet him at ITO. When she met him, he told that

he had a plan with Raju @ Raj Kumar Sharma to go to Shimla and requested her to accompany them. When she refused to go without her

parents' permission, he asked her to accompany him to Noida as Raj Kumar's friends were waiting for them there and they were to accompany

them to Shimla. She went to Noida where Raj Kumar was waiting with two girls. Raj Kumar brought two glasses of juice on Kuldeep's directions.

After taking juice, she started feeling drowsy. She requested Kuldeep to drop her at ITO as she wanted to return home. However, she was taken

to Shimla. She was not in her full senses and was not aware as to what was happening. She further deposed that at Shimla and other places

Kuldeep Tyagi established physical relations with her on the promise to marry her. On earlier occasion, he had told her that he was unmarried and

would marry her soon after she completed 18 years.

6. In the cross-examination, she admitted that when she met Kuldeep for the first time about one year back at Laxmi Nagar, she was working in

ICICI bank at Shakarpur. They were frequently meeting and whenever they met, they had physical relations. She further disclosed that for about

six months, they were meeting as friends without having physical relations. She further admitted physical relations were made with her consent.

However, she explained that she was having no other option because Kuldeep Tyagi told her that it would make no difference whether it (physical

relation) was before or after marriage. She did not complain to any official of the hotel about what happened with her. She denied that Kuldeep

never promised to marry and she was aware about his marital status.

7. From the testimony of the prosecutrix it reveals that after developing friendship with Kuldeep Tyagi for about six months, they had physical

relations thereafter for about six months. She admitted that whenever they met, they had physical relationship. She did not claim that before

entering into physical relationship at the first instance or thereafter, the appellant had given her any promise to marry or that he obtained her consent

for sex on the false promise of marriage. She did not depose if she lodged any complaint against the appellant for obtaining her consent under

misconception of fact. She continued to have physical relationship frequently without insisting the appellant to fulfill his promise to marry her. She

did not bring this relationship to the notice of her parents and her elder sister (PW-3). She did not visit the house of the accused and met his

parents. She never took the accused to her residence to introduce him with her parents. On the day of occurrence, she voluntarily went to different

places i.e. Shimla, Nanital and Mussoorie and remained in the appellant's company for number of days. She had two mobile phones. At no stage,

she informed her sister or parents about her whereabouts. She did not raise hue and cry at any place. She travelled with the accused and had

physical relations with him with her consent. Prior to her recovery by Delhi Police after registration of the case u/s 365/364A IPC in Delhi, she had

no grievance against the conduct and attitude of the appellant. It is not her case that she ever insisted him to marry her or that the offer was

declined by him. Till recovery, the prosecutrix was not even aware that the appellant was a married man and had a family. She was a grown up girl

aged more than 17 years. She had disclosed her age 18 years while getting job at ICICI Bank. She was aware of the consequences of her act of

having sexual intercourse voluntarily with the appellant. It is unclear as to when and where the appellant obtained her consent under misconception

of fact. When "X" was apprehended in the company of the accused, consequent to registration of the FIR at Delhi, she for the first time alleged

that her consent was due to false promise of marriage. There was no occasion for her to travel to remote places without her parents' consent and

permission and to indulge in sexual relation with the accused. It was not a single occasion when she submitted for sexual relationship on the alleged

promise of marriage. The relationship continued for many months. It is not "X"s plea that on every occasion, she had sex on the false promise of

marriage. It is not expected that "X" who was on the verge of attaining majority would continue to submit for sex to the accused and would not

come to know about his marital status and family. Initially, the prosecutrix intended to implicate him for forcible abduction after administering

poisonous intoxicant in the juice. Her father even alleged that Rs. 15 lacs were demanded as ransom by the accused for her release. Subsequently,

"X" changed her version and introduced a new story that sexual relationship was with consent but was because of the promise to marry.

8. PW-7 (Bineeta) and PW-8 (Jonali) had also accompanied them to Shimla and other places. They were Raj Kumar Sharma's friend and stayed

with him in different rooms. They did not allege that anything untoward happened with them. They did not depose that "X" was ever molested or

served with an intoxicant. "X" never lodged any complaint to the girl accompanying them. Their statements were recorded by the police soon after

recovering "X". However, "X" refused to give her statement saying that she would give her statement in the presence of her father.

9. In Uday Vs. State of Karnataka, the Supreme Court held:-

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 strait jacket 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.

10. In Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Another, , Supreme Court quoted with approval para (7) of the report

of Division Bench of the Calcutta High Court in Jayanti Rani Panda Vs. State of West Bengal and Another, which is extracted hereunder:-

The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a

misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an

immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such

a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a

full grown 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. Section 90 IPC cannot be called in aid in such a

case to pardon the act of the girl and fasten criminal liability on the other, unless the Court" can be assured that from the very inception the accused

never really intended to marry her.

11. In the recent case K.P. Thimmappa Gowda Vs. State of Karnataka, the Supreme Court held as under:-""In the present case, the facts are that

Rathnamma herself stated in her evidence that she had sex with the Appellant on several occasions. It is also an admitted fact that the FIR against

the Appellant was lodged just a few days before the birth of Rathnamma's child, which means there is delay of over months in lodging the FIR.

The finding of the trial court, which has not been disturbed by the High Court, is that Rathnamma was about 18 years of age at the relevant time.

On these facts a view is reasonably possible that Rathnamma had sex with the Appellant with her consent and hence there was no offence u/s 376

IPC because sex with a woman above 16 years of age with her consent is not rape.

12. In the instant case the prosecutrix was on the verge of attaining majority. She was working in ICICI bank. She had sufficient intelligence to

understand the significance and moral quality of the act she was consenting to. She had friendship with the accused and had no grievance against

his conduct and behavior at any time. She had established physical relationship number of times. She accompanied the accused with his friends to

different places at Shimla, Nainital and Mussoorie. She never informed her parents and kept it a secret. She had physical relations with the accused

at different places with her consent without any resistance. During that period, she never lodged any complaint against the accused for cheating her.

She never insisted the accused to marry her. She never informed her parents about her friendship with the accused and his promise to marry. She

gave inconsistent and contradictory version in her statement u/s 161 Cr.P.C/164 Cr.P.C. and the one in the court. Allegations against the accused

for forcibly kidnapping her and demand of ransom of Rs. 15 lacs could not be established. Co-accused Raj Kumar remained in custody for long

time but in her statement the prosecutrix had no complaint against him and it resulted in his acquittal. The accused was already a married man

having kids. All these surrounding circumstances reveal that the prosecutrix established physical relationship with the accused with her free consent

and there was no false promise to marry. She was under no misconception of fact before offering consent. It was an act of promiscuity on her part

and not an act induced by an act of misconception of fact. Her consent was voluntary.

13. The appellant deserves benefit of doubt. The appeal is allowed and conviction and sentence of the appellant are set aside. Bail bonds and

surety bonds of the appellant stand discharged. Pending application stands disposed of. Trial Court record be sent back forthwith.