

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 30TH DAY OF MARCH 2022 / 9TH CHAITHRA, 1944

CRL.A NO. 568 OF 2020

AGAINST THE JUDGMENT IN SC 237/2015 OF ADDITIONAL DISTRICT
COURT & SESSIONS COURT - IV, KOTTAYAM
IN CP 20/2015 OF JUDICIAL MAGISTRATE OF FIRST CLASS,
KOTTAYAM

APPELLANT/S:

RAMACHANDRAN @ CHANDRAN
AGED 35 YEARS
S/O. KARUPPAYYA RAMAN, MELPPURATHU PUTHUVEL,
HOUSE NO. 427, VANDIPPERIYAR PANCHAYATH IV,
VALAR TEA P.O, VALAR TEA ESTATE, HML MALAYALAM
PLANTATION, VANDIPERIYAR KARA, PERIYAR VILLAGE,
IDUKKI DISTRICT, PIN 685 533
BY ADVS.
LAL K.JOSEPH
SRI.A.A.ZIYAD RAHMAN
SRI.M.R.XAVIER JESS
SRI.SURESH SUKUMAR
SRI.V.S.SHIRAZ BAVA
SHRI.CHACKO MATHEWS K.

RESPONDENT/S:

- 1 STATE OF KERALA
REPRESENTED BY SUB-INSPECTOR OF POLICE,
KOTTAYAM EAST POLICE STATION,
KOTTAYAM, PIN 686 009
THROUGH PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM, KOCHI 682 031
- 2 XXX
XXXX

BY SPL GOVERNMENT PLEADER SMT.AMBIKA DEVI (WOMEN
& CHILDREN)

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON
30.03.2022, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

A.MUHAMED MUSTAQUE & DR.KAUSER EDAPPAGATH, JJ.

Cr1.Appeal No.568/2020

“C.R.”

J U D G M E N T

Dated this the 30th day of March, 2022

A.Muhamed Mustaque, J.

In what circumstances does sex on a promise to marry become rape? Does the law postulate determination of the criminality of the sexual act in the context of 'consent' on the premise of inviolability of sexual autonomy? Does law contemplate to categorise a sexual act based on consent only on the understanding of the woman?

2. Perhaps we have to answer the above mentioned questions based on the factual background of the case in this appeal which arises from a judgment convicting the appellant for the offence under Section 376 of the Indian Penal Code, 1860.

3. The appellant has been sentenced to undergo imprisonment for life and to pay a fine of Rs.50,000/- in the impugned judgment. He has been acquitted for

other charges framed against him under Sections 406 and 420 of the IPC. The appellant had sexual intercourse with the victim on three occasions. The prosecutrix and the accused are relatives. The accused is the son of the prosecutrix's uncle. They were in love for more than 10 years. The case of the prosecutrix, hereinafter referred to as PW1, was that she and the accused married on 3-4-2014 at Manarcaud Temple and thereafter, they went to Kumily, where they pledged her ring and a pair of earrings at Kosamattam Finance. According to PW1, as the accused had no money for registering the marriage, she had pledged the gold ornaments as above. Thereafter, PW1 and the accused stayed at a lodge in Thekkady and therein they had sexual intercourse. It is stated by her that the next morning also, she was physically abused (sexually). The accused then left for Theni for a meeting and asked PW1 to go to his house. PW1 then would say that she was not accepted at the house of the accused and his mother had a quarrel with her. The mother of the accused also demanded 25 sovereigns of gold ornaments and Rs.1,00,000/-. The accused, thereafter, came to his house and since they

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were not allowed to enter the room, they remained at the sit-out of the house. On that day also, they had physical relationship. This was on 5-4-2014. PW1 and the accused went to the house of PW1 in Kottayam. By that time, the parents of PW1 made a complaint before the Police Station at Vandiperiyar. When the police called the accused, he stated that they were in Kottayam. There also at the house of PW1, the accused had sexual intercourse with PW1. The alleged sexual intercourse occurred between 3-4-2014 and 5-4-2014. The accused married PW3 on 08/04/2014. Though PW1 deposed that she had been physically exploited (rather mentioned as 'physically abused' if translation in vernacular language is made - *shaareerikamaayi peedippichu*). The case as above would not disclose any violent or forceful sexual act. The charge framed by the Sessions Court reads thus:

Firstly, that you on 28th day of May 2012, conducted the engagement of marriage with CW1 and received Rs.25,000/- and ten sovereigns of gold ornaments from CW1 and thereby committed an offence punishable under Section 420 of the Indian Penal Code which is within the cognizance of this Court.

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Secondly, that you on 03.04.2014 made CW1 to believe that you would marry her and took her to Vandipperiyar and stayed in Room No. 103 of New residency lodge at Thekkadi in Ward No. XI/284 of Kumily Panchayath and had sexual intercourse with CW1 from 03.04.2014 to 05.04.2014 against her will and thereby committed an offence punishable under Section 376 of Indian Penal Code.

Thirdly, on the same and same time you received the gold ornaments worn by CW1 by misrepresenting her that money is required for registering the marriage and pledged the same and used the money for your own use and thereby committed the offence punishable under Section 406 of Indian Penal Code, within the cognizance of this Court.

The charge discloses that the accused had sexual intercourse with PW1 from 3/4/2014 to 5/4/2014 against her will. Nevertheless, it has come out from PW1, as well as the findings of the Sessions Court that, this was not a case of forcible sexual act as against her will but a sexual act on a promise to marry where the consent is implicit. We find the charge as framed was defective, but it has not resulted in any form of prejudice to the accused.

4. The incidents of rape alleged, occurred in the year 2014. The amended provisions of the Indian Penal Code, 1860 and the Indian Evidence Act, 1872 as amended

by Act 13 of 2013 will have to be considered in this case. Though PW1 has not spoken in detail about the nature of the rape committed on her in regard to penetration, insertion etc., her testimony that she has been sexually abused means to convey that there was sexual intercourse between her and the accused. The Court cannot ignore the background of the witness while analysing the testimony of such a witness. She was a maidservant coming from a rural background. She is not an educated woman. The Court cannot expect such a woman to narrate the instances of sexual intercourse in detail. The shyness and ignorance, coupled with the pompous edifice of the Court room would dissuade such a person from disclosing the sexual act in detail. From the charge itself, it was revealed to the accused that the allegations of sexual intercourse with PW1 is the foundation of the prosecution's case. Therefore, it cannot be said that the accused also had not understood the nature of the sexual act alleged to have been committed by him.

Understanding the 'consent' of a woman on a promise to marry:

5. The consent of a woman on a promise to marry is an enigma for the prosecution to prove. Consent refers to the state of mind of both parties in an act. In a sexual act, if both have understood the nature of the sexual relationship, consent is implicit in such a relationship. While considering the relationship, the Court will have to weigh the position of the accused to control the woman. It is to be remembered that the statutory provisions of the offence of rape as understood in the Indian Penal Code, is not gender neutral. A woman, on a false promise of marrying and having sexual relationship with a man, with the consent of the latter obtained on such false promise, cannot be punished for rape. However, a man on a false promise of marrying a woman and having sexual relationship with the woman would lead to the prosecution's case of rape. The law, therefore, creates a fictitious assumption that the man is always in a position to dominate the will of the woman. The understanding of consent

therefore, has to be related to the dominant and subordinate relationship in a sexual act.

6. Section 375 of the IPC states that a man is said to commit rape if he has had any form of sexual intercourse without the consent of a woman. Explanation 2 to Section 375 refers to the form of expression of 'consent'. It is appropriate to refer to explanation 2 which reads thus:

Explanation 2: Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

There cannot be any room for doubt in this case as to the consent of PW1 for having sexual intercourse with the accused. PW1 referred to three incidents of sexual intercourse. First of such incidents happened in a lodge. She did not raise any complaint immediately thereafter. Again, she had sexual intercourse at the residence of the accused. The third incident happened

at her own house where also, she did not raise any complaint. According to her, she was promised by the accused that he would marry her. She also deposed about proposing the marriage at the Manarcaud Temple. But no ceremonies were conducted to establish legal marriage. She approached the Chief Judicial Magistrate, Kottayam, with a complaint. This was forwarded to the police for investigation. The police registered an FIR on 18/11/2014.

Consent on misconception of fact:

7. Section 90 of IPC refers to a consent as not consent intended by any provisions of the Indian Penal Code. Section 90 reads thus:

90. Consent known to be given under fear or misconception.—A consent is not such a consent as is 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.

8. We shall now advert to some of the precedents before considering the point of guilt of the accused in this case. In **Pramod Suryabhan Pawar v. State of Maharashtra and another [(2019) 9 SCC 608]**, the Apex Court distinguished sexual relationship based on false promise to marry and a breach of promise to marry. The Apex Court held that the offence of rape is not constituted when it was only a breach of promise to marry. The false promise of marriage is explained as a promise not given in good faith, with no intention of being adhered to at the time it was given. In **Anurag Soni v. State of Chhattisgarh [(2019) 13 SCC 1]** on a similar line, the Apex Court, noting that the accused had no intention to marry the prosecutrix, held that engaging in a physical relationship on the pretext of marriage, fell in the category of rape. In **Deepak Gulati v. State of Haryana [MANU/SC/0546/2013]** the

Hon'ble Supreme Court distinguished rape and consensual sex and held that "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 made a false promise to this effect only to satisfy his lust. As the latter falls within the ambit of cheating or deception." In **Dhruvaram Murlidhar Sonar (Dr.) v. State of Maharashtra and Others [2019 (1) KHC 403]**, the Apex Court held that if the accused had not made a promise with the sole intention to seduce the prosecutrix to indulge in sexual act, such an act would not amount to rape. In **State of Uttar Pradesh v. Naushad [(2013) 16 SCC 651]** again the Hon'ble Supreme Court held that the consent of the victim obtained by the accused by giving false promise of marrying her would amount to committing rape.

9. The false promise of marriage refers to the state of mind of the accused. The point of guilt is relatable to the state of mind of the accused at the

time of committing the act of sex. If the accused had no real intention to marry, it can be easily concluded that the consent of the victim is a misconception of fact. The accused might have had intention to marry but he was not sure whether the marriage would take place or not. If the accused had not disclosed full information to the prosecutrix regarding the factors which would hamper or hinder the impending marriage with her, can the Court hold that sexual autonomy had been violated or not? Had the accused disclosed information about the chances of marriage, would she have consented? If there was no full disclosure of factors that could have a bearing on the consent of the woman, can we hold that such cases fall in the category of breach of promise? We need to discuss this in detail.

Ostensible consent and sexual autonomy:

10. Non-disclosure of material facts that would impact the consent of the victim is to be considered in the context of criminalizing a sexual act *quo* sexual autonomy of the woman. Law on rape broadly classifies

rape into two categories. One causing bodily harm. The second category of offence against sexual autonomy. The first category of offence has been referred under Section 375 of the IPC by nature of harm caused against her will. In the second category there are two sub categories. One refers to sexual acts without her consent. In this context, without consent has to be understood with reference to Section 90 of the IPC. The other sub category is with 'consent' as referred to in Section 375 from descriptions three to six. Sex on promise to marry can be established as rape only if it is coming under the first sub category that means the accused has violated the decisional autonomy of the victim at the time of having sex with the victim. False promise to marry has already been categorized as the type of act to attract the provision of the IPC. Non-disclosure of the material facts, affecting the consent of the victim has not been adverted to in any of the precedents cited at the bar.

11. Sexual autonomy of a woman to decide upon her body is a natural right and part of her liberty. The

dominant nature of men to subordinate the decisional autonomy of women has been perceived by the legislature while making the penal provision as not gender neutral. The law presumes a man's position to subordinate the decisional autonomy of a woman. The idea of the legislature is to protect the sexual autonomy of the woman.

12. On account of such position or relation she is having with a man, the law recognises both forceful act as well as a violation of sexual autonomy within the ambit of the penal provision.

13. In an article written by Jack Vidler on 'Ostensible Consent and the Limits of Sexual Autonomy' published in the Macquarie Law Journal, Volume 17 (2017), the author refers to establishing sexual autonomy as follows:

"Sexual autonomy (and autonomy more generally) is a philosophical concept, so its fundamental features are relatively consistent throughout various interpretations. According to Madhloom's Kantian analysis of autonomy, a person must have the 'capacity ... to decide ... and pursue a course of action'. This

highlights the dual requirement of autonomy: possession of relevant information, and the (ideally unrestrained) ability to act in accordance with a personal assessment of that information. Lacey defines sexual autonomy as ‘the freedom to determine one’s own sexual experiences, to choose how and with whom one expresses oneself sexually’. Schulhofer conceives of sexual autonomy as the ‘right of every person to freely choose or refuse any sexual encounter’. He argues this right ‘must be fully protected’, requiring a model of ‘affirmative consent’, wherein the emphasis is to look for the presence, not absence, of consent. Further, a comprehensive review of US jurisdictions in 2012 found that the common elements of the various consent definitions were freedom and ‘capacity’, such as acting on free will with relevant knowledge of the act. The presence of the philosophical dyad of autonomy in the operational principle of consent both suggests that sexual autonomy is simply personal autonomy in a sexual context, and reaffirms the link between sexual autonomy and consent in general. Herring similarly understands sexual autonomy as the ‘right to choose with whom we have sexual contact’. Providing a more operational account, however, Herring posits that sexual autonomy is violated when, inter alia, consent is given in ignorance of significant relevant facts. Thus, deception and informational constraints may vitiate consent and violate sexual autonomy. Though this is a common theme in other authors’ conceptions, Herring specifically acknowledges its operational consequences – that consent is vitiated if the complainant would not have engaged in the sexual interaction if they ‘had known the truth’; that is, if they had had access to the relevant information that was previously obscured from them. They must

have knowledge of the key facts involved in making the decision to engage in sexual conduct in order for their consent to properly safeguard their autonomy. These facts have also been termed 'material facts bearing significantly on the decision to consent'.

14. In an another article by Nora Scheidegger on 'Balancing Sexual Autonomy, Responsibility, and the Right to Privacy: Principles for Criminalizing Sex by Deception', published in German Law Journal, Volume 22, (2021), the author explains the concept of the right to sexual autonomy as:

"The right to sexual autonomy comprises negative and positive dimensions. The negative dimension includes the right to be free from non-consensual or unwanted sexual contact and the right to refuse to have sexual relations with anyone at any time. The positive dimension includes the right to engage in sexual activity one wishes to pursue with any consenting person. However, this positive right to sexual self-determination is not unlimited. Sexuality is not a solo activity, and therefore has "built-in limits." A person's right to positive sexual self-determination can only exist as long as it is not in conflict with someone else's negative right to self-determination. The negative right generates on others duties not to interfere. It is only through consent that the other person is released from non-interference and that consent makes it morally and legally

permissible for others to engage with her in ways that would otherwise be impermissible.”

15. The sexual act on promise to marry is an offence against the decisional autonomy of a woman having the choice to engage in physical intimacy. The material facts related to consent, known to the offender or the accused, if not disclosed at the time of the sexual act, the consent so obtained would violate the decisional autonomy of the victim to engage in physical intimacy or not. The offender may have the intention to marry; he may also know at the time of committing the sexual act that there are obstacles to the marriage. If he was not certain about the marriage, he is bound to disclose that fact to the woman. If such fact was not disclosed, consent may fall under the category of ‘misconception of fact’ and the consent would be vitiated under the category of misconception of fact as referred to in Section 90 of the IPC.

16. In an article by Omar Madhloom, on “Deception, Mistake and Non-disclosure: Challenging the Current Approach to Protecting Sexual Autonomy”, published in

Northern Ireland Legal Quarterly, Volume 70 No.2, the author refers to non-disclosure of material facts as:

A material fact is one which plays a significant role in C's decision to permit or engage in sexual activity; and it may be material to her, whether it would be material to someone else.

Non-disclosure and mistake should nullify consent because it prevents individuals from setting their own standards with regards to the characteristics of their sexual partners. Consent should be deemed valid where C is mistaken about D's attributes, such as his marital status, religious affiliations and wealth. Where D withholds information relating to a material fact, and he does so for the purpose of manipulating her decision to have sex, C's consent should be considered to have been vitiated by his non-disclosure. The focus should be on the impact the deceptive conduct had on the individual's choice.

17. The law recognizes an offence with reference to two elements. *Actus reus* and *mens rea*. *Actus reus* constitutes either commission or omission of acts. The voluntary act or omission is called *actus reus* in our legal system. *Mens rea* refers to the state of mind of the accused at the time of the act. Misconception of fact to vitiate consent as referred under Section 90 of

IPC may happen on false promise or omission to disclose material facts. If the accused has a reason to believe that such material facts would vitiate consent, that denotes *mens rea*.

18. Thus, the legal position is clear. Non-disclosure of material facts by the accused affecting the consent would amount to violation of the sexual autonomy of the woman. Sexual autonomy consists of two requirements. First, the possession of relevant information and second the ability to act in accordance with the personal assessment of that information. The material facts known to the accused if not shared with the woman at the time of committing the sexual act, certainly would encroach upon her right to protect her decisional autonomy. Section 375 of IPC clearly envisages any violation of sexual decisional autonomy as an offence.

19. Section 114-A of the Indian Evidence Act, as amended in the year 2013, gives presumption as to the absence of consent in certain prosecutions for rape. Section 114-A reads thus:

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114-A. Presumption as to absence of consent in certain prosecution for rape. - In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), clause (g), clause (h), clause (i), clause (j), clause (k), clause (l), clause (m) or clause (n) 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 such woman states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

20. Sex on promise to marry will give rise to the presumption under Section 114-A of the Indian Evidence Act. Section 376(2) of the IPC states that certain categories of relationships and positions attract aggravated forms of punishment. Section 114-A presumption are relatable to certain types of sexual acts referred to in Section 376(2) of the IPC. It is appropriate to refer to Section 376(2)(f) of the IPC, which reads thus:

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman;

The reference under Section 376 (2)(f) of the IPC to a male in a position of trust towards the woman would clearly indicate that a sexual act on a promise of marriage would give rise to the presumption under Section 114-A of the Indian Evidence Act as in every sexual act, based on a promise to marry, there exists an element of trust.

21. However, in order to give rise to the presumption under Section 114-A of the Indian Evidence Act, in context of prosecution on a promise to marry, the woman has to state in her evidence that the promise was false with necessary elements at the time of the sexual act or has to state that non-disclosure of material facts affected her consent. It is only when foundational facts are disclosed to show false promise or non-disclosure of material facts, as referred to as above, the presumption under Section 114-A of the Indian Evidence Act is attracted. Once foundational facts are disclosed in evidence, unless and until disproved, the presumption is that of the guilt of the accused.

22. A combined reading of Section 90 of the IPC and Section 114-A of the Indian Evidence Act gives the following proposition of law in the context of sexual relationship on a promise to marry.

i. Law presumes lack of consent when a woman states in evidence that she did not consent, if the prosecution is able to prove sexual intercourse by the accused.

ii. This presumption is available in favour of the prosecution if the consent was obtained in any of the circumstances narrated under Section 90 of the IPC.

iii. The woman must state in evidence the foundational facts constituting elements for false promise or non disclosure of materials facts.

23. Coming back to the facts of this case, the prosecution has miserably failed to prove the sexual act was on false promise or consent was obtained by non-disclosure of material facts. The prosecutrix had not stated anything in evidence to constitute the foundational facts for attracting the presumption under Section 114-A of the Evidence Act. Merely for the

reason that the accused contracted another marriage immediately after the sexual act with the victim cannot give rise to the presumption of lack of consent. We cannot ignore the social circumstances of the parties. The lack of consent has to be stated by the prosecutrix. The victim and accused were in a love relationship for more than ten years. The sexual act referred to only occurred just before the preparation for the marriage was made. The prosecution evidence itself would show that there was resistance from the parents of the accused to accept the marriage without dowry. That would show that the sexual act committed by the accused was with real intention to marry the victim and he could not hold onto his promise due to resistance from his family. In the absence of any other evidence on the side of the prosecution, the conduct of the accused can only be treated as a breach of promise. In light of the discussions, we are of the view that the accused is entitled to benefit of doubt as the prosecution has failed to prove the sexual act was on a false promise to marry or the consent was obtained by non-disclosure of material facts.

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We, therefore, allow the appeal, set aside the impugned judgment of conviction and sentence, acquit the appellant/accused and direct him to be released and set at liberty forthwith, if he is not otherwise required.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

DR.KAUSER EDAPPAGATH, JUDGE

In/ms

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APPENDIX OF CRL.A 568/2020

APPELLANT'S ANNEXURES

ANNEXURE A1 TRUE COPY OF THE DEPOSITION OF PW1

ANNEXURE A2 TRUE COPY OF STATEMENT UNDER S. 164
CR.P.C

ANNEXURE A3 TRUE COPY OF THE DEPOSITION OF PW3