

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

WEDNESDAY, THE 15TH DAY OF DECEMBER 2021/24TH AGRAHAYANA,
1943

CRL.REV.PET NO. 177 OF 2018

AGAINST THE JUDGMENT IN CRA 40/2016 OF SESSIONS
COURT, KASARAGOD

SC 390/2010 OF ASST.SSESSIONS COURT, HOSDURG

REVISION PETITIONER/ACCUSED:

RANJITH, S/O NARAYANAN,
C.NO. 652/16, CENTRAL PRISON & CORRECTIONAL HOME,
KANNUR
BY ADV SMT. SHERLY. S. A (STATE BRIEF)

RESPONDENT:

STATE OF KERALA REP.BY PUBLIC PROSECUTOR
KASARAGOD.
BY ADV.SRI.SANAL P.RAJ, PP

THIS CRIMINAL REVISION PETITION HAVING BEN FINALLY
HEARD ON 1.11.2021, THE COURT ON 15.12.2021 DELIVERED
THE FOLLOWING:

O R D E R

Dated this the 15th day of December, 2021

The accused is the revision petitioner. He challenges concurrent findings of guilt u/s 376 of IPC against him.

2. The victim and her mother, both illiterate, were residing at their residential house situated at Puliyaikulam, Parappa Village. Both of them were working as a coolie at a nearby quarry. The accused was working at a furniture shop situated near to the house of the victim. Admittedly the victim and the accused got acquainted and they fell in love eventually. They decided to marry. The prosecution allegation is that, one day in the third week of December 2009, at 11.00 p.m, the accused went to the house of the victim, had sex with her and made her pregnant on false promise of marriage.

3. The Vellarikkundu police registered crime against the accused on the basis of the First Information Statement (Ext. P1) given by the victim after three months of the alleged incident. After hearing both sides, the trial Court framed charge against

the accused u/s 376 of IPC. He pleaded not guilty. After trial, the trial Court found the accused guilty u/s 376 of IPC, convicted and sentenced him to undergo rigorous imprisonment for 7 years and to pay a fine of ₹10,000/-, in default to suffer rigorous imprisonment for six months. In appeal, the appellate Court confirmed the conviction and sentence. The conviction was based mainly on the oral testimonies of the victim and her mother who were examined as PWs1 and 2 respectively.

4. As the revision petitioner was not represented by his own lawyer, Smt. Sherly S.A was appointed as the Legal Aid Counsel. I heard the learned Legal Aid Counsel as well as the learned Public Prosecutor Sri.Sanal P.Raj.

5. The learned Counsel for the revision petitioner impeached the findings of the courts below on appreciation of evidence and resultant finding as to the guilt. The learned counsel submitted that even if the prosecution case is believed in its entirety, still on the basis of the material brought on record by the prosecution, offence under S.376 of IPC is not made out against the accused. The counsel further submitted that there is no cogent and reliable evidence to show that the accused

committed rape on the victim as alleged by the prosecution. The courts below committed serious illegality in convicting the accused, submitted the counsel. The learned Public Prosecutor, on the other hand, supported the findings and verdict handed down by the courts below and argued that necessary ingredients of S.376 of IPC had been established and the prosecution has succeeded in proving the case beyond reasonable doubt.

6. The testimony of PW1 and the statement of the accused given u/s 313 of Cr.P.C would show that the victim and the accused got acquainted, their friendship blossomed eventually and they fell in love with the knowledge of PW2. It is also not in dispute that subsequently, the accused proposed the victim and they decided to marry. According to the prosecution, the accused withdrew from the marriage proposal unilaterally after satisfying his sexual lust on the fateful day, while according to the defence, the victim and her mother withdrew from the marriage proposal since the accused failed to return gold chain borrowed by him from the victim for pledging.

7. PW2 narrated the circumstances which led to the close acquaintance of PW1 with the accused. According to her, the

accused was a frequent visitor to her house, pretended love for PW1 and expressed desire to marry her. She deposed that the accused made her believe that his relatives would officially come and meet her with the marriage proposal. She further stated that thereafter the accused impregnated the victim which she came to know only when the victim was taken to a doctor due to vomiting. PW1 deposed that on the alleged day and time of the incident, the accused came to her house and knocked at the door. When she opened the door, the accused entered the room, hugged and impregnated her. The only incriminating part in the testimony of PW1 is that “the accused hugged and impregnated me (പ്രതി എന്നെ കെട്ടിപ്പിടിച്ചു ഗർഭിണിയാക്കി)”. There is no other evidence to suggest penetrative sexual intercourse. There is no evidence to show that the victim gave birth to a child as alleged. Admittedly no DNA test was conducted to find out the paternity of the child. Still, both the courts below found that oral testimony of PWs 1 and 2 are sufficient to suggest sexual intercourse between the victim and the accused on the fateful day. However, the appellate Court found that consent writ large in the prosecution

evidence, but the evidence and circumstances disclose that the consent was obtained by the accused by giving false promise of marriage and the victim submitted to him with the hope that he would marry her in future. Accordingly it was concluded that the consent is vitiated and the sexual intercourse constitutes rape.

8. According to Section 375 of IPC (prior to amendment in 2013), the offence of rape is the commission of a penetrative sexual intercourse upon a woman by a man under circumstances falling under any of the six descriptions specified therein. A reading of S.375 IPC shows that to commit 'rape', a man must have 'sexual intercourse' with a woman. The Apex Court, by referring to offence of 'rape', held in ***Sakshi v. Union of India*** (AIR 2004 SC 3566) that 'sexual intercourse' is heterosexual intercourse involving penetration of the vagina by the penis. Needless to say, even the slightest penile vaginal entry will amount to 'sexual intercourse'. The Apex Court and various High Courts have made it clear that the 'penile accessing' would be sufficient to constitute the 'penetration' in the sexual intercourse, which is necessary for the offence of 'rape', which occurs, even in the absence of actual entry of the male organ through vagina or

rupture of hymen. The definition of rape as per Section 375 of IPC has undergone a sea change after the amendment introduced in Section 375 with effect from 03/02/2013 bringing within its ambit any non-consensual penetration of a sexual nature. Since the commission of the offence in this case was in the year 2009, it is governed by the unamended provision.

9. The evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. However, even in a case of rape, the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. One of the cardinal principles of our system of administration of criminal justice that a person arraigned as the accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence as may show him to be guilty of the offence with which he is charged is applicable to rape case as well. Penetration being an essential ingredient of the offence of rape, there must be proof of actual penetration or at least penile accessing. The only witness who can prove that is the victim. But, even on a plain reading of the evidence of PW1, such

fact is not revealed. She has not stated anything relating to "penile penetration" or such attempt. She only stated that the accused hugged and impregnated her. Mere statement by the victim in her evidence "the accused hugged and impregnated me" without indication about penetration aspect is not sufficient to attract the offence of rape. Such a vague statement would not be a substitute for the statutory mandate as contained in the Explanation to S. 375. Offence of rape is constituted only if the ingredients under S.375 are made out. Unless the victim states in her evidence about the penetrative non consensual sexual act by the accused on her, the offence of rape cannot be said to be made out. The evidence of PW1 is lacking in this aspect.

10. Even if the prosecution version that there was sexual intercourse between the accused and the victim on the fateful day is assumed as correct, still the evidence on record and the attending circumstances do not remotely suggest that it was non-consensual. The appellate court also, after adverting to the evidence of PWs 1 and 2, observed that the consent writ large in the prosecution evidence. However, it was found the consent was obtained by the accused by making a false promise to marry and

such a consent is non-est in law. Let me examine the correctness and legality of the said factual finding with reference to law on the point.

11. Consent is at the centre of the offence of rape. If we analyze Section 375 of IPC, there is no such mention of the consent obtained under the false promise of marriage. Section 90 of IPC refers to the expression "consent". Section 90, though, does not define "consent", describes what is not consent. It says that "consent" is not a consent if it is given by a person 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 misconception. Relying on this, the courts have interpreted the word "consent" in the description 'secondly' under Section 375 i.e. "without her consent", and held that any consent given under a misconception of fact is vitiated and therefore the act becomes an act without consent, thereby making it rape.

12. In ***Uday v. State of Karnataka*** {(2003) 4 SCC 46} - which was the first in the line of judgments - the Apex Court held

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that a false promise to marry cannot come within the ambit of 'misconception of fact' and that the consent given by the woman 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. It was further held that there is no straitjacket formula for determining whether consent given by the woman to sexual intercourse is voluntary, or whether it is given under a misconception of fact and that the court needs to look at surrounding circumstances and 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. However, later, in **Deelip Singh v. State of Bihar** {(2005) 1 SCC 88}, the Apex Court, for the first time, unequivocally held that a false promise to marry falls within the ambit of the description "secondly" of Section 375 i.e. "without her consent". It was held that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent given. In **Pradeep Kumar v. State of Bihar** {(2007) 7 SCC 413} while reiterating that a promise to

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marry without anything more will not give rise to misconception of fact within the meaning of Section 90, clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. The Apex court qualified the proposition which it stated earlier by adding the qualification at the end unless the court can be assured that from the very inception the accused never really intended to marry her.

13. In **Deepak Gulati v. State of Haryana** {(2013) 7 SCC 675} and in **Dhruvaram Muralidhar Sonar (Dr) v. State of Maharashtra** (AIR 2019 SC 327), the Apex Court drawing distinction between rape and consensual sex observed that the Court must very carefully examine whether the complainant 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. Drawing distinction between mere breach of a promise and not fulfilling a false promise, it was further observed that if the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such

an act would not amount to rape and that if the accused had any *mala fide* intention or had clandestine motives, it is a clear case of rape. Again in ***Pramod Suryabhan Pawar v. State of Maharashtra and Another*** {(2019) 9 SCC 608} the Apex Court held that not every failed promise to marry can lead to a rape charge. The bench made a distinction between breach of a promise and a false promise, which would lead to "misconception of fact" vitiating a women's "consent" in law. It was held that where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent" under Section 375 (rape) of IPC, on the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it," said the judgment. It emphasized that the 'consent' of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act and to establish whether the 'consent' was vitiated by a "misconception of fact"

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arising out of a promise to marry, two propositions must be established, (i) the promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. (ii) the false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act. The Court added that an individual, who makes a reasoned choice to act after evaluating various alternative actions as well as the various possible consequences flowing from such action or inaction, consents to such action. Recently in ***Sonu alias Subhash Kumar v. State of Uttar Pradesh*** (AIR 2021 SC 1405), while quashing a charge sheet alleging an offence under Section 376 of IPC, the Apex Court observed that if there is no allegation to the effect that the promise to marry given to the victim was false at the inception, no offence of rape has been attracted.

14. The legal position which can be culled out from the judicial pronouncements referred above is that If a man retracts his promise to marry a woman, consensual sex they had would not constitute an offence of rape under Section 376 of the IPC unless it is established that the consent for such sexual act was

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obtained by him by giving false promise of marriage with no intention of being adhered to and that promise made was false to his knowledge. The prosecution must lead positive evidence to give rise to inference beyond reasonable doubt that accused had no intention to marry prosecutrix at all from the very inception.

15. Coming to the facts of the case, the evidence of PW1 would show that on the alleged date of the incident at odd hour, when the accused knocked at the door of her house, she opened it and let the accused in. She also stated that she switched on the light. According to her, thereafter he hugged and made her pregnant. She has no case that she raised alarm when he hugged her. It has also come out in evidence that she did not make any complaint regarding the said incident against the accused to anybody. She did not even disclose to PW2. There was unexplained delay of more than three months in lodging FIS. The evidence of PW2 would show that the house of the victim consists of a small hall and two small rooms which do not have doors. PW1 deposed that she and PW2 used to sleep together in a room. She further stated that PW2 knew when she switched on the light. These evidence of PWs 1 and 2 coupled with the

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attended circumstances clearly indicate that if at all there was sexual intercourse between the victim and the accused as alleged by the prosecution, it was a consensual one, that too with the knowledge of PW2. PW1 or PW2 has no case at all during evidence that PW1 subjected herself to sex, persuaded or believed by the promise of marriage given by the accused. Even in the FI statement, there was no such case. On the other hand, what was stated in the FI statement was that the accused seduced her though she protested his advances and after the intercourse, he told him not to reveal the incident to anyone and left the house with a promise to marry her. Thus, even according to the prosecution case, the promise of marriage was given after the alleged sexual act and not at the initial stage.

16. Considering the aforesaid evidence and facts and circumstances of the case in the light of the law laid down by the Apex Court in the aforesaid decisions, I am of the view that the Courts below have committed illegality in holding that the victim gave consent relying upon the false promise of the accused that he will marry her and, therefore, the consent given by her cannot be said to be a consent so as to excuse the accused for the

charge of rape as defined under Section 375 of the IPC.

17. It is true that the jurisdiction of a High Court in revision is severely restricted and it cannot embark upon reappraisal of evidence. However, if the findings in the judgments under revision have been arrived at by ignoring or excluding relevant materials, or by taking into consideration irrelevant/inadmissible materials, or the entire approach of the Court in dealing with the evidence is patently illegal, leading to the miscarriage of justice, nothing prevents the High Court from exercising such revisional powers. The powers u/s 397 r/w with S.401 of Cr.P.C. are inherent in nature to correct the judgments and the orders of the courts below which suffer from gross illegality or jurisdictional error. As stated already, there is absolutely no evidence to substantiate the basic ingredients constituting the offence of rape. Hence, I hold that this is a fit case where discretionary power vested with this Court u/s 397 r/w S.401 of Cr.P.C. could be exercised.

In the light of the above findings, the conviction and sentence passed by the courts below vide the impugned judgments are set aside. The revision petitioner is found not guilty of the offence charged against him and accordingly he is

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acquitted. He shall be set at liberty forthwith if he is not required in any other case. The Criminal Revision Petition is allowed as above.

The Registry is directed to forward a copy of this order forthwith to the Superintendent, Central Prison, Kannur, where the revision petitioner is undergoing imprisonment.

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

//True copy//

PS to Judge