Maheshwar Tigga vs The State Of Jharkhand on 28 September, 2020

Equivalent citations: AIR 2020 SUPREME COURT 4535, AIRONLINE 2020 SC 743

Author: Navin Sinha

Bench: Indira Banerjee, Navin Sinha, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 635 OF 2020
(Arising out of SLP (Crl.) No.393 of 2020)

MAHESHWAR TIGGA ...APPELLANT(S)

VERSUS

THE STATE OF JHARKHAND ...RESPONDENT(S)

JUDGMENT

NAVIN SINHA, J.

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 Date: 2020.09.28 16:28:48 IST Reason:

> 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:□"Question1. 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". Question3. 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 :□"5.....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."

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 327 and 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 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:

> "25...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.

.....J. [R.F. NARIMAN] .....J. [NAVIN SINHA] .....J. [INDIRA BANERJEE] NEW DELHI SEPTEMBER 28, 2020