Vinod Kumar vs State Of Kerala on 4 April, 2014

Equivalent citations: AIRONLINE 2014 SC 405, 2014 AIR SCW 2247, 2014 (3) AJR 79, 2014 CRI. L. J. 2360, AIR 2014 SC (CRIMINAL) 1105, AIR 2014 SC (SUPP) 764, (2014) 4 MH LJ (CRI) 293, 2014 (2) SCC (CRI) 663, (2014) 3 JLJR 194, (2014) 4 SCALE 537, 2014 ALLMR(CRI) 1915, (2014) 138 ALLINDCAS 243 (SC), 2014 CALCRILR 2 466, (2014) 2 ALLCRIR 1716, (2014) 3 CRIMES 28, (2014) 86 ALLCRIC 973, (2014) 2 RECCRIR 440, (2014) 3 KCCR 275, 2014 (5) SCC 678, (2014) 3 PAT LJR 303, (2014) 2 ALD(CRL) 433

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Bench: Vikramajit Sen, K.S. Radhakrishnan

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL No. OF 2014
[Arising out of SLP(Crl.) No.9014 of 2013]

VINOD KUMAR
…..APPELLANT
.….APPELLANT

Versus

STATE OF KERALA …..RESPONDENT

J U D G M E N T

VIKRAMAJIT SEN,J.

1 Leave granted.

2 In this Appeal we are confronted with the concurrent conviction of the Appellant under Section 376 of the Indian Penal Code (IPC), although the findings of the two Courts substantially differ. The High Court has set aside his conviction under Sections 417 and 419 IPC, whereas the Additional District & Sessions Judge, Thiruvanthapuram, had sentenced the Appellant to Rigorous Imprisonment for a period of seven years and a fine of Rs.25,000/- and in default of payment thereof, to undergo Rigorous Imprisonment for three years. In the Impugned Order the High Court has reduced this sentence to Rigorous Imprisonment for a period of four years but, while maintaining the fine of Rs.25,000/-, has ordered that in default of its deposit, the Appellant would suffer Rigorous Imprisonment for the reduced period of six months. At the commencement of the impugned Judgment, the learned Judge has aptly observed that what began as a telephonic friendship strengthened into close acquaintance between the Appellant and the prosecutrix (PW2) which later blossomed into love, eventually leading them to elope. Despite arriving at this conclusion, the learned Judge has nevertheless termed PW2 as the victim, which seems to us to be an incongruous factual finding leading to a misconception and consequently a misapplication of the law.

3 So far as the facts are concerned, it is uncontroverted that at the material time PW2 was twenty years old and was studying in College for a Degree and that she appeared in and successfully wrote her last examination on 19.4.2000, the fateful day. Thereafter, when she did not return home from college, her father conducted a search which proved to be futile. Accordingly, on the next day, 20th April, 2000, he lodged the First Information Report, Exhibit P-1. It transpires that the prosecutrix (PW2) has since got married on 11th March, 2001 and at the time of her deposition had already been blessed with children. It is also not controverted that a document was registered with Sub-Registrar Office Kazhakoottam (SRO) which has been variously nomenclatured, including as a marriage registration. The Appellant's case is that he had met PW2 in the University College and after some meetings and their getting to know each other better she had threatened to commit suicide if he did not marry her; that he immediately informed her that he was already married and had two children and that he had even given his marriage photographs to her, which she had entrusted to her friend, Fathima; that she asked him to divorce his wife; that she informed him that since her religion permitted a man to marry four times at least some documentation should be prepared to evidence their decision and compact to marry each other. It has been contended by the Appellant that sexual intercourse transpired post 19.4.2000 only and was with the free consent of both persons. The Trial Court had applied the Fourth Explanation to Section 375 and, thereafter, held the Appellant guilty, inter alia, of the commission of rape.

4 After considering the evidence of PW2 the High Court has notably concluded that there was no compulsion from the side of the Appellant at any stage, including when the prosecutrix had accompanied him on earlier occasion on a day trip to Ponmudi, when significantly no room had been booked and they had taken food in KTDC Ponmudi. PW2 has adopted the stand that the Appellant had not disclosed the factum of his being a married man and, contrary to the say of the Appellant, that he had threatened to commit suicide if she refused to marry him. She has deposed that he had told her "that after conversion marriage can be performed" but upon inquiry from the Imam he was told that his conversion was not possible just for marriage, and that conversion was possible only after a registered marriage. The prosecutrix has further testified that on the insistence

of the Appellant, she had on the morning of 19th April, 2000 accompanied him to the office of the Registrar, where she had signed a paper in the Maruti Van which was driven by his driver and in which the latter's wife and child were also seated, after which she was dropped back to College where she wrote her last examination, in the event with success. After the examination, she accompanied by all these persons went to Katela, where fully appointed and furnished premises had been taken on rent by the Appellant; and that the next day she departed for Chavra, where the Appellant and she stayed in Room No.106 in the Mella Lodge. From there they left for Coimbatore and, thereafter, to Ooty, where they stayed for two days, i.e. 22nd and 23rd April, 2000; thereafter, they stayed in a house belonging to relatives of the Appellant in Neelagiri for three days. She has deposed that she had sex with the Appellant at all these places. It was then and there that her uncle Abdul Rasheed and his auto-rickshah driver chanced upon them when they had gone to the market to make some purchases. At that juncture her uncle Abdul Rasheed took out the photograph of the Appellant's marriage, a verbal altercation ensued and the Appellant departed in the Maruti Van. The prosecutrix has testified that "until uncle showed the photograph of A1's marriage I never knew that he is already a married person, A1 never told me that he is married. If I had an hint I would not have done all this. Thinking that I am the legally wedded wife of A1 I used to have sexual intercourse". She has testified that she told her friend and confidant, Fathima, about the Appellant speaking to her on the phone and equally importantly, that on her elopement she had informed her that she was safely staying at Katela. As already recorded, the case of the defence is that the photograph of the Appellant's marriage was subsequently entrusted by the prosecutrix to Fathima. Significantly, Fathima has not been examined by the prosecution and instead, the ill- founded contention has been articulated by learned State Counsel that she could and should have been examined by the Appellant. It is her say that although she had signed a document which was on stamp paper of Rs.50/- and had appeared before the Registrar. She was not aware of its contents. The prosecution case is that PW2, after her initial reluctance, was persuaded to immediately accompany the Appellant for the purpose of registration of marriage. It was in these circumstances that she believed that she was the legally wedded wife of the Appellant. As already noted physical sexual relations between the couple have not been denied. She has testified that had she been aware that the accused was already married, she would not have ventured into the relationship.

5 Obviously, the statement of PW2 forms the fulcrum of the case. According to her the Appellant had introduced himself as a student of B.C.M. College, Kottayam and after they had daily telephonic conversations, they consented to meet each other in person. On 17.1.2000 she accompanied him to Ponmudi, where he proposed marriage to her and they were in each others company from 11.00 a.m. to 4.30 p.m. As already noted, the prosecutrix has, inter alia, stated that - "He told me that after conversion marriage can be performed and to know about it went to meet Imam of Palayam Mosque who told him that conversion is not possible just for marriage and therefore conversion is possible only after a registered marriage. Thus I agreed for marriage. He told me that the marriage would be registered on 19th." In our opinion this statement is indeed telltale. We cannot lose perspective of the fact that the prosecutrix is a graduate having exercised exemplary steadfastness, responsibility, resolve and discipline in appearing in and passing her last examination for graduation on the very same day when, in the morning she had appeared before the Sub-Registrar for registration of an agreement for marriage, and, later, she had proceeded and participated in her elopement. 6 Another significant feature is that PW4, the Sub-Registrar Kazhakoottam has deposed that he had registered

a “marriage agreement” between the Appellant and the prosecutrix on 19.4.2000 and that the document was in the handwriting of a deed-writer named Mohana Chandran Nair (PW5). In cross-examination he has stated that he had informed the couple that the marriage would not be complete on the registration of that agreement, which in his opinion had been executed by them without any hesitation and with their free consent. So far as PW5 is concerned, we have carefully considered the statements made by him in Examination-in-Chief, none of which appears to run contrary to the prosecution case, yet, inexplicably he has been declared hostile. It will be apposite to recall that in Rabindra Kumar Dey vs State of Orissa 1976 (4) SCC 233, this Court has opined that - “... Merely because a witness in an unguarded moment speaks the truth which may not suit the prosecution or which may be favourable to the accused, the discretion to allow the party concerned to cross-examine its own witness cannot be allowed. In other words a witness should be regarded as adverse and liable to be cross- examined by the party calling him only when the court is satisfied that the witness bears hostile animus against the party for whom he is deposing or that he does not appear to be willing to tell the truth. In order to ascertain the intention of the witness or his conduct, the judge concerned may look into the statements made by the witness before the Investigating Officer or the previous authorities to find out as to whether or not there is any indication of the witness making a statement inconsistent on a most material point with the one which he gave before the previous authorities. The court must, however, distinguish between a statement made by the witness by way of an unfriendly act and one which lets out the truth without any hostile intention”. It is also evident to us that the cross- examination of PW5 has the effect of weakening the prosecution case. All too frequently the cross-examiner is oblivious to the danger that is fraught in asking questions the answers to which are not known or predictable and which invariably prove to be detrimental to his interests. It seems to us that details of Sasi, the social worker who was a witness to the marriage agreement were available and being a relevant witness to elucidate the state of mind of the prosecutrix, she ought to have been examined by the prosecution. To compound it for the prosecution, it is in the re-examination of PW5 that it has emerged that his opinion that document of marriage was deficient if not devoid of legal validity and efficacy was conveyed to the prosecutrix by PW5 on 18.4.2000, i.e. the day previous to the date of registration. We emphasise that the testimony of PW5 is of importance because he has stated that both the prosecutrix as well as the Appellant, as also the social worker named Sasi, had instructed and engaged him on 18.4.2000 with regard to the drafting of the subject Agreement and that he had told the prosecutrix that the registration would not create a legal marriage.

7 PW12, namely, Chitralekha, is the wife of the accused/Appellant and her statement is also very damaging for the prosecution inasmuch as before the subject elopement, in the course of a telephone call she had informed the speaker that she was the wife of the Appellant and that the prosecutrix had subsequently in the course of that conversation disclosed her name and had told PW12 that she would talk to the Appellant directly. This witness has also been declared hostile; and she has subsequently tendered the information that she has separated from the Appellant and is living in her father’s home. Nothing adverse to the stance of the Appellant has been elicited by the Public Prosecutor in her cross-examination. 8 In Kaini Rajan vs State of Kerala (2013) 9 SCC 113, my esteemed Brother has explained the essentials and parameters of the offence of rape in the extracted words, which renders idle any further explanation or elaboration:-

> "12. Section 375 IPC defines the expression "rape", which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression "against her will" means that the act must have been done in spite of the opposition of the woman. An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression "consent". Section 90, though, does not define "consent", but describes what is not consent. "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances".

9 We are fully mindful receptive, conscious and concerned of the fact that the Appellant has been found guilty and has been punished by both the Courts below for the reprehensible crime of the rape of the prosecutrix. However, we consider that the verdict manifests a misunderstanding and misapplication of the law and misreading of the facts unraveled by the examination of the witnesses. Firstly, the prosecutrix is a graduate and even otherwise is not a gullible women of feeble intellect as is evident from her conduct in completing her examination successfully even on the eventful day, i.e. 19.4.2000. In fact she has displayed mental maturity of an advanced and unusual scale. We are convinced that she was aware that a legal marriage could not be performed and, therefore, was content for the time being that an agreement for marriage be executed. Secondly, the testimony of PW4 and PW5 independently indicates that the prosecutrix had been made aware by knowledgeable and independent persons that no legally efficacious marriage had occurred between the couple. Thirdly, this state of affairs can reasonably be deduced from the fact that, possibly on the prompting of the prosecutrix, the Appellant had consulted an Imam, who both the parties were aware, had not recommended the Appellant's conversion to Islam, obviously because of his marital status and the law enunciated by this Court in this context. Palpably, had he been a bachelor at that time, there would have been no plausible reason for the Imam's reluctance to carry out his conversion. Nay, in the ordinary course, he would have been welcomed to that faith, as well as by his prospective wife's family, making any opposition even by the latter totally improbable. For reasons recondite, the Imam has also not been examined by the prosecution. Fourthly, if he was a bachelor there would have been no impediment whastsoever for them to marry under the Special Marriage Act. Fifthly, we cannot discount the statement attributed to the prosecutrix that her faith permitted polygamy; on extrapolation it would indicate that she was aware that the Appellant was already married and nevertheless she was willing to enter into a relationship akin to marriage with the Appellant, albeit, in the expectation that he may divorce his wife. Sixthly, the prosecution should have investigated the manner in which the prosecutrix's uncle came into possession of the Appellant's marriage photograph, specially since it is his defence that he had given the photograph to the prosecutrix

when she had insisted, on the threat of suicide, that they should marry each other. The Appellant has also stated that this photograph had been entrusted to Fathima, on the prosecutrix's own showing, was her confidant. Again, for reasons that are unfathomable, the prosecution has not produced these witnesses, leading to the only inference that had they been produced, the duplicity in professing ignorance of the Appellant's marital status would have been exposed. The role of the prosecution is to unravel the truth, and to bring to book the guilty, and not to sentence the innocent. But we are distressed that this important responsibility has been cast to the winds. In fact, learned counsel for the State has contended that Fathima could have been produced by the Appellant, which argument has only to be stated for it to be stoutly rejected. The Court can fairly deduce from such an argument that had Fathima been examined she would have spoken in favour of the Appellant. Seventhly, it has not been controverted by the prosecutrix that the Appellant had made all arrangements requisite and necessary for setting up a home with the prosecutrix. The present case is not one where the Appellant has prevailed on the prosecutrix to have sexual intercourse with him on the assurance that they were legally wedded; the prosecutrix was discerning and intelligent enough to know otherwise. The facts as have emerged are that the couple were infatuated with each other and wanted to live together in a relationship as close to matrimony as the circumstances would permit. Eightly, as already stated, Sasi should have been examined by the prosecution as she was a material witness and would have testified as to the state of mind of the prosecutrix. Finally, the law has been succinctly clarified in Kaini Rajan. The Court is duty bound when assessing the presence or absence of consent, to satisfy itself that both parties are ad idem on essential features; in the case in hand that the prosecutrix was lead to believe that her marriage to the Appellant had been duly and legally performed. It is not sufficient that she convinced herself of the existence of this factual matrix, without the Appellant inducing or persuading her to arrive at that conclusion. It is not possible to convict a person who did not hold out any promise or make any misstatement of facts or law or who presented a false scenario which had the consequence of inducing the other party into the commission of an act. There may be cases where one party may, owing to his or her own hallucinations, believe in the existence of a scenario which is a mirage and in the creation of which the other party has made no contribution. If the other party is forthright or honest in endeavouring to present the correct picture, such party cannot obviously be found culpable. The following paragraph from Deelip Singh vs State of Bihar 2005 (1) SCC 88, is extracted:

> " 19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology".

10 We are in no manner of doubt that in the conspectus that unfolds itself in the present case, the prosecutrix was aware that the Appellant was already married but, possibly because a polygamous relationship was not anathema to her because of the faith which she adheres to, the prosecutrix was willing to start a home with the Appellant. In these premises, it cannot be concluded beyond reasonable doubt that the Appellant is culpable for the offence of rape; nay, reason relentlessly points to the commission of consensual sexual relationship, which was brought to an abrupt end by the appearance in the scene of the uncle of the prosecutrix. Rape is indeed a reprehensible act and every perpetrator should be punished expeditiously, severally and strictly. However, this is only possible when guilt has been proved beyond reasonable doubt. In our deduction there was no seduction; just two persons fatally in love, their youth blinding them to the futility of their relationship.

11 The Appellant is not an innocent man inasmuch as he had willy-nilly entered into a relationship with the prosecutrix, in violation of his matrimonial vows and his paternal duties and responsibilities. If he has suffered incarceration for an offence for which he is not culpable, he should realise that retribution in another form has duly visited him. It can only be hoped that his wife Chitralekha will find in herself the fortitude to forgive so that their family may be united again and may rediscover happiness, as avowedly the prosecutrix has found. 12 It is in these premises that we allow the Appeal. We set aside the conviction of the Appellant and direct that he be released forthwith.

.....J. [K.S. RADHAKRISHNAN] .....J. [VIKRAMAJIT SEN] New Delhi April 04, 2014.

ITEM NO.1B COURT NO.7 SECTION IIB
(for Jt.)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Crl.A.No...../2014

Petition(s) for Special Leave to Appeal (Crl) No(s).9014/2013 (From the judgement and order dated 17/07/2013 in CRLA No.1481/2006, of The HIGH COURT OF KERALA AT ERNAKULAM) VINOD KUMAR Petitioner(s) VERSUS STATE OF KERALA Respondent(s) Date: 04/04/2014 This Petition was called on for pronouncement of judgment today.

For Petitioner(s) Mr. Raghenth Basant,Adv.
Mr. Senthil Jagadeesan,Adv.

For Respondent(s)
Ms. Bina Madhavan,Adv.

Hon'ble Mr. Justice Vikramajit Sen pronounced the judgment of the Bench comprising of Hon'ble Mr. Justice K.S.Radhakrishnan and His Lordship.

Leave granted.

The appeal is allowed setting aside the conviction of the appellant and directing that he be released forthwith.

(SUMAN WADHWA) (RENUKA SADANA)
AR-cum-PS COURT MASTER

Signed Reportable Judgment is placed on the file.
