

SUPREME COURT OF INDIA

State of U.P.

Vs.

Naushad

CrI.A.No.1949 of 2013

(S.J.Mukhopadhaya and V.Gopala Gowda, JJ.)

19.11.2013

JUDGMENT

V. Gopala Gowda, J.

1. Leave granted.

2. This appeal is directed against the impugned judgment and order dated 16.03.2007, passed by the High Court of Judicature at Allahabad in Criminal Appeal No. 4505 of 2005, whereby the High Court allowed the appeal filed by the accused-respondent acquitting him for the offence punishable under Section 376 of the Indian Penal Code (in short IPC) by reversing the judgment and order dated 05.10.2005 of the Additional Sessions Judge, Fast Track Courts 1, Muzzaffarnagar in Sessions Trial No. 377 of 2004 which convicted the accused under Section 376 and sentenced him to undergo imprisonment for life and a fine of [pic]10,000/- and in default of payment of fine further imprisonment for a period of one year.

3. The brief facts of the case are stated hereunder to examine the correctness of the findings recorded by the High Court in reversing the judgment of the trial court. The accused- Naushad is the son of the maternal uncle of the prosecutrix – Shabana's father - who is the informant. The informant complained that Naushad used to visit their house often and enticed his daughter - Shabana and cheated her, promising to marry her and had regular sexual intercourse with her on this pretext. The informant came to know about this

when his daughter narrated to her mother how she was raped and she got pregnant. The complainant along with his wife went to complain to the parents of the accused, Irshad and his wife and told them that their son-Naushad raped their daughter-Shabana by giving a false promise of marriage and she has become pregnant. Irshad and his wife accepted their fault and promised to punish Naushad. A Panchayat was held a day before lodging the report when Irshad and his wife offered [pic]10,000/- to [pic]20,000/- to them and said that they will not marry their son with Shabana. The informant alleged that Irshad and his wife even threatened to kill him if any action is taken. On the basis of this information given by Irshad, case crime no. 115 of 2003 was registered at P.S. Kotwali Nagar in Muzaffar Nagar. After investigation, the Investigating Officer arrested Irshad and Naushad. Shabana was sent for medical examination and the report was submitted by Dr. Abha. After the charge sheet was submitted, the case was committed to the Sessions Court. The Sessions Judge framed charge under Section 376, IPC against Irshad and Section 376 read with Section 109, IPC against Naushad and both were further charged under Section 506, IPC. The Sessions Judge held the accused Naushad guilty of the charge under Section 376 and convicted him, sentencing him to imprisonment for life. Being aggrieved by this, the accused filed an appeal before the High Court. The High Court allowed the appeal and held that the prosecution had failed to prove its case beyond reasonable doubt and the order of conviction and sentence of the accused respondent was set aside and he was directed to be released forthwith. Against the reversal of conviction and sentence of the accused by the High Court, the appellant - State has filed the present appeal.

4. The trial court after examining the evidence on record and hearing the rival legal contentions recorded its findings on the issue as to whether the accused – Naushad is guilty of the offence of rape charged under Section 376 of the IPC. On behalf of the prosecution, P.W.1 Shabana (the prosecutrix), P.W.2 (the complainant) Muzaffar Ali, P.W.3 Dr.Abha Attrey and P.W.4 S.I. Kiran Pal Singh were examined by way of oral evidence in support of the occurrence. P.W.2 has proved the written complaint vide Ex. Ka-1, P.W.3 has proved her medical examination report vide Ex. Ka-2 and P.W.4 has proved the FIR vide Ex. Ka-3, and showing the registration of the case vide Ex.Ka-4, the charge-sheet vide Ex. Ka-8 among other exhibits. The statement of the accused was recorded under Section 313 of the Cr.P.C. wherein he has stated that he used to visit the house of the complainant but he denied any illicit relations with Shabana. He stated that there was a rumour in the village about her becoming pregnant and the complainant made a proposal to arrange his marriage with Shabana but the members of his family refused to the proposal on the ground that Shabana was of ‘bad character’. The accused alleged that the complainant filed a false complaint and the witnesses have made false depositions and the case has been filed in order to pressurise him. The accused produced no evidence to prove his defence. P.W.1 the prosecutrix-Shabana was examined by the prosecution and deposed on solemn affirmation that “Irshad is related to me like Dada (like grandfather). He is the maternal uncle of my father and the accused Naushad is the son of Irshad. The incident dates back to about two years or quarter past two years. The accused Naushad used to often visit my house and sometimes used to sleep at night in my house itself. At that time, my age was about 15 years. Naushad used to say to me, I shall marry you and then he forcibly used to commit rape on me and might have forcibly committed rape on

me 15 or 20 times in a year and he continued inciting and misguiding me. I became pregnant as a result of this and when I asked him to marry me, he refused to do so. ... Even in the Panchayat, Naushad refused to marry me. Irshad offered [pic]20,000/- and refused to arrange marriage of his son with me". She also stated that thereafter a daughter was born to her and it was the result of the accused leaving her pregnant.

"Further, P.W.2-Muzaffar Ali, while making his deposition on solemn affirmation has stated that "Accused Irshad is related to me as my real maternal uncle and accused Naushad is his son. About one and a half years ago, I lodged the (F.I.) Report of the occurrence. At that time the age of Shabana was about 16 years. Naushad used to visit my house prior to one and a half years, and sometimes he used to stay at night in my house. He might have stayed at night in my house several times. Ten days prior to lodging the (F.I.) Report, Shabana conveyed that Naushad had committed rape on her as a result of which she had become pregnant. I talked to my maternal uncle (Irshad) about this matter, he asked me to wait for some time and thereafter "Nikah" (contract-marriage) will be got arranged. But two or four days thereafter, Irshad stated that "Nikah" is not possible. You may accept ten to twenty thousand rupees and threatened if a Report of the case was made, he (Irshad) would kill him (Muzaffar Ali). Thereafter, whatever was conveyed by my daughter was got type written in a form of complaint and then the same was lodged at the Police Station. After lodging the (F.I.) Report, a baby/daughter was born to Shabana, which might be aged about 8 months now. Thereafter, a Panchayat was held in the village. Even in the Panchayat, Irshad refused to arrange "Nikah" of his son (accused Naushad) with my daughter Shabana."

5. After hearing the arguments advanced by the learned counsel on behalf of the parties, the trial court came to the conclusion that in the circumstances narrated by the witnesses of the prosecution and the evidence on record the charge levelled against accused-Naushad under Section 376 of the IPC stands proved. Vide order dated 05.10.2005 of the Session's Judge, the accused was convicted of the offence of rape under Section 376 of the IPC on the ground that the consent given by P.W.1 Shabana was not consent for sexual intercourse in the eyes of law. She had given consent on the ground that the accused had promised to marry her and thus this consent was obtained by misconception of fact and therefore the case is covered under section 376 of the IPC. The trial court held that as the facts of this case are of a very grave nature, the accused was awarded maximum sentence of life imprisonment and further stated that the victim and the accused are related to each other and the accused took undue advantage of the victim due to this relationship by keeping her under the misconception that he would marry her and committed rape on her as a result of which she became pregnant and later on gave birth to a baby daughter. In view of the circumstances, the trial court awarded sentence of life imprisonment for the accused and to pay a fine of [pic]10,000/-.

6. Against this judgment and order of the trial court the accused filed an appeal in the High Court urging various grounds in support of his prayer. On re-appreciation of the

evidence of record, the High Court has held that there is no material on record to show that the accused had committed forcible sexual intercourse and that the prosecutrix resisted it. The High Court stated that she has admitted the presence of her grandmother and younger sister in the room where the accused used to commit sexual intercourse but she never raised an alarm at that time or thereafter. The High Court further stated that it was also very surprising that she never objected to the accused sleeping in her room even though she claimed that he used to commit forcible sexual intercourse. The High Court has held that circumstances clearly show that she was a consenting party to the act of the accused and the allegation of forcible sexual intercourse as alleged cannot be accepted. Further, the High Court stated that even if it is accepted that she consented for sexual intercourse on account of misconception of fact that the accused had promised to marry her, it will not give rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. The High Court, citing the case of *Deelip Singh @ Dilip Singh v. State of Bihar*¹, has held that it could be a breach of promise to marry rather than false promise to marry and there is nothing on record to indicate that she was incapable of understanding the nature and implication of the act of the accused for which she consented to. The High Court thus allowed the appeal and set aside the judgment and order dated 05.10.2005 of the trial court convicting and sentencing the accused, on the ground that the prosecution failed to prove its case beyond reasonable doubt and held that the trial court has erroneously convicted the accused. The accused was acquitted of the charge under Section 376 of the IPC and was directed to be released from jail.

7. Being aggrieved by the impugned judgment and order of the High Court, the appellant-State of Uttar Pradesh has filed this appeal before this Court.

The learned senior counsel for the appellant-State, Mr. Ratnakar Dash has contended that the accused promised the prosecutrix - Shabana that he would marry her and then had sexual intercourse with her even though he knew from the inception that he had no intention of marrying her and that the High Court erred in holding that the victim was a consenting party and that even if the victim consented to sexual intercourse, it was not free consent but was given on the pretext of a false promise made by the accused to marry her. Thus, the accused committed rape on the victim. He further contended that in such type of case, the trial court has rightly observed that the evidence of the victim is comparatively more important and credible. He stated that the accused clearly practiced deception on the victim in order to indulge in sexual intercourse with her and the trial court rightly convicted the accused of rape and sentenced him to life imprisonment due to the gravity of the offence.

8. Mr. Pranab Kumar Mullick, learned counsel on behalf of the respondent contended that no time of committing rape has been mentioned in the FIR and hence, the entire prosecution story is doubtful and also as per the FIR, the victim narrated her story to her mother but it is silent about the manner in which her father came to know about the incident. It was further contended that the age of the victim was 19 years and at the time

of the occurrence, her age was not less than 16 years. It was further contended that the victim was of little intelligence but no such evidence is available on file. Also, admittedly, other family members used to sleep in the room and no hue and cry was made at the time of intercourse and hence, it was intercourse with consent and not rape. It was contended that the High Court rightly reversed the conviction of the trial court and acquitted the accused of the charge of rape.

9. We have heard the rival legal contentions and perused the evidence on record. The following issues arise for our consideration:

(i) Whether the High Court has rightly reversed the conviction and sentence of the accused for the offence of rape punishable under Section 376 of the IPC?

(ii) Whether the trial court was correct in convicting the accused for the offence of rape punishable under Section 376 of the IPC by holding that the victim did not give her free consent to the act of sexual intercourse but it was consent given under misconception of fact?

(iii) Whether the trial court was right in holding that the crime was of a very grave nature and was thus justified in sentencing the accused to the maximum punishment of life imprisonment as provided for under Section 376 of the IPC?

10. We will answer point nos. 1 and 2 together as they are related to each other. Section 376 of IPC prescribes the punishment for the offence of rape. Section 375 of the IPC defines the offence of rape, and enumerates six descriptions of the offence. The description “secondly” speaks of rape “without her consent”. Thus, sexual intercourse by a man with a woman without her consent will constitute the offence of rape. We have to examine as to whether in the present case, the accused is guilty of the act of sexual intercourse with the prosecutrix ‘against her consent’. The prosecutrix in this case has deposed on record that the accused promised marriage with her and had sexual intercourse with her on this pretext and when she got pregnant, his family refused to marry him with her on the ground that she is of ‘bad character’.

How is ‘consent’ defined? Section 90 of the IPC defines consent known to be given under ‘fear or misconception’ which reads as under:-

“90. Consent known to be given under fear or misconception – A consent is not such consent as it 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; xxxx” Thus, if consent is given by the prosecutrix under a misconception of fact, it is vitiated. In the present case, the accused had sexual intercourse with the prosecutrix by giving false assurance to

the prosecutrix that he would marry her. After she got pregnant, he refused to do so. From this, it is evident that he never intended to marry her and procured her consent only for the reason of having sexual relations with her, which act of the accused falls squarely under the definition of rape as he had sexual intercourse with her consent which was consent obtained under a misconception of fact as defined under Section 90 of the IPC. Thus, the alleged consent said to have obtained by the accused was not voluntary consent and this Court is of the view that the accused indulged in sexual intercourse with the prosecutrix by misconstruing to her his true intentions. It is apparent from the evidence that the accused only wanted to indulge in sexual intercourse with her and was under no intention of actually marrying the prosecutrix. He made a false promise to her and he never aimed to marry her. In the case of *Yedla Srinivas Rao vs. State of A.P*², with reference to similar facts, this Court in para 10 held as under:-

“10. It appears that the intention of the accused as per the testimony of PW1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before Panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfill the promise and persuaded the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be consent.” Further, in para 17 of the said judgment, this Court held that:-

“In the present case in view of the facts as mentioned above we are satisfied that the consent which had been obtained by the accused was not a voluntary one which was given by her under misconception of fact that the accused would marry her but this is not a consent in law. This is more evident from the testimony of PW1 as well as PW6 who was functioning as Panchayat where the accused admitted that he had committed sexual intercourse and promised to marry her but he absconded despite the promise made before the Panchayat. That shows that the accused had no intention to marry her right from the beginning and committed sexual intercourse totally under the misconception of fact by prosecutor that he would marry her.” Thus, this Court held that the accused in that case was guilty of the offence of rape as he had obtained the consent of the prosecutrix fraudulently, under a misconception of fact.”

11. The High Court has gravely erred in fact and in law by reversing the conviction of the

accused for the offence of rape and convicting him under Section 376 of the IPC. It is apparent from the evidence on record that the accused had obtained the consent of the prosecutrix for sexual intercourse under a misconception of fact i.e. that he would marry her and thus made her pregnant. He is thus guilty of rape as defined under Section 375 of the IPC and is liable to be punished for the offence under Section 376 of the IPC. The trial court was absolutely correct in appreciating the evidence on record and convicting and sentencing the accused for the offence of rape by holding that the accused had obtained the consent of the prosecutrix under a misconception of fact and this act of his amounts to an offence as the alleged consent is on the basis of misconception, and the accused raped the prosecutrix. He brazenly raped her for two years or more giving her the false assurance that he would marry her, and as a consequence she became pregnant. For the reasons stated supra, we have to uphold the judgment and order of the trial court in convicting and sentencing the accused for the offence of rape, by reversing the judgment and order of the High Court. We find the accused-respondent guilty of the offence of rape as defined under Section 375 of the IPC.

12. The answer to point no.3 is pertaining to the question of sentence awarded by the trial court to the accused. The trial court has justified in awarding of maximum sentence of life imprisonment to the accused under Section 376 of the IPC on the ground that the facts of this case are of a very grave nature. The accused being related to the prosecution used to often visit her house and took undue advantage of this relationship and kept the prosecutrix under the misconception that he would marry her and committed rape on her for more than two years thereby making her pregnant. In such circumstances, the trial court held that it would be justifiable to award the maximum sentence to the accused. We, therefore, hold that the trial court was correct in awarding the maximum sentence of life imprisonment to the accused as he has committed a breach of the trust that the prosecutrix had in him, especially due to the fact that they were related to each other. He thus invaded her person, by indulging in sexual intercourse with her, in order to appease his lust, all the time knowing that he would not marry her. He committed an act of brazen fraud leading her to believe that he would marry her.

13. A woman's body is not a man's plaything and he cannot take advantage of it in order to satisfy his lust and desires by fooling a woman into consenting to sexual intercourse simply because he wants to indulge in it. The accused in this case has committed the vile act of rape and deserves to be suitably punished for it.

14. In view of the foregoing reasons, this appeal is allowed. The judgment and order of the High Court is set aside and the conviction and sentencing of the accused by the trial court under Section 376 of the IPC is upheld. The accused-respondent is found guilty of the offence of rape as defined under Section 375 of the IPC and is sentenced to imprisonment for life under Section 376 of the IPC. The accused-respondent is directed to surrender before the trial court within four weeks.

Judgment referred

¹2005(1) SCC 0088

²2006) 11 SCC 0615