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KAINI RAJAN

v.

STATE OF KERALA

(Criminal Appeal No.1467 of 2013)

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SEPTEMBER 19, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

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Penal Code, 1860 – s.376 – Rape – Allegation that appellant raped PW2 – PW2 had previous acquaintance with appellant, he being her elder brother's friend – Conviction of appellant by Courts below – Propriety – Held: The alleged incident occurred early morning at 8.30 AM and the place of the alleged incident was on the side of a public road – If PW2 had made any semblance of resistance or made any hue and cry it would have attracted large number of people from the locality – Further the FIR was lodged 10 months after the alleged incident – All these factors cast some shadow of doubt on the version of PW2 – Further, strange behaviour of the parents of PW2 viz. PW3 and PW4 – They stated that they came to know about the relations between the appellant and PW2 when they found her pregnant – PW2 had told them that appellant had agreed to marry her – They knew the appellant and his family already, however, they did not approach the appellant or his family members for marrying PW2 – Instead they straightaway went to the police station to lodge the report, that too after the birth of the child – All these factors cast a doubt on the prosecution version – Version of a rape victim commands great respect and acceptability, but, if there are some circumstances which cast some doubt in the mind of the court about the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape – Conviction and sentence imposed on the appellant accordingly set aside.

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Penal Code, 1860 – s.375 – Rape – Consent – Meaning A
of.

According to the prosecution, in the morning when PW2 was proceeding to the Khadi Centre from her house, the accused-appellant, a friend of her brother, caught hold of her by hand and forcibly took her to a nearby compound and committed rape on her, without her consent. She tried to make a hue and cry, but was silenced by the accused by stating that he would marry her. Even after this incident, he had sexual relationship with her on more than one occasion. PW2, later, became pregnant and gave birth to a boy. Appellant not only did not kept his promise to marry her, but even disputed the paternity of the child. PW2 then lodged a complaint in Police Station.

PW2 deposed that she had previous acquaintance with the appellant, he being her brother's friend. As per her version, on few occasions there were sexual encounters between the parties, after the first alleged incident. She accepted that they were consensual and she was a willing party, though she did so on the promise of the appellant that he would marry her. In respect of these subsequent acts between the parties, the appellant was charged with the offence under Section 417 IPC. In regard to the first incident, the appellant was charged under Section 376 IPC, as the prosecution case was that it was forcible and without the consent of PW2.

The trial Court acquitted the appellant of the charge under Section 417 IPC, but convicted him under Section 376 IPC and sentenced to him undergo rigorous imprisonment for seven years. The High Court upheld the order of conviction and sentence, and therefore the instant appeal.

Allowing the appeal, the Court

A HELD:1. Section 375 IPC defines the expression
 “rape”. “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
 B 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.
 [Para 12] [203-F; 204-A-C]

C *State v. Mango Ram* (2000) 7 SCC 224: 2000 (2) Suppl.
 SCR 626 – relied on.

2.1. The consistent version of PW2, her mother
 (PW3), and her father (PW4) is that PW2 had previous
 acquaintance with the accused being her elder brother’s
 D friend for a period of more than two years before the date
 of incident. The place of the alleged incident and the time
 is very crucial, so for as this case is concerned. It was
 early morning at 8.30 AM and the place of the alleged
 incident was on the side of a public road. If she had made
 E any semblance of resistance or made any hue and cry it
 would have attracted large number of people from the
 locality. Further the first information report was lodged
 after a period of 10 months of the alleged incident. All
 these factors cast some shadow of doubt on the version
 F of PW2. [Para 18] [206-C-E]

2.2. Behaviour of the parents of PW2 viz. PW3 and
 PW4 also appears to be strange. On their evidence they
 stated that they came to know about the relations
 between the appellant and PW2 when they found her
 G pregnant. PW2 had told them that the appellant had
 agreed to marry her. They knew the appellant and his
 family already. However, there is not even a whisper that
 they approached the appellant or his family members for
 marrying PW2. They straightaway went to the police
 H station to lodge the report, that too after the birth of the

child. All these factors cast a doubt on the prosecution version. The version of victim, in rape commands great respect and acceptability, but, if there are some circumstances which cast some doubt in the mind of the court of the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape. [Para 19] [206-F-H; 207-A]

Deelip Singh alias Dilip Kumar v. State of Bihar (2005) 1 SCC 88; 2004 (5) Suppl. SCR 909; Ramdas and Others v. State of Maharashtra (2007) 2 SCC 170; Vijayan v. State of Kerala (2008) 14 SCC 763; K. P. Thimmappa Gowda v. State of Karnataka (2011) 14 SCC 475; 2011 (4) SCR 200 – referred to.

3. The trial Court as well as the High Court committed an error in holding that the accused-appellant is guilty of the offence punishable under Section 376 IPC. In such circumstances, the conviction and sentence imposed on the appellant is set aside. [Para 20] [207-A]

Case Law Reference:

2000 (2) Suppl. SCR 626	relied on	Para 12
2004 (5) Suppl. SCR 909	referred to	Para 14
(2007) 2 SCC 170	referred to	Para 15
(2008) 14 SCC 763	referred to	Para 16
2011 (4) SCR 200	referred to	Para 17

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1467 of 2013.

From the Judgment & Order dated 13.07.2009 of the High Court of Kerala at Ernakulam in Crl. Appeal No. 1139/2003.

E.M.S. Anam for the Appellant.

A K.K. Sudheesh (for Jogy Scaria) for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Leave granted.

B 2. This appeal has been filed by the accused who was convicted for an offence punishable under Section 376 IPC and sentenced to undergo Rigorous Imprisonment for seven years. Facts leading to this appeal are as follows:

C 3. PW2, the prosecutrix, was employed in a Khadi Centre, Kayoor and residing at Arakachal along with her parents, brothers and sisters. According to the prosecution, on 17.9.1997 at about 8.30 AM, when she was proceeding to the Khadi Centre from her house, the accused, a friend of her brother, caught hold of her by hand and forcibly took her to the nearby property of one Karunakaran and committed rape on her, without her consent. She tried to make a hue and cry, but was silenced by the accused by stating that he would marry her. Even after this incident, he had sexual relationship with her on more than one occasions.

E 4. PW2, later, became pregnant and gave birth to a boy on 24.6.1998 in the Government Hospital, Payyannur. Accused not only not kept his promise to marry her, but even disputed the paternity of the child. PW2 then lodged a complaint on 26.7.1998 before the Assistant Sub-Inspector of Police, Cheemeni Police Station and on the basis of that complaint, police registered Crime No. 64 of 1998. After investigation, the police filed a report charging offences under Sections 376 and 417 IPC against the accused. The case was tried by the Additional Sessions Judge, Kasaragod. From the side of the prosecution, PWs1 to 8 were examined and Exh. P1-P4 were marked. When questioned under Section 313 Cr.P.C., the accused denied all incriminating evidence.

H 5. PW2 deposed that she had previous acquaintance with the accused being his brother's friend. But, on the date of the

incident, even though she made a hue and cry, she was threatened and told not to disclose the incident to anybody and also made to believe that he would marry her. PW3, mother of PW2, as well as PW4, the father, deposed that they came to know of the incident only when PW2 became pregnant and only after the delivery of the child they approached the police station to lodge a complaint.

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6. The trial Court after appreciating the evidence took the view that subsequent contact of the parties cannot be taken as a ground to infer consent for the incident, which occurred in August 1997. The trial Court also noticed that the accused had spoiled the future of PW2 and disputed the paternity of the child and he cannot escape on the loophole of consent. The trial Court, however, found nothing to attract Section 417 IPC, but convicted the accused under Section 376 IPC and sentenced to him undergo rigorous imprisonment for seven years, together with a fine of Rs.25,000/- with default clause.

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7. The accused took up the matter in appeal before the High Court in Criminal Appeal No. 1139 of 2003. The High Court noticed that both in the chief-examination as well as in the cross-examination PW2 has stated that the initial sexual act was without her consent, and though she tried to resist, she was threatened that she would be killed and that the accused promised that he would marry her. PW2, according to the High Court, had no reason or motive to falsify the accused and there is no reason to disbelieve version of PW2 regarding the paternity of the child. The High Court upheld the order of conviction and sentence awarded by the trial Court and dismissed the criminal appeal, against which this appeal has been filed.

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8. We may indicate that from the reading of the judgments of the Trial Court as well as the High Court, it becomes clear that even as per the version of the prosecutrix, on few occasions there were sexual encounters between the parties, after the first alleged incident in 1997. She accepted that they were

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A consensual and she was a willing party, though she did so on the promise of the appellant that he would marry her. In respect of these subsequent acts between the parties, the appellant was charged with the offence under Section 417 IPC but exonerated by the trial Court itself. The conviction is related to
 B the first incident which is treated as rape, believing the prosecution version that it was forcible and without the consent of the prosecutrix. Entire case is to be examined on this limited aspect.

C 9. Shri E.M.S. Anam, learned counsel appearing for the appellant, submitted that it is evident from the FIR as well as the evidence of PW2 that grievance of PW2 was mainly against the breaking of the promise of marriage alleged to have been made by the accused and there is absolutely no independent evidence to show that the alleged sexual act, stated to have
 D been committed on 17.9.1997 was without her consent. Learned counsel also submitted that absence of injuries on PW2 and the accused, would rule out forcible intercourse without consent. If she had made any hue and cry, that would have been heard by the neighbours of the locality and none was
 E examined by the prosecution. Learned counsel submitted that the very fact that no one had seen the incident or heard any hue or cry for help, it has to be presumed that no such incident had occurred, as alleged by the prosecution. Learned counsel also submitted that there is a considerable delay in lodging the
 F FIR and also no DNA test was conducted even after the accused had disputed the paternity of the child. Learned counsel also submitted that the conviction is only based on the testimony of PW2 which cannot be relied on in the absence of any corroboration, especially in the facts and circumstances of
 G the present case.

H 10. Shri K. K. Sudheesh, learned counsel appearing for the State, on the other hand, contended that there is no reason to disturb the findings recorded by the trial Court, affirmed by the High Court. Learned counsel submitted that, in a case of this nature, it is difficult to get any direct evidence or eye-

witnesses, especially when PW2 has stated that on the date of the incident, even though she tried to resist, she was threatened that she would be killed and that the accused had promised to marry her. Learned counsel pointed out that the evidence of PW2 that the first sexual act was committed by the accused without her consent, can be accepted safely even without any corroboration.

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11. We have three crucial witnesses in this case. The first and foremost is the prosecutrix herself. We have gone through her evidence with great care. She has stated in her cross-examination that the accused used to come to her house to meet her elder brother, quite often. In the cross-examination also, she has deposed that the accused used to come to her house frequently since two to three years prior to the date of the incident and that she used to talk to the accused. PW3, mother of PW2, has also deposed in the cross-examination that the accused is her son's friend. PW4, father of PW2, has also deposed that the accused is the friend of his son. Evidence of PW2 to PW4 would, therefore, clearly indicate that the accused was having close acquaintance with the family of PW2 and he was not a stranger to her on the date of the incident.

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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.

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A 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
 B 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. [See *State v. Mango Ram* (2000) 7 SCC 224]

C 13. We are, in this case, concerned with a situation where the incident alleged to have occurred at 8.30 AM in day light and at a place near the compound of one Karunakaran, not within the four walls of a house or a building. Accused was not a stranger. The The prosecutrix had previous acquaintance with the accused or else in all probability she would have resisted
 D forcefully, attracting passersby or people from the neighbourhood. She has stated that she was threatened and made to believe that the accused would marry her. She later became pregnant and delivered a child, and the paternity of the child is disputed by the accused. FIR was lodged after a period
 E of 10 months from the date of incident.

14. This Court examined the scope of Section 375 IPC in a case where the facts have some resemblance with the one in hand. Reference may be made to the judgment of this Court
 F in *Deelip Singh alias Dilip Kumar v. State of Bihar* (2005) 1 SCC 88. In that case, this Court examined the meaning and content of the expression "without her consent" in Section 375 IPC as well as whether the consent given by woman believing the man's promise to marry her, is a consent which excludes the offence of rape. This Court endorsed the principle that a
 G misrepresentation as regards the intention of the person seeking consent, i.e. the accused, could give rise to the misconception of fact. While applying this principle to a case arising under Section 375 IPC, this Court held that the consent
 H given pursuant to a false representation that the accused

intends to marry, could be regarded as consent given under misconception of fact. But a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90 IPC. This Court further held that if, on facts, it is established that at the very inception of the making of promise the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of the second clause of Section 375 IPC. In the facts of that case, this Court held, that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. The Court held that she came to the decision to have a sexual affair only after being convinced that the accused would marry her and it is quite clear from her evidence, which is in tune with her earlier version given in the first information report. The Court noticed that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act.

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15. In *Ramdas and Others v. State of Maharashtra* (2007) 2 SCC 170, this Court held that the conviction in case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the Court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which cast a shadow of doubt over her veracity.

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16. *Vijayan v. State of Kerala* (2008) 14 SCC 763 was a case where the complaint was made by the prosecutrix after the alleged commission of rape on her by the accused. At the time of making the case, the prosecutrix was pregnant for about seven months. This Court did not place reliance on the sole testimony of the prosecutrix. The Court noticed that flaw that no DNA test was conducted to find out whether the child was born out of the said incident and the accused was responsible for the said child.

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A 17. *K. P. Thimmappa Gowda v. State of Karnataka* (2011)
 14 SCC 475, was a case where the accused had assured the
 prosecutrix that he would marry her and had sexual affair, which
 was repeated on several occasions as well. But he did not
 marry and she became pregnant. That was a case where there
 B was delay of eight months in filing the complaint. The accused
 was given the benefit of doubt holding that it would not be
 possible to conclude that the alleged sexual act was committed
 without the consent of the prosecutrix.

C 18. We have already referred to the evidence of PW2 to
 PW4 and that their consistent version is that PW2 had previous
 acquaintance with the accused being her elder brother's friend
 for a period of more than two years before the date of incident.
 The place of the alleged incident and the time is very crucial,
 so for as this case is concerned. It was early morning at 8.30
 D AM and the place of the alleged incident was on the side of a
 public road. If she had made any semblance of resistance or
 made any hue and cry it would have attracted large number of
 people from the locality. Further the first information report, as
 already indicated, was lodged after a period of 10 months of
 E the alleged incident. All these factors cast some shadow of
 doubt on the version of PW2.

19. Behaviour of the parents of the prosecutrix viz. PW3
 and PW4 also appears to be strange. On their evidence they
 F stated that they came to know about the relations between the
 appellant and the prosecutrix when they found her pregnant.
 Prosecutrix had told them that the appellant had agreed to marry
 her. They knew the appellant and his family already. However,
 there is not even a whisper that they approached the appellant
 G or his family members for marrying the prosecutrix. They
 straightaway went to the police station to lodge the report, that
 too after the birth of the child. All these factors cast a doubt on
 the prosecution version. The version of victim, in rape
 commands great respect and acceptability, but, if there are
 H some circumstances which cast some doubt in the mind of the

court of the veracity of the victim's evidence, then, it is not safe to rely on the uncorroborated version of the victim of rape. A

20. The trial Court as well as the High Court has committed an error in holding that the accused is guilty of the offence punishable under Section 376 IPC. In such circumstances, we are inclined to allow this appeal and set aside the conviction and sentence imposed on the appellant and order accordingly. B

B.B.B.

Appeal allowed.