

IN THE COURT OF ANKUR JAIN
ADDITIONAL SESSIONS JUDGE: SFTC (WEST)-01: DELHI

Sessions Case no. :111/16

State

Vs.

Pawandeep Sharma
S/o Late Sh. Pradeep Sharma
R/o H. No. Q-175, Vikas Vihar, Uttam Nagar
New Delhi 110059

FIR No. 1391/2015
PS. : Uttam Nagar

Date of receipt of File After Committal	: 05.08.2018
Date of reserving Judgement	: 23.06.2020
Date of Judgment	: 30.06.2020
Final Decision	: Acquittal

JUDGMENT

1. Rape is a crime against basic human rights and violation of the victim's most cherished fundamental right namely right to life contained in Article 21 of the Indian Constitution. (**Bodhisattwa Gautam v Subhra Chakraborty (Ms) (1996) 1 SCC 490**)
2. This court is called upon to decide whether in the facts of the case victim had given consent for the sexual intercourse between her and the accused. Criminal law was set into motion on the complaint made by 'Ms. K' stating that accused was her colleague initially while working with M/s 'A T' Pvt Ltd and thereafter again when they joined M/s 'I' Pvt Ltd at Noida. It is also stated they were living in the same locality. Accused created good impression



upon her and they became friends since 2013. On 30.05.2015 when her family members had gone to Haridwar accused came to her house and committed rape. The complainant could not report the matter as she became afraid.

3. It is further stated in the complaint that the accused asked the complainant to accompany him to Jaipur and forever after he would never trouble the complainant, believing him, the complainant and accused went to Jaipur, in spite of that he used to torture the complainant and also took her to Country Inn Hotel at Sohna Road and once in a hotel in Noida and raped her.
4. There are also allegations in the complaint that he took the debit card of the complainant and took a sum of Rs. 30,000/-. On the basis of above said complaint FIR U/s 376/506 IPC was registered. The complainant was got medically examined, however, since the last sexual contact was reported to be on 26.09.2015, no samples were lifted. The statement of the victim U/s 164 Cr.P.C was recorded. The accused was granted anticipatory bail by the Hon'ble High Court of Delhi. After completion of investigation charge sheet was filed in the Court. The file was committed to Sessions Court on on 02.08.2016 for 05.08.2016. Charge U/s 376/506 IPC was framed on 02.11.2016.
5. In order to prove its case prosecution cited 15 witnesses. The accused admitted his and the MLC of prosecutrix, statement of the victim recorded U/s 164 Cr.P.C and the check in and check out register of Hotel Country Inn resultantly Dr. Sonia, Dr. Garima, Dr. Shashank, Dr. Vimal, Ms. Mahima Rai Ld. MM and Manager of Country Inn were not examined. Prosecution examined only 8 witnesses.

6. PW1 is the complainant / victim who has supported the case of prosecution and the complaint and statement U/s 164 Cr.P.C made by her. The complaint was exhibited as Ex. PW1/A. The MLC was exhibited as Ex. PW1/B and the statement U/s 164 Cr.P.C was exhibited as Ex. PW1/C.
7. PW2 'Ms. Kanchan' is the sister of Ms. 'K' who stated that friend of 'K' had called her on 22.10.2015 where she met 'N' (friend of complainant) and her sister. Thereafter, 'N' informed her about the incident which happened with her sister.
8. PW3 is the Duty officer who proved the FIR as Ex. PW3/A and the endorsement made on the original Tehrir as Ex.PW3/B. The certificate U/s 65 B of the Indian Evidence Act was exhibited as Ex. PW3/C.
9. PW4 Mr. N. is the friend of prosecutrix who deposed that on 22.10.2015 Prosecutrix met him and she was receiving certain calls. The prosecutrix informed him that accused is mentally and physically harassing her and after blackmailing her had established physical relations with her. The sister of prosecutrix came to meet them and the entire facts were narrated to her.
10. PW 5 Mr. Dipesh Kumar brought the record pertaining to check in and check out of the Hotel Premier Resort Jaipur which established that Pawandeep Sharma along with one female had checked in on 08.08.2015 at about 6:15 PM and had checked out on 10.08.2015. The relevant entries were exhibited as Ex. PW5/A and Ex.PW5/B.
11. PW6 and PW 7 are ASI Nimmo and Ct. Mahender who went with the prosecutrix and accused to DDU Hospital for their medical examination.



12. PW8 ASI Sushma is the IO of the case who deposed about the investigation carried out by her.
13. On 11.12.2018 statement of accused U/s 313 Cr.PC was recorded and he chose not to lead any defence evidence. DE was closed and case was listed for final arguments. Vide order dated 29.07.2019 charge was amended and framed under 376(2)(n)/506 IPC.
14. Ld. Counsel for accused has argued that it is a classic case where the initial love affair has turned sour and the complainant has used the law as a weapon to harass the accused. He has further argued that there are contradictions in the testimony of the victim viz a viz. the asal Tehrir, statement U/s 164 Cr.P.C and the complaint made by her to the ACP dated 24.10.2015. He has further argued that none of the incident narrated in the complaint, statement made U/s 164 Cr.P.C shows that there was any kind of coercion or force. He submits that no hue and cry was made by the complainant when the first act was committed, or at any subsequent time which clearly establish that it was a case where complainant was a consenting party and thus accused is liable to be acquitted. In support of his arguments he has relied upon the following judgments : ***Geeta Sharma Vs. State of NCT of Delhi 2017(7) A.D. Delhi 485; Razak Mohd. vs State of Himachal Pradesh Crl. Appeal no. 1395/2015 decided on 23.08.2018; Bhimapa Chandappa Hosamani Vs. State of Karnataka (2006) 11 SCC 323; Anwar Khan Iqbal Khan Vs. State of Maharashtra 2010 SCC online Bombay 652.***
15. On the other hand, Ld Addl. PP for State has argued that the judgments relied on by the Ld. Counsel for accused are not applicable on the facts of the case. It is submitted that it is a



settled law that conviction can be based on the sole testimony of the complainant and in the present case the accused has not been able to point out as to how the testimony of the victim is unreliable. He has further relied upon section 114 (A) of the Indian Evidence Act to argue that presumption is required to be raised as victim has clearly stated in her cross examination that she had never given any consent. Ld. Counsel for complainant has supported the submission made by the Addl. PP for the State and has also argued that inconsistent stand had been taken by the accused at various stages of investigation and trial. He submits that while anticipatory bail application was moved by the accused he took a different stand and in the trial and during the course of final arguments a complete summer salt is being made. It is thus argued that accused is liable to be convicted for the offence charged with. In rebuttal Ld. Counsel for accused has submitted that the accused has not taken any contradictory stand. Moreover, it is the duty of the prosecution to prove the case beyond reasonable doubt.

16. I have heard Ld. Counsel for accused and Ld. Addl. PP for state and Ld. Counsel for victim and perused the record.

17. Rape is defined Under Section 375. ***A man is said to commit "rape" if he –***

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) Inserts, to any extent, any object or part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

First.—Against her will.

Secondly.—Without her consent.

Thirdly.—With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.—With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.—With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome Substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.—With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.'

18. On examination of the above said definition it is clear that rape is said to be committed if it is against the will or without the consent of the women. Explanation 2 attached to this section defines consent to mean unequivocal voluntary agreement, either by words, gesture or any form of verbal or non verbal communication whereby the woman communicates her wiliness to participate in the specific sexual act.

19. Ld. Addl. PP for State has argued that in the present case Sec 114 A of the Indian Evidence Act, would apply and presumption needs to be drawn against the accused, for benefit of appreciating the arguments Sec 114 A of the Indian Evidence Act is reproduced as under :-

114A. Presumption as to absence of consent in certain prosecutions for rape.—In a prosecution for rape under clause (a), clause (b), clause (c), clause (d) , clause (e) , clause (g), clause (h), clause (i) , clause (j) , clause (k) , clause (l) , clause (m) or clause (n) of sub-section (2) of section 376 of the Indian Penal Code, (45 of 1860), where sexual



intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

Explanation – In this section, ‘sexual intercourse’ shall mean any of the acts mentioned in clauses (a) to (d) of Section 375 of the Indian Penal Code (45 of 1860).

20. Section 114 A clearly spells that in specific case falling under section 376 (2) Clause (a) to (n) if sexual intercourse is proved and the question is whether the woman consented or not, and the woman deposes in the Court that she did not give consent, then her statement shall be presumed to be true. In so far as clauses (a) to (m) are concerned they are not applicable to the facts of the case. It is only under clause (n) the facts can be said to be covered. No doubt that Section 114A of the Indian Evidence Act envisages raising of presumption but the same is rebuttable. In a sense the onus would shift on the accused to show that actually there was consent. Section 114 A creates presumption of absence of consent where the prosecutrix so alleges, thereby shifting the onus to prove presence of consent on the accused. Reference can be made to **Shiva @ Chandrika v State 2019 (262) DLT 221**. Therefore, the onus in the present case would shift on the accused to prove consent on the part of prosecutrix and that his case is covered under the Explanation 2 appended to Sec 375 IPC. It depends on facts and circumstances of each case whether the sexual act was consensual or otherwise. Consent as such would be determined from facts of each case, before I examine the facts of the case, it is important to bear in mind the legal position.



21. In **Aman Kumar Vs.State of Haryana (2004) 4 SCC 379** the meaning of “rape” was explained by the Hon’ble Supreme Court of India and it held as under :-

“6. The offence of rape occurs in Chapter XVI IPC. It is an offence affecting the human body. In that chapter, there is a separate heading for “sexual offences”, which encompass Sections 375, 376, 376-A, 376-B, 376-C and 376-D. “Rape” is defined in Section 375. Sections 375 and 376 have been substantially changed by the Criminal Law (Amendment) Act, 1983, and several new sections were introduced by the new Act i.e. Sections 376-A, 376-B, 376-C and 376-D. The fast sweeping changes introduced reflect the legislative intent to curb with an iron hand, the offence of rape which affects the dignity of a woman. The offence of rape in its simplest term is “the ravishment of a woman, without her consent, by force, fear or fraud”, or as “the carnal knowledge of a woman by force against her will”. “Rape or raptus” is when a man hath carnal knowledge of a woman by force and against her will (Co Litt 123 b); or, as expressed more fully, “rape is the carnal knowledge of any woman, above the age of particular years, against her will; or of a woman child, under that age, with or against her will”. (Hale PC 628) The essential words in an indictment for rape are rapuit and carnaliter cognovit; but carnaliter cognovit, nor any other circumlocution without the word rapuit, are not sufficient in a legal sense to express rape. [1 Hen. 6, 1a, 9 Edw. 4, 26 a (Hale PC 628)] In the crime of rape, “carnal knowledge” means the penetration

to any the slightest degree of the organ alleged to have been carnally known by the male organ of generation. (Stephen's Criminal Law, 9th Edn., p. 262) In Encyclopaedia of Crime and Justice (Vol. 4, p. 1356), it is stated "... even slight penetration is sufficient and emission is unnecessary". In Halsbury's Statutes of England and Wales (4th Edn.), Vol. 12, it is stated that even the slightest degree of penetration is sufficient to prove sexual intercourse. It is violation, with violence, of the private person of a woman, an outrage by all means. By the very nature of the offence it is an obnoxious act of the highest order."

22. In **Deepak Gulati Vs. State of Haryana, AIR 2013 SC 675**, the Hon'ble Supreme Court of India had laid down the meaning of consent as appearing in Section 375 IPC.

"20. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It

causes psychological and physical harm to the victim, leaving upon her indelible marks.

21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused 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, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives”.

23. In Deepak Gulati (**Supra**) the Hon'ble Supreme Court explained the meaning of consent which could be express or implied.



24. In **Geeta Sharma (Supra)** the Hon'ble Delhi High Court held:-

“10 This Court had observed on number of occasions that the number of cases where both persons, out of their own will and choose to develop consensual physical relationship, when the relationship breaks due to some reasons, the women use the law as a weapon for vengeance and personal vendetta. They tend to convert such consensual act as an incident of rape may be out of anger and frustration thereby defeating the very purpose of the provision. This requires a clear demarcation between the rape and consensual sex especially in the case where complaint is that consent was given on promise to marry.”

24 In **Geeta Sharma (Supra)**, the Court clearly drew a distinction between consensual sex and rape and how, at time, former is used as a weapon.

25. In **Anwar Khan (Supra)**, it was observed by the Bombay High Court that :-

“23. It is probable that the prosecutrix was unaware of need of self restraint of chastity, and therefore, she had succumbed to the sexual passion induced due to the promises to marry. In such eventuality as well, she was supposed to know that the absence of actual matrimonial ties what was being done was an impropriety and

immorality from the point of view of the society. The prosecutrix is of age of maturity and it cannot be believed that she does not have knowledge of the consequences of sex particularly after one abortion of pregnancy as she claims which had followed first two acts of rape on her, of which accused caused abortion, by himself providing tablets.

26 In this case also the Court refused to believe the prosecutrix on the ground that she was major and had the knowledge of the acts being done by her.

27 In the light of the judgment it is to be seen whether accused has been able to discharge the onus that in fact prosecutrix had given her consent.

28 PW1 is a lady of mature age she was about 27 years of age and is a qualified MBA. She completely knew the consequence of acts, at the time of incident. In her statement before this Court she has categorically stated that accused was having friendly relations with her since 2013 as they used to share the same cab for the purpose of commuting to the office. The first act which the prosecutrix has alleged is said to be on 31.05.2015 when while her family members had gone to Haridwar the accused made a call and came to her residence. In her testimony she has

described the incident wherein she did not allow the accused to enter the house, however somehow due to the persistence of the accused he was allowed to enter. She further deposed that accused had sex with her against her wishes and after establishing physical relations accused left the house.

29 In Asal tehrir which is Ex. PW1/A she has mentioned the incident to have been occurred on 30.05.2015, whereas in the statement under section 164 Cr.P.C. she has said that incident is of 31.05.2020 even if the date is ignored, on record there is a complaint made by the victim/ prosecutrix to the ACP concerned wherein she has given a different version in respect of the incident. The IO had placed the same along with the chargsheet but prosecution did not chose to rely upon the same. According to the said complaint, on 30.05.2015 accused came to her house but did not do anything except hugging and kissing her and left the house. He again came back on 31.05.2015 and apologised for the incident dated 30.05.2015, thereafter she allowed him to enter the house thinking that nothing bad would happen, but instead accused raped her. These facts do not find mention in the asal therir Ex Pw 1/A or in the statement under section 164 Cr.P.C. There is apparent discrepancy in the version of the prosecutrix given in the complaint which is addressed to the ACP and the

statement before this Court making the testimony of the prosecutrix unbelievable. Moreover, the prosecutrix further goes on to say that accused had committed rape again in month of August when he had taken her to a trip to Jaipur, thereafter again in the month of September 2015 when they had gone to a hotel at Sohna Road and then again in the same month when they had gone to NOIDA in a hotel which was booked through OYO rooms. If the statement of the prosecutrix is to be believed, then each time she has stated to have not given consent. It is not clear as to why every time she accompanied the accused or responded to his calls to go to various places. On 12.11.2015 PW 8 , IO of the case had gone to Country Inn Sohna Road and gave notice under section 91 Cr.P.C. to the manager, who produced the relevant record and the same were seized by the IO of the case vide Seizure Memo Ex PW 8/D. the documents with respect to the identity of the guest were also recovered. This document has not been seperatley marked or exhibited but is a print out of an email sent by Country Inn to its another Email ID, the perusal of this document shows that complainant on 12.09.2015 at around 2.45 pm had sent an image file to Country Inn reservation Desk, if it is compared with the invoice Ex P 1 the Check in time is 2.54, it establishes that only after the email was received by Country Inn



they allowed Check In. The complainant from her own Email Id had sent the image file which was probable her ID proof and then only they were allowed to Check Inn, If the complainant was not a consenting party then why would she send an Email from her own ID to reservation desk of Country Inn. It could be argued that accused was having access to the password of the complainant, but then the complainant has not stated so in her complainant or in her evidence. The IO had recovered the check in and check out register along with the ID cards of the accused and prosecutrix. Why, on earth would the prosecutrix provide the accused with her ID card when she was not a consenting party. There is no complaint that accused had forcefully taken her ID card and the same was retained by him. The prosecutrix had not explained as to what kind of threat was given by accused each time. The first act is stated to have been committed on 31.5.2015 and last act in September, 2015. This means that accused continued to rape her at regular intervals over a period of four months, neither in her complaint, in her statement U/s 164 Cr.PC or her statement made before this Court she had stated that accused used to extend threats each time the act was done and it was for this reason she could not lodge the complaint. There was no hurdle for her to lodge the complaint on each and every



occasion. In these circumstances true facts have not been deposed by the prosecutrix.

30 In similar circumstances the Bombay High Court in Anwar Iqbal Khan has noted that if the prosecutrix did not desire the company of the accused or to keep sexual relations with him she would not have repeatedly visited the hotel rooms with the accused and the forcible acts would not have gone unnoticed.

31 The version of the prosecutrix that on all occasions all the acts were forcible sexual intercourse does not inspire confidence. The accused has discharged his burden. Ld counsel for the complainant had argued that accused had taken different stand at various stages, the argument is noted to be rejected as it has no relevance. In Criminal Trial the prosecution is duty bound to prove the case beyond reasonable doubt. The averments in the bail application cannot be construed to be admission on the part of the accused which would tantamount to his stand in the Criminal Trial. In the facts and circumstances of the case, it is established that victim was a consenting party and the accused is entitled to be acquitted and is acquitted of all the charges.



32 Considering the circumstances prevailing in the country the bail bond of the accused which were submitted by him are extended for another period of 6 months.

File be consigned to record room after due compliance.

Announced through CISCO WEB EX on 30.06.2020


(Ankur Jain)
Addl. Sessions Judge (SFTC-01) West
Delhi.30.06.2020