

Uday Vs. State

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SooperKanoon Citation : sooperkanoon.com/380829

Court : Karnataka

Decided On : Apr-20-1995

Reported in : ILR1996KAR312

Judge : Padmaraj, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 90, 375 and 376

Appeal No. : Crl. Appeal No. 428 of 1992

Appellant : Uday

Respondent : State

Advocate for Def. : H. Hanumantharayappa, HCGP

Advocate for Pet/Ap. : V.P. Kulkarni, Adv.

Disposition : Appeal dismissed

Judgement :

Padmaraj, J.

1. The sole accused in S.C.No. 16/90 on the file of the learned Sessions Judge, Karwar preferred this Appeal challenging the legality and correctness of the conviction of the appellant under Section 376 IPC and sentenced to undergo rigorous imprisonment for a period of seven years and to pay a fine of Rs. 20,000/-

, out of which Rs. 10,000/-is awarded as compensation to PW-1 and in default of payment of fine to undergo simple imprisonment for a period of six months.

2. The appellant was tried for the charge under Section 376 IPC, on the allegation that on a certain day in the first week of September 1988 at about 12-30 p.m. at Majali village in Sy.No. 1090-A/3 in the newly constructed house, the appellant woke up the complainant Kum. Vasanthi, daughter of Rangaswami Goundar (PW-1) with the intention of having sexual intercourse with her and compelled her to accompany him and on her refusal, he forcibly took her outside and had sexual intercourse with her and promising to marry her within six months, he had intercourse with her many a times and later refused to marry her and thereby committed the offence of rape under Section 376 IPC.

3. To substantiate the above said charge framed against the accused, the prosecution has examined at the trial PWs-1 to 15 and marked Exhibits P1 to P13.

4. The case of the prosecution as disclosed from the oral and documentary evidence can be briefly stated as follows:

PW-1 Vasanthi had been residing with her father, mother, two sisters and four brothers in a house situate at Majali Gaongeri. PW-2 is her mother and PW-3 is her elder brother. The accused, who had been residing near their house, became a friend of PW-3. He used to visit the house of the parents of PW-1, daily and used to talk to them. PW-1 was also used to talk with the accused in the normal way when he used to visit their house and on a certain day, the accused told PW-1 that he wants to marry her. But PW-1 told the accused that she belongs to a different caste and he belongs to a different caste and that their marriage is not possible. Later, love was developed between them. PW-1 was not talking to the accused before her parents in their house but the accused was coming to their house. They were both loving each other. While this was so, in the last week of August 1988 or in the first week of September 1988, when PW-1 was studying in the room of their house, the accused came near the window and called PW-1 to come out of the house in order to have a talk with her. Since they were loving each other, PW-1 came outside the house near the accused. The accused took PW-1 to his house, which was then still under construction to have a talk with her. He first talked to her

about their love and then he kissed and embraced her. He promised PW-1 that he would marry her. Then again, the accused kissed PW-1 and had a sexual intercourse with her. She was reluctant to have sexual intercourse with the accused, but since the accused had held her tight and promised to marry her, PW-1 allowed the accused to have a sexual intercourse with her and she did not tell about this fact to her parents. Thereafter, the accused and PW-1 used to meet frequently and the accused might have had sexual intercourse with her for about 15 to 20 times stating to her that he would marry her. About 10 days after their first sexual intercourse, one Vanamala Bandekar (PW-4) saw PW-1 in the company of the accused on the Highway at about 5.30 p.m. in the evening and on the next day, PW-4 asked PW-1 about her affairs with the accused and PW-1 told her that they are in love with each other and that the accused had promised to marry her and PW-1 requested her not to disclose this fact to anybody as the accused had told her that he would commit suicide if this fact is made public and she further told PW-4 that she has no regrets and that she would love the accused. One Dayananda Banavali had also seen PW-2 in the company of the accused, in the house under construction of the accused. The others who had also seen them together were Seetha Mahale and Ramesh Kadam. PW-1 used to ask the accused about their marriage and the accused used to tell her that he would perform a registered marriage with her after completion of the construction of his house. On account of the sexual intercourse that she used to have with the accused, PW-1 became pregnant. She told the accused about her becoming pregnant on account of the sexual intercourse he used to have with her. Then the accused told her not to worry herself about her becoming pregnant and that he would marry her after some time. During the six months of her pregnancy her mother suspected her and asked PW-1. Then PW-1 told her mother PW-2 about their affair and she told PW-2 that the accused would marry her. PW-1 told the accused about the enquiries made by her mother. Then the accused told PW-1 that he would take her to some other place and there, he would marry her. Her brother PW-3 - Jagadish went and asked the accused whether he would marry his sister and the accused told PW-3 Jagadish that he would marry her and not to disclose this fact to his parents i.e., the parents of the accused. When PW-1 was in the eighth month of her pregnancy, the accused told PW-1 that she should be

ready to go along with him and PW-1 prepared herself for the same. The accused told her that they would be leaving early in the morning and had asked PW-1 to be ready on the previous evening. Accordingly, PW-1 was ready, but the accused did not come. The cousin of the accused came and informed that the accused had gone to Sangli. After about 8 days of this, when the accused returned from Sangli, her brother Jagadish PW-3 went and asked the accused whether he is not going to marry his sister PW-1. The accused told PW-3 to keep his sister PW-1 at some place and that he would bear the expenses of her maintenance and that he would marry PW-1 after her delivery and after constructing his house. But PW-1 and her people were not prepared for that proposal of the accused. Thereupon, the accused became angry and went home on their refusal to agree for such proposal.

Next day her brother PW-3 went to the house of the accused, but the accused did not come out of his house to meet PW-3. Having waited for some time outside the house of the accused, PW-3 returned to the house. Then, PW-3 Jagadish informed to one Ullas Rane about this and he discussed this matter with the maternal aunt of the accused. But the maternal aunt and the mother of the accused started quarrelling with the mother and brother of PW-1. Then the said Ullas Rane quietly returned home. Thereafter, PW-1 complained the matter to the Police. Subsequently, on 29.5.1989 PW-1 delivered a baby. The Doctor had taken her blood sample as well as the blood sample of her baby for investigation. PW-1 gave her complaint orally to the Police regarding this, which was recorded to writing as per Ex.P1. PW-10 was then working as PSI in the Chittakula Police Station and he had recorded the oral complaint of PW-1 to writing at the Police Station on 12.5.1989 which is as per Ex.P1. On the basis of that complaint, the PSI PW-10 registered the crime and sent the FIR to the Court as per Ex.P3. On 13.5.1989, PW-10 visited the spot where he secured the panchas and drew up a spot panchanama as per Ex.P4, in their presence. Then, he recorded the statements of PWs-2, 3, 4, 5, 8 and others. Later on, the PSI PW-10 secured the accused to the Police Station and sent him to the Medical Officer for medical examination along with PW-1. Accordingly, the accused was medically examined by the Doctor PW-7 at 2-10 p.m. on 13.5.1989 and opined that the accused is potent and capable of having sexual intercourse and accordingly he has issued Certificate which is as per Ex.P22. The blood group of the accused was 'A'

positive. After the accused was medically examined by the Doctor, the PSI PW-10 arrested the accused and produced him before the JMFC, Thereafter, the PSI PW-10 made over the further investigation of this case to the CPI - PW-12. On 13.5.1989 the incharge CPI - PW-1 2 had received the express FIR in this case and on the same day evening he visited the Chittakula Police Station and took up the further investigation of this case from the PSI - PW-10. Then, PW-12 visited the scene of incident and recorded the statements of PW-6, PW-11 and CW-14. He collected the School Certificate in respect of PW-1 and on the same day, the accused was produced before the Court. Thereafter the incharge CPI - PW-12 made over the further investigation of this case to the regular CPI of Karwar - PW-13 on 3.6.1989. After the regular CPI - PW-13 took over the further investigation of this case, he examined CWs-16, 18 and 21 and on 21.6.1989, he again visited the village to find out any other witnesses. On 25.6.1989 he received sketch map of the scene of the incident from the PWD Engineer as per Ex.P5. On the same day, he recorded the further statements of PWs-1 to 3 and CWs-5 and 6. The complainant PW-1 produced two medical chits relating to post confinement period before the CPI PW-13 which are as per Ex.P.6 and 7. Subsequently, on 11.8.1989, PW-13 collected the Medical Report in respect of the accused which is as per Ex.P2. He requested the Tahsildar to issue certificates in respect of the houses of the accused and PW-1 and also the Certificate of the Registration of Birth of the child of PW-1. On 17.8.1989 the CPI PW-13 obtained the Medical Certificate in respect of PW-1 and on 13,9.1989, he received the documents from the office of the Tahsildar as per Ex.P9, the Property Register extract in respect of the house of the accused as per Ex.P10 and the Birth Register extract of the child of PW-1 as per Ex.P11. On 14.9.1989, the CPI PW-13 made an application to the JMFC to send the accused, PW-1 and her child for medical examination to the KMC Hospital at Hubli and obtained orders from the JMFC and they were accordingly sent to the KMC Hospital at Hubli. On 9.10.1989 PW-13 recorded the further statement of PW-3. On 24.10.1989 the accused, PW-1 and the child returned from KMC after they were examined. On 31.10.1989, PW-13 received the Certificate from the KMC Hospital, Hubli which is as per Ex.P13. On 30.1.1990, the CPI PW-13 filed the chargesheet.

5. PW-14 is the Lady Medical Officer who examined the complainant - PW-1 on 13.5.1989 as per the requisition received from the CPI, Karwar. She has opined the probable age of PW-1 to be 18 to 20 years as per the physical and dental examination. She did not however find any evidence of violence over the body of PW-1 on the date of her examination, on 13.5.1989 at 3-30 p.m. The probable duration of pregnancy at the time of the examination of PW-1 was between 36 to 38 weeks. The blood group of Vasanthi PW-1 was 'B' positive and Ex.P8 is the Certificate issued by the Doctor - PW-14 in respect of PW-1.

6. PW-15 is the Forensic Professor who examined the blood samples of the accused, PW-1 and her child. The blood examination of these persons revealed that the blood of the accused is 'A' positive, the blood of PW-1 is 'B' positive and that of the child is 'A' positive. PW-15 gave his opinion that the accused cannot be excluded from the possibility of being the father of the child born to Vasanthi-PW1. Ex.P13 is the Certificate issued by PW-15.

7. When the accused was examined with reference to the incriminating piece of evidence, he denied his complicity in the commission of the offence. The accused had, however, submitted his written say in the matter before the Trial Court, which reads thus:

Written say of the accused admitted under Section 313 Cr.P.C -

I, Uday Shivanand Kolvekar of Gaongeri Majali, being the accused in the above said case do hereby humbly state as follows:

'I have committed no offence either of rape or any other offence against PW-1 Vasanthi. The said complainant has tried desperately to rape me in one way or the other since she got pregnancy by illicit affair and wants to foist the blame on me. During her High School days and the College days she used to have flirtations with so many students whom I know only by face but not by names. But one such boy was Dhananjay Datta Naik and this boy's father died somewhere in 1988 and or so at Belgaum. Thereafter Dhananjay himself went to Belgaum and he is said to be employed there. Having found that Dhananjay does not return, she must have tried to implicate me in this affair.

I was neighbour of the complainant no doubt and was acquainted only by name and face, but closer contact as such with any of them was not there at all. I belong to Daivajna Brahmin community and marriage with PW-1 was nearly impossible in our community. Still, PW-1 and her people including her mother and brother have concocted this charge against me I have produced the letter written in Marathi by PW-1 herself to Dhananjay and there is great similarity in letters both in Ex.D-1 and the sample writing taken in Court. I humbly pray that I may be acquitted of this false charge brought as against me since I am innocent in this affair.'

8. The learned Sessions Judge, for the reasons assigned in his judgment, found that the prosecution has established that the sexual intercourse which the accused had with PW-1 under false promise of marriage is held as being without her consent coming within the purview of the second description of Section 375 IPC and hence, the learned Sessions Judge answered the Point No. 1 in the affirmative and consequently, he convicted the accused for the offence charged and sentenced him as aforementioned. Hence this Appeal.

9. The learned Counsel for the appellant took me through the relevant evidence of the prosecution witnesses examined in the case and made various submissions. According to the learned Counsel for the appellant, the learned Sessions Judge committed a grave error in convicting the accused for the offence under Section 376 IPC when the evidence of PW-1 herself would show that she was in love with the accused and permitted the accused to have sexual intercourse with her though on the promise of marrying her. In support of his contention, the learned Counsel placed reliance upon the following two Decisions of the Calcutta High Court:

a) In the Decision in JAYANTI RANI PANDA v. STATE OF WEST BENGAL AND ANR, 1984 Cri.LJ. 1525. wherein it is held as under:

'The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself, in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and

not an act induced by misconception of fact. Section 90, IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her (1916) 18 Cri. LJ 18 (Lah) and (1933)34 Cri.LJ 696 (Rang) (FB) and Edington v. Fitzmaurice, (1885) 29 Ch.D.459, Ret.'

b) In the Decision in HARI MAJHI v. THE STATE, 1990 (1) Cri.LJ. 650, wherein it is held as under:

'The accused had frequent sexual intercourse with the girl for more than a year before she conceived. Even if it is assumed that she agreed to sexual intercourse with the accused on account of promise of the marriage, the charge under Section 417 could not be substantiated in the absence of any evidence to show that the said representation by the accused was false to the knowledge of the accused at the time it was made.

Where the charge of heating, as in this case, rests upon a representation, which is false and which relates not to an existing fact but to a certain future event, it must be shown by the prosecution that the representation is false to the knowledge of the accused when it was made, it will be of no consequence to show that in fact the representation has ultimately turned out to be untrue.'

10. Per contra, it was contended by the learned Government Pleader for the State that the alleged consent of PW-1 is not a consent in the eye of law as the same has been obtained by playing fraud on PW-1 and hence, the learned Sessions Judge has rightly convicted the accused for the offence under Section 376 IPC. The learned Government Pleader in support of his contention has placed reliance on the following Decision:

11. In SALEHA KHATOON v. STATE OF BIHAR AND ANR., 1989 (1) CrI.LJ. 202. wherein it is held as under:-

'Much emphasis was argued on behalf of opposite party No. 2 that in this case none of the ingredients aforesaid, prima facie, establish to show that an offence of rape was committed. The first point which attracts my attention is the second

ingredient 'without her consent'. Consent always means free will or voluntary act. In this case consent was obtained on the basis of some fraud and allurements or practising deception upon the lady on the pretext that ultimately she will be married and under that pretext she allowed opposite party No. 2 to have sexual intercourse with her. Therefore, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that it was 'with consent'. Had the lady known that ultimately she would be deserted, the facts and circumstances stated above and the materials placed would go to show that she would have refrained from giving such consent. Then a question would arise what was the purpose for which she gave consent. It was a fraud that was practised on her or she was deceived by giving false assurance. Such type of consent must be termed to be consent obtained without her consent. Consent obtained by deceitful means is no consent and comes within the ambit of ingredients of the definition of rape.'

12. In view of the above submissions made on both sides, the point that will arise for consideration in this Appeal is whether the prosecution has proved the charge against the accused beyond all reasonable doubt.

13. The prosecution in this case, has mainly relied on the evidence of the prosecutrix - PW-1 and for corroboration the evidence of PW-2 and PW-3, the mother and brother of the prosecutrix as well as the evidence of the other independent witnesses like, PWs-4, 5, 6, 8 and 11 and also the medical evidence adduced through the Doctors PW-7, PW-14 and PW-15 for establishing the charge against the accused. I have already set out the details of the case and the evidence adduced by the prosecution through PW-1 and other witnesses while narrating the prosecution case and hence I do not propose to reiterate the same once again except such of those portions which are relevant for consideration of the case for the prosecution and the defence.

14. It is not in dispute that the appellant was a neighbour of the complainant - PW-1 and according to the appellant, he was only acquainted by name and face of the complainant - PW-1. The accused would further state in his written say submitted before the Trial Court that he belongs to Daivajna Brahmin Community and

marriage with PW-1 was nearly impossible in their community. But still according to the appellant, PW-1 and her people including her mother and brother have concocted this charge against him. It is, however, relevant to note that the accused in his written say, did not allege that they had any illwill or enmity against him or his parents. True, the accused would allege that during her High School days and the College days, PW-1 used to have flirtations with so many students whom he alleged to know only by face and not by names and that one such boy was Dhananjay Datta Naik. But there is no positive evidence to substantiate the same. It cannot, therefore, be said that the prosecutrix PW-1 was a girl of easy virtue. There is absolutely no positive material on record to show that PW-1 was a girl of easy virtue. On the other hand, the evidence on record would show that at the relevant time of the incident, PW-1 had been living with her parents, brothers and sisters in a house situate in Gaongeri. It is elicited in the cross-examination of PW-1 that the accused used to visit the house of her parents during the day time and her parents had seen the accused coming to their house. The accused used to talk in the normal way. Her parents are the natives of Tamil Nadu and they are Goundars by community. But PW-1 was born and brought up in Majali. It is further brought out in the cross-examination of PW-1 that it was at about 12 O'clock in the night when she was studying, the accused called her out. He had a sexual intercourse with her by making her to lie down on the ground. She would further state in the cross-examination that during the entire period of six months, she was intensely loving the accused and the accused was also loving her. She never doubted the assurance of the accused about his proposal to marry her.

The accused apprehended that his family people may scuttle their love and therefore, he had told her not to inform this affair to anybody. She has further stated that till Ullas Rane told her about the refusal of the accused to marry her she had reposed faith in the accused that he would marry her. PW-1 had discontinued the College in December 1988.

15. The evidence of the Doctor - PW-14 would show that PW-1 was examined by her on 13.5.1989 and the probable age of PW-1 in the opinion of the Doctor - PW-14 as on the date of her examination was 18 to 20 years. The said evidence of the Doctor PW-14 has remained unchallenged. The accused when examined by the

Court under Section 313 Cr.P.C. on 18.11.1992, has given his age to be 25 years. That means, as on the date of the incident, in the year 1988, the accused might be aged about 20 or 21 years. It would therefore appear from the material on record that during the relevant time of this incident, the accused was aged about 20 to 21 years while the prosecutrix PW-1 was aged about 17 to 19 years, PW-1 had discontinued the College in December 1988. That means, she was still a student at the relevant time of this incident. They were both in the prime of their youth, then.

16. PW-2 is the mother of the prosecutrix PW-1. She has stated that the accused was a friend of her son and therefore, he used to visit their house. On one day, she saw the abdomen of her daughter PW-1 which was found to be bulging and she suspected and asked her daughter PW-1 about it. Then, she was told by PW-1 that the accused has promised to marry her and that this fact should not be revealed to the family members of the accused. She, however, discussed this matter with her son Jagadish PW-3. Under the cross-examination, she has stated that when she asked her daughter PW-1 about her pregnancy, she was told by PW-1 that the accused will not deceive her and that he would marry her and that she has become pregnant at his instance. Except with her son Jagadish -PW-3 she never discussed this matter with any other person. She has further stated in her cross-examination that till the complaint was given to the Police, her daughter was telling that the accused will definitely marry her and she had full confidence with the accused. She denied the suggestion that the pregnancy was not at the instance of the accused and that they have falsely implicated the accused. She has further stated in her cross-examination that she had not seen her daughter PW-1 moving with any Dhananjaya Datt Naik.

17. PW-13 is the elder brother of PW-1. He has stated before the Court that since the accused was residing nearby their house, he became his friend. The accused used to come to their house daily and used to talk with them. He has stated that his mother informed him about the pregnancy of his sister. His mother told him that his sister is in love with the accused and that she has become pregnant at his instance. His sister also told him that during the course of her love, she was forced for intercourse and later on, the accused promised that he would marry her. He

went and enquired with the accused about his intention to marry and the accused told him that he would marry after some time as his position is not good and that after marriage, he would live separately and that this, went on for some time. The accused went to Sangli for about 7 to 8 days and after his return from Sangli he met the accused in the night and asked him. Then the accused told him that on the next day morning he would take his sister to the Sub-Registrar's Office and marry her. On the next day morning when he went to the house of the accused, the accused was simply sitting in the house and he did not talk. He again went to call the accused, but the accused told him that he would not come and that they can do whatever they like. Then, he went and contacted Ullas Rane and his wife and they talked to the aunt and her husband of the accused. But they quarrelled and told him that they do not know anything and that they need not be contacted by them. Then he and PW-1 went to the Police Station and lodged a complaint. Under the cross-examination, he has stated that the house of the accused was about 400 from their house.

18. PW-11 Ullas Rane has stated before the Court that he was requested by PW-3 to mediate in the matter relating to his sister. On 11.5.1989, PW-3 told him that his sister has become pregnant at the instance of the accused and that the accused is refusing to marry her and requested him to mediate. He told him that his word would not carry any weight. But still PW-3 insisted that he should mediate and accordingly, himself, his wife and PW-3 Jagadish went and talked with the aunt and uncle of the accused. But they told them that they did not know anything about it and to go and ask the accused. Under the cross-examination, he has stated that he is Konkana Maratha by caste. He is not related to the accused and PW-3 in any manner. He has further stated that the aunt of the accused told them that why the parents of PW-1 did not control her and they refused to talk with him in the matter.

19. PW-4 Smt. Vanamala who had been a resident of Gaongergeri has stated that on a certain day in the evening at about 5-00 p.m. when she was going to attend the nature's call, and was crossing the highway she saw this accused and PW-1 talking with each other by standing near a tree. On the next day, she asked PW-1 whether she has any intention to marry the accused and she was told by PW-1 that she is going to marry the accused. She also told her that she should not

disclose this fact to anyone and that she is going to marry the accused by a registered marriage. It may be about 3 or 4 months prior to the rumors were spread about the pregnancy of PW-1, he had seen the accused and PW-1 together. Under the cross-examination, she has stated that she saw them together only once on that day and she did not see them together subsequently. In her estimation when she had seen PW-1 and the accused together, PW-1 might be in her 3rd or 4th month of pregnancy.

20. PW-5 Dayanand had also been residing in Gaonger. He has stated that he had seen the accused and PW-1 together in the night time around 11-00 p.m. or 12 midnight. He had also asked the accused about it and he was told by the accused that he would marry PW-1. He does not remember the month, date or day of his seeing the accused and PW-1 together. Thereafter, he came to know that PW-1 became pregnant. Under the cross-examination, he has stated that it was 6 or 7 months back the people were talking that PW-1 became pregnant.

21. PW-6 Ramesh was cultivating the garden land of the father of PW-1. He has stated that he has seen the accused and PW-1 together in the garden land speaking under a coconut tree. He had seen them for about 20 to 25 times. Under the cross-examination, he has stated that the garden land is about half K.M. away from the house of PW-1. He did not inform or discuss this fact with anybody. He had seen them together in June 1988, July 1988 and in all he had seen them together about 20 to 25 times in these two months.

22. PW-7 is the Doctor who examined the accused on 13.5.1989 and has opined that the accused is potent and capable of having sexual intercourse.

23. PW-15 is the Professor of Forensic Science. He has stated that as per the requisition of the Police, he examined the blood samples of the accused, PW-1 and her child. The blood examination of these persons revealed that the blood of the accused is 'A' positive, the blood of PW-1 is 'B' positive and that of her child is 'A' positive and accordingly, he has given the opinion that the accused cannot be excluded from the possibility of being the father of the child born to PW-1. Ex.P13 is the Certificate issued by him. Under the cross-examination, he has stated that any male person of 'A' positive blood group can be the father of the child. Normally

'RH' positive will be present in about 18 percent of the people generally.

24. After giving my anxious consideration to the facts and circumstances of the case and the materials on record and the submissions made on both sides, it appears to me that the offence of rape has been established against the appellant and the case of the prosecution so far as the offence of rape is concerned should not be disbelieved on the facts and circumstances of the case especially having regard to the statement made by the accused in his written say that the marriage with PW-1 was nearly impossible in their community. That means, the accused knew full well even from the very inception that he may not be able to marry PW-1, having regard to the fact that he belongs to Daivajna Brahmin Community and PW-1 belongs to Goundar community. In spite of this, in order to have a sexual intercourse with PW-1, the accused made her to believe that he would marry her. It is thus clear from the facts and circumstances of the case that knowing fully well that his marriage with PW-1 was nearly impossible, the accused made a fraudulent and false representation to PW-1 that he would marry her and thereby he had access to her body. But for such representation, which PW-1 believed to be true she would not allow the accused to have sexual intercourse with her. True, if PW-1 had been little cautious in not placing implicit reliance on the words of the accused, she would not have suffered such a misfortune. But simply because, the complainant - PW-1 believed the words of the accused, who was no other than a friend of her brother and a neighbour and she simply reposed confidence in him, the prosecution case should not be disbelieved particularly when there is convincing evidence on record to show that the accused had access to her body by persuading her to believe that he would marry her. But he knew fully well even from the very inception that the marriage with PW-1 was nearly impossible which is very clear from his own written say filed before the Court. The evidence of the mother and the brother of PW-1 and other independent witnesses fully support PW-1's evidence that she had reposed confidence till the end that the accused would marry her, while the accused, as can be seen from his own written say, knew full well that his marriage with PW-1 was nearly impossible. While making a representation to the complainant - PW-1, the accused knew fully well that it may not be possible for him to marry PW-1, but in spite of that, he made such a representation which he believed to be impossible of performance and so the only

inference that could be drawn from this, is that he played fraud on PW-1 in order to have sexual intercourse with her. But on the other hand, PW-1 in her ignorance and respect for inherent human goodness placed implicit reliance on the appellant who promised to marry her so that she could find a shelter in the accused. If she had been little cautious and worldly wise she would not have fallen a prey to the false promise of the accused. Though educated, she was simple in heart, having respect for goodness of mankind. For such reason, she placed reliance on the words of the accused and allowed the accused to have access to her body; least realising that ultimately it is the woman who is a loser. Considering the fact that the accused, who knew from the very inception that the marriage with PW-1 is a near impossible, in a designed manner ravished the persecutory - PW-1 and ultimately betrayed her confidence. It is not a case where the accused made a bonafide promise, but it is a case where the accused knowing fully well that his marriage with PW-1 is near impossible, made such false promise only to have access to her body by such deceitful means. Therefore, it is clear case of fraud practised on PW-1 to have access to her body. Therefore, the two Decisions of the Calcutta High Court relied upon by the learned Counsel for the appellant have practically no application to the facts and circumstances in this case. In the present case, the evidence on record shows that the appellant, on giving false assurance and allurements that he would marry the complainant PW-1, developed sexual connection with her. The ingredients necessary to constitute an offence of rape is illustrated in Section 375 IPC, which clearly indicates that if sexual intercourse is done 'without her consent' and if consent is obtained 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. It was strenuously argued by the learned Counsel for the appellant that in this case, none of the ingredients aforesaid are established to show that an offence of rape was committed. It is pertinent to note that in this case, the written say of the accused would clearly indicate that the accused knew full well that his marriage with PW-1 is nearly impossible and the evidence of PW-1, on the other hand, would show that on the promise of marrying her the accused had access to her body. Under the circumstances, therefore, it would show that but for such promise, the complainant PW-1 would not have allowed the accused to have sexual intercourse

with her. Therefore, on the facts and circumstances of this case what attracts my attention is the second ingredient 'without her consent'. Consent always means free will or voluntary act. In this case, consent was obtained by the appellant on the basis of some fraud or practising deception upon PW-1, on the pretext that ultimately she will be married and under that pretext, the prosecutrix PW-1 allowed the accused to have access to her body. Therefore, this tainted consent or a consent obtained by practising deception upon PW-1 cannot be termed as 'with consent'. Had PW-1 known that ultimately, the accused will not marry her and she would be deceived by him, the facts and circumstances stated above and the materials placed on record would go to show that she would have refrained from allowing the accused to have sexual intercourse with her. The facts and circumstances of the case here would clearly go to show that it was a fraud practiced on PW-1 or she was deceived by the accused by giving a false assurance. Such consent obtained cannot be termed as 'with consent'. Consent obtained by deceitful means is no consent in the eye of law and comes within the ambit of the ingredients of the definition of 'rape'. The accused always pretended to her that he would become her husband in future. This shows that he had given a false assurance to PW-1 that if she allows him to have sexual intercourse with her she would be married and he would treat her as his married wife. The accused should not be allowed to reap the benefits of his fraud. It is therefore a case where the accused knew from very inception that his marriage with PW-1 was nearly impossible and PW-1 who had no knowledge of the same reposed confidence on PW-1 and allowed the accused to have sexual intercourse with her under the fond belief that she would become the wife of the accused. If she had knowledge that the accused had no inclination to marry her she would not have allowed the accused to co-habit with her. It is to be stated that the word 'consent' in Section 375 IPC, has to be interpreted in terms of Section 90 and as the prosecutrix - PW-1 was under a misconception that the accused would in all probability marry her, it could not be held that PW-1 had a consent for co-habitation, the case was covered by Section 375 clause secondly and the accused was guilty under Section 375 IPC punishable under Section 376 IPC.

25. Therefore, for the foregoing reasons, I endorse the view of the trial Court that the offence of rape against the accused was established by the prosecution.

Therefore, I do not find any ground to interfere with the conviction of the accused-appellant under Section 376 IPC. Hence, I find no merit in the contention of the learned Counsel for the appellant that the trial Court committed an error in convicting the accused under Section 376 IPC. In my view, the trial Court was right in convicting the accused under Section 376 IPC on the facts and circumstances of the case.

26. So far as the sentence of seven years rigorous imprisonment and a fine of Rs. 20,000/- awarded by the Trial Court on the accused is concerned, it appears to me that to a certain extent PW-1 had also been responsible for the sexual act committed on her by the appellant by being simply swayed away by the false promise or allurements made by the accused. Being educated and knowing fully well that the accused and herself do not belong to the same community she should have also been cautious before becoming a prey to his allurements. Therefore, there is also some innocent contribution on the part of PW-1 for the accused to commit such act on her. She could not have simply come out of the house during the dead of night on the mere calling of the accused and thereby created an opportunity for the accused to commit such act on her. It was represented to me during the course of the argument that the accused had shown his inclination to marry PW-1 during the pendency of this Appeal and that the prosecutrix PW-1 having already been married by then, the said offer could not be accepted by PW-1. I have no reason to doubt the said representation made before me by the learned Counsel for the appellant. No doubt such a gesture had come from the accused only after he suffered a conviction at the trial Court but even then, it would show that there was some sort of repentance on the part of the accused to make amends for the wrong committed by him. The appellant also appears to be quite young and he was hardly aged about 20 or 21 years at the time of this incident and he might be now aged about 27 years. The incident took place about 7 years back when both PW-1 and the accused were quite young. Having regard to the fact that the incident took place about 7 years back and during the proceedings upto this Court, the appellant had suffered disrepute and mental agony and has also appeared to have shown some sign of repentance by proposing to marry PW-1 though after suffering a conviction at the hands of the trial Court. Therefore, on the facts and peculiar circumstances of this case, I think

that the ends of justice would be met if the accused is awarded a lesser sentence. The policy of punishment is not merely to punish the accused but also to reform the accused. In this connection, a reference may be made to a Decision of the Hon'ble Supreme Court in PHUL SINGH v. STATE OF HARYANA, 1980 Madras Law Journal (Crl) 533, wherein it is held as under:

'Ordinarily, rape is violation, with violence of the private person of a woman - an outrage by all canons. In our conditions of escalating brutality a 4 year term for rape is not excessive. But here, the offender is in his early twenties and signs of repentance are seen. The victim and her parents have forgiven the molester, who is a first cousin. Under the circumstances, the sentence was reduced from 4 years to 2 years rigorous imprisonment.

Sentencing efficacy in cases of lust loaded criminality cannot be simplistically assumed by award of long incarceration, for, often that remedy aggravates the malady. Punitive therapeutics must be more enlightened than the blind strategy of prison severity where all that happens is sex starvation, brutalisation, criminal companionship, versatile vices through bio-environmental pollution, dehumanised cell drill under 'zoological conditions' and emergence, at the time of release, of an embittered enemy of society and its values with an indelible stigma as convict stamped on him - a potentially good person 'successfully' processed into a hardened delinquent, thanks to the penal illiteracy of the prison system. The Court must restore the man.'

27. The above observations are aptly applicable to this Case also.

28. Therefore, on the facts and circumstances of this case and in the light of the above quoted Decision of the Hon'ble Supreme Court, I reduce the sentence to two years rigorous imprisonment and a fine of Rs. 5,000/- and in default of which to undergo a further rigorous imprisonment for six months. I shall therefore direct that the accused/appellant should suffer rigorous imprisonment for two years and a fine of Rs. 5000/- (Rupees five thousand only) and in default of which, to suffer further rigorous imprisonment for six months. Within the limits of the Prison Act and Rules thereunder, the State Government or the Inspector General of Prison will ensure that a parole, furlough or orders the young appellant turns a new leaf of

the normal life. To the above extent, the judgment of the trial Court stands modified in this Appeal. With this modification, the Appeal is dismissed.

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