

Uttarakhand High Court

Sanjay Semwal @ Meenu vs State Of Uttarakhand on 11 November, 2021

HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 265 of 2021

Sanjay Semwal @ Meenu

....Appellant

Versus

State of Uttarakhand

....Respondent

Present:-

Mr. V.B.S. Negi, Senior Advocate, assisted by Ms.
Prabha Naithani, Advocate for the appellant.
Mr. Lalit Miglani, A.G.A. for the State.

JUDGMENT

Hon'ble Ravindra Maithani, J. (Oral) Instant appeal is preferred against the judgment and order dated 28.08.2021/31.08.2021, passed in Sessions Trial No. 24 of 2019, State Vs. Sanjay Semwal @ Minu and another, by the court of District and Sessions Judge, Pauri Garhwal. By the impugned judgment and order, the appellant has been convicted under Section 376 (1) and 506 IPC and sentenced as hereunder:-

"(i) Under Section 376 (1) IPC, rigorous imprisonment for a period of ten years and a fine of Rs.10,000/-. In default of payment of fine to undergo rigorous imprisonment for a further period of three months.

(ii) Under Section 506 IPC, rigorous imprisonment for a period of two years and a fine of Rs. 5000/-. In default of payment of fine to undergo rigorous imprisonment for a further period of one month."

2. The prosecution case, briefly stated is as follows:-

The prosecutrix left her house on 17.05.2019 to get some goods from the market, but she did not return. This fact was informed to the Police. On 18.05.2019, the prosecutrix returned her house at 9:15 AM. On being asked, she revealed that on 17.05.2019, at 5:35 in the evening, the appellant enticed her in a Scooty. He was accompanied by a Rajat also. The appellant took her in the house of his aunt (mother's sister). There appellant made her drink beer. In the night, the appellant forcibly raped her in the kitchen and threatened her to life in case she reveals it to anyone. A report of the incident was given on 18.05.2019 at Mahila Police Station Srinagar. Based on it, FIR under Section 3/4 of the Protection of Children from Sexual Offences Act, 2012 and Section 363, 376, 506 IPC was lodged and investigation was carried out.

3. During investigation, statements of the prosecutrix were recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short, "the Code"). The Investigating Officer (for short, "the IO") also collected the transfer certificate of the prosecutrix to ascertain her date of birth. The prosecutrix was medically examined also. Certain articles were sent for forensic examination. A report was received. Neither semen nor blood could be detected on any of the articles sent for examination. The IO also prepared site plan of the place of incident. The IO found that the prosecutrix was above 18 years of age on the date of incident. After investigation, charge sheet under Sections 365, 376 and 506 IPC was submitted against the appellant and co-accused Rajat Patel.

4. On 09.09.2019, charge under Sections 365, 376, 506 IPC was framed against the appellant. Charge under Section 365 IPC was also framed against co-accused Rajat Patel.

5. In order to prove its case, the prosecution examined as many as eleven witnesses, namely, PW1, the prosecutrix, PW2 the mother of the prosecutrix, PW3 Suman Lata Panwar, PW4 Dr. Navjyoti Bora, PW5 Sarika Devi, PW6 Soni Naithani, PW7 Dimpal, PW8 Constable Police, Rekha, PW9 Aamod Thapliyal, PW10 Sub Inspector, Sandhya Negi, the IO and PW11 the friend of the prosecutrix.

6. The appellant was examined under section 313 of the Code. According to him, he has been falsely implicated in the case. After considering the material on record, by the impugned judgment and order, co-accused Rajat Patel has been acquitted of the charge under Section 365 IPC. But, the appellant has been convicted under Sections 376 (1) and 506 IPC and sentenced, as indicated hereinabove. Aggrieved, the appellant is in appeal.

7. Heard learned counsel for the parties and perused the record.

8. Learned senior counsel for the appellant would submit that the prosecution has utterly failed to prove its case against the appellant. The statement of the prosecutrix itself reveals that the appellant did not commit any offence. Learned senior counsel raised the following points in his submission.

(i) It is the consensual act of the prosecutrix.

She has free consent to the act.

(ii) The medical evidence does not support the prosecution case.

(iii) The forensic reports also does not support the prosecution case.

9. While demonstrating these points, learned senior counsel referred to the statement of PW1, the prosecutrix. It is argued that the appellant ought to have been acquitted of the charge, but the court below committed an error in law in convicting the appellant. Therefore, the appeal deserves to be allowed.

10. In support of his contentions, learned senior counsel has referred to the principles of law, as laid down in the cases of Kaini Ranjan Vs. State of Kerala, (2013) 9 SCC 110 and Maheshwar Tigga Vs. State of Jharkhand, (2020) 10 SCC 108.

11. In the case of Kaini Ranjan (supra), the Hon'ble Supreme Court discussed the "consent" and observed as hereunder:-

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

(emphasis supplied)

12. In the case of Maheshwar Tigga (supra), the Hon'ble Supreme Court also discussed the concept of consent and referring to the judgment in the case of Uday Vs. State of Karnataka (2003) 4 SCC 46 observed as hereunder:-

"20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday [Uday v. State of Karnataka, (2003) 4 SCC 46 : 2003 SCC (Cri) 775] are considered relevant: (SCC p. 58, para 25) "25. ... It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having

sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

13. Learned State counsel would submit that the prosecutrix as PW1 has supported the prosecution case.

14. Appellant has been convicted under Sections 376 and 506 IPC. In the impugned order, the reference has been made to the Explanation II to Section 375 IPC, which is as hereunder:-

"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."

15. After referring to the judgment on consent, in the impugned judgment and order, it has been held that the act of the prosecutrix cannot be termed as a consensual act.

16. There are some special provisions with regard to the offence of rape, as defined under Section 375 IPC. Section 114 A of the Indian Evidence Act, 1872 makes provision with regard to the presumption. It is as hereunder:-

"114A. Presumption as to absence of consent in certain prosecution for rape. --In a prosecution for rape under clause (a), clause (b), clause (c), clause (d), clause (e), clause (f), 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 such woman 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)."

17. In order to attract the provisions of Section 376 IPC, first and foremost, it has also to be established that the act was done without the consent of the prosecutrix.

18. In the case of Satpal Singh Vs. State of Haryana, (2010) 8 SCC 714, the Hon'ble Supreme Court discussed the concept of "consent" and observed as hereunder:-

"30. It can be held that a woman has given consent only if she has freely agreed to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. An act of helplessness in the face of inevitable compulsions is not consent in law. More so, it is not necessary that there should be actual use of force. A threat of use of force is sufficient.

31. The concept of "consent" in the context of Section 375 IPC has to be understood differently, keeping in mind the provision of Section 90 IPC, according to which a consent given under fear/coercion or misconception/mistake of fact is not a consent at all. Scheme of Section 90 IPC is couched in negative terminology. Consent is different from submission. (Vide Uday v. State of Karnataka [(2003) 4 SCC 46 : 2003 SCC (Cri) 775 : AIR 2003 SC 1639] , Deelip Singh v. State of Bihar [(2005) 1 SCC 88 : 2005 SCC (Cri) 253] and Yedla Srinivasa Rao v. State of A.P. [(2006) 11 SCC 615 : (2007) 1 SCC (Cri) 557]).

32. In State of H.P. v. Mange Ram [(2000) 7 SCC 224 : 2000 SCC (Cri) 1331 : AIR 2000 SC 2798] , this Court, while considering the same issue, held as under: (SCC pp. 230-31, para 13) "13. ... Submission of the body under the fear of terror cannot be construed as a consented sexual act. Consent for the purpose of Section 375 requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act but after having fully exercised the choice between resistance and assent."

19. In the case of Rao Harnarain Singh and others Vs the State AIR 1958 Punjab & Haryana 123, the Hon'ble Supreme Court made a distinction between consent and submission and observed in para 6 as hereunder:-

"7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, 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 freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has wished as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former....."

20. The concept of consent, in the context of promise to marry, has been summarised by the Hon'ble Supreme Court in the case of Pramod Suryabhan Pawar Vs. State of Maharashtra and another, (2019) 9 SCC 608 and observed as hereunder:-

"18. To summarise the legal position that emerges from the above cases, the "consent" of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the "consent" was vitiated by a "misconception of fact" arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman's decision to engage in the sexual act."

21. In view of the legal position, the matter needs examination. PW1 is the prosecutrix. She has stated that on 17.05.2019, she alongwith her friend PW11 had gone market to purchase certain articles. There in the shop, they met Rajat. Rajat wanted to talk to the prosecutrix. When the prosecutrix asked, as to why Rajat wants to speak to her, Rajat raised alarm and threatened the prosecutrix that she should join him in his Scooty. Thereafter, the prosecutrix alongwith the appellant and Rajat went towards Pauri in his Scooty. On the way, Rajat made the prosecutrix to drink beer. The appellant took her in a village where his aunt was staying. There they stayed in the night. In the midnight, at 2:30, according to the PW1 the prosecutrix, the appellant called her in the kitchen and raped her. He also threatened her to life in case she reveals it to anyone. PW1 the prosecutrix has also proved her statement recorded under Section 164 of the Code.

22. PW2 is the mother of the prosecutrix. According to her, the prosecutrix had left her house on 17.05.2019, but she did not return on that day. Next day, on her return, she revealed that the appellant raped her in the kitchen on the previous night. Thereafter, this witness lodged an FIR Ex. A2.

23. PW3 Suman Lata Panwar has proved the transfer certificate of the prosecutrix, which records her date of birth as 07.05.2001. It means, on the date of incident, she was above 18 years of age.

24. PW4 Dr. Navjyoti Bora medically examined the prosecutrix. She has proved her report. She did not find any internal injury on the person of the prosecutrix. But, there were nail scratch marks on her back. The hymen was absent. PW4 Dr. Navjyoti Bora proved the medical examination report, which also records the history. According to which, sexual activity was conducted with the prosecutrix. In her statement, PW4 Dr. Navjyoti Bora has stated that at the time of examination, the prosecutrix had revealed it to her that she was threatened and forced to consume beer. She was subjected to oral sex and the appellant inserted his finger in her inner part.

25. PW5 Sarika Devi is the aunt of the appellant, in whose house, according to the prosecutrix she was raped. According to her, on 17.05.2019, the appellant alongwith a boy and girl visited her house and they stayed there. In the night, the girl slept with the daughter of this witness and next day, the girl had breakfast and she left the house.

26. PW7 Dimple is the daughter of PW5 Sarika Devi. She also corroborates the statement of PW5 Sarika Devi. PW7 Dimple categorically tells that in the night she and the prosecutrix slept together. In the morning, she found that the girl had left.

27. PW8 Constable Rekha has proved the chik FIR and general diary entries by which the case was lodged and appellant was arrested.

28. PW6 Soni Naithani and PW9 Aamod Thapliyal are neighbours of the prosecutrix. Both have stated that on 17.05.2019, PW2 mother of the prosecutrix had told it to them that the prosecutrix had gone market, but she did not return. Next day, when the prosecutrix returned, she revealed that on the previous day, she had gone market with her friend PW11 where two boys took her to Pauri. They made her consume beer and the appellant raped her.

29. PW10 Sub Inspector, Sandhya Negi is the IO. She has conducted the investigation, proved the site plan and submitted charge sheet.

30. PW11 is the friend of the prosecutrix. She did not support the prosecution case.

31. It is true that in the Forensic Science Laboratory report, the semen or blood was not found on any of the articles which were sent for forensic examination. It is also true that in the medical examination report conducted by PW4 Dr. Navjyoti Bora injury on the internal parts was not found. Spermatozoa was also not detected and hymen was absent. But, the fact remains that the prosecutrix has herself stated that the appellant raped her in the kitchen, in the house of his aunt. The statement of PW1, the prosecutrix to be examined to ascertain its truthfulness.

32. Learned senior counsel appearing for the appellant has extensively referred to the cross examination of the PW1 the prosecutrix. In the cases of sexual assault, it is not always necessary that the statement of the prosecutrix should always find corroboration. It is the reliability of the

statement of the prosecutrix which matters. It is also settled law that even on the basis of the statement of the prosecutrix alone, conviction can be obtained in such cases. But, the question is of reliability, credibility and truthfulness of the statement of the prosecutrix. As also corroborations, if there are opportunity for such corroboration.

33. According to PW1 the prosecutrix, on the date of incident, she had gone market alongwith her friend PW11. There in the market Rajat requested the friend of the prosecutrix that he wanted to speak to the prosecutrix, but this has not been supported by PW11. According to PW11, on the date of incident the prosecutrix had visited her house, kept her books there and left her house. According to PW11, she did not accompany the prosecutrix to market on that day.

34. PW1 the prosecutrix was studying in class 10th on the date of incident and she was above 18 years of age. According to her, she was told that Rajat wanted to speak to her and when she inquired about it, Rajat raised alarm and thereafter, she accompanied the appellant and Rajat. At the first instance, why did the prosecutrix joined the company of the appellant and Rajat. If Rajat wanted to speak to her and she was not willing for it, she would have simply denied for it. According to the prosecutrix, she was in the market. She was not all alone. Instead of Rajat raising alarm, why the prosecutrix did not raise alarm? Why did she join the appellant and the co- accused? In her cross examination PW1 the prosecutrix has categorically stated that she did not raise any alarm. She was old acquaintance of Rajat Patel, which she has admitted in para 5 of her examination. According to her, she went in a Scooty from Srinagar to Kirtinagar alongwith the appellant, but she did not raise any alarm, why?

35. In paragraph 6 of her statement the prosecutrix as PW1 has stated that she purchased beer for herself and Rajat Patel purchased liquor and thereafter, they visited Pauri. In paragraph 17 of her statement, the prosecutrix categorically tells that on mutual consent she had gone Pauri. It means she was not forced to go Pauri by the appellant. It is admitted that on the way there were crowd, there were shops and residential area (PW1 Para

6).

36. In her examination-in-chief, PW1 the prosecutrix has said that in the intervening night of 17/18.05.2019, at 2:30 the appellant called her and raped her in the kitchen. How did it happen? In her cross examination PW1 the prosecutrix tells that without making any noise she went in the kitchen and after the incident, she quietly slept. Next day also she did not reveal it to anyone in the house where she was staying (statement of PW1 prosecutrix para 13).

37. What is most important is that according to the PW1 the prosecutrix, the room where she was sleeping on the date of incident was bolted from inside. The prosecutrix says that silently she unbolted the door and sneaked in the kitchen. Nobody could hear the unbolting of the door. (statement of PW1 at para 15) The statement of PW1 prosecutrix belies her statement that she was forcibly raped. The statement of PW1 prosecutrix in abundance shows that she was consenting to follow the appellant to Pauri. She has admitted that she purchased beer for her consumption. She also admits that the boys with her had also purchased liquor. It was her independent choice. She did

not raise any alarm. She did not protest at any stage from Srinagar to Pauri. During the course of argument, it is admitted by the learned counsel for the parties that the distance between Srinagar and Pauri is 25 Km.

38. In the house of the aunt of the appellant, PW1 prosecutrix slept with PW7 the cousin of the appellant. The door was bolted from inside. In her statement under Section 164 of the Code, PW1 the prosecutrix has stated that she was in a bed with PW7 Dimple and in the same room on another bed appellant and Rajat were sleeping How did the appellant call her at 2:30 in the midnight? Did he telephone her? Or did he physically indicated the PW1 prosecutrix to move out of the room. The room was bolted from inside. And even if the appellant had called her by any means, why did the prosecutrix unbolt the door? She would have further raised alarm. She would have informed PW7 the cousin of the appellant, as to why the appellant is calling her at that hour in the midnight. But, the prosecutrix did nothing. According to the PW1 the prosecutrix she sneaked in the kitchen discreetly and after the act came back and slept. It shows that she was a consenting party The statement of PW1 the prosecutrix, in fact, proves that she has freely agreed to submit herself, while in free and un-constrained possession of her physical and moral power to act in a manner she wanted. It was voluntary and conscious act of the prosecutrix. The act allegedly committed did not fall under the definition of Section 375 IPC because, as stated, the act was with free and voluntary consent of the prosecutrix.

39. In view of the foregoing discussion, this Court is of the view that the prosecution has not been able to prove the charge under Sections 376 (1) and 506 IPC against the appellant Sanjay Semwal @ Minu. Learned Court below committed an error in convicting and sentencing the appellant. Accordingly, the Court is of the view that the appeal deserves to be allowed.

40. Accordingly, the appeal is allowed.

41. Impugned judgment and order dated dated 28.08.2021/31.08.2021, passed in Sessions Trial No. 24 of 2019, State Vs. Sanjay Semwal @ Minu and another, by the court of District and Sessions Judge, Pauri Garhwal is set aside. The appellant is acquitted of the charge under Sections 376 (1) and 506 IPC.

42. The appellant is in jail. He be released forthwith, if not wanted in any other case subject to his furnishing a personal bond and two sureties, each of the like amount to the satisfaction of the court concerned under Section 437 A of the Code.

43. Let a copy of this judgment along with Lower Court Record be transmitted to the Court below for compliance.

(Ravindra Maithani, J.) 11.11.2021 Jitendra