

**CASE COMMENT ON Dr. Dhruvram Murlidhar Sonar vs. The State of Maharashtra
& Ors.: DISTINGUISHING RAPE AND CONSENSUAL SEX**

- Yash Pandey¹

ABSTRACT

The Judicial approach regarding marriage in India has evolved in the past decade. From the time that live in relationships had no legal status to the present situation where Supreme Court held that even a women living in a live in relationship has right to seek maintenance from her partner under the Domestic Violence Act,2005². Another facet to issues regarding marriage has emerged before the court in Dr. Dhruvram Murlidhar Sonar v The State of Maharashtra³ Case. In this case the question before the court was when there is consensual sex between live in partners on the basis of a promise to marry, ‘does a failure to uphold such promise to marry amounts to rape?’. The court in this case has made clear distinction between consensual sex and rape. The court was of the opinion that unless the person has not made promise to marry with the sole intention to seduce a women to indulge in sexual activity, such an act would not amount to rape. If a man is unable to marry a woman due to circumstances beyond his control, then such an act of consensual sex would not amount to rape. On the other hand, the court has also made it clear that if it is proved that the accused had any intent to deceive or had any clandestine motives then such an act of consensual sex would amount to rape. The aim of this research paper is to critically analyse this recent decision of the Supreme Court.

Brief Facts of the Case

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² Lalita Toppo v The State of Jharkhand, 2018 SCC OnLine SC 2301

³ Dr. Dhruvram Murlidhar Sonar v The State of Maharashtra, 2018 SCC OnLine SC 3100

Appellant No.1 was working as a medical officer in a Primary Health Centre at Toranmal, Maharashtra. Respondent/Complainant No. 4 was working as a nurse in the same establishment. According to complain made by complainant in FIR, her husband died on 05.11.1997. She was left with the responsibility of two children. During this time appellant informed her that there were difference between him and his wife and therefore he was going to divorce his wife. It was also informed by the appellant that it would take a month for registration of their marriage because they belonged to different communities. It was alleged in the complaint that they started living under the same roof as if they were husband and wife. It was further alleged that appellant acted in a manner that they both were married and maintained a physical relationship with her. However, he failed to marry her. At the same time accused no. 2, i.e. the brother of appellant claims to have married her.

The appellant was charged with offences under Section 376 (2) (b), Section 420 read with section 34 of Indian Penal Code, 1860 and under Section 3 (1) (x) of Scheduled caste and the Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Issues of Rape and Consent in case of a Promise to Marry

The Court pointed out that the offence alleged in the compliant was of Rape under Section 376 (2) (b)⁴ which provides for rape committed by a Public Servant taking advantage of his official position on a woman who is in his custody or custody of a public servant subordinate to him. Further the Court pointed out that the offence of rape as defined under Section 375 defines the offence of rape and enumerates six types of offences. Under the first clause it is provided that the offence occurs when the women is in her senses and, therefore, capable of consenting but the act is done against her will. Under the second clause offence occurs when act is done without her consent. Under the third, fourth and fifth clause the offence occurs

⁴ Provision at the time of offence

Indian Penal Code § 376 (1860)

Punishment for rape.-

(1)

2. Whoever,—

(a)

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) to (g)

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine."

even if there is consent but the consent is obtained by putting the women, or any person she is interested, in fear of death or of hurt. The Court further pointed out, “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 mind of a person to permit the doing of the act complained of.”⁵

The Court also discussed section 90⁶ of Indian Penal Code and observed that the section does not per se define what ‘is consent’ but it describes what ‘is not consent’. To determine consent the Court has to carefully look into the relevant circumstances. If the consent is given under misconception of a fact, it is vitiated. The Court further said. “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 also after having fully exercised the choice between resistance and assent”⁷.

The Court relied on *Uday v. State of Karnataka*⁸ case to answer the question whether consent given by the prosecutrix was under misconception of fact in case if she agrees to have a sexual intercourse with a person on the basis of a promise that he would marry her. The Court explained that in this case there was a grown up 19 year old lady who was in love with a 21 year old man and they had a physical relationship. It was already known to both of them that there could be difficulty in their marriage as both of them belonged to different caste. Later the women got pregnant and the relation between the two families got strained. Eventually the boy refused to marry her. The Court in this case held that the consent to have sexual intercourse cannot be said to be given under misconception of fact in this case. In *Dhruvram Murlidhar Sonar* case the Court pointed out excerpts from the *Uday v. State of Karnataka* to explain how we can determine whether the consent was freely exercised or not. The Court pointed out the following excerpts, “In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a

⁵ *Dr. Dhruvram Murlidhar Sonar v. The State of Maharashtra & Ors*, AIR2019SC327, at p .9.

⁶ Indian Penal Code § 90 (1860): Consent known to be given under fear or misconception.—A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

⁷ *Dr. Dhruvram Murlidhar Sonar v. The State of Maharashtra & Ors*, AIR2019SC327, at p. 10.

⁸ *Uday v. State of Karnataka*, (2003) 4 SCC 46.

secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact."⁹

The Court also referred to *Deelip Singh alias Dilip Kumar v. State of Bihar*¹⁰ case. The Court explained through this case that in cases where the parties had sexual intercourse on the basis of a promise to marry and the man does not have any fraudulent intention to deceit the woman to indulge in sexual activity on the basis of a false promise to marry, then in such cases if at a later stage the man fails to marry the women in that case it can at best be said to be a case of breach of promise rather than a case of false promise to marry.

The Distinction between Rape and Consensual Sex as given by the Court

The Court in clear words said, "If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape."¹¹ The Court also pointed out that there can be cases where the accused and the prosecutrix had sexual intercourse on account of love or passion and not on account of misconception created by the accused. There can be circumstances in such cases that the accused is unable to marry the prosecutrix because of events beyond his control or circumstances that he could not have foreseen. If in such cases the accused is unable to marry the prosecutrix despite having every intention to marry her then such cases should be treated differently. It does not amount to rape. The Court also said, "The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC."¹²

⁹ *Dr. Dhruvram Murlidhar Sonar v. The State of Maharashtra & Ors*, AIR2019SC327, at p. 12.

¹⁰ *Deelip Singh alias Dilip Kumar v. State of Bihar*, (2005) 1 SCC 88.

¹¹ *Dr. Dhruvram Murlidhar Sonar v. The State of Maharashtra & Ors*, AIR2019SC327, at p. 16.

¹² *Dr. Dhruvram Murlidhar Sonar v. The State of Maharashtra & Ors*, AIR2019SC327, at p. 17.

Decision of the Court

The Court pointed out that the prosecutrix had taken conscious decision after active application of mind to things that had happened. The Court after referring to the relevant facts of the case held that there was consensual sexual intercourse between the accused and the prosecutrix. The Court held that the offences alleged against the accused does not sustain.

Conclusion

In a report of 2014 given by the Delhi Commission of Women (DCW), it was revealed that 53.2% of the rape cases filed between April 2013 and July 2014 in Delhi were found to be 'false'¹³. Similarly, in an interview Lawyer Tanveer Ahmed Mir pointed out that according to his experience in Delhi Fast Track Courts 99% of the cases result in acquittals because of fabrication in most of the cases¹⁴. It is not always the case that a prosecutrix would file a false case, in most of the cases due to lack of knowledge or because of anger or immense dissatisfaction the women would file a case under Section 376. In most of the cases it is the lawyers or the police persons that would guide these women to file a complaint under Section 376. Recently, a Delhi Court directed the Delhi Commission for Women to train its counsellors posted in various police stations to provide support to rape victims and not to advise them to file false rape complains¹⁵. In light of these events the judgment delivered by the Supreme Court in Dhruvram Murlidhar Sonar case comes as a relief to the persons who had consensual sex with a lady on the basis of a promise to marry her, without having any fraudulent intention to deceive her. The court has clearly pointed out that if in such cases the man has every intention to perform his promise to marry and due to circumstances beyond his control he is unable to marry the women, then he should not be held guilty under Section 376. The judgment has provided clarity between a case of consensual sexual intercourse that was done on the basis of a promise to marry and a case where the accused, on the basis of a false

¹³ 53.2 per cent rape cases filed between April 2013-July 2014 false, says DCW, India Today (Dec. 24, 2014), <https://www.indiatoday.in/india/north/story/false-rape-cases-in-delhi-delhi-commission-of-women-233222-2014-12-29>.

¹⁴ Poorvi Gupta, Fast-track Courts Doing More Harm Than Good: Experts, She the People.TV (Aug. 04, 2018), <https://www.shethepeople.tv/news/happy-birthday-barack-obama-feminist-quotes>.

¹⁵ Nirimesh Kumar, Don't advise women to lodge false rape cases: court, The Hindu (March. 24 2018), <https://www.thehindu.com/news/cities/Delhi/dont-advise-women-to-lodge-false-rape-cases-court/article23337654.ece>.

promise to marry deceits a women to indulge in sexual intercourse. In the later case the act would amount to Rape and not in the former case.