A COMMENT ON *DEELIP SINGH* v. *STATE OF BIHAR*

THE DECISION in *Deelip Singh* v. *State of Bihar*[1] assumes much importance for several reasons. It sets in a different trend in the matter of appreciation of evidence in rape cases. It shows strong adherence of the Supreme Court to the rules governing admission of evidence in the court. It also shows the court's unusual strictness in the matter of appreciation of evidence. The scheme of the judgment does not conform to the usual standards of Supreme Court judgments. It fails to analyse the law correctly in the light of latest thinking on the offence of rape. It raises fundamental questions on inference of consent in the context of rape. It overturns the practice of non-interference by the Supreme Court with the concurrent findings of the district court and the high court.

A reading of the Supreme Court cases in recent years gives the impression that the court usually ignores minor discrepancies and technicalities in prosecution evidence in rape cases. The shortcomings are not taken seriously. For example, as regards the age the court has been very lenient in admitting the records submitted by the victims. In *State of Himachal Pradesh* v. *Shrikant Shekari*[2] the Supreme Court did not approve of the high court's rejection of the school records. The court categorically stated that the records should be accepted. In *Chattisgarh* v. *Derha*[3] also the Supreme Court held that the records submitted by the victim should be accepted to prove her age. Again in *State of MP* v. *Balu*[4] much against the objection of the defence the

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1. (2005) 1SCC 88. In this case a girl complained to the police that she was raped by the accused in February 1988. They were neighbours and in love. He consoled her saying that he would marry her. So they continued the relationship and the girl conceived. When she reported the matter to the parents and others, the parents of the accused did not allow him to marry her. The radiologist found her to be between 16 and 17 years. The trial court found her to be below 16 years at the time of rape. The high court also affirmed this finding. The trial court also recorded an alternative finding that she was forcibly raped on the first occasion though the high court did not discuss the alternative conclusion. The trial court awarded 10 years imprisonment. The high court modified the sentence to seven years. The Supreme Court set aside the conviction and sentence. The school certificate produced by the girl to prove her age was not accepted by the Supreme Court, as it was not properly produced. The Court awarded a compensation of Rs.50,000/-.

2. (2004) SCC (Cri) 327.

3. (2004) 9 SCC 699.

4. (2005) SCC (Cri) 270.

court accepted the age indicated by the doctor at first.

It is also pertinent to point out that the Supreme Court has been reiterating the view that the victim of rape is not an accomplice and her evidence should be accepted if other circumstances are susceptible to such acceptance. In other words her evidence need not be corroborated. The court could convict the offender relying on the evidence of the victim. In *State of HP* v. *Shrikant Shekari*[5] the court observed thus:[6]

> Even otherwise, the High Court seems to have fallen in grave error in coming to the conclusion that the victim has not shown that the act was not done with her consent. It is not for the victims to show that there was consent.

The court further said:[7]

> The question of consent is really a matter of defence by the accused and it is for him to place materials to show that there was consent.

It is pertinent to point out that when one speaks about the burden of proof of establishing consent, the victim of rape not being an accomplice, it is for the offender to prove that there was consent. If the woman says that she did not consent, it is for the offender to show that what he did was not rape but consensual sexual intercourse. The traditional technicalities should not be adopted in dealing with such issues, as it is a question of violation of the body of a woman.

In *Shrikant Shekari* the court has stressed the need to consider the rustic background of the people warned thus:[8]

> To examine their evidence (the victim and her mother) with microscopic approach would be an insult to justice-oriented judicial system. It would be totally detached from the realities of life.

Reiterating that the victim of rape is not an accomplice the court in *Shivnarayan Saha* v. *Tripura*[9] has observed thus:[10]

> If the totality of the circumstances appearing on the record of the case discloses that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no objection in accepting her evidence.

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5. 2004 SCC (Cri.) 327.
6. *Id.* at 332.
7. *Ibid.*
8. *Ibid.*
9. (2004) SCC (Cri) 410.
10. *Id.* at 413. Also see *State of Punjab* v. *Ram Dev Singh,* 2004 SCC (Cri) 307 urging to give importance to the statements of the victim in rape cases.

The present judgment thus stands apart from the earlier decisions in this respect. It is interesting to note that the court has generally not accepted the plea of infirmity in prosecution evidence in rape and murder cases. Even where the court has notice of the infirmities, if there was evidence against the offender it has chosen to convict him. This is evident from the court's reasoning in *Surendra Pal Shivbalak Pal* v. *State of Gujarat*[11] wherein it has noted the infirmities thus:[12]

> The recoveries are alleged to have been made at 8.30 p.m on the same day. But the inquest is alleged to have taken place at 7.30 a.m on the very same day. There is incongruity in the prosecution evidence regarding recovery of the body and the inquest of the dead body. PW19, the investigating officer could not throw much light on this infirmity in the investigation. Therefore, we do not attach importance to the alleged recovery of the dead body at the instance of the appellant.

In the same breath ignoring the infirmities, the court has reasoned thus:[13]

> The dead body of the deceased Sanju was found in the early morning of 12.09.2002 and the appellant was arrested immediately and previous conduct also though not strictly admissible in evidence would prove that the appellant was prone to do such crime. The sessions judge as well as the High Court appreciated the evidence in the correct perspective and found the appellant guilty and we do not find reasons to disbelieve this finding.

Be that as it may, it is strongly felt that the scheme or structure of the present judgment does not conform to the usual frame of judgments of the Supreme Court. For example, the discussion in the judgment from paras 21 to 25 does not subscribe to the final view that emerges from it. After stating that various high courts and the Supreme Court have not merely gone by the language of section 90 IPC but has travelled a wider field away from the etymology of the word 'consent', the court dealt with a number of decisions but left the discussion at that. It then started with the meaning of the actual wording in section 90 IPC and decided the issue before it. The discussions that follow move on in a zig-zag manner making the inferences made by the court less convincing.

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11. (2005) SCC (Cri.) 653. In this case the offender allegedly raped and killed a child.
12. *Id.* at 655.
13. *Ibid.*

When one thinks about the meanings of 'rape' 'consent' *etc*. one is reminded of the case, *Sakshi* v. *Union of India*[14] where the petitioners prayed for accepting a wider meaning to the concept of rape. The women's organisations demanded that the currently restricted concept of rape should be revised by way of judicial interpretation to include even indecent behaviour against women within the meaning of rape. It is oxymoronic that the apex court in the above mentioned case reiterated the earlier archaic views about rape and consent.

Drawing help from a vintage decision of the Madras High Court,[14a] the court got stuck up with the meaning of the term, 'misconception of fact' implying that if there was misconception of fact, consent would be vitiated. It concluded its discussion thus:[15]

> While we reiterate that a promise to marry without anything more will not give rise to 'misconception of fact' within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 Clause secondly.

The court drew strength from the Calcutta High Court's decision in *Jayanti Rani Panda* v. *State of West Bengal*[16] and the Supreme Court's decision in *Uday* v. *State of Karnataka*[17] case. The court has tried to make out a case that the offender did in fact have an intention of marrying her and it was only because of the opposition from his relatives that he could not. And the girl on her own surrendered to him and she did it knowing well that she was not going to be married by him as they belonged to two different castes. It may be asked: Was not the man aware that they belonged to two different castes? Was he not aware that in the usual run of things the promised marriage was impossible because of difference in castes as it later turned out to be? Was he not creating a misconception of fact to exact consent from the victim?

It is unfortunate that the court did not consider the victim's education and rustic background as in other cases while evaluating her statement

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14. (2004) 5 SCC 518.
14a. *N.Jaladu Re*, ILR (1913) 36 Mad 453.
15. *Supra* note 1 at 104.
16. 1984 Cri. L. J. 1535 (Cal.).
17. (2003) 4SCC 46.

to the police or before the court. On the contrary, it reinforced its conclusion that the perpetrator had intention to marry her initially by stating that it found no evidence, which gave rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge.[18]

In fact right from the date of report she maintained that initially she had inhibitions and it was only on promises of marriage to the knowledge of elders that she surrendered to him.

And the court also did acknowledge this thus:[19]

> However, she agreed to marry him after she was raped and under this impression that he would marry, she did not complain to anybody. These statements do indicate that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act.

Indeed, she realised and she did not complain to anybody because he promised to marry. Did that mean that she consented to sexual intercourse initially? Even according to the court it was only after rape was committed that she was given the promise. She did know the risk. But was there any relation between this knowledge and misconception of fact created by the promise of the accused?

The rum part of the court's reasoning becomes evident when one searches for answers to the question: how could a person who is aware of the risk give consent at least at the inception? It is common knowledge that promise of marriage is usually given by such perpetrators of rape in particular either at the initial stage or at the end of the trial. It is a matter of common sense to assume that a girl who is tried to be raped would resist the violation of her body. At least her reaction should have been viewed by the court in the background of such common perceptions.

In effect what the court has done in this case is equating the rape with a crime on property. If a person does not at the inception had intention to deceive another, there is no offence. Here the lack of evidence against the offender is accepted to state that he had no intention to deceive her. In a rape situation what was in the mind of the offender should not be allowed to be determinative of the issue. Here it is violation of the body of a person. If she was given promise and was it on this assurance that she gave her consent it should be viewed seriously. It is not property that she loses here. It is her honour. It is her personality that is defiled. The difference becomes quite obvious when one examines the responsibility of an offender who despite withdrawal of consent

18. *Supra* note 1 at 106.
19. *Ibid.*

proceeds to have sexual intercourse with a woman. The man will be liable as it is violation of her body that results from his act. This can be explained by examining a hypothetical situation. Suppose an adult woman who has had no sexual experience wants to have the kick of it and solicits a person to have sexual intercourse with her. If on the first stage of penetration she feels pain and resists him withdrawing the consent, and despite that the man proceeds to have sexual intercourse, it is presumed that he is responsible for rape and the initial consent of the woman would not come to his rescue although she had been initially responsible for his sexual arousing. This is because rape involves violation of her body. It results in a crime. It results in an insult to honour of woman rather than loss of property.

Even in the case of response to remedies this judgment stands apart from other decisions. By equating it as a breach of promise the court commanded to its aid article 142 to grant compensation to the girl. And the court prefaces its remedying effort with the following statement: [20]

> With this verdict the appellant no doubt extricates himself from the clutches of the penal law by getting the benefit of doubt on charge levelled against him.

It is interesting to note that the court nowhere before this statement speaks about the benefit of doubt being given to the accused. In fact he was not being given benefit of any doubt. The court does not give the impression that it had any doubt. It did read the evidence in his favour though in other decisions it was for the defence to prove consent of the woman. It is disheartening to see that the victim was given an amount of Rs.50,000/- only to take care of the child. The court noted that this amount was reasonable as the accused belonged to a backward community and his family was not that well off.[21]

Such kind of reasoning may echo in future as mitigating circumstances. This kind of remedy and reasoning are indeed disturbing.

Another disturbing feature of this case is that the court annulled the concurrent findings of the sessions court and the high court, the final court on facts. One does not find any peculiarity in this case demanding such a deviation from the general practice.

In sum, this is an unfortunate decision, which fails to answer several important questions.

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20. *Ibid.*

21. See for example *Balu* v. *State of M.P.,* 2005 SCC (Cri) 270.

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