

IN THE CITY CIVIL AND SESSIONS COURT, AT AHMEDABAD.**Sessions Case Number : 294 of 2016**

State :Prosecution

VersusKamlesh @ Akshay Rajput :Accused No.1
s/o. Mafatlal Sargar

Residing at :

House No.15, Aakashganganagar, Nr.
Ghanti Bus Stand, Rabari Colony,
Amraiwadi, Ahmedabad.

Piyush Vaktajibhai Rathod (Sargara) :Accused No.2

Residing at :

B/403, Naiya Apartment, Nr. Ramol
Toll Plaza, Akruti Apartment Road,
Ahmedabad.

Ajay Rameshbhai Gohel :Accused No.3

Residing at :

A/42, Sakal Sural Society,
Shanti Complex,
Opp.Vejalpur Village Bus Stand,
Vejalpur, Ahmedabad.**WITH****Sessions Case Number : 112 OF 2017**

State :Prosecution

Versus

Rahulbhai Nilambarbhai Jha :Accused No.1

Residing at :

A/81, Rameshwar Park Society,
Nr. Shayona City,
R.C.Technical Road, Chandlodiya,
Ahmedabad.

Pushpendrasingh Mahipalsingh :Accused No.2
Chauhan

Residing at :
436/22, Baayvir Kaur, Rakhiyal Road,
Rakhiyal,
Ahmedabad.

Sandipkumar Babubhai Rathod :Accused No.3
Residing at :

House No.12, Maruti Tenement,
Nr. Canal Road, Nr. Bhavna School,
Vastral Road, Odhav,
Ahmedabad.

Appearance :

Mr.K.G.Jain, Ld. APP

Mr.I.A.Pathan, Ld.Counsel for accused persons

The name of the prosecutrix has been withheld, in compliance with ratio in Bhupinder Sharma Vs. State of Himachal Pradesh (2003) 8 SCC 551.

JUDGMENT

1. Accused No.1, in Sessions Case No.294 of 2016 is facing charges under section 376, 419 and 420 of the Indian Penal Code 1860 (hereinafter referred to as “IPC”) whereas, accused No. 2 and 3 in Sessions Case No.294 of 2016 & accused no. 1 to 3 in Sessions Case No. 112 of 2017 are facing charges under sections 417 IPC.

2. Both Session Case Nos. 294 of 2016 & 112 of 2017 are disposed off vide common judgment as they emanate from FIR No.129/2015 dated 04.10.2015 registered against all accused persons with Navrangpura Police Station for offences punishable under sections 376, 114 IPC.

CASE OF PROSECUTION

3. The succinct facts set forth by prosecution are that in the year 2011, prosecutrix came in contact with one Rahul Nilambarbhai Jha (accused no.1 in Session Case No. 112/2017) who offered her a job in his office and also introduced her to a person by the name of Akshay Rajput (accused no.1 in Session Case No. 294/2016) as his brother. Both accused no.1 (Session Case No. 112/2017) & prosecutrix started talking over phone when he proposed to marry her however, she refused. On informing about the same to accused no.1 (Session Case No. 294/2016), he told her not to talk to accused no.1 (Session Case No. 112/2017). Later, both accused no.1 (Session Case No. 294/2016) and prosecutrix developed love relationship and started talking over their mobile nos. 9722691189 and 9574770803 and often meeting each other whereupon, he proposed her for marriage but at that time prosecutrix did not give any reply however, later she had shown her willingness to marry him but he informed her that they would get married as soon as he is settled in his business. During this period, accused no.1 (Session Case No. 294/2016) introduced her with his brother Pintu @ Piyush Vaktajibhai Rathod (Sargara) (accused no.2 in Session Case No. 294/2016) and his friends Ajay Rameshbhai Gohel (accused No.3 in Sessions Case No. 294/2016), Pushpendra Chauhan (accused No.2 in Sessions Case No. 112/2017) and Rahul Pandey @ Sandeepkumar Babulal Raathod (accused No.3 in Sessions Case No. 112/2017) and they used to talk with one another.

The prosecution has alleged that about 3 years and 9 months prior to lodging of police complaint, accused no.1 (Session Case No. 294/2016) took the prosecutrix to the office of accused no.3 (Sessions Case No. 112/2017) in Gold Shouk, C.G. Road where, he and accused no.2 (Session Case No. 112/2017) who were present, left the place

after having snacks together after which accused no.1 (Session Case No. 294/16) locked the office from inside on the pretext of talking to prosecutrix in loneliness but he started taking undue liberty and established physical relations with her on the pretext of marriage despite her refusal. He then informed her that he would take her to meet his parents tomorrow for marriage upon which she asked him to take her today itself but he refused saying that earlier he had love affair with another girl and since his family members are aware about it therefore presently, he cannot take her to his house. Thereafter, when Rahul Pandey (Accused No.3 in Sessions Case No. 112/2017) and Pushpendra Chauhan (Accused No.2 in Sessions Case No. 112/2017) came back to office, prosecutrix and Akshay (Accused No.1 in Session Case No. 294/2016) went to a garden as she was upset due to physical relations established by him, he convinced to marry her and dropped her at her residence. It is alleged that thereafter also accused no.1 (Session Case No. 294/2016) used to take her at the office of accused No.3 (in Sessions Case No. 112/2017) and Kamal Palace Hotel, at Soni ni chali and established physical relations with her on the pretext of marriage. Allegedly, about 1½ years ago, accused no.1 (in Session Case No. 294/2016) last established physical relations with her in a room in Kamal Palace Hotel. Thereafter, the prosecutrix often asked him to marry her but he delayed saying he would marry after 2-3 years whereupon, she told other co-accused persons who assured her that accused No.1 (Session Case No. 294/2016) will marry her but he refused to marry and wasted her money. She then told him she would commit suicide he if would not marry with him therefore, he gave assurance in writing but then he stopped talking and meeting with prosecutrix.

It is further alleged that the prosecutrix did not have address of accused No.1 (in Sessions Case No. 294/2016) and upon inquiry it was

found that his real name was Kamallesh Sargara and that he was already married having two children. Thereafter, she informed his family members about their relations however, they asked her to leave from there. Further, the prosecutrix delayed in lodging police complaint as Piyush Rathod (brother of accused no.1-Akshay (Accused No.2 in Sessions Case No.294/2016) gave her false assurance that he will convince Akshay to marry her. All co-accused persons concealed real name of accused no.1 (Session Case No.294/2016), aiding the crime therefore, prosecutrix lodged police complaint.

4. During investigation accused No.1, Kamlesh @ Akshay Rajput was enlarged on regular bail by the Hon'ble High Court of Gujarat in Crl.Misc. Application No. 923/2016 vide order dated 05.02.2016 whereas, accused No.2 Piyush Vaktajibhai Rathod and accused No. 3 Ajay Rameshbhai Gohil were granted anticipatory bail by the Sessions Court vide order dated 27.10.2015 and 03.11.2015 respectively.

In Sessions Case No. 112/2017, accused No.1 Rahul Nilambarbhai Jha and accused No.2, Pushpendrasingh Mahipalsingh Chauhan were enlarged on regular bail by the Sessions Court vide order dated 23.5.2016 and accused No.3 Sandeepkumar Babubhai Rathod was also enlarged on regular bail by Sessions Court on 06.06.2016.

5. Subsequent to filing of charge sheet dated 02.12.2018 against accused persons in Session case nos. 294/2016, the case was committed to this court on 31.03.2016. A supplementary charge sheet dated 21.07.2016 was filed in Sessions Case No.112/2017 and the same was committed vide committal order dated 09.01.2017.

6. On appearance of Ld. Counsel, Mr. I.A.Pathan on behalf of all accused persons in both the cases, charges were framed on 17.8.2021

as referred in foregoing paragraph. The accused persons denied all the charges levelled against them and claimed for trial.

7. In order to prove guilt of accused persons, prosecution has examined as many as following 5 witnesses:-

Sr. No.	P.W.	Name of the witness	Exh.
1	1	Prosecutrix	17
2	2	Dr.Mitesh Bhagwanbhai Patel	19
3	3	Dr.Mahesh Motibhai Goswami	22
4	4	Raimalbhai Versibhai Desai	33
5	5	Bhavorsingh Hamirsingh Rav	50

DOCUMENTARY EVIDENCE LED BY THE PROSECUTION:

The prosecution has led following documentary evidence:-

Sr.No.	Particulars	Exh.
1	Complaint dated 04.10.2015	18
2	Injury certificate of accused	21
3	Injury certificate of prosecutrix	24
4	Panchnama of place of incident	27
5	Panchnama for recovery of clothes of prosecutrix	28
6	Panchnama for collecting medical samples of prosecutrix	29
7	Panchnama for collecting medical samples of accused	30
8	Panchnama for recovery of clothes worn by accused at the time of offence	31
9	Report u/s. 157 of Cr.P.C.	34
10	Dispatch Note of FSL	35
11	Receipt of FSL	36
12	FSL Covering Letter	37

13	FSL Report of Biology Department	38
14	FSL Report of Serology Department	39
15	Muddamal Articles	40 to 48
16	Closing purshish	51

STATEMENT OF ACCUSED PERSONS U/S. 313 Cr.P.C.:

8. The Ld. Defense Counsel has not disputed the genuineness of documents at Serial Nos. 3 to 7 (Exh.27,28,29,30 and 31) as per list produced by Ld. Additional Public Prosecutor at Exh.05 therefore, the same are exhibited and read in evidence under section 294 Cr.PC.

9. After closing of prosecution evidence vide purshish at Exh.51, all incriminatory evidence were put to accused persons in accordance to the provisions of section 313 of Cr.P.C. who made a general denial taking the defense that they have been falsely implicated in the alleged offences whereupon, the case was fixed for the defense evidence, who did not wish to examine any witness however, led documentary evidence but the same being xerox copy not proved as per provisions of Indian Evidence Act is not taken into consideration hence, the case was listed for final arguments. However, before appreciating entire evidence in the light of facts and circumstances of the present case, it is imperative to give a brief narration of testimonial evidence of prosecution witnesses as under:-

(a) The prosecution has firstly examined prosecutrix as PW1 at Exh. 17 who deposed that in the year 2011, she was working as Call Operator in Dhanlaxmi Stock at Mangalmurti Complex when she came in contact with one Rahul Rathod (accused no.1 in Session Case No.112/2017) who informed her that he is also looking after work of share market and offered her a job and it is through him that she

came in contact with Kamlesh Sargara @ Akshay Rajput (accused No.1 in Sessions Case No. 294/2016). Thereafter, they both started talking with each other through mobile phone and SMS when Akshay Rajput proposed her for marriage to which she replied to answer after sometime however, in the meantime she reposed trust in him. Accused No.1 (Session Case No.294/2016) introduced prosecutrix with his friends Ajay Gohil, Piyush Rathod, Rahul, Pushpendra Chauhan. It is further alleged that accused no.1 (Session Case No.294/2016) called her at Gold Shop Building at C.G.Road where his above named friends were already present who left the office after having snacks whereas, accused no.1 (Session Case No.294/2016) and prosecutrix stayed there when he locked the door from inside and started taking liberty despite her resistance and established physical relations with her on the pretext of marriage. Thereafter, accused no.1 (Session Case No.294/2016) told her that next day he would take her to meet his parents and as earlier he had love relationship with some other girl of which his family is aware, he cannot talk with them about their relation and kept delaying on one or the other pretext. Thereafter, he took her at Kamal Palace Hotel where again established physical relations with her. She informed his friends Pushpendra Chauhan, Ajay Gohil, Piyush Rathod and Rahul that accused no.1 (Session Case No.294/2016) is not marrying her who then convinced her. She went to Usmanpura Garden being annoyed with accused no.1(Session Case No.294/2016) who consoled her and gave her a written assurance for marriage but thereafter, he switch off his mobile. It is further alleged that upon inquiry from Idea office, she came to know that mobile number of accused no.1 (Session Case No.294/2016) was registered in the name of Kamlesh Sargara whereupon, she went to his residence and came to know that he is married and have two children and when she tried to talk with his family members, they asked her to leave

from there however, his brother Piyush Sargara (Accused No.2 in Sessions Case No. 294/2016) convinced that accused will marry her but prosecutrix, on knowing truth lodged complaint before Navrangpura Police Station. She has further deposed that she was taken to Sola Civil Hospital for medical examination where she narrated the facts of incident to the doctor. She has identified her complaint at Exh.18 along with her signature and muddamal article no. 1 to 5. She has also identified accused persons present in the Court.

During cross-examination, prosecutrix admitted that she can understand Gujarati language and she had signed the complaint at Exh.18 after reading the same wherein, no specific date of alleged incidents are mentioned. She admitted of knowing accused no.1 (Session Case No.294/2016) four years prior to lodging of complaint and that she had not given any police complaint against him during this period. She further denied if accused no.1 mentioned his real name and address at any place in her presence prior to two-three years of lodging police complaint. It is admitted that prosecutrix had not informed her family members about alleged incidents and none of them went with her to lodge complaint. She further admitted of not giving any document to police along with her complaint. The prosecutrix then admitted of neither stating in her complaint if accused no.1 (Session Case No.294/2016) took her to Usmanpura garden nor mentioned any date and time of any incident including the incident when accused no.1 took her to Kamal Palace.

She has further deposed that she had handed over her clothes to the police immediately after the alleged incident. She did not give written application in office of Idea company to obtain address of accused no.1 (Session Case No.294/2016) and did not state in her police complaint as to on which date and what time she went to his residence or talked with his relatives and co-accused persons however,

she individually spoke with them personally and over phone. She admitted of sharing business and other relations with accused no.1 and co-accused persons and further admitted that Piyush Rathod (accused No.2 in Sessions Case No. 294/2016) is not the real brother of accused no.1(Session Case No.294/2016). The prosecutrix denied that she knew details of accused no.1 from the beginning and that she has filed a false case to pressurize him to marry her. She admitted that wife of accused no.1 had lodged case against her as she went to his house for compromise.

(b) The prosecution then examined Dr.Mitesh Bhagwanbhai Patel (PW2) who medico-legally examined the accused. He identified Police Yadi at Exh.20 and Injury certificate of accused at Ex.21 while deposing that accused admitted of establishing consensual sexual relationship with prosecutrix in the medical history given before him.

During cross-examination by Ld. Counsel for accused persons, witness admitted that there was no internal or external injury on the body of accused and denied to have written the history as told by police.

(c) Thereafter, the prosecution has examined Dr.Mahesh Motibhai Goswami as PW3 who deposed that on 05.10.2015 the prosecutrix was brought for medical examination with police yaadi at Exh.23 who stated in her medical history that she knew Akshay Rajput alias Kamlesh Sargara (accused no.1 in Session Case No.294/2016) for last for yours who proposed her for marriage and established forceful physical relations with her on the pretext of marrying her and that he would take her to meet his family members which continued thus, during this time her career was ruined but he continued these bad activities for about one and half year. Thereafter, on examination of

prosecutrix by Dr.Shilpa Gupta (Gynec.), her hymen was found having old tear and she had no external or internal injury. Her medical samples were sent for F.S.L. examination. He has identified the injury certificate issued by him under his signature at Exh.24.

During cross-examination by Ld.Counsel for accused persons she has admitted that brief facts of the case are written in police yaadi.

(d) Thereafter, prosecution examined Raimalbhai Versibhai Desai (Investigating Officer) as PW4 who identified the complaint at Exh.18 bearing signatures of prosecutrix. He has further deposed that during investigation he had recorded the statement of prosecution witnesses and recovered muddamal articles as per Exh.41 to 48 and after finding sufficient evidence against accused persons, he had prepared charge-sheet on 02.12.2018. He has identified the report under section 157 of Cr.PC at Exh.34, panchnama of place of incident at Exh.27, panchnama for recovery of clothes of accused at Exh.31. He has also identified the forwarding letter of FSL at Exh.37, FSL report at Exh.38 and Serology Report at Exh.39.

During cross-examination, Investigating Officer admitted of recording the complaint but no further statement of prosecutrix and other witnesses was recorded. He also admitted that no passbook, written agreement or any other document was recovered during investigation. The prosecutrix did not mention exact date and time of alleged incident in her complaint and admitted that he has not recorded the statement of family members of prosecutrix. He has further not investigated about the marital status of prosecutrix and has also not produced call details, whatsapp and text messages, voluntarily deposing that he wrote a letter to concerned offices for the same. He further admitted that he has not obtained map and photographs of place of alleged incident and also not recorded

statements of other witnesses residing in the vicinity of place of offence and he had also not recovered CCTV footage of place of alleged incident. It is admitted that present complaint was lodged after a delay of about one and a half year of the last incident and there was no blood stains or human semen found on the clothes of prosecutrix and accused no.1 (Session Case No.294/2016) as per the FSL report at Exh.38.

He admitted that as per statement of owner of Kamal Palace Hotel, prosecutrix and accused no.1 (Session Case No.294/2016) had stayed in the said hotel on 11.05.2013 with their real names and addresses recorded in the register of Hotel. He further admitted that as per his knowledge, mobile company cannot provide details of its customer to any third party except police and that accused Piyush @ Pintu (Session Case No.294/2016) is not real brother of accused no.1(Session Case No.294/2016) but his cousin. The prosecutrix has mentioned only about accused no.1 and not co-accused persons in medical history before doctor at Exh.24 i.e. her injury certificate.

(e) Lastly, the prosecution examined Bhavarsingh Hamirsingh Rav as PW5 at Exh. 50, owner of Kamal Palace Hotel who deposed that as per entry no. 9671 dated 11.05.2013 made in hotel register, accused no.1 Kamlesh Marvadi and prosecutrix stayed in hotel and made entry in their real names. However, said register can not be produced as the same was destroyed by termite during Covid Pandemic when the hotel was closed.

During cross-examination, the witness admitted that name and address of accused no.1 (Session Case No.294/2016) was written in hotel register according to his identity proof and there is no entry in hotel register in the name of Akshay Rajput.

CONTENTION OF PARTIES

10. Mr.K.G.Jain, Ld. Additional Public Prosecutor argued that prosecution has proved charges framed against accused persons in as much as accused no.1, by concealing his real name and marital status cheated and committed rape upon prosecutrix on the pretext of marriage by obtaining her consent on misconception of fact where, co-accused persons actively aided the said crime. In support of his argument, Ld. APP has relied on the testimony of prosecutrix and complaint at Exh.17 proved by her and Investigating officer (PW4). He has also placed reliance on medical history given by prosecutrix before doctor in injury certificate at Exh.24 wherein, also she supported the prosecution case. It is further contended that conviction in a rape case can be based on sole testimony of prosecutrix where delay is not fatal to prosecution therefore, maximum punishment be awarded to accused persons as prescribed by law.

11. Per contra, Mr.I.A.Pathan Ld. Defence Counsel has filed written arguments at Exh.52 mainly, arguing that prosecutrix being a major and educated woman from inception knew the true name and marital status of accused no.1, by relying on her testimony as well as testimony of PW4 and PW5 in as much as, both accused no.1 and prosecutrix entered their true names and signatures in hotel register of Kamal Palace on 11.04.2013 therefore, it cannot be said that accused no.1 concealed his real name from her. It is contended that both accused no.1 and prosecutrix knew each other for almost four years having business relations thus, it cannot be believed that she was not aware of his marital status and that he established sexual relations on promise to marry her. Ld. Counsel has further urged that there is an unreasonable delay in lodging complaint even after prosecutrix, as per her own case came to know the true facts. As far

as co-accused persons are concerned, it is submitted that they were not named by prosecutrix in her medical history and considering her three to four years of relation with accused no.1, no overt act could have been attributed to them. It is on the basis of said arguments, Ld. Counsel has submitted that prosecution version doesn't inspire confidence and therefore, accused persons should be acquitted of all charges framed against them.

CHARGES UNDER SECTION 376,419,420 IPC AGAINST ACCUSED NO.1
(SESSION CASE NO.294/2016)

12. The prosecutrix who was aged, 27 years at the time of lodging of complaint dated 04.10.2015 had studied till M.A. 1st year and was working as a call operator. It is the case of prosecution that accused no.1 (Session Case No.294/2016) concealed from the prosecutrix his real name and the fact that he was already married and established sexual relations with her on false promise of marriage from the year 2011 till about one and a half years prior to lodging of police complaint dated 04.10.2015. In the context of further delay in lodging complaint even after prosecutrix came to know the real name of accused no.1 and his marital status, she has deposed that his brother, Piyush Sargara (accused no.2 in Sessions Case No. 294/2016) convinced her that accused no.1 will marry her. Admittedly, it is due to the said delay in lodging police complaint that nothing incriminating could be found during medical examination and scientific evidence i.e. FSL and Serological examination as per reports at Exh.24, 38 and 39 respectively. It is in these attending circumstances that sole testimony of prosecutrix has to be judicially scrutinized to see if she can be called a 'sterling witness' so as to base conviction of accused on her

solitary evidence. The principle of law in this regard is settled by Hon'ble Supreme Court as under:-

12.1 In the case of **Rai Sandeep alias Deeput v. State of NCT of Delhi (2012 AIR SCWN 4456 Supreme Court)**, Hon'ble Supreme Court explained the meaning of "sterling witness" as:-

Para 15. "In our considered opinion, the 'sterling witness' should be of a very high quality and caliber whose version, should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and strenuous it may be and under no circumstances should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and every one of other supporting material. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to

hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a 'sterling witness' whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charged alleged".

12.2 Further, the Hon'ble Supreme Court in, **Santosh Prasad Alias Santosh Kumar Vs. State of Bihar ((2020) 2 Supreme Court cases (Cri) 77)** considering the aspect of delay in registration of FIR apart from other factors held as under -

"It cannot be disputed that there can be a conviction solely based on the evidence of the prosecutrix. However, the evidence must be reliable and trustworthy. Therefore, now let us examine the evidence of the prosecutrix and consider whether in the facts and circumstances of the case is it safe to convict the accused solely based on the deposition of the prosecutrix, more particularly when neither the medical report / evidence supports nor other witnesses support.

.....The manner in which the occurrence is stated to have occurred is not believable. Therefore, in the facts and

circumstance of the case, we find that the solitary version of the prosecutrix, PW5 cannot be taken as a gospel truth at face value and in the absence of any other supporting evidence, there is no scope to sustain the conviction and sentence imposed on the appellant and there accused is to be given benefit of doubt”.

13. It is further the case of prosecution that accused no.1 (Session Case No.294/2016) established physical relations with prosecutrix on the pretext of marriage from the year 2011 till around the year 2013 (one and a half year of lodging complaint dated 04.10.2015) and during said period, accused no.1 suppressed his real name and marital status where, co-accused persons aided the said act of accused no.1. The question for consideration is whether consent of prosecutrix was based on a fraudulent misrepresentation of marriage made by accused no.1 by suppressing his marital status due to which he never intended to marry her from very inception of their relationship. If this court reach the conclusion that he intentionally made a fraudulent misrepresentation from the very inception and the prosecutrix gave her consent on a misconception of fact, the offence of rape under section 375 IPC is certainly made out. In this regard, the Hon'ble Supreme Court has recently in the case of, **Maheshwar Tigga Vs. State of Jharkhand (CRIMINAL APPEAL NO.635 OF 2020)** (Arising out of SLP (Crl.) No.393 of 2020) dated 28.11.2020) has held as under:-

“Under Section 90 IPC, a consent given under a misconception of fact is no consent in the eyes of law. But the misconception of fact has to be in proximity of time to the occurrence and cannot be spread over a period of four

years. It hardly needs any elaboration that the consent by the appellant was a conscious and informed choice made by her after due deliberation, it being spread over a long period of time coupled with a conscious positive action not to protest”.

14. In **Uday vs. State of Karnataka (2003) 4 SCC 46**, the Hon’ble Supreme Court was considering a case where the prosecutrix, aged about 19 years had given consent to sexual intercourse with the accused with whom she was deeply in love, on a promise that he would marry her on a later date. The prosecutrix continued to meet the accused and often had sexual intercourse and became pregnant. A complaint was lodged on failure of the accused to marry her. It was held thus:-

"It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the

question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them”.

15. Keeping in view the ratio laid down by Hon’ble Supreme Court that the court must adopt in such cases, the court has to examine if the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of mis-representation made to her by the accused as observed by Hon’ble Supreme Court in **Deepak Gulati v. State of Haryana (AIR 2013 SC 2071)**. I shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up and well qualified girl working as a call operator. She has admitted in her cross-examination of also sharing business relations with accused no.1 and co-accused persons apart from having other relations. She has further admitted of being in physical relationship with accused no.1 from year 2011 till about 2013 under misconception of factum of marriage however, the said misconception of fact has to be in proximity of time to the occurrence and cannot spread over a period of about three years particularly when prosecutrix shared business relations with accused no.1, as observed by Hon’ble Supreme Court in **Uday case (supra)**. In this context, testimony of PW5 assumes significance who fortified the fact that both accused no.1 and prosecutrix stayed in his hotel on 11.05.2013 by making entry in their real names, where name of accused no.1 was registered as Kamlesh Marwadi alongwith his address as per his identity proof, as also

corroborated by testimony of Investigating Officer (PW4). Allegedly, prosecutrix found real name and address of accused no.1 on inquiring from office of Idea company however, she admitted to have given no written application in this regard which could have been produced during investigation. The prosecutrix has neither mentioned the dates of alleged incidents nor as to when did she find that accused no.1 (in Sessions Case No. 294/2016) was already married, upon visiting his residence. Apart from above, it is apposite to observe that prosecutrix delayed in lodging complaint even after marital status of accused no.1 (in Sessions Case No. 294/2016) came to her knowledge as is her own case, on assurance given by Piyush Rathod (Sargara) (accused No.2 in S.C. No.294/2016) that he will convince him to marry her. With respect to delay in registration of FIR in cases of rape, Hon'ble Supreme Court in **Parminder Kaur v. State of Punjab, (2020) 8 SCC 811** has held that

“Sweeping assumptions concerning delays in registration of FIRs for sexual offences, send a problematic signal to society and create opportunities for abuse by miscreants. Instead, the facts of each individual case and the behaviour of the parties involved ought to be analysed by courts before reaching a conclusion on the reason and effect of delay in registration of FIR....”.

16. The delay of 1½ years in lodging police complaint of last incident of alleged rape including the period after the prosecutrix came to know the reality of accused no.1 (in Sessions Case No. 294/2016), cannot be termed as ‘reasonable delay’. It is beyond comprehension that prosecutrix then aged about 23 years having adequate intelligence and maturity to understand the significance and morality associated with the act she was

consenting to, would still believe Piyush Rathod (accused no.2 in Session Case No.294/2016) and await accused no.1 (Session Case No.294/2016) to marry her despite knowing his marital status. It is also to be noted that prosecutrix admitted of never informing her family members about the alleged incidents being spread over number of years, which is unlikely of a rape victim considering the totality of prosecution case.

17. The evidence as discussed above in the light of surrounding circumstances does not indicate that prosecutrix had sexual relationship with accused no.1 under the misconception of fact or that her consent was based on fraudulent misrepresentation of marriage. Infact, it appears that she knew the real name and marital status of accused no.1 from the beginning, particularly when their relation had spread over a period of about three years while prosecutrix also shared business relations with him and co-accused persons thus, in absence of any substantive evidence to prove that prosecutrix came to know the real facts later except for bare allegation when on the contrary, hotel register of Kamal Palace bear their real names as admitted by PW5 and IO (PW4), who also confirmed that there is no entry in the name of Akshay Rajput in hotel register in the year 2013. Hence, it can be said that alleged offence is an act of promiscuity on part of prosecutrix and not on account of inducement by misconception of fact as she, being a fully grown up girl should have known the consequences of her voluntary act of having sexual intercourse with a married man. The act of accused no.1 (Session Case No.294/2016) is certainly morally wrong but section 90 IPC cannot be called in aid in such a case to fasten criminal liability on him as evidence on record reveals that sexual relationship between the prosecutrix and the accused no.1

was consensual. On appreciating above evidence coupled with unreasonable delay, the prosecutrix cannot be termed as a 'sterling witness' on whose solitary testimony accused no.1 (Session Case No.294/2016) can be convicted therefore, this court has arrived at a conclusion that charge under section 376, 419 and 420 IPC as against accused no.1 could not be proved by prosecution beyond reasonable doubt.

Charge Under Section 417 IPC against accused nos.2 & 3 in Session Case nos.294/2016 and accused No.1,2 & 3 in Sessions Case Nos. 112/2017

18. The case of prosecution as against abovementioned co-accused persons is that they actively aided the crime committed by accused no.1 (Session Case No.294/2016) by knowingly omit to disclose his real identity and yet giving false assurance that he will marry the prosecutrix. Allegedly, Piyush Vaktajibhai Rathod (accused No.2 in Sessions Case No. 294/2016) convinced prosecutrix not to lodge police complaint against accused no.1 (Session Case No.294/2016) on an assurance that he will marry her after she came to know his real name and marital status however, once this court has reached to the conclusion that sexual relations between prosecutrix and accused no.1 were consensual and prosecutrix was aware of his true identity and consequences thereof, no question arises if co-accused persons concealed real facts from her. Besides this, perusal of evidence on record elucidates that Piyush Vaktajibhai Rathod (accused No.2 in Sessions Case No. 294/2016) is not the real brother of accused no.1 and the prosecutrix has not even mentioned the names of co-accused in medical history as recorded before doctor at Exh.24 as also admitted by Investigating

Officer (PW4). There is absolutely no evidence to prove that the prosecutrix had consented for physical relationship with accused no.1 (Session Case No.294/2016) on intentional omission of true facts by co-accused persons, as stipulated under section 415 IPC thus, mere refusal to marry on part of accused no.1 would not constitute offence under section 417 IPC against them as prosecution failed to prove beyond reasonable doubt that prosecutrix was induced to establish sexual relations with accused no.1 on misrepresentation of facts which she wouldn't have done had she she known true facts. The prosecutrix ought to have known, as observed earlier, that her marriage with accused no.1 was perhaps impossible on account of him being married and having children thus, resulting in benefit of doubt to accused no. 2 and 3 in Sessions Case No. 294/2016 and accused no. 1, 2 and 3 in Sessions Case No. 112/2017. Accordingly, I pass following final order:-

ORDER

1. Accused No.1 Kamlesh @ Akshay Rajput s/o. Mafatlal Sargara, is hereby acquitted from all the charges framed against him for offences punishable under sections 376,419, 420 of the Indian Penal Code,1860 and Accused No.2 Piyush Vaktaji Rathod (Sargara), Accused No.3 Ajay Rameshbhai Gohil, are hereby acquitted from all the charges framed against them for offences punishable under section 417 of the Indian Penal Code,1860, in Session Case No.294/2016 in connection with FIR being I-CR No.129/2015 dated 04.10.2015 registered at Navrangpura Police Station, Ahmedabad.
2. Accused No.1 Rahulbhai Nilambarbhai Jha, Accused No.2 Pushpendrasingh Mahipalsingh Chauhan and Accused No.3 Sandipkumar Babubhai Rathod are, hereby acquitted from all the charges framed against them for offences punishable under sections 417 of the Indian Penal Code,1860, in Session

Case No.112/2017 in connection with FIR being I-CR No.129/2015 dated 04.10.2015 registered at Navrangpura Police Station, Ahmedabad.

3. Muddamal articles, if any, be destroyed after expiry period of appeal. If appeal is preferred, then muddamal be dealt as per the order of Hon'ble Appellate Court.
4. Bail bond stands cancelled and surety is discharged, forthwith.
5. In terms of section 437-A of Cr.P.C, accused persons are directed to furnish personal bond of Rs. 5,000/- each with one surety of like amount for a period of six months for their appearance before the Hon'ble High Court of Gujarat in the event, the prosecution wishes to file an appeal challenging the present judgment.

File be consigned to the Record room.

Signed and Pronounced in the open court today on this 30th Day of March,2022.

(Priyanka Agarwal)
Additional Sessions Judge
Court No.26,
City Civil Court, Ahmedabad
Unique ID Code GJ01597