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MAHMOOD FAROOQUI V. STATE OF NCT OF DELHI

A Flawed Judgment Deciding The Consent Of Women

For Sexual Intercourse

Authored By- Nitin Kalson

I. INTRODUCTION

The Delhi High Court's decision to overrule the trial court's conviction of Mahmood Farooqui under Section 376 of IPC, 1860 raises different controversial questions, not only about the meaning of consent and the minimum standard for proving *lack of consent* in a rape prosecution but also about the purpose of Criminal Law related to the sexual offenses and the limits of these laws.

FACTS:

Mr. Farooqui had called the prosecutrix to his home in January 2015, ostensibly so that they could attend a marriage together, joined by Mr. Farooqui's wife. However, when the prosecutrix arrived at Mr. Farooqui's residence, she saw Mr. Farooqui drunk and being consoled by a friend. When the prosecutrix's companion left the residence, the two of them (Mr. Farooqui and the prosecutrix) "exchanged kisses," and Mr. Farooqui then requested her for oral sex, which she denied. Despite the rejection, Mr. Farooqui persisted in his request for oral sex, and he ultimately forced himself on her.

She stayed quiet and feigned an orgasm because she was afraid of bodily harm if she denied him the favor (this fear occurred when the recollection of what happened to Nirbhaya when she rejected the unfortunate act of sexual intercourse passed through her mind). This horrific crime, however, was cut short when said pal rang the doorstep.

The prosecutrix immediately left the location, and multiple emails were sent between the prosecutrix, Mr. Farooqui, and Mr. Farooqui's wife Anusha in the days that followed, in which the prosecutrix voiced her disgust and indignation at Mr. Farooqui's conduct and the situation that occurred.

Following this, the prosecutrix filed a police report, and the matter was heard by an Additional Sessions Judge, with Mr. Farooqui being found guilty under Section 376 of the Indian Penal Code, 1860. As previously stated, this matter was brought before the High Court as an appeal against Mr. Mahmood Farooqui's conviction of rape by the Sessions Court.

ISSUES:

1. Whether there was consent by the prosecutrix for the sexual intercourse or it was forced by the defendant on her?
2. Whether there was a communication of the consent by the prosecutrix to Defendant?
3. Whether the defendant was acting under the mistake?
4. Whether the trial court was right to hold that defendant raped the prosecutrix?

JUDGEMENT:

"It continues to remain in hesitation as to whether quite an event, as has been reported by the prosecutrix, took place and, if it did, whether it was without the consent/will of the prosecutrix and, if it was without the consent/will of the prosecutrix, whether the appellant could decipher the same," wrote a Single Judge of the High Court in a judgment dated September 25¹.

In today's environment, when parity is the "talking point" and both men and women are "initiators" of sexual actions, consent should be a clear and unmistakable "no," according to Justice Ashutosh Kumar's ruling. In other words, there is no place for a weak "no."

The Court, therefore, required three ingredients to be proved to constitute an offense under Section 375:

1. "That the event took place, in that there was the *actus reus*, i.e., any of the four actions that are enumerated in subsections (a) to (d) of Section 375 were committed.
2. That any of the circumstances enumerated in Section 375 were present. In the present case, the circumstance invoked was that there was a 'lack of consent.
- 3.

¹Mahmood Farooqui vs. State (Govt. of NCT of Delhi), 2018 Cri LJ 3457, Delhi HC.

4. That there was *mens rea*, being the specific knowledge of the accused that he was performing the act without the consent of the prosecutrix, i.e., the accused could discern that there was lack of consent.”²

Critical Analysis:

This particular case raises serious issues regarding sexual offenses against the human body. But the main issue which was discussed all over the case was whether there was consent or not by the prosecutrix for the sexual intercourse.

For the last few years, the law of sexual assault and consent has been a grey area in India. After the brutal Nirbhaya gang rape in 2012, there were major criminal law amendments by the Indian Government which are referred to as 2013 criminal law amendments.³ These were based on a series of recommendations made by the Verma committee.

In the present case, the incident took place at his house after he had invited the prosecutrix to accompany him and his wife to a local wedding. When the prosecutrix arrived, the accused was intoxicated and his wife was not at home. He forcibly performed oral sex on her. She said she didn't want to engage in the oral sex and that as “*the appellant tried to pull down her underwear she kept on pulling it up.*” She resisted but was forcefully pinned down, as soon as it was over, she tried to leave the house. The prosecutrix, in her email to the accused, is quoted as having said “*I told you many times I didn't want to. But you did become forceful. I went along because I did not want things to escalate... I was just afraid that something bad would happen if I didn't ... it was because of pressure and your force physically on me.*”⁴ Despite this clear evidence, the court acquitted the accused.

This judgment is erroneous on different legal grounds. **Firstly**, the court allowed an alternate plea to be added by the defense which is completely contradictory to the initial plea. Secondly, the wrong interpretation of section 375 of IPC by the judge while deciding the case.

Alternate pleas are allowed and can be added at a later stage. Notably, the proviso to Order 6 Rule 17 states: “*Provided that no application for amendment shall be allowed after the trial has commenced unless the Court concludes that despite due diligence, the party could not have raised the matter before the commencement of trial.*”⁵

² Rupali Samuel, The Acquittal in Mahmood Farooqui case, BAR & BENCH (March 2, 2022, 10:55 AM), <https://www.barandbench.com/columns/acquittal-mahmood-farooqui-case>.

³Severyna Magill, “Farooqui v State Government of Delhi: Confusing Consent” (OxHRH Blog, 22 November, 2017) <https://ohrh.law.ox.ac.uk/farooqui-v-state-government-of-delhi-confusing-consent/>

⁴Id. at 1.

⁵ Indian Evidence Act, 1872, Order 6 Rule 17, No. 1, Acts of Parliament, 1872 (India).

The interpretation of the order according to my view is that the court allows alternate pleas but only those which are reasonable in nature. The word “reasonable” means here that the plea should not be destructive of the statement which has been given by the defendant initially. Thus, alternate pleas are allowed but the pleas which are mutually destructive of each other are not allowed in the court. In *Naresh Kumar v. Meer Singh*,⁶ the Supreme court of India held that the allowed plea by the high court was beyond the liberty that is provided by order 6 rule 17, therefore, the trial court was right in dismissing the plea and the high court made a mistake. In *Gautam Sarup v. Leela Jetly*⁷, the court held that the defendant is entitled to take an alternative plea during the trial but such an alternative plea cannot be destructive of the original stance. However, in the present case, the plea cannot be allowed because it falls out of the scope of liberty given by the said order. The alternate plea clearly shows that it destroys the evidence which was initially provided by the defendant. Defendant initially pleaded at the trial court that the act which he is being accused of, did not take place at all, that is, whatever the allegations are against him they are completely false. The alternate plea was that the act was consensual. This does not make any sense. How can one firstly say that there was nothing and then later admit that there was consensus ad idem. The alternate pleas are pleaded just to amend or modify the initial statement but here it was used to destroy the initial evidence. One can either contest the claim of the rival party or concur with it.⁸ No one can do both, in different petitions. So, it becomes illegal and illogical to allow that kind of plea before the court.

Secondly, in the present case, the interpretation of section 375 of IPC, after the amendment, by the court is not quite apt at all. The court's interpretation was that this section requires to be proved by the prosecution that not only the prosecutrix consented but the accused was not mistaken that the prosecutrix had not consented. But, the interpretation of section 375 in other judgments contradicts this court's interpretation. For example, in the case *Himachal Pradesh vs. Mangoram*⁹, the court held that the accused overpowered the prosecutrix and committed a sexual act. The court held him guilty for the offense of rape under section 375 of the IPC as the act was against the will or consent of the prosecutrix. The crux of this section is the lack of consent. It's up to the court whether the prosecutrix consented or not. But in the present case, the judge argued on the behalf of accused that he did not know that she was not consenting to the act. The accused being mistaken to the consent of the prosecutrix is not a defense to the offense of rape. To prove this perception of the accused the court relied on section 90 of the IPC, which states the legality of the consent given under the misconception of a fact or a gesture.

⁶Naresh Kumar v. Meer Singh, [2020 SCC Online Del 398](#), decided on 28-01-2020.

⁷Gautam Sarup v. Leela jetly, 2008 7 SCC 85.

⁸Raghav Pandey, The Judgment in Mahmood Farooqui case, BAR & BENCH (September 28, 2017), <https://www.firstpost.com/india/delhi-hcs-verdict-in-mahmood-farooqui-rape-case-is-travesty-of-justice-hopefully-supreme-court-will-overrule-order-4090613.html>)

⁹Himachal Pradesh vs. Mangoram(2000).

However, in my opinion, this reliance is flawed because of two reasons: *firstly*, the section deals only with the men's re a of the prosecutrix. *Secondly*, in the legal domain, it is a principle that if there is a term in a particular section, then the definition of that particular term should be according to that particular section only. In the present case, the term "consent" is defined in explanation 2 under section 375, but the judge seemed more focused on the wider definition of consent under section 90 of the act. There was no need to look at the definition of consent under section 90 of IPC.

The Consent Debate

Besides the arguments of the defendant and the prosecutrix, the court depends upon explanation 2 of section 375 of IPC, 1860.

*"Explanation 2. Consent means an unequivocal voluntary agreement when the woman by words, gestures, or any form of verbal or non-verbal communication, communicates a willingness to participate in the specific sexual act"*¹⁰

The court interpreted explanation 2 of section 375 as "The explanation (2) and the proviso make it very clear that consent has to be categorical, unequivocal, voluntary and could be given by words, gestures or any form of verbal or non-verbal communication signifying willingness to participate in a specific sexual act. By way of precaution, a proviso has been added to the aforesaid explanation namely that a woman who does not physically resist an act of rape shall not by that reason only be regarded as having consented to such sexual activity"¹¹

In the present scenario, the court had completely gone into the literal sense of the section. The court said that consent for sexual intercourse must be voluntary and unequivocal which can be given by the words or gestures by the men or women. After the court laid the point after hearing both parties that the consent was given by the prosecutrix. According to the justice, the prosecutrix was in love with the defendant and they engaged in kissing each other several times. Also, they kissed when the wife of the defendant was at home. The judge reiterated this point and then asked the prosecution "which victim says I Love You after being raped?" By all these arguments it's completely evident that the judge was of the view that a feeble "no" may mean "yes". Here comes the most controversial topic of the case whether that feeble "no" whether means yes or no. According to the

¹⁰Explanation 2, § 375, Indian Penal Code, 1860.

¹¹Chaganti, Shishir, Feminist Re-Writing of Mahmood Farooqui v. State (NCT of Delhi) (April 6, 2020). Available at SSRN: <https://ssrn.com/abstract=3569593> or <http://dx.doi.org/10.2139/ssrn.3569593>.

case, it is yes. But according to the circumstances, scholars and feminists that feeble “no” may be a complete “no”.

In the present case, according to my analysis, the judge completely relied on two grounds. Firstly, he relied on the fact that the prosecutrix in one of the emails wrote that “she went along”. Secondly, the judge said that the prosecutrix in her statement mentioned that there was a fake orgasm from her side and hence, she didn’t negate it. Thus, the judge said that it is evident from the facts that there was consent by the prosecutrix.

In my opinion, both of the aforementioned grounds are flawed. This is not sufficient in law to constitute an unequivocal expression of willingness. The proviso in Section 375 explicitly prohibits the Court from reaching such a conclusion. The reasoning behind my opinion is that the prosecutrix mentioned that she was afraid of her safety. She mentioned that the medical officer who examined Nirbhaya said that she would have survived if she didn’t resist and therefore, to avoid any physical injury she faked an orgasm. Although the judge agreed with this particular argument of the prosecutrix yet he went ahead with the argument of the defendant. This issue was dealt with in the case of *Doyle (2010)* by the Court of Appeal in the UK. The court concluded that the fact that the victim “just let him get on with it” was held to be no consent as there was a fear of harm.¹²

The Supreme Court declared in *Idan Singh v. State of Rajasthan*¹³ (that consent gained under the effect of dread and fear does not constitute consent. Consent must always be given voluntarily and with full awareness of what the other party is proposing. Because it is plain from the facts of this case that the prosecutrix was afraid of any kind of physical harm to her body, any gesture made by her cannot be interpreted as consent for sexual intercourse.

The Supreme Court has adopted a wider interpretation of consent in the case of *State of U.P. v. Chhoteylal*¹⁴ regarding the claims of sexual offenses. The Court declared in this decision that “Consent implies three things: physical power, mental power, and the free and serious use of those powers, and consent obtained through intimidation, coercion, planned imposition, circumvention, astonishment, or undue influence should be viewed as a hallucination and not as a conscious and autonomous mental act.” As previously stated, the prosecutrix was coerced into oral sex by the

¹²Chaganti, Shishir, Feminist Re-Writing of Mahmood Farooqui v. State (NCT of Delhi) (April 6, 2020)<https://www.dailyo.in/politics/mahmood-farooqui-case-consent-sexual-assault-orgasm-supreme-court/story/1/21891.html>

¹³Idan Singh v. State of Rajasthan, 1977 CriLJ 556, 1976 (9) WLN 665.

¹⁴State of U.P. v. Chhoteylal, Crl. A. No.-000769-000769 / 2006 (Supreme Court, 14/1/2011).

defendant, and she stated that she had no idea he was so powerful until that day. As a result, it's clear that the prosecutrix was just deluded and did not consent to the act.

These rulings have established clear precedence that if a woman submits, it does not imply that she has given her agreement to the sexual relationship. If simple submitting does not constitute consent, then *Mahmood Farooqui's* decision, which gives the girl the benefit of the doubt due to her surrender, goes completely against previous judicial interpretations.¹⁵

Moreover, the prosecutrix claimed that the defendant kept pulling her underwear down and she kept pulling it up. As the judge agreed that this certain instance happened, then why not this instance can be considered as a complete "no"? Also, when the judge asked the lawyer Vrinda Grover how did prosecutrix negate the act, the lawyer replied that she said no several times but the judge completely ignored this fact and moved on with his arguments.

Furthermore, a review of the ruling reveals that the judge determined this case based on preconceptions and rape myths that are common in conventional rape adjudication cases. The following stereotypes and behaviors have been considered relevant during rape law adjudication in India: the survivor's previous sexual conduct; the accused's relationship with the survivor; whether she yelled during the mishap; whether she physiologically tried to resist; the period gap between the event and the filing of the FIR; and whether the survivor immediately notified her family, friends, or even passers-by. For example, the judge said that strangers never kiss each other like the prosecutrix and the accused did and don't drink together, they aren't permitted to do so.

Let's move to the aspect of proximity or the relationship between the parties. "Often a woman's appearance and previous sexual history with the man is used as a substitute for consent, thereby rendering her actual consent irrelevant."(*MacKinnon-Feminism*.) The importance of previous physical contact between the accused and the prosecutrix was also examined in the decision, which noted that "The communication goes on to say that the appellant went too far that night. This is the case that suggests that there were a few previous meetings that may or may not have been of such interest. Although there was no such intensity or passion, there was some physical touch which was accepted", and further "History of intimacy and the unabashedliking/attraction of the prosecutrix towards the appellant may have given animpression to the appellant of consent."¹⁶

¹⁵Anant Prakash Narayan, Delhi High Court's Judgment of Mahmood Farooqui v. State (Govtof NCT of Delhi) and Debate of Consent in the Rape Cases: An Analysis, 12 NUALS L.J.156 (2018).

¹⁶K. Vibhute, PSA Pillai's Criminal Law. 967 (10th ed., 2008).

For a long time in the Indian judiciary, the question of whether there was consent from the women is decided from the character of the women. The courts used to look whether the character of the woman shows that she had engaged in sexual intercourse with someone else and if yes, then, for the concerned act, she consented. But in 84th law commission report recommended that the character of the victim should be irrelevant for the question of consent because even a prostitute can be raped. Therefore, after a long controversy, provision was included in the evidence laws. Section 146 of the Indian evidence act says that during the trial of rape the question related to the general immoral character of prosecutrix shall not be allowed. Also, in the case *State of Maharashtra vs. Madhukar Narayan*¹⁷, the Supreme Court held that the history of the women should not be taken into consideration and removed the inspector from his service. Later the provision of Section 53A, which was inserted through the Criminal Law Amendment Act 2013, more clearly stated regarding the issue related to the consent.¹⁸

Sec 53A states that “in a prosecution for an offense under section 354, section 354A, section 354B, section 354C, section 354D, section 376, 2[section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB] or section 376E of the Indian Penal Code (45 of 1860) or attempt to commit any such offense, where the question of consent is in issue, evidence of the character of the victim or such person's previous sexual experience with any person shall not be relevant on the issue of such consent or the quality of consent.”¹⁹

In *State of U.P.v. Pappu Yunus & Anr.*²⁰ the Supreme Court of India held that the past sexual intercourse with men will not be a ground for the acquittal in the rape case. I argue, there is an indication by the court that in such cases the ingredients of the resistance should come back to prove the non-consent of the woman.²¹ Thus, it is evident from the statutes that the previous character of the girl should not be considered at the time of answering the question of consent. But in the present case, the judge completely ignored these statutes and provided a fallacious judgment on these unlawful grounds. This judgment is a mirror of the status of sexual offenses cases where we can see that it becomes very difficult for the judges to provide a rational judgment and thus, the victim suffers a lot.

It is completely an irrational thing that the court presumes that a woman has consented to have sexual intercourse if she had previously engaged in any kind of sexual activity with a particular man. In my opinion, any kind of resistance by the women before sexual intercourse should be considered as a “no”. If this becomes a statute, these kinds of cases will be reduced.

¹⁷State of Maharashtra vs. Madhukar Narayan (1990).

¹⁸ Id. at 13.

¹⁹Indian Evidence Act, 1872, § 53A, No. 1, Acts of Parliament, 1872 (India).

²⁰State of U.P.v. Pappu Yunus & Anr., AIR 2005 SC 1248.

²¹Id. at 15.

CONCLUSION

To summarize, the Court erred in implementing codified law to a complex case situation. While Section 375 considers consent being determined from the perspective of the woman, the Court erred in relying on Section 90 and placing an undue emphasis on what had been conveyed to the defendant, thereby relying on patrilineal beliefs and perceptions to evaluate whether the prosecutrix's modesty had been violated. It also misjudged the existence of consent by relying solely on a performing account and utterly disregarding mens rea.

The Court failed to acknowledge that static subservience is not morally equivalent to constructive consent, putting an outsized burden on women to express her lack of willingness, unequivocally and not-feeblely, while disregarding that the man is obliged to make a reasonable attempt to decode consent by observing that a feeble 'no' may mean a 'yes', especially in 'acts of passion' between people who know each other. Finally, the Court reinforced traditional patriarchal concepts of true rape and traumatized victims by rejecting to recognize that 'borderline' situations that deprive women of their autonomy, dignity, and control over their sexual identity may entail rape under Section 375.

