
CASE COMMENT: DECIPHERING CONSENT: MAHMOOD FAROOQUI V. STATE (GOVT. OF NCT OF DELHI) (2017) 243 DLT 310 (DEL)

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ABSTRACT

This case comment argues that in *Mahmood Farooqui v. State (Govt. of NCT of Delhi)*¹, The court by not considering verbal communication as sufficient proof of non-consent, and moreover requiring the victim's bodily actions to be synchronous with her verbal communication, misreads Section 375 of the IPC. It also undermines years of legal development, including the Criminal Law (Amendment) Act, 2013, which sought to protect women's autonomy and bodily integrity.

1. INTRODUCTION

This is a judgment that the Delhi High Court gave in the case of *Mahmood Farooqui v. State (NCT of Delhi)*². The judgment was delivered by the single judge bench of Justice Ashutosh Kumar. The present case arose out of an appeal against the conviction of Mahmood Farooqi under Section 376³ by the trial court, which had sentenced him to undergo seven years of rigorous imprisonment.

The central issue that the Hon'ble Court identified was regarding the interpretation of "consent" under Section 375⁴, particularly in the instances of prior intimacies between the parties and alleged ambiguities regarding verbal and non-verbal communication of the consent. The Court examined whether the prosecutrix had unequivocally refused to consent and whether the accused could have been said to understand the absence of consent. The Delhi High Court in the present appeal engages with the complexities engaged in cases where there

¹ *Mahmood Farooqui v State (Govt of NCT of Delhi)* (2017) 243 DLT 310 (Del)

² *Mahmood Farooqui v State (Govt of NCT of Delhi)* (2017) 243 DLT 310 (Del)

³ Indian Penal Code 1860 s 376

⁴ Indian Penal Code 1860, s 375

have been instances of intimacies and where the communication of non-consent is ambiguous. The Court ultimately extended the benefit of doubt to the appellant, holding that the surrounding circumstances had created doubt as to whether the prosecutrix had clearly communicated non-consent to the accused.

This paper argues that the court seriously erred in its interpretation of consent under S. 375 IPC⁵.

2. FACTUAL SUMMARY AND LEGAL BACKGROUND

The prosecutrix, a Fulbright fellow from Columbia University, was introduced to the appellant, Mahmood Farooqui, in June 2014 to assist with her PhD research on Hindi literature and the Nath Sampraday. Over the following months, the two maintained constant communication through SMS and they also met on several occasions, including dinner parties and social outings. The relationship extended beyond academic mentorship; they had exchanged kisses and hugs in the past, including an instance where they kissed while the appellant's wife was briefly out of the room. On March 28, 2015, the appellant invited the prosecutrix to his house for dinner, mentioning they might attend a wedding. When she arrived, she found the appellant in a heavily intoxicated and "lachrymose" state. After other people present at that time in the house left, the appellant allegedly forced oral sex upon her. The prosecutrix testified that she said "no" and pushed him, but ultimately "went along" because she was scared and wanted to avoid physical harm. She admitted to feigning an orgasm to end the encounter more quickly. Following the incident, the prosecutrix left for the United States on April 14, 2015. After seeking counselling and support from her university and family, she returned to India and lodged an FIR on June 19, 2015. As far as the legal background is concerned, the Trial Court convicted Mahmood Farooqui under Section 376⁶ and sentenced him to undergo seven years of Rigorous Imprisonment. Section 375 IPC⁷ provides the definition of rape. It specifies certain acts such as penetration of penis into the vagina, mouth, urethra, anus, or the insertion of any object or other body parts into the same without the consent and will of the woman constitutes the offence of rape.

⁵. Ibid.

⁶. Indian Penal Code 1860, s 376

⁷. Indian Penal Code 1860, s 375

3. JUDGMENT OF THE HIGH COURT OF DELHI

The single-judge bench of the High Court of Delhi set aside the conviction of Mahmood Farooqi and acquitted him of all the charges under Section 376 IPC. The Court based its decision on several grounds.

3.1 Regarding Consent: The court's holding revolved around its interpretation of consent under Section 375 IPC. While taking into account the Criminal Law (Amendment) Act, 2013, the Court introduced a subjective test regarding consent under Section 375 IPC, according to which it was not sufficient that the Prosecutrix had not given consent, but it also mandated that the accused should have reasonably discerned that the consent was not present. The court reportedly remarked that a "feeble" NO may not amount to an actual NO.

3.2 Regarding Prior Intimacies: The Court observed that in cases involving prior intimacies between the parties, the communication of non-consent should be loud and clear so as to be unambiguous to the accused.

3.3 Regarding Testimony of Prosecutrix: The Court subjected the prosecutrix's testimony to considerable scrutiny. It gave reliance to the fact that she had feigned an orgasm during the alleged sexual act by the accused, treating it as evidence of absence of communication of non-consent. The Court also gave credence to the fact that there was delay on the part of the prosecutrix in filing the FIR, while it acknowledged that delay in reporting sexual offences is not uncommon due to the fear of social stigma and other factors, but it nonetheless considered it as a factor that created doubt regarding prosecutrix's allegation.

4. CRITICAL ANALYSIS

Section 375 of the Indian Penal Code, as amended through the Criminal Law (Amendment) Act, 2013, defines consent with utmost clarity. Explanation 2 provides that consent must be unequivocal and voluntary, communicable through words, gestures, or any form of verbal or non-verbal communication. The subsequent proviso explicitly states that the absence of resistance shall not be considered as consent by the woman. It is noteworthy to look at the Justice Verma Commission Report, based on which the Criminal Law (Amendment) Act, 2013 was enacted. The Commission clearly noted that it is well settled that the evidence of the victim of rape is on the same footing as the evidence of an injured complainant or witness. Her testimony alone is sufficient for conviction. In prosecutions of rape, the law does not require corroboration. It is only by way of abundant caution that the court may look for some

corroboration so as to satisfy its conscience and rule out any false accusation. Further, it also noted that the Indian Evidence Act, 1872, was also amended by the Criminal Law (Amendment) Act, 1983 and section 114A was incorporated which imposed the burden of proving “consent” upon the accused in the aforesaid cases of aggravated rape. In the present case, the Delhi High Court’s judgment runs contrary to the text and intent behind the legal provisions dealing with sexual assault. By requiring that a verbal ‘no’ be loud and clear that it should be discernible to the accused in instances of prior intimacies, the Court effectively reads conditions in the statute which the Parliament clearly intended to do away with. It would be poignant to refer to the critique of the present judgment by Prof Mrinal Satish in his commentary⁸, where he states that though the court noted that the prosecutrix was a sterling witness, but still it fell back on stereotypes to second-guess the survivor’s testimony. It stated that the axiom “yes is yes and no is no” does not have universal acceptance. It noted that “instances of woman behaviour are not unknown and that a feeble ‘no’ may mean a ‘yes’, the judgment basically went on to state that different standards of consent apply in instances of rape by strangers and by acquaintances, that the act of rape when committed by acquaintances is less serious than the act of rape when done by strangers.

One of the most contentious observations that the court makes in the present case is stating that a “feeble” no may not mean “actual” no in real-life scenarios. The court here tries to import the reasoning that if the man and woman have known each other from before and had a certain degree of romantic intimacy, then the woman’s statement cannot be relied on completely. At this point, it would be highly relevant to also refer to the critique given to this position of the Court by Arun Sagar, published in NLSIU Socio Legal Review Journal⁹. The author states that by bringing narratives of past physical conduct on the part of the prosecutrix through a careful rhetorical manoeuvre, the woman’s prior conduct in ‘accepting’ some contact is brought to bear on the question of determining what she communicated to the accused. This move allows the Court to seemingly reverse the affirmative consent standard that appears to be incorporated in the legal provision and which the Court had itself stressed two paragraphs earlier, i.e. the idea that consent needs to be communicated clearly. Through the Court’s narrative, the prior close relationship now means that not consent, but non-consent needs to be communicated clearly. In the absence of such clear communication, consent is

⁸. Mrinal Satish, *'The Farooqui Judgment's Interpretation of Consent Ignores Decades of Rape-Law Reform and Catastrophically Affects Rape Adjudication'* (The Caravan, 7 October 2017)

⁹. Arun Sagar, *'An Analysis of Mahmood Farooqui v State (Govt of NCT of Delhi)'* (2020) 16 NLSIU Socio-Legal Review 1

presumed. The burden of preventing rape begins to shift to the victim. The author also points to the proposition taken by the Court in the present case that '*she said no but meant yes*' evokes the myth of the fabricated rape charge: if she meant yes, she indeed consent, in which case the rape accusation is a lie or is at least an instance of post facto irritational behaviour.

It should also be worthy to note that the Court observes that the communication of non-consent should be discernible by the accused, which effectively changes the burden of proving the 'presence' of consent on the part of the accused to proving the 'absence' of consent on the part of the victim. The criminal standard of proof beyond reasonable doubt requires the prosecution to prove each element of the offence. Under Section 375¹⁰, those elements include the act itself and the absence of consent. The 2002 Amendment¹¹ which amended S. 375 IPC¹² and 114A of IEA¹³, and 2013 Amendment¹⁴, through adding Explanation 2 and the accompanying Proviso to S. 375 IPC, defined consent in a manner specifically designed to make the victim's verbal testimony sufficient to discharge this burden. Thus, by imposing the additional requirement that non-consent be discernible to the accused, the Court introduced a further element that the prosecution must establish, one that is fundamentally harder to prove because it is based on the subjectivity of the accused. The accused can always claim, as Farooqui effectively did, that the signals were ambiguous to him, that the context of prior intimacy made him uncertain, or that his own condition at the time impaired his perception. None of these claims negates the objective fact of the prosecutrix's verbal refusal, but under the Court's framework, they are capable of generating reasonable doubt.

5. CONCLUSION

The Legal Developments regarding sexual offences, especially after the horrendous incident of "Nirbhaya", led up to the enactment of the Criminal Law (Amendment) Act, 2013, through which the Indian Parliament explicitly signalled its intention that a woman's "no", however spoken, however quiet, is a complete and sufficient legal act. It needs no further corroboration. It does not need to be louder or be actively resisted simply because she once knew the man who ignored it. The Justice Verma Committee said it plainly. And yet the Delhi High Court,

¹⁰. Indian Penal Code 1860, s 375

¹¹. Criminal Law (Amendment) Act 2002

¹². Indian Penal Code 1860, s 375

¹³. Indian Evidence Act 1872, s 114

¹⁴. Criminal Law (Amendment) Act 2013

in the *Farooqui*¹⁵ judgment, found a way to circumvent it. What makes this judgment particularly problematic is not merely its legal error. It is the human repercussions of those errors. Behind the doctrinal analysis of burden-shifting and statutory interpretation is a woman who said "no," who pushed him away, who complied out of fear, who feigned an orgasm to make it stop, who left the country, who spent months in counselling before she could bring herself to file a report and who was then told, in effect, that she had not made herself clear enough. That the man who forced himself upon her could not discern that she did not want it. The Court implied that the intimacy they had shared before made her refusal somehow ambiguous. It is one of the gravest travesties of law, which results in pushing back the substantial legal developments that had taken place in dealing with sexual offences against women.

¹⁵. *Mahmood Farooqui v State* (Govt of NCT of Delhi) (2017) 243 DLT 310 (Del)