IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
Appellate Side

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 297 of 2016

Versus
The State of West Bengal & Anr

For the appellant	:	Mr. Prabir Majumder, Adv. Mr. Snehansu Majumder, Adv. Mr. Avisek Chatterjee, Adv. Ms. Sangeeta Chakraborty, Adv.
For the State	:	Mr. S. S. Imam, Adv. Mr. Sandip Kundu, Adv.
Heard on	:	15.02.2023
Judgment on	:	24.02.2023

Ajay Kumar Gupta, J:

1. The instant appeal has been assailed by the appellant against the judgment and order of conviction dated 30.03.2016 and 31.03.2016 passed by the Assistant Sessions Judge, 2nd Court, Krishnanagar, Nadia in Sessions Trial No. XI of March, 2013 arising out of Sessions Case No. 92(2) of 2013 convicting the appellant under Section 376/417 of the Indian Penal Code and sentencing to suffer rigorous imprisonment for 10 years and also sentenced to pay a fine of Rs. 50, 000/-, in default, to undergo rigorous imprisonment for a period of six months for the offence punishable under Section 376 of the I.P.C. and further sentenced to suffer rigorous imprisonment for one year and also to pay a fine of Rs. 5,000/-, in default, to undergo rigorous imprisonment for three months for the offence punishable under Section 417 of the I.P.C. Both the sentences shall run concurrently.

2. Gist of the prosecution case is that on 03.09.2009 an F.I.R. was lodged under Section 420/120B/417/323 of the I.P.C. against the appellant as per the direction passed by the Learned Chief Judicial Magistrate, Nadia arising out of a Court complaint made by the victim girl under Section 156 (3) of the Criminal Procedure Code alleging that the

appellant intimate association with her and had cohabited with her on the false promise to marry. She became pregnant and gave birth to a female child on 18th December, 2009. Appellant took her to the hospital during her pregnancy and prepared a health card for treatment but he did not marry her despite of given assurance and finally drove her away on 10.07.2009 after assaulting her when she was six months' pregnant. This resulted in registration of Nakashipara Police Station Case No. 424 of 2009 dated 03.09.2009 under Section 420/120B/417/323 of the I.P.C. against the appellant.

3. After conclusion of the investigation, charge sheet was filed against the appellant. Upon hearing the parties, the Trial Court framed charges against the appellant under Section 376/417 of the I.P.C. Contents of the charges were read over and explained to him to which he pleaded not guilty and claimed to be tried. Defence case of the appellant was that he was innocent and had been falsely implicated by the de-facto complainant. During trial, prosecution examined 13 witnesses and exhibited number of documents as Exhibit Nos. 1 to 11 respectively to prove its case.

4. On the basis of evidence brought before the Trial Court, the Trial Court convicted and sentenced the appellant as aforesaid.

5. The appellant preferred this appeal praying for setting aside the impugned judgment and order of conviction and sentence passed by the Trial Court.

6. Learned counsel appearing on behalf of the appellant submitted that the appellant is innocent and the allegation of rape against the appellant has not been proved. Judgment and order passed by the Trial Court is based on surmises and conjectures. Furthermore, he submitted even if for the sake of argument, it is accepted there was a sexual intercourse between them then it ought to be treated as consensual as the victim was a fully grown up lady and had given her consent to such physical relations for a long period till she conceived. No case of forcible rape is proved. Lastly, the learned counsel submitted earlier similar allegation was levelled against the appellant and on the basis of such allegation, a full-fledged trial was conducted. After conclusion of trial and hearing the parties, Learned Trial Court had acquitted the appellant of the charges levelled against him.

7. Learned counsel appearing on behalf of the State, on the other hand, submitted that earlier case was disposed of on the basis of compromise between the parties. Thereafter, appellant again gave assurance to marry and resided as husband and wife. However, he did not marry the victim. She became pregnant again. She gave birth to a female child. DNA test confirmed the child is the biological daughter of the appellant. Accordingly, the learned Trial Court rightly convicted and sentenced the appellant. So, the appeal may be dismissed.

8. In view of the arguments of the parties and evidence on record, it appears that the allegation against the appellant is that he had physical relationship with the victim girl on the false promise of marriage. Due to cohabitation she became pregnant and finally gave birth to a female child on 18th December, 2009. Despite of the said facts, the appellant did not marry with her though he had given assurance to marry her and also had taken her to the hospital to prepare a health card for treatment during pregnancy. Accordingly, she went to the local police station for lodging complaint against the appellant but on being refusal by the local police station, she had compelled to file Court complaint before the Learned Chief Judicial Magistrate, Nadia and as per direction by the learned Chief Judicial Magistrate, F.I.R. was registered against the appellant under

Section 420/120B/417/323 of the I.P.C. After conclusion of investigation, charge sheet was filed against the appellant under Section 376/417 of the Indian Penal Code. Admittedly, a similar case was lodged against the appellant and after trial, appellant was acquitted from the said case but none of the parties brought any document or judgment or order of the Trial Court on record.

9. The prosecution had examined a number of witnesses out of those witnesses, the uncle (P.W. 1) and father (P.W. 3) were declared hostile. They were cross-examined by the prosecution.

10. Victim girl (P.W. 2) narrated during her examination that the appellant has given promise to marry her and lead marital life with her. On such promise, the appellant has further cohabited with her on several occasions. Due to such cohabitation, she became pregnant and finally delivered a female child on 18th December, 2009. She further disclosed that the appellant had cohabited with her in her residence as well as at the residence of the appellant on several occasions. When she came to know about the pregnancy, she went to the residence of appellant and disclosed the fact to his mother, who asked her to go to the Court for her redressal. Accordingly, she filed a Court complaint before the learned

Chief Judicial Magistrate, Nadia when local police refused to accept the same. She proved the contents of the said complaint which was written by learned advocate, Safikul Alam. The said complaint was marked as Exhibit 1 and her signature marked as Exhibit 1/1. She further disclosed that she made statement before the Magistrate under Section 164 of the Cr.P.C. She was sent for medical examination to Sadar Hospital, Krishnanagar in September 2010. She also disclosed that neither her parents nor the appellant and his family members were ready and willing to accept her shelter with her child. Accordingly, she was compelled to live at the home at .

11. Her statement was corroborated by her mother (P.W. 4) who deposed appellant gave proposal of marriage to the victim girl and, thereafter, they started mixing with each other. Out of such mixing, she became pregnant. Initially accused refused to marry her but at the instance of local P.S., appellant agreed to marry her but he did not marry rather he assaulted her when she was six months' pregnant and drove her away. Police did not take any action. Accordingly, the victim girl filed this case. Apart from these two witnesses, no other near relatives' witnesses supported the prosecution case.

12. However, prosecution examined number of the other Government officials' witnesses, who deposed as follows:-

13. P.W. 5 is a retired person from the police department. He stated he was posted as S.I. of police in Nakashipara police station on 03.09.2009. On that date he received complaint from learned Chief Judicial Magistrate, Nadia with direction he starts Nakashipara P.S. Case No. 424/09 dated 03.09.2009 under Section 420/120B/417/323, I.P.C. He proved the formal F.I.R. marked as Exhibit 5.

14. P.W. 6, Dr. Manoj Kr. Basak stated he collected blood samples of the appellant, victim girl and her child with the help of thalassemic unit in connection with this case. The said samples were received by P.W. 8, Ikramul Haque, senior scientific officer, who stated that he received three sealed paper packets vide CMR No. E/18923/CA-1 dated 30.09.2010 through learned Chief Judicial Magistrate, Nadia at Krishnanagar. Those three parcels were opened by him were marked as Ext. A, Ext. B and Ext. C respectively and finally used for DNA isolation as per the SOP. Data was run on genetic analyser and finally opined that the female baby is the biological daughter of the appellant and the victim girl. He proved the

report as Ext. 6 collectively and the Blood Authentication Form marked as Ext. 7 collectively.

15. P.W. 9, Dr. Sutapa Biswas deposed that on 10.07.2009 she was posted as Medical Officer at Bethuadahary Block Primary Health Centre. On that date she examined the victim girl. The case was a case of physical assault by slapping and fists and blows. On examination she found a small abrasion on the right elbow joint. She proved the injury report marked as Ext. 8. However, during cross-examination she disclosed there is no reflection in the injury report who had brought victim girl before her? It was not mentioned in the report that who had assaulted her. Lastly, she admitted that the abrasion of such nature could be possible by falling on any hard substance.

16. From the injury report Ext. 8, it does not appear who had assaulted the victim. She had not narrated to the doctor how she had sustained the injuries. No other reliable evidence transpires from the entire records to prove the case of assault by the appellant. Though oral evidence has come on record by her mother (P.W. 4) that appellant had assaulted her when she was six months' pregnant, the victim did not level

any allegation of physical assault by the appellant before the medical officer. The version of physical assault by the appellant is not reliable.

17. Regarding allegation of cohabitation on the false promise to marry her learned counsel appearing on behalf of the appellant vehemently argued that the victim girl had lodged an earlier complaint prior to institution of this case. In the said case the appellant was acquitted by the Trial Court. P.W. 2 deposed earlier incident occurred in 1999. She delivered a baby on 29th July, 1999 but baby expired in hospital. This Court thoroughly scanned the evidence of all the prosecution witnesses specially the victim girl, who admitted during cross-examination that she had lodged a case against the appellant as the appellant refused to marry her. She further admitted that earlier case was heard before the learned Fast Track Court-I, Krishnanagar. During pendency of the said case appellant gave assurance to marry her and as such she did not adduce any positive evidence and agree to go with him and lead marital life. The appellant did not perform any formal marriage but he had put vermillion on her forehead.

18. Considering the above evidence brought on record by the prosecution it appears as follows:-

i) Intimacy had grown up between the victim girl and the appellant since long and they had cohabited on several occasions.

ii) The victim girl had lodged a similar complaint earlier against the present appellant but the appellant was acquitted. During pendency of earlier case, appellant had given assurance to take her and lead marital life. As such she did not adduce positive evidence and agreed to go with him and lead marital life.

iii) Thereafter, appellant lived with the victim as husband and wife. He put vermillion on her forehead - a sign of matrimony but did not formally marry her. As a result, a baby girl was born. Then the appellant drove her away.

19. From the above circumstances, this Court has to decide as hereunder: -

Firstly, whether continue cohabitation between the parties was on the false promise of marriage and would amount to rape in the eye of law?

Secondly, whether the conduct of the appellant would constitute cheating punishable under Section 417 of the Indian Penal Code?

Normally, in criminal cases, the burden of proof is on the prosecution to prove the ingredient of an offence as alleged without any shadow of doubt.

Therefore, once again before stepping into the scanning of the evidence of prosecution, I would like to refer the 375 of the Indian penal code and its essential ingredients in the backdrop of Section 90 to decide whether consent of the victim was procured through a misconception of fact :-

"**Section 375. – Rape.** - A man is said to commit "rape" if he-

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:-

First. - Against her will.

Secondly. - Without her consent.

Thirdly. - With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. - With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. - With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. - With or without her consent, when she is under eighteen years of age.

Seventhly. - When she is unable to communicate consent.

Explanation 1. - For the purposes of this Section, “vagina” shall also include *labia majora*.

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

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. - A medical procedure or intervention shall not constitute rape.

Exception 2.- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Thus, the prosecution must establish the following essential ingredients of the offence of rape are as follows:-

i. Accused committed sexual intercourse with a woman;

ii. He did so against her will or without her consent;

iii. If there was consent it was obtained by putting her or any of her relations or person interested in fear of death or hurt;

iv. Where consent was taken in the deceitful belief that the accused was husband;

v. If consent was taken when the victim was incapable of understanding its nature and consequences due to-

(a). Unsoundness of mind,

(b). Intoxication,

(c). Administration of any stupefying drug or substance by the accused either personally or through some agents.

vi. When the accused had sexual intercourse with his wife less than 15 years of age.

In the present case, though sexual intercourse with the victim is proved, it is to be seen whether the sexual intercourse was without her free consent which is essential to declare the appellant guilty of offence punishable under Section 376 of the Indian Penal Code.

Consent has been well explained in Section 90 of the Indian Penal Code:

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 of misconception ; or

Consent of insane person : if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child - Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

It is an admitted fact that the victim was 26 years old and for the sake of argument even she had physical relation with the appellant on many occasions it is difficult to believe the cohabitation was on a misconception of fact i.e. the appellant would marry her. It is relevant to note she did not disclose her physical relationship to any other person for a long period. Only after becoming pregnant she lodged the case against the appellant.

Learned counsel appearing on behalf of the appellant argued that even for the sake of argument if he involves in sexual intercourse with the victim lady. That sexual intercourse was with free consent of the victim lady. The consent given by the victim lady is not on misconception of fact.

This court relied on the Judgments reported in :-

1) 2003 (1) C.Cr.L.R. (SC) 555 (Uday Vs. State of Karnataka),

2) 2000 C.Cr.L.R. (Cal) 1 (Sudhamay Nath @ Bachhu Vs. State of West Bengal) and

3) 2004 C.Cr.L.R. (Cal) 945 (Krishna Pada Mahato Vs. The State of West Bengal).

The question that has to be now dealt with is whether in the facts and circumstances, the accused can be held guilty of the charges framed against him under section 376 I.P.C. for committing rape on victim and for cheating. The pivotal issue in this context is the age of the girl. If the girl was above 18 years of age on the date of her physical relationship and the sexual intercourse took place with her consent, the appellant cannot be held guilty of rape.

In the F.I.R., lodged by the victim lady, her age is stated as 26 years. Even in the statement recorded by the Magistrate she stated her age is 26 years. So, it would show that the girl was well above 18 years when she had sexual intercourse with the appellant. It also appears from the evidence of victim lady that on many occasions they had physical relationship at her residence as well as that of the appellant. If that be so, then it would seem to be a voluntary affair between them. In that event it is difficult to hold that the offence of rape is made out.

Case of the victim lady is that her consent was procured by the appellant on the assurance that he would marry her and believing the same she submitted herself to sexual intercourse with the appellant.

Whether such consent can be said to be a free or voluntary one? In her examination-in-chief, the victim stated the appellant told her that he would marry her. In fact, an informal marriage had been entered into and the appellant had put vermillion on her forehead. They continued to cohabit as husband and wife. Only after birth of child appellant did not enter into a legal marriage and drive her away. These circumstances do not establish a case of false promise at the inception of their relationship. It shows parties were cohabiting on the basis of an informal relationship for a considerable period of time. Only after birth of a child misunderstandings cropped up as appellant was unwilling to give a stamp of formality to the relationship. Subsequent act of the appellant cannot give rise to the irresistible inference that the earlier cohabitation was on the false promise of marriage. It may not be out of place to recount the victim had lodged an earlier case against the appellant and thereafter again had cohabited with him.

No doubt it is morally reprehensible for the appellant to desert the victim lady with whom he had entered into an informal marriage after she had become pregnant. But moral indignation cannot take the place of legal proof that the cohabitation of the parties was on the basis of a dishonest representation of the appellant. Even for arguments sake it is accepted the appellant had committed a breach of promise that by itself cannot give rise to an inference that he entertained dishonest intention at the inception of the relationship. On the other hand, it appears parties cohabited under an informal arrangement and subsequently the appellant refused to formalise the relationship which resulted in the institution of the criminal case. These circumstances do not persuade this Court to hold cohabitation was on the basis of dishonest representation.

In ***Jayanti Rani Panda vs. State of West Bengal and another***,[1] the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix, he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance, the prosecutrix started cohabiting

[1] 1984 Crl. L. J. 1535

with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Indian Penal Code and concluded :-

> "*The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact.*
>
> *But, here the fact alleged is a promise to marry I do not know when. If a full grown lady consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of*

> *promiscuity on her part and not an act induced by misconception of fact. Section 90 of I.P.C. cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her."*

The same view was reiterated in ***Hari Majhi vs. The State***[2] and ***Abhoy Pradhan vs. State of West Bengal***[3].

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.

In the instant case, the prosecutrix was a grown up lady aged about 26 years. She was in intimacy with the appellant. 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 secret as long as she could. It

[2] 1990 Crl. L.J. 650
[3] 1999 Crl. L.J. 3534

appears that the matter got complicated on account of the prosecutrix becoming pregnant.

In plethora of judgment of Supreme Court and High Court have held that 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. In the instant case, the prosecutrix was a grown up lady aged about 26 years at the time of incident and she and the appellant were in physical relation. They have made sexual intercourseon several occasions in the residence of victim lady as well as the appellant. The circumstances clearly indicate that the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was in love, not because he promised to marry her, but because she also desired it. The circumstances clearly show that the prosecutrix voluntarily and consciously consented to having sexual intercourse with the appellant and her consent was not in consequence of any misconception of fact.

Relying on the decisions cited above, I am of opinion that in the instant case there was no misconception of fact and the victim being a fully grown up lady voluntarily consented to having sexual intercourse

with the appellant. Her evidence also reveals that they had entered into an informal marriage. The aforesaid situation makes it clear that the appellant cannot be held guilty under Section 376 of the I.P.C. or Section 417 of the I.P.C.

In the instant case, the prosecution has failed to establish that the appellant committed offence under Section 376/417 of the I.P.C. That being the position the appellant cannot be held guilty under Section 376/417 of the I.P.C.

20. The impugned judgment and order of conviction and sentence is, thus, set aside.

21. The appellant is acquitted of the offence levelled against him.

22. Accordingly, the appeal is allowed.

23. Appellant shall be set at liberty forthwith if he is not wanted in any other case, upon execution of a bond to the satisfaction of the Trial Court which shall remain in force for a period of six months in terms of Section 437A of the Code of Criminal Procedure.

24. With above observations, CRAN No. 2 of 2019 (Old No. CRAN 3579 of 2019) is also, thus, disposed of.

25. Lower Court records along with copies of this judgment are to be sent down at once to the learned Trial Court as well as the Superintendent of Correctional Home for necessary compliance.

26. Photostat certified copy of this judgment, if applied for, is to be given to the parties on priority basis on compliance of all formalities.

I Agree.

(Joymalya Bagchi, J) **(Ajay Kumar Gupta, J)**

P. Adak (P.A.)