

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
CrI. A(J) No. 02 of 2021

1. Sri Sanjib Paul

.....Appellant

-VERSUS-

1. The State of Tripura.

..... Respondent.

B_E_F_O_R_E
HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE ARINDAM LODH

For Appellant(s)	:	Mr. P. K. Biswas, Sr. Advocate. Mr. P. Majumder, Advocate.
For Respondent(s)	:	Mr. Ratan Datta, P.P. Ms. V. Podder, Advocate.
Date of hearing and delivery of judgment and order	:	20.07.2022
Whether fit for reporting	:	NO

JUDGMENT & ORDER [ORAL]

[T. Amarnath Goud, JJ]

Heard Mr. P. K. Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel appearing for the appellant. Also heard Mr. Ratan Datta, learned Public Prosecutor appearing for the State-respondent and Ms. V. Podder, learned counsel appearing for the de-facto respondent.

[2] This criminal appeal under Section-374 of the Code of Criminal Procedure is directed against the judgment and order of conviction dated 11.02.2021 and 12.02.2021, passed by the learned Addl.

Sessions Judge, Court No.5, West Tripura, Agartala, in connection with case No. S.T.(T-1) 10 of 2015, whereby and whereunder, the appellant has been convicted under Sections-376(1) of IPC and thereby sentenced him to suffer rigorous imprisonment for 12 years and also to pay a fine of Rs.50,000/- in default to suffer further RI for 1 year. Further convicted him under Section-417 of the IPC and sentenced to suffer RI for 1 year with a fine of Rs.10,000/- with default stipulations. Both the sentences shall run concurrently.

[3] The factual background of the prosecution case is that one Bhabana Das, the complainant herein, complained that Sanjib Paul, the accused-person was in love affair with her daughter (name withheld) and being in relationship with her daughter, the accused-person have gone to the extent of developing sexual relationship, which was purely on the assurance of marriage given by the accused-appellant to her daughter. Her daughter being pregnant before the marriage, the matter was decided by both the families to be settled before the birth of the child and decision was taken that Court marriage would be held. Accordingly, 28.02.2014 was finalized for the registration of the marriage in the Court but, neither the accused-person nor his family members turned up on that day in the Court. Subsequently, the accused-person informed the daughter of the complainant to come to his house in the attire of a married woman to be accepted as his wife. The daughter of the complainant accordingly, went to his house obeying his instruction but, the accused-person was often mentally and physically tortured by the parents and relatives of the accused-person.

[4] On 25.03.2014, the daughter of the complainant gave birth to a male child. As the torture upon the daughter of the complainant increased day by day, the matter was taken up with the members of a local club,

namely, Aikyatan Club. Every endeavours of the members of the club having failed in ending the dispute of the parties, advice was given to take the shelter of law. The complainant after realizing that every doors have been shut have then taken shelter of law and the complaint of the complainant was then registered by the OC Amtali P.S.

[5] On the basis of the aforesaid complaint, Amtali P.S. FIR No.92 of 2014 dated 25.04.2014 under Sections-376/417/109/506/34 of IPC was registered against the accused-persons, namely, Sri Sanjib Paul, Sri Sunil Paul, Smt. Rekha Paul, Sri Sanjoy Paul, Smt. Shilpi Das and Sri Rabindra Paul and the investigation concluded by presenting a charge sheet vide Amtali P.S. CS No.144 of 2014 dated 25.08.2014 under Sections-376/417/506 of IPC against the accused-persons in the Court of law.

[6] On the basis of the FIR police took up investigation and on completion of the investigation filed charge sheet against the appellant for the offence punishable under Sections-376/417/506 of IPC and the learned SDJM, Bishalgarh took cognizance of the offence and as the case was exclusively triable by the Court of Sessions, the case was transferred to the Court of learned Sessions Judge, West Tripura and subsequently, the case was again transferred to the learned Addl. Sessions Judge, Court No.4, West Tripura, Agartala and after hearing the prosecution as well as the defence and on perusal of the papers submitted by the police, the learned trial Court was pleased to frame charge against the accused-persons for the offence punishable under Sections-376(1)/417/34 of IPC and separate charge was framed against other accused persons for the offence punishable under Sections-417/506/34 of IPC, to which the present accused-person pleaded not guilty and claimed to be tried. During the trial, two accused-persons, namely, Sunil Paul and Rabindra Paul had expired.

[7] During trial, to substantiate the charge, prosecution has adduced as many as 11 witnesses including the complainant of this case mentioned in the appendix attached herewith. The prosecution also relied upon some documentary evidence as well as material object which were also marked as exhibits in connection with the instant case as reflected in the attached appendix. The defence case was that of total denial of the allegation of the prosecution and as such the convict-appellant during his examination under Section-313 of Cr. P.C, pleaded his innocence and denied to adduce any witness in support of his defence.

[8] After hearing both the parties, the learned Court below found that the appellant is guilty for committing offence punishable under Sections-376(1)/417 of IPC and thereby sentenced his as stated supra. For the purpose of reference, the observation of the Court below may be reproduced hereinbelow:

“Having regard to the entire evidence as adduced by the prosecution, I am of the considered view that the prosecution has established the charge under Sections-376(1)/417 of IPC beyond all reasonable shadow of doubts. Consequently, accused Sri Sabjib Paul, son of Lt. Sunil Paul is found guilty for commission of the offences under Sections-376(1)/417 of the Indian Penal Code and as prosecution could not establish the charge under Section-506 of IPC, he is acquitted for the offence punishable under Section-506 of IPC. The other accused persons namely, Sanjoy Paul, Rekha Paul and Shilpi Das are acquitted from the charge punishable under Sections-506/34 of IPC, as prosecution has failed to prove the commission of offence under Sections-506/34 of IPC against the accused-persons beyond the reasonable shadow of doubt.

In the result, accused Sanjib Paul is hereby convicted under Sections-376(1)/417 of IPC.”

[9] The appellant herein, being aggrieved by and dissatisfied with the impugned judgment and order of conviction dated 11.02.2021, has preferred this present appeal for ends of justice.

[10] Mr. Biswas, learned senior counsel assisted by Mr. P. Majumder, learned counsel in support of the case of the accused-person has

submitted that the findings of the court below are highly illegal, erroneous and perverse based on mere surmise and conjecture, which is liable to be set aside. The learned Court below has erred both in law as well as in fact and arrived at a wrong conclusion.

[11] He has submitted that the evidences on record and the statements made by the witnesses do not constitute any offence punishable either under Section-376(1) IPC nor under Section-417 of IPC and as such the order of conviction and sentence passed by the learned trial Court is liable to be set aside. The Court below has failed to apply its judicious mind in appreciation of the evidences on record and accordingly, arrived at a wrong conclusion. The learned Court below should have held that physical relation developed between the victim and the appellant not because of assurance of marriage but, because of deep love and as such, the learned trial Court has committed serious error and illegality by convicting the appellant which is liable to be set aside.

[12] The statements made by the prosecution witnesses are self contradictory and one is condemning the other and as such, the learned trial Court has committed serious error and illegality by placing reliance on the evidence of the prosecution witnesses. It is clearly proved that both the appellant and the victim were in deep love and the same continued for several years and during that period they had sexual relation on several occasions and as soon as she became pregnant, she asked the appellant to marry her which was denied by the appellant and as a result by making false allegation that on the basis of false assurance of marriage, the sexual relation was developed and, as such, the learned Court below should have acquitted the appellant on the ground that sexual affair/relation between the appellant and the victim took place on several occasion which was peaceful

affairs and both indulged in the FIR due to deep love and not because of assurance of marriage.

[13] Mr. Biswas, learned counsel has submitted that the victim was examined the learned Magistrate during the investigation and here statement was recorded under Section-164(5) Cr.P.C. and the said statement contains no allegation of having sexual relation with her on the assurance of marriage and, as such, the learned trial Court should have acquitted the appellant on the basis of said statement which has been subsequently, proved by the learned Magistrate.

[14] From a bare reading of the evidence on record, it is crystal clear that it is not only the appellant but, the victim who voluntarily indulged for having physical relation knowing the consequence of the affairs and as such, the learned Court below has committed serious error and illegality by holding that the appellant has developed sexual relation by giving false assurance of marriage. He further contended that, the evidence on record clearly shows that there was no assurance of marriage at the initial stage of having sexual relation but, the allegation of false assurance of marriage has been put forward only when the victim became pregnant.

[15] In support of the case of the convict-appellant, Mr. Biswas, learned senior counsel has relied on a decision of the Apex Court in *Maheshwar Tigga v. State of Jharkhand*, reported in (2020) 10 SCC 108, wherein, the Apex Court has held thus:

“18. We have given our thoughtful consideration to the facts and circumstances of the present case and are of the considered opinion that the appellant did not make any false promise or intentional misrepresentation of marriage leading to establishment of physical relationship between the parties. The prosecutrix was herself aware of the obstacles in their relationship because of different religious beliefs. An engagement ceremony was also held in the solemn belief that the societal obstacles would be overcome, but unfortunately differences also arose whether the marriage was to be solemnised in the Church or in a Temple and ultimately failed. It is not possible to hold on the evidence

available that the appellant right from the inception did not intend to marry the prosecutrix ever and had fraudulently misrepresented only in order to establish physical relation with her. The prosecutrix in her letters acknowledged that the appellant's family was always very nice to her."

20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deepseated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday (supra) are considered relevant:

"25...It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent."

[16] For the purpose of deciding the present case, depositions of PW-2 is very much important to the facts and circumstances of the case. PW-2 in her deposition has stated that her mother lodged a complaint on 25.04.2014. Since 3/4 years prior to the lodging of complaint she has love affairs with Sanjib, the appellant herein. She has stated that beginning of their relation, on several occasions the convict-appellant made physical relation with her on promise of marriage and subsequently, she became pregnant. She informed the fact to the appellant and he taken to her to doctor in two occasions. He also took her to Doctor P. K. Roy, who was maintaining his chamber at Bishalgarh and also at Ker-chowmuhani, Agartala. She has further deposed that after observing physical changes, her parents asked her as to what happened. Thereafter, her mother took her

to the chamber of Dr. P. K. Roy where she disclosed the fact to her mother, but before that she did not disclose anything to anyone.

[17] She has further stated that a meeting was organized on 27.12.2013 in their house where both the parties were present. In that meeting it was resolved that court marriage would be arranged and she should abort her child. On 21.01.2014 they visited the Court and the appellant sworn an affidavit for the purpose of their marriage. In that affidavit both of them signed voluntarily. On the date of court marriage she along with her family members were present in the Court but the convict-appellant and his family members were not present and for that marriage was not solemnized. On 02.03.2014 the convict-appellant called her over telephone and asked her to go to their house with vermilion and bangle. Accordingly, she went in his house and stayed there. She has further stated that whenever she raised her voice for marriage, the family members of appellant tortured by them.

[18] From her cross-examination it reveals that she lodged complaint against all the accused-persons under Domestic Violence Act. It is true that in the Court of Magistrate final order was passed that the case was not maintainable. Thereafter, she appeared against that order which was upheld by the appellate Court and now the matter is pending before this Court. She has deposed that before she disclosed to her mother the fact was not disclosed to any other persons. In the year 2013, she was 25 years old and already passed Madhyamik Examination. Prior to the lodging of complaint never the fact was informed at police station. She did not lodge any complaint either to Mahila commission of police.

[19] On the strength of the evidence of PW-2 before the Court below as well as the statement made under Section-164 of Cr. P.C., nowhere the prosecutrix has categorically stated that she had under the

false promise and misconception, she had physical relation with the accused-person and thereafter he ran away. In the entire statement, the allegation against the accused-person regarding *mala fides* and the requirements under Section-417 is silent. Since both are majors and even as per the statement of the prosecutrix, they were in love and were in relation for quite sometimes.

[20] Having come to the knowledge about the pregnancy out of their relationship, both went to Dr. P. K. Roy, for consultation for getting aborted. In the process, the mother of the prosecutrix came to know about the same due to the observation of the physical features of the her daughter and after visiting the doctor the made deliberations amongst their family members in the locality in presence of the village pradhan and they even proceeded for wedding in the Court of D.M. office. On the affidavits both of them i.e. the victim and the accused-person have signed and on the date of performing marriage, the prosecutrix along with her family members were present whereas, the accused person was not present and none of the family members of the accused-person were also present. Later, the accused-person called the prosecutrix and informed her to come to his house wearing vermillion and bungle to visit his family members where he is staying with his parents. Accordingly, she visited and thereafter, the family members did not accept her and she was tortured in various manners.

[21] In the above background, the mother of the victim girl came to file complaint against the accused-person and the other family members of the appellant. Even in the complaint, there is no whisper by the complainant, the PW-1 against the appellant herein, stating that he has turned down his promise of marriage and he ran away. It is a categorical statement of PW-1 that under pressures of the parents he could not marry

her daughter i.e. PW-2. Even as per evidence of PW-2, nowhere she has stated that the accused-person, the appellant herein has promised her that he would marry her and then make her believe, they had a physical relationship.

[22] In the absence of specific allegations by PW-2 who is the crucial witness in the present case, this Court finds that Section-417 do not attract and also Section-19 has not been made out. Insofar as Section-376 is concerned, PW-2 is 25 years of age fully matured girl and she could have resisted having relationship with the accused-person and it is not for the first time, immediately she was found pregnant repeatedly for prolong period they were in relation and they had intercourse and as result she was declared pregnant and subsequently, she gave birth to a child.

[23] The question for our consideration is whether the prosecutrix consented to the physical relationship under any misconception of fact with regard to the promise of marriage by the appellant or was her consent based on a fraudulent misrepresentation of marriage which the appellant never intended to keep since the very inception of the relationship. If we 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 clearly made out. It is not possible to hold in the nature of evidence on record that the appellant obtained her consent at the inception by putting her under any fear. Under Section-90 IPC a consent given under fear of injury is not consent in the eyes of law. In the facts of the present case we are not persuaded to accept the solitary statement of the prosecutrix that at the time of the first alleged offence her consent was obtained under fear of injury.

[24] It stands well settled that circumstances not put to an accused under Section-313Cr. P.C. cannot be used against him and must be

excluded from consideration. In a criminal trial, the importance of the questions put to an accused are basic to the principles of natural justice as it provides him the opportunity not only to furnish defence, but also to explain the incriminating circumstances against him. A probable defence raised by an accused is sufficient to rebut the accusation without the requirement of proof beyond reasonable doubt.

[25] We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in *Uday v. State of Karnataka*, reported in (2003) 4 SCC 46 are considered relevant:

“25...It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.”

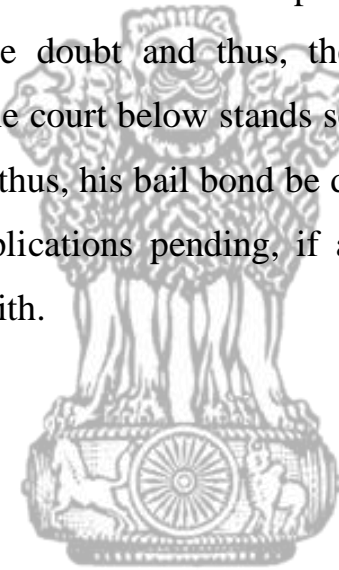
[26] In *Uday* (supra), the Hon'ble Apex Court has dealt with the physical relations contained between them on the understanding and assurance of marriage. The Court has observed as under:

“21. 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.”

[27] Even in the entire statement of PW-2 before the Court and in Section-164 of Cr. P.C., no such allegation is made against the accused-person to attract Section-417 and Section-376 since, the relationship was consented. In the light of the judgments of *Maheshwar Tigga* (supra), this Court is convinced that the prosecution has not proved the case against the appellant beyond reasonable doubt and thus, the same stands allowed consequently, the order of the court below stands set aside. It is made clear that the appellant is on bail, thus, his bail bond be discharged forthwith. As a sequel, miscellaneous applications pending, if any, shall stand closed. Send down the LCRs forthwith.

JUDGE



JUDGE

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