

GAHC010120502012



**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)**

Crl.Rev.P. 125/2012

Sri Jagannath Das
S/O Sri Monindra Kr. Das R/O Vill- No. 2, Pipal Pukhuri, P.S. Lanka, Dist. Nagaon, Assam,
..... **Petitioner**

VERSUS

The State of Assam
..... **Respondent**

**BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND**

Advocate for the Petitioner	:	Mr. K. Agarwal, Sr. Advocate
Advocate for the Respondent	:	Mr. P. Borthakur, Addl. P.P.
Date of Hearing	:	03.01.2023
Date of Judgment	:	15.05.2023

JUDGMENT & ORDER (CAV)

- 1.** Heard Mr. K. Agarwal, learned Senior Counsel assisted by Ms. P. Neog, learned counsel for the petitioner. Also heard Mr. P. Borthakur, learned Addl. P.P. for the State.
- 2.** This revision was initiated *suo motu* vide order dated 05.03.2012 in Criminal Appeal No. 254/2004 wherein this Court in para 6 of the judgment & order observed that –

“6. Section 401 Cr.PC read with Section 397 Cr.PC empowers the High Court to exercise revisional jurisdiction *suo motu* and while exercising such jurisdiction, Section 397 Cr.PC allows the High Court to examine the record of any proceeding for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order. Thus, as indicated hereinbefore, this Court is duty bound, as a Court exercising revisional jurisdiction, that a finding, which is incorrect, be not allowed to remain good on record. The duty, so imposed by the statute, cannot be avoided from being exercised by the High Court on the ground that the matter has come to the notice of the High Court from an appeal, which has been preferred by the accused against his conviction in respect of an offence other than one, which he has been acquitted of.”

3. Notices were issued to Jagannath Das (hereinafter referred to as the petitioner), to show cause, if any, as to why finding of acquittal, recorded by the learned trial Court in respect of the charge framed against him under Section 376(1) of the Indian Penal Code (IPC for short) be not set aside and the whole proceeding be not remanded to the learned trial Court with direction to take into account the unchallenged evidence of the prosecutrix, and render its finding in accordance with law. The Criminal Appeal No. 254/2004 was converted to this present Revision Petition No. 125/2012, pursuant to the Order dated 05.03.2012 in Criminal Appeal No. 254/2004.

4. The genesis of the case was that the prosecutrix (name withheld and herein after referred to as X) was acquainted with Shri Jagannath Das (hereinafter referred to as the petitioner). On 18.02.2002, taking advantage of the absence of her parents, the petitioner had sexual intercourse with X with promises to marry her. She was impregnated by the petitioner but he refused to marry her and forced her to undergo abortion by threatening her. A village “Mel” was organized on 25.11.2001 to settle the matter but the petitioner and his relatives refused any kind of settlement. This impelled the prosecutrix X to enter into the house of the petitioner on 25.11.2001 but Sri Hari Sankar Das, Sri Gopal Das, Sri Manindra

Das, Sri Kananbala Das, Smt. Pratima Das, Smt. Bhanu Das assaulted X at the behest of Sri Ramagya Prasad Das and Sri Paresh Paul. An FIR was lodged and X was forwarded to Udali P.S. and thereafter to Lanka P.S. for medical examination, but the police ignored the first FIR, and the endeavours of the local people to settle the matter were not fruitful.

5. The present FIR was lodged on 18.02.2002 i.e. after 6/7 months of the incident. This FIR was registered as Lanka PS. Case No. 14/2002 under Sections 143/323/376/493/313 IPC. The Investigating Officer (IO for short) embarked upon the investigation and forwarded the victim to Nagaon Civil Hospital. The victim was also forwarded to the Court to record her statement under Section 164 of the Code of Criminal Procedure (Cr.PC for short). On conclusion of investigation charge-sheet was laid against the petitioner under Sections 143/323/493/313/376 IPC and against the other accused Sri Hari Sankar Das, Sri Gopal Das, Sri Manindra Das, Sri Kananbala Das, Smt. Pratima Das, Smt. Bhanu Das, Sri Sagar Das, Sri Ramagya Prasad Das and Sri Paresh Paul under Sections 143/341/323 IPC. All the accused persons entered appearance at the commencement of trial. A formal charge under Sections 143/323/376(1)/417/313 IPC was framed and read over to the petitioner and charge under Sections 143/323 IPC was framed and read over to the other accused who were also forwarded for trial. All the accused adjured the guilt and claimed innocence.

6. To substantiate its stance, the prosecution adduced the evidence of 10 witnesses and the defence cross-examined the witnesses to refute the charges. To the incriminating circumstances arising against them, several questions were asked to the accused under Section 313 Cr.PC and their responses were recorded. The accused did not tender any evidence in defence.

7. The learned trial Court delineated the following points for determination:

“1. Whether on 25.11.2001 all the above-named accused were members of an unlawful assembly and in prosecution of the common object of that unlawful assembly, began to beat X who came to enter into the house of the accused to live as the wife of accused Sri Jagannath Das, voluntarily caused simple injuries on the person of X or not; and

2. Whether accused Sri Jagannath Das committed rape upon X and had sexual intercourse with her by promising to marry her but later on refused to marry her or not and whether accused Sri Jagannath Das voluntarily caused X who was pregnant due to their sexual intercourse, to miscarry without her consent with was not done in good faith to save the life of X or not.”

8. In this present petition arising out of the Appeal No. 234/2004 the question that falls for consideration is :

(i) whether the learned trial Court erred while acquitting the appellant/petitioner from charges under Section 376(1) IPC;

(ii) whether the petitioner deserves acquittal from charges under Section 417 IPC.

9. To decide this matter, a cursory glance of the evidence is inevitable, although in a revision the entire evidence is not required to be scrutinised. The legality and propriety of the order has to be assessed.

10. X testified as PW-1 that the petitioner often visited her during the day time when she was alone at home as her parents used to go out for work. On the date of the incident, the petitioner taking advantage of the absence of her parents, forcefully committed sexual intercourse on X. The victim X then stated that she would inform her parents about the incident, and then the petitioner promised to marry her and on the pretext of marrying her, the petitioner had physical relationship with the victim and he impregnated her. The victim X further testified that her mother took her to a doctor who informed her mother that she was

pregnant. Her mother then assaulted her and then 'X' confided to her mother that the petitioner had impregnated her. Then she and her mother went to Doiyang and the petitioner again promised to marry her. Her mother thereafter proceeded to Lumding to meet her father who was at Lumding, to inform her father about the incident. At that juncture, the petitioner forcibly took X to a doctor and forced her to abort the foetus. He promised X that he would marry her after the abortion. The victim then informed her mother about the forceful abortion caused by the petitioner. Her mother then called a meeting but the petitioner did not agree with the decision taken in the meeting and X decided to stay in the petitioner's house as his wife and proceeded to the petitioner's house by following him after the meeting. As soon as she arrived near the petitioner's house, the accused Jagannath Das , Munindra Das, Hari Sankar Das, Gopal Das, Protima Das, Smt. Bhanu Das and Smt. Kananbala Das assaulted her and she was knocked unconscious and then X was taken to Lanka PHC. Thereafter another meeting was held by X's mother which yielded no result. This impelled X to lodge the FIR. She was forwarded for medical examination and her statement was recorded in the Court.

11. The victim's mother Y testified as PW-2 that her daughter was 16/17 years of age at the time of the incident. When her daughter took ill, she took her daughter to a person named Chand Khan, who practised medicine but he was not a doctor in the true sense and Chand Khan revealed that her daughter was pregnant at that time. PW-2 then assaulted her daughter who then disclosed that the petitioner had impregnated her. Then PW-2 took her daughter to Doiyang to meet the petitioner and the petitioner requested her not to divulge about the incident and he reassured her that he would resolve the matter. Then they returned from Doiyang and she, PW-2 went to Lumding to meet her husband to inform him about the incident. After she returned from Lumding, she learnt that the petitioner took her daughter to

a doctor and got her pregnancy terminated. Then she organised a meeting where the elderly people of the village assembled but the petitioner did not agree with the decision taken in the meeting. Her daughter, PW-1 then followed the petitioner to his house to stay with him as his wife, but the petitioner assaulted her daughter.

12. The learned counsel for the petitioner laid stress in his argument that Chand Khan is not a doctor and doubt creeps into one's mind when the pregnancy claimed by the victim is not substantiated with proper medical report by a doctor who is in fact a quack.

13. Shri Rajabala Sarma testified as PW-3 that when PW-2 informed him that the petitioner impregnated her daughter 'X', then he, Jagendra Gaonbura, Harilal Majhi, Purna Kalita Gaonbura went to meet the petitioner's father and informed him about a village meeting. The petitioner's father then disagreed to comply with the decision of the village meeting. Then a meeting of the villagers was arranged at Kalimandir and both the parties were called to the meeting but the petitioner did not attend the meeting. Thereafter, '*Anchalik*' was held and the petitioner attended the '*Anchalik*' and both the parties were interrogated but the petitioner left the meeting and went away. The victim 'X' then followed the petitioner up to his house. After ten (10) minutes, they heard that the victim was being assaulted and they too went to the place of the occurrence and found the victim 'X', lying on the road in an injured condition. The victim 'X' was taken to the Udali police station and thereafter, she was taken to the hospital at Lanka and she was admitted in the hospital as Indoor patient for ten days. When she returned from the hospital, the victim 'X' informed him that the accused kicked her and punched her.

In his cross-examination, PW-3 has admitted that he did not witness, the incident. No

contradictions as per Section 145 of the Indian Evidence Act, 1872 (the evidence Act for short) qua 162 Cr.P.C could be elicited through the cross examination of this witness and the cross-examination of the I/O, Sri Dimbeswar Das PW-8.

14. Md. Matasin Ali has testified as PW-4. He stated that he was the President of the '*Anchalik Samiti*', which used to decide trivial disputes. The victim's father asked for a Bichar from the '*Anchalik*' regarding the relation between his daughter and the petitioner. Both the parties were present in the Bichar. It was decided by the '*Anchalik*' that the petitioner should marry the victim and the minutes of the meeting were noted down on Exhibit-3. He proved his signature on the Exhibit-3 as Exhibit-3(1) and Exhibit-3(2). This document was however exhibited under objection by the defence. PW-4 Matasin Ali further testified that Rajmohan Nath, Jogendra Nath and Ilasuddin were present in the meeting, which was attended by the 30/40 prominent people of the village. The second meeting was held in the mandir at Pepul Pukhuri. While, they were attending the meeting both the parties affixed their signatures on the Exhibit-3 and left the meeting while the meeting was still going on. The victim 'X' was assaulted in front of the petitioner's house but he did not go to the place of occurrence.

15. In sync with the evidence of PW-3 and PW-4, Shri Raja Mohan Nath also stated about the meeting in his evidence. He testified as PW-5 that he is the Gaonburah of Gohagaon. He was present in the meeting regarding the affair between the victim and the petitioner. The petitioner's father and the victim's parents were present in the meeting attended by 30/40 villagers. It was decided in the meeting that the petitioner should marry the victim and the Exhibit-3 was prepared. He proved his signature as Exhibit-3(2) which is the minutes of the meeting exhibited under objection. The petitioner and his family members refused to comply with the decision of the meeting and they quit the meeting. The victim 'X' also followed the

petitioner. After some time, they heard that the victim was assaulted by the accused in front of the petitioner's house. While he was returning home, he found the victim lying in front of the petitioner's house.

16. Thus it clear from the evidence of PW-3, 4 and 5 that the meeting was indeed held as stated by PW-1 and PW-2. The relationship between the petitioner and the victim has also surfaced through the evidence of independent witnesses PW-3, PW-4 and PW-5, who was the Gaonburah at the time of the incident.

17. A school teacher Md. Eliash Uddin @ Eliash has testified as PW-6 that he was present during the dispute that arose due to the illicit relationship between the petitioner and the victim. Md. Matasin Ali was the president in the meeting held at Pepul Pukhuri Mandir campus. The petitioner along with his father and the victim along with her parents were present in the meeting and other family members also attended the meeting. After hearing both the sides, it was decided in the meeting that the petitioner should marry the victim and the minutes of the meeting was prepared and marked as Annexure-3. The petitioner and his family members disagreed to comply with the decision of the meeting and they quit the meeting and went away. The victim 'X' also followed the petitioner. Later, they heard that the victim was assaulted in front of the petitioner's house and he went and found the victim lying in front of the petitioner's house. In his cross-examination, he has admitted that, he could not remember the minutes of the meeting marked as Exhibit-3. The petitioner did not affix his signature on the Exhibit-3, while the victim has given her signature and he identified her signature as Exhibit-3(3). He has admitted that the meeting was held in the year 2000.

18. The victim has clearly testified that the petitioner Jagannath and the accused

Munindra, Hari Sankar, Gopal, Pratima, Bhanu, Kanklata assaulted her. The victim's mother, PW-2, did not mention that the other accused assaulted her daughter. However, she stated that her daughter was found lying unconscious in front of the petitioner's house. Although, PW-4 and 5 have stated that the victim was assaulted in front of the petitioner's house, they have not named the assailants who had assaulted the victim. PW-3 has stated that the victim told him that the accused assaulted her by using their hands, legs and fists. The other accused were acquitted from the charges under Sections 143/323 IPC on benefit of doubt. The petitioner was also not held guilty of offence under Sections 143/376/313/323 IPC, so the discussion narrows down to offence under Section 376 IPC and also offence under Section 417 IPC.

19. Although, the incident of assault is not relevant to this case yet the incident in its entirety is discussed to bring out a clear picture of the evidence, to decide the veracity of the evidence of the victim and other witnesses. It has to be borne in mind that this case was taken up *ex debito justitiae*. As there was no evidence that the petitioner as well as the accused assaulted the victim, the petitioner as well as the accused were not convicted under Section 323 IPC. Charges under Sections 143/323/493/313 IPC were not established against the petitioner as well as the other accused, and rightly so when we do not have even a scintilla of evidence that the victim 'X' was under the belief that she was lawfully married to the petitioner. In this case, the victim knew well enough that she was having an affair, with a married man. She has admitted in her cross-examination that when the petitioner expressed his love for her, he was already married. She has admitted in her cross-examination that prior to the incident of physical relationship between her and the petitioner, the petitioner was in love with her and even after the incident of physical relationship, the petitioner was in love

with her. The victim's mother, PW-2, did not witness the incident of assault. Although, the PW-2, PW-3, PW-4 and PW-5 have stated that after the meeting the victim followed the petitioner up to his house and she was assaulted by the accused, yet not a single witness have categorically pointed out that the petitioner had assaulted her or any of the accused assaulted her. The witnesses did not see the petitioner or the other accused assaulting her. The Medical Officer however after examination of the victim on 25.11.2001 detected tenderness on the chest back and head, and abrasion of the tip of the victim's left middle finger. According to the FIR, the incident occurred on 25.11.2001 and the FIR was lodged on 18.02.2002. After the incident she was immediately examined by the Dr. Abdul Waris, PW-7, on 25.11.2001 and he found injuries as discussed above but all the accused and the petitioner were exonerated from the charges under Section 323 IPC.

20. The Medical Officer Dr. Abdul Warish has testified as PW-7 that on 25.01.2023, he examined the victim 'X' and found the following:- (i) Tenderness present on chest, back and head, (ii) Abrasion on the tip of left of middle finger $\frac{1}{2}$ X $\frac{1}{2}$. The injuries were fresh, simple and caused by blunt object.

21. The I/O Shri Dimbeswar Das testified as PW-8 that on 18.02.2002, while serving as I/C in Udali O.P, he received an FIR from 'X' and he registered GDE No. 287 dated 18.02.2002 and forwarded the FIR to the Lanka P.S. and Lanka P.S. Case No. 41/2002 was registered and he embarked upon the investigation. He went to the place of occurrence and recorded the statements of the witnesses. He forwarded the victim for medical examination and also to the Court for recording her statements under Section 161 Cr.P.C. He arrested the petitioner. The other accused were released on bail. He forwarded the petitioner to jail. On completion of investigation, he submitted charge-sheet against the petitioner under Sections

143/323/376/493 IPC and against other accused under sections 143/341/323 IPC. He has proved the FIR as Exhibit-4 and Exhibit-4 (1) as his signature. He collected the medico legal report of the victim and identified it as Exhibit-5. He stated that the victim was sent to Lanka PHC for medical examination, after incident of assault. The Exhibit-6 is also another medical report of the victim.

22. The learned SDJM Sri Pratim Kumar Bora has testified as PW-9 that on 15.03.2002, while serving as JMFC, Hojai at Sankardev Nagar, Nagaon, he recorded the statement of the victim 'X'. He proved the statement of the victim as Exhibit-4 and Exhibit-4(1), 4 (2) and 4 (3) as his signatures.

23. Dr. Pradeep Saikia, PW-10 has examined the victim after the FIR was lodged on 18.02.2002 and he found the following:-

“ No injury was found upon her person. The hymen was found absent. The cervical opening was H-shaped. The uterus was found in normal size. Smear reveals no spermatozoa. From her radiological report her age was determined as 16/17 years.

Opinion: No sign of recent sexual intercourse was found. Shape of the cervical opening indicates some manipulation in the cervix.”

24. According to the opinion of the doctor, generally when there is no delivery, the cervical opening remains o-shaped, but when delivery is done, the cervical opening takes the shape of H. As the cervical opening of the victim was found to be H-shaped, definitely there was delivery either by manipulation or by normal method. He proved his medico legal report as Exhibit-5 and Exhibit-5(1) and 5(2) as his signatures. He has also admitted in his cross-examination that he had given the age of the victim sans the radiological report. He has also

admitted that, he could not affirm whether the victim 'X' was actually examined by him.

25. Thus, in this case, the trial Court had correctly held that the petitioner is not guilty of offence under Section 313 Cr.P.C. The Medical Officer, PW-10 could not ascertain whether the victim gave birth to a child or whether she was compelled to undergo abortion.

26. Now, the core question is whether the petitioner committed rape on the victim or whether he is guilty of offence under Section 417 IPC. It has been held in **Jaya Mala vs Home Secretary, Government Of Jammu and Kashmir AIR 1982 SC 1297** that:-

“However, it is notorious and one can take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side.”

27. In this case at hand, the age of the victim was given as 16 to 17 years, and if two years on the higher side of her age is calculated then the age of the victim tantamounts to 19 years. After considering 2(two) years on the higher side of the age of the victim, now the question that arises is whether the victim was induced into having sexual relationship with the petitioner on misconception of facts.

28. The learned counsel for the petitioner has relied on decision of the Hon'ble Supreme Court in **Deepak Gulati Vs. State of Haryana** reported in **(2013) 7 SCC 675**, wherein, it has been held that:-

“ Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date,

due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term misconception of fact, the fact must have an immediate relevance."Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."

29. It has also been held by the Hon'ble Supreme Court in **Dr. Dhruvaram Murlidhar Sonar Vs. State of Maharashtra and Others** reported in **(2019) 18 SCC 191**, wherein, it has been held that:-

"Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. 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 the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the

IPC.”

30. In the instant case, the victim was well acquainted with the petitioner. She concealed about her relationship with the petitioner and her mother took her to a doctor, when she took ill. The incident of assault allegedly occurred on 25.11.2001 and the FIR was lodged on 18.02.2002. Prior to the incident of assault on 25.11.2001, the victim 'X' allegedly was induced into having physical relationship with the accused and thereafter, continuously for one year, the victim 'X' had physical relationship with the petitioner on her own volition. She has deposed that initially she was induced into having sexual relationship with the petitioner who promised to marry her and thereafter, continuously for one year, she had sexual relationship with the petitioner because he promised to marry her. The petitioner was already a married man at that time. The victim has given her age as 15 years when her statement was recorded under Section 164 Cr.P.C by the Judicial Magistrate, whereas, the Medical Officer, PW-10 had opined that the victim was around 16 to 17 years old on 25.11.2001. It is possible that the victim may not be aware that she cannot get married to an already married man. The petitioner was around 30 years old at the time of the incident. He is a peasant and he may also not be aware that he cannot marry for the second time being governed by the Hindu Marriage Act. There is every possibility that the petitioner as well as the victim may not be aware that they cannot lawfully get married as the petitioner is a married man. When such doubt creeps in, the benefit of doubt has to be extended to the petitioner. The minutes of the meeting Exhibit-3 was exhibited under objection by the accused, which also includes the petitioner. The Exhibit-3 is a photocopy of minutes of the meeting.

31. The petitioner had also preferred an appeal, which was converted into this revision petition. The petitioner is aggrieved by the order of conviction and sentence passed by the

Sessions Judge, convicting him under Section 417 to undergo rigorous imprisonment for 3(three) months and to pay a fine of Rs. 2,000/- with default stipulation. The learned counsel for the petitioner has relied on relation of this Court in ***Ripak Das Vs. State of Assam*** reported in ***2012 (2) GLT 137***, wherein, it has been held that:-

“(19) It is important to note that “consent” in positive terms has not been defined in the IPC. Section 90 IPC, however, amongst others, provides that a consent is not such a consent as is intended by any section of IPC, 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 or misconception. For application of Section 90 IPC, in a case of this nature, two conditions are to be fulfilled. Firstly, it must be established that the consent was given under a misconception of fact and secondly, it must be proved that the person who obtained the consent, knew or had reason to believe that the consent was given in consequence of such misconception. The failure to keep a promise at a future uncertain date does not necessarily amount to a misconception of fact at the very inception of the act itself for fastening of criminal liability. It must also be proved that from the very inception, the accused never intended to marry her. In other words, though a promise to marry without anything more may not give rise to a misconception of fact within the meaning of Section 90 IPC, a false representation deliberately made by the accused with a view to obtain consent of the woman without having at all intended to marry her will vitiate the consent, if any, given by the woman.

(20) From the evidence of PW-1, it appears that she did not agree to the proposition of Ripak to have intimacy on the promise that he would marry her. She, in categorical terms, both stated that she was not agreeable to the same. However, the evidence on record discloses

that she had intercourse on 4/5 occasions with Ripak. From the evidence of PW-1, it also appears that there is no allegation of the petitioner forcefully committing sexual intercourse with her. It would appear that, if at all, the petitioner had consensual intercourse with the PW-1. There is also no evidence to show that from the very beginning, assuming that the petitioner had promised to marry her, he did not really intend to marry her. Rather the version of the PW-1 is that even at the time of her departure, Ripak had told her that he would marry her and had also visited their residence and had asked her to prepare for the wedding.”

32. Reverting back to this case, it is held that the evidence of the Medical Officer, PW-10, clearly reveals that there is evidence of some sort of manipulation in the cervix of the victim and the cervix was found to be H-shaped. A meeting was arranged and the petitioner was present in the meeting. The uncontroverted evidence of PW-1, PW-2, PW-3, PW-4, PW-5 and PW-6 clearly implicates that the petitioner was present in the “Anchalik” meeting. The uncontroverted evidence of PW-1 and PW-2 also reveals that the victim ‘X’ had sexual intercourse with the petitioner. She was also impregnated by the petitioner. To the incriminating circumstances arising against him several questions were asked under Section 313 Cr.P.C to the petitioner and he denied and disowned all the allegations levelled against him by the witnesses. He stated about criminal cases between his family and the victim’s family insinuating *mens rea* for false allegations. The evidence of the victim is not sufficient to prove that the petitioner committed rape on the victim with false promises of marriage and thereafter, induced her to have sexual relationship with him for over a year until she was found to be pregnant by her mother. The allegation by the victim against the petitioner of having forcefully committed sexual assault on her and thereafter, inducing her to continue having sexual relationship with him with false promises of marriage does not inspire

confidence. She was having a love affair with a married man for over a year. She has admitted as PW-1 that she was in love with the petitioner.

33. The evidence of PW-2 clearly depicts that she came to know about her daughter's pregnancy when her daughter took ill. Her daughter 'X' admitted of having a relationship with the petitioner. The victim who is considered to be a major was having an affair with the petitioner for over a year. Although, the petitioner is a married man, the victim relied on him and she continued with her relationship with the petitioner. It is not clear from the evidence if the petitioner, from the very inception of his relationship with the victim intended to cheat the victim with false promises of marriage and thereafter, induced her into having physical relationship with him for over a year. The learned trial Court did not convict the petitioner under Section 313 IPC and also under Section 323 IPC. The victim's evidence and her mother's evidence was not held to be reliable to convict the petitioner under Section 323/313 IPC.

34. In her cross-examination, the victim, PW-10 has testified that 5,6 months before, she had sexual relationship with the petitioner, the petitioner had expressed his love for her and he promised to marry her. Thereafter, the petitioner used to visit her frequently. Her evidence depicts that she secretly continued with her relationship with the petitioner for a year, after the alleged date of incident, until her mother found out that she is pregnant. The petitioner did not voluntarily inform her mother that she was pregnant, but when she took ill, her mother took her to the Chand Khan, a kind of traditional healer or a sorcerer, who informed the victim's mother that the victim was pregnant. It cannot be deciphered that the petitioner had no intention to marry the victim. A village meeting was called and a dispute erupted in the village meeting. The petitioner left the meeting and the victim followed him. It is alleged

that the accused assaulted the victim. The accused who allegedly assaulted the victim are related to the victim. One accused Smti. Pratima Das, is the petitioner's wife, the other accused Smti. Bhanu Das, is the petitioner's sister-in-law, Sri Gopal Das, is the petitioner's younger brother and Sri Hari Sankar Das, is the petitioner's elder brother. Accused Munindra Kr. Das, is the father of the petitioner. It is alleged that all the accused persons have allegedly assaulted the victim, but all the accused have been exonerated and they have been acquitted from the charges under Section 323 IPC. The remaining two accused are not related to the petitioner. Accused Paresh Paul and Sagar Ch. Das are not related to the petitioner. The victim testified as PW-1 that all the accused assaulted her and her evidence has been substantiated by the evidence of her mother as PW-2 but the trial Court has acquitted the accused persons from the charges under Section 143/323 IPC. The contradictions prevented the trial Court from convicting the accused under Section 143/323 IPC. These contradictions were elicited through the cross-examination of PW-1 and cross-examination of the I/O, PW-9.

35. The contradiction under Section 145 of the Evidence Act qua Section 162 Cr.P.C. clearly depicts that the victim did not mention before the I/O under Section 161 Cr.P.C that the accused assaulted her and she was rendered unconscious as a result of the assault. In her statement under Section 164 Cr.P.C, the victim however, stated that the accused assaulted her and left her lying on the road. It is submitted on behalf of the petitioner that the statement of the victim under Section 164 Cr.P.C. was an afterthought. Her statement was recorded on 05.03.2022, whereas, the alleged incident occurred on 25.11.2001. There is not even iota of doubt that in the meeting, a difference arose between the parties and the petitioner and his family members left the meeting. The victim who followed the petitioners, was not allowed to enter into the petitioner's house. The evidence of PW-1 is substantiated

by the evidence of other witnesses who were present in the meeting. The PW-2, 3, 4, 5 and 6 were present in the meeting. It is clear from the evidence of PW-1 to 6 that the victim followed the petitioner up to his house. The victim has stated that she wanted to enter into the petitioner's house and stay in his house as his wife but she not allowed to enter. There may have been a scuffle but it cannot be considered as an incident of assault. The victim was not allowed to enter into the petitioner's house and she was found lying on the road. The victim was disillusioned by the petitioner's behaviour. It is, however, not discernible that the petitioner from the very inception had intended to cheat the victim. The turn of events, after the meeting led to the incident. Even the evidence of the victim does not prove beyond reasonable doubt that the petitioner from the inception cheated her and induced her into having physical relationship with him and on misconception of facts, the victim had sexual relationship with the petitioner. The victim has testified that she continued with this secret relationship with the petitioner for more than a year until she was caught by her mother, when her mother found that she was pregnant.

36. The learned counsel for the petitioner has also emphasised through his argument that there was an inexplicable delay in lodging the FIR. The incident of assault occurred on 25.11.2001 while the FIR was lodged on 18.02.2002, providing sufficient time for fabrication of the FIR.

37. It is also submitted that the PW-1 admitted in her cross-examination that her mother had lodged an FIR against Munindra Das, which is still pending. Another FIR has been lodged against her mother and her elder sister by the accused Munindra Das which was settled in the National Lok Adalat and her mother was sentenced to fine. The petitioner has also stated about a land dispute between him and the victim's family in his statement under Section 313

Cr.P.C. However, the suggestion regarding the land dispute has been denied by the PW-1.

38. It has been held by the Hon'ble Supreme Court in ***Deelip Singh Alias Dilip Kumar Vs. State of Bihar*** reported in ***(2005) 1 SCC 88*** that:-

“35. The remaining question is whether on the basis of the evidence on record, is it reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry? We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW-12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW-12 that 'later on', the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialize on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday's case at paragraph 24 comes to the aid of the appellant.

36. We reach the ultimate conclusion that the findings of the trial court as affirmed by the High Court are either perverse or vitiated by non-consideration of material evidence and relevant factors emerging from the prosecution evidence. We cannot, therefore, sustain the conviction.”

39. Reverting back to this case, it is held that the victim's evidence does not inspire confidence. Her mother's evidence also does not inspire confidence. The other witnesses PW-3, 4, 5 and 6 have proved the fact that the meeting was held on 25.11.2001. This meeting was regarding the victim's pregnancy. Before the meeting could be concluded, the accused left the meeting. The victim followed him but she was not allowed to enter into his house and stay with him as his wife. The petitioner's wife and other family members prevented the victim from entering into his house. Even if the petitioner had promised to marry the victim, he could not keep his promise as the victim was not allowed to enter into his house by his family members. He was already a married man at the time of the incident. He had attended the meeting, which was arranged by the petitioner's mother with the help of villagers. Even if the petitioner had a good intention of marrying the victim, he was prevented from doing so by his family members. The petitioner ought to get the benefit of doubt. It is apparent from the victim's evidence that although her first sexual intercourse was against her will, she became a consenting party later on. The version of rape seems to be highly doubtful when tested in the light of her statements under Sections 161 and 164 Cr.P.C.

40. In view of my foregoing discussions, it is thus held that the prosecution has failed to prove beyond a reasonable doubt that from the very inception, the accused had no intention to marry the victim and had obtained the consent of the victim to have sexual relationship with her with false promises of marriage and under misconception of facts. It is thereby held that the trial Court's decision acquitting the petitioner from charges under Section 376 IPC is sustainable and does not require interference. However, I do not concur with the findings of the trial Court holding the petitioner guilty of offence under Section 417 IPC. It has already been held in my foregoing discussions that the prosecution has failed to prove beyond

reasonable doubt that the petitioner from the very inception of his relationship had intended to cheat the victim. He might have been prompted by a genuine intention to marry the victim, which did not materialise on account of pressure exercised by his family members. The victim's evidence clearly reveals that she was in love with the petitioner, who was a married man. The victim and the petitioner carried on with their relationship until the victim was caught by her mother, when she took ill. After the meeting that was held by the Anchalik, the petitioner was followed by the victim but she was not allowed to enter into his house by his family members. It is thereby held that the petitioner ought to get the benefit of doubt. It is thereby held that the prosecution has failed to prove beyond reasonable doubt that the petitioner is guilty of offence of cheating. The petitioner is thereby acquitted from the charges under Section 417 IPC on benefit of doubt. The judgment and order dated 31.08.2004 passed by the learned Adhoc Additional Sessions Judge, Hojai at Sankardev Nagar, convicting the petitioner under Section 417 IPC is hereby set aside.

41. The surety stands discharged.

Send back the LCR.

JUDGE

Comparing Assistant