

GAHC010193662011



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./6/2011

MAHESH KHARIA
S/O SRI BALA KHARIA,
R/O DULIABAM TEA ESTATE,
P.S. KHOWANG,
DIST. DIBRUGARH, ASSAM.

VERSUS

THE STATE OF ASSAM

Advocates for the Appellant : Mr. A. K. Gupta, Id. Adv.

Advocates for the respondent : Mr. B. Sharma, Id. Addl. P.P.

:::BEFORE:::
HON'BLE MRS. JUSTICE MITALI THAKURIA

Date of hearing : 21.09.2023
Date of Judgment & Order : 13.10.2023

JUDGMENT & ORDER (CAV)

Heard Mr. A. K. Gupta, learned counsel for the appellant. Also heard Mr. B. Sharma, learned Additional Public Prosecutor for the State respondent.

2. This application is filed under Section 374 (2) of the Code of Criminal Procedure Code, 1973 challenging the Judgment and Order dated 11.11.2010 passed by the learned Sessions Judge, Dibrugarh in Session Case No.153/08 convicting the accused/appellant under Section 417 of IPC and sentenced him to undergo rigorous imprisonment for 1(one) year and to pay a fine of Rs.5,000/- and in default of payment of fine to undergo rigorous imprisonment for a period of another 3(three) months.

3. The brief facts of the prosecution case is that, one Sri Anil Bhunij lodged an FIR on 06.04.2008 alleging that 5(five) months prior to the filing of the FIR, the accused/appellant forcibly committed sexual intercourse with the sister of the informant which resulted in pregnancy and for that reason a village bichaar was held, wherein, the victim was handed over to the accused/appellant, but, he refused to accept her disowning the responsibility. Thereafter, the FIR has been lodged against the accused/appellant which has been registered under Khowang Police Station Case No.23/2008, under Section 376 of IPC and started investigation. During the investigation, the victim was medically examined and her statement was recorded under Section 164 of Cr.P.C. along with the statement of witnesses under Section 161 of Cr.P.C. After completion of the

investigation, the charge-sheet was filed against the accused/appellant under Section 376 of IPC and accordingly, after committal of the case, the learned Sessions Judge framed the charge against the present accused/appellant under Section 376 of IPC; the charges have been read over and explained to the accused appellant, to which he pleaded not guilty and claimed to be tried.

4. The prosecution has examined as many as 8(eight) witnesses in respect of this case including the victim, informant and IO. After conclusion of the evidence of prosecution, the appellant was examined under Section 313 of Cr.P.C., wherein, he denied the allegation brought against him and thereafter, hearing the arguments put forwarded by the learned counsels of both sides, the judgment was passed on 11.11.2010, wherein, the accused/appellant was convicted under Section 417 of I.P.C. and sentenced him to undergo rigorous imprisonment for 1(one) year along with a fine of Rs. 5,000/-(Rupees five thousand) only and in default R.I. for another 3(three) months.

5. On being highly aggrieved and dissatisfied with the judgment and order dated 11.11.2010 passed by the learned Sessions Judge, Dibrugarh in Sessions Case No.153/2008, the present appellant has preferred this appeal.

6. Mr. A. K. Gupta, learned counsel for the appellant has submitted that the learned Trial Court had failed to appreciate the evidence on record in its true perspective and thus, came to a perverse finding by convicting the accused/appellant under Section 417 of IPC. The said Court failed to prove the statement made in the FIR i.e. Exhibit-3 and also failed to examine the writer of the FIR. Further, he submitted that in the village bichaar, there was no allegation was brought against the accused/appellant that he had committed sexual intercourse with the victim with a false promise of marriage.

Nevertheless, the false allegation of marriage has been brought against the accused/appellant subsequently to make the case stronger, but, the learned Special Judge failed to consider this aspect of the case and arrived at a wrong finding. Rather, it is seen from the evidence of the prosecutrix that the FIR was lodged only when the accused/appellant refused to marry her. Except the PW-2/victim of this case, none of the other witnesses have stated that the accused/appellant had committed sexual intercourse with the victim on false promise of marriage. Thus, the victim had leveled the allegation on the present accused only to attract Section 417 of IPC.

7. He also submitted that the learned Trial Court had failed to consider the fact that during the deposition of the victim, the prosecution exhibited her 164 statement and thus, the appellant was deprived from his valuable right of examining the prosecutrix on the statement of the victim under Section 164 of Cr.P.C. and without considering or without giving the opportunity of cross examination, the learned Special Judge, convicted the appellant on the basis of her statement recorded under Section 164 of Cr.P.C. More so, there is no material on record to prove the paternity of the child and without any proper finding that the accused/appellant is the father of the child; the learned Trial Court convicted the accused/appellant which is illegal and liable to be set aside and quashed.

8. Accordingly, it is submitted that the prosecution has failed to establish the case against the present appellant under Section 417 of I.P.C. and the learned Trial Court had passed the judgment without going into the merits of the case and also without appreciating the evidence on record which is illegal and liable to be set aside and quashed. Hence, the interference of this Court is necessary

in the judgment passed by the learned Sessions Judge.

9. In the contention made in his submission, he relies on the judgment passed by the Hon'ble Apex Court in ***Hridaya Ranjan Pd. Verma & Others Vs. State of Bihar & Anr.***, reported in ***AIR 2000 SC 2341***, wherein, it has been held that the dishonest intention of the accused has to be proved at the beginning of negotiation. But, here in the instant case, it is seen that, there is no evidence at all to prove that the accused had any intention to deceive the victim at the very inception of their relationship.

10. He also relies on another decision rendered by the Hon'ble Apex Court in ***Criminal Appeal No.1165 of 2019 (Arising out of SLP (Crl) No.2712 of 2019)***, reported in ***AIR 2019 SC 4010 (Pramod Suryabhan Pawar Vs. State of Maharashtra & Anr.)***, wherein, he stressed mainly in paragraph No-24 of the said judgment which read as under:-

"24, 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."

11. In support of his submission, he further relied on the ratio laid down by the Hon'ble Apex Court in the case of ***Suryalakshmi Cotton Mills Limited Vs. Rajvir Industries Limited & Others***, reported in ***(2008) 13 SCC 678***,

wherein, it has been expressed the view that, "*A bare perusal of [Section 415](#) read with [Section 420](#) of the Indian Penal Code would clearly lead to the conclusion that the fraudulent or dishonest inducement on the part of the accused must be at the inception and not at a subsequent stage*'.

12. The learned counsel for the appellant, Mr. A. K, Gupta further submitted that the present accused/appellant and the victim are of same age group and had a love affairs for a considerable period; there was consensual sexual relationship between them. Though, the accused/appellant had been charged under Section 417 of I.P.C., but, there is no evidence available to fulfill the ingredients of cheating to the victim by the accused/appellant on false promise of marriage. Therefore, he submits that the judgment passed by the learned Sessions Judge is liable to be set aside and quashed.

13. In this context, Mr. B. Sharma, learned Additional Public Prosecutor has submitted that from the evidence of PW-2, it clearly reveals that the accused/appellant had committed the offence of cheating to the victim and it is not a case that due to some non-avoidable circumstances he could not marry the prosecutrix. The accused/appellant had the intention of cheating from the very inspection and he had a sexual relationship with the victim on false promise of marriage. He also submitted that in paragraph-11 of the judgment passed by the learned Special Judge had discussed as how the accused had cheated the victim and even in the village bichaar he refused to accept the paternity of the child. The learned Sessions Judge had passed the judgment by considering the entire circumstances of this case and also after proper appreciation of evidence, and thus, the said Court has not committed any error or mistake while passing the same by convicting the accused/appellant under

Section 417 of I.P.C. Hence, the interference of this Court is not at all necessary in the judgment passed by the learned Trial Court and he accordingly, prays for dismissal of the same.

14. After hearing the submissions made by the learned counsels of both sides, I have perused the case record along with the impugned Judgment passed by the learned Trial Court. To arrive at just conclusion, let me scrutinize the evidences of the prosecution witnesses which are as follows:-

I. PW-1 is the complainant who is the brother of the victim and as per him the accused/appellant and her sister had a love affair and out of which she became pregnant. The village 'Mel' was held where the accused had denied the paternity of the child in the womb of his sister and also he refused to marry her. Accordingly, he lodged the FIR against the accused/appellant.

II. PW-2 is the victim/prosecutrix. She testified that the incident took place at one and half years back. The accused had committed rape on her in her residence by gagging her mouth for which she could not raise any alarm. In the relevant day of the incident, the elder sister of her mother was also residing with her, who is a blind lady. The accused also had a sexual intercourse with her on various dates as he had given the assurance of marriage. However, when she became pregnant, she requested the accused to marry her, but, when he refused to marry her only then, she informed about the incident to her parents. Thereafter, a village Mel was held where the accused denied the paternity of her child in womb. And thereafter, the matter was informed to the local women organization and as per their advice her elder brother had lodged the FIR.

From the cross evidence, it reveals that the accused had known to her

from a very long time. He also promise her for a social marriage and believing in his promise, she did not disclose the matter initially and thus, the accused had sexual intercourse with her for 8(eight) times and when he refused to marry her, the FIR was lodged. Her statement was also recorded under Section 164 of Cr.P.C., wherein, she categorically stated the incident corroborating her evidence deposed before the Court. It is fact that she was in love affairs with the accused appellant for 3(three) years and he promised to marry her and he used to visit in her house, where she used to stay along with her aunt who is a old ailing blind lady. Initially she refused to have any sexual relationship with him, but, the accused forcibly had a sexual relationship with her by gagging her mouth. And also after the said incident he had a sexual relationship with her.

III. PW-3 is the mother of the victim and she deposed that her daughter used to work in the garden and she was residing at a different place. At the relevant time of the incident, her daughter was staying with her elder sister, who is an old blind lady. After having pain in abdomen, the victim came to know that she was pregnant and thereafter, the matter was informed to them. On enquiry, the victim told that she got pregnant through the accused/appellant.

IV. PW-4 is the Doctor, who examined the victim on 08.04.2008 and as per the report of the Ultra Sonography, she was found pregnant with gestational age of 22 weeks 2 days.

V. PW-5 and PW-6 were present in the village Mel which was held after the victim became pregnant. As per them, when they enquired the matter to the victim, she told that she got pregnant through the accused/appellant, however, the accused denied the paternity of the child.

VI. PW-7 is the UD assistant of CJM, Dibrugarh, who exhibited the 164 statement of the victim as exhibit-2 and also exhibited the signature of the concerned Magistrate as Exhibit-2(1) & 2(2). Further, exhibited his signature as 2(4), 2(5) which was given by him by endorsing the thumb impression of the victim.

VII. PW-8 is the IO of this case who deposed that one FIR was received by the OC, Khowang P.S. and he was entrusted with the investigation. Accordingly, he recorded the statements of the witnesses, informant, victim under Section 161 of Cr.P.C., visited the place of occurrence and drew the sketch map. After completion of the investigation, the victim was medically examined and after collection of the medical report, he submitted the charge-sheet against the present accused appellant. He stated in cross examination that FIR was received on 06.04.2008, but, in the FIR the date of offence was not mentioned. He also came to know that during the investigation the accused/appellant had denied to accept/marry the victim, when the villagers tried to handover the victim girl to him.

15. So, from the discussion made above, it is seen that the other witnesses came to know about the incident only when the victim reported about the incident to her parents. Thereafter, the village bichaar was held. As per the victim, she got pregnant through the accused/appellant, but, the accused/appellant had denied the paternity of the child in the womb of the victim before the Village Mel. The PWs-1, 3, 5 and 6 are claiming their present in the village 'Mel', where it was decided to handover the victim girl to the accused/appellant, but, he did not accept her and also denied the paternity of the child. But, the evidence of the victim remained consistent in her statements

recorded under Sections 161 and 164 Cr.P.C. as well as in the evidence adduced by her before the Court. The defence could not rebut her evidence by cross examining her. However, from the evidence it is seen that, though initially, she raised objection and refused to have any sexual relationship with the accused/appellant. But, subsequently, she gave her consent and had sexual intercourse with the accused for about 8(eight) times, but, the question arises as to whether the accused/appellant obtained her consent with false promise of marriage. It is the plea of the prosecution that the accused had sexual intercourse with the victim only with the false promise of marriage and when she got pregnant out of their relationship, he refused to marry her. He also denied the paternity of the child. The victim did not disclose about the physical relationship with the accused, as she was under impression that the accused would marry her, but, when he refused to accept her and also denied the paternity of the child, the FIR was lodged by her brother as per advice and instruction of the women organization.

16. So, from the evidence on record, it appears that the consent was obtained under the misconception of fact and she gave her consent only when the accused promised to marry her and on the false promise of marriage, the accused had physical relationship with her. But, subsequently, he denied to accept her and also denied the paternity of the child. Further, it is seen that the victim girl did not report about the alleged forceful commission of rape to any body and she remained silent till she reached her advance stage of pregnancy and she also trusted him and was under the impression that the accused appellant would accept and marry her. But the case was lodged when the accused refused to marry her and also denied the paternity of the child.

17. To prove the offence under Section 417 IPC, prosecution must prove the offence prescribed under Section 415 IPC which reads as follows:-

“Cheating-Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to “cheat”. Explanation.-A dishonest concealment of facts is a deception within the meaning of this section”.

18. Coming to the consent of the prosecutrix in the case of *Uday v. State of Karnataka* reported in (2003) 4 SCC 46, the Hon’ble Supreme Court had put a word of caution 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. The Court at page 57 of the Report stated:-

“...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....”

19. The learned counsel for the appellant argued on this aspect that the FIR was lodged only when the accused refused to marry her or denied the paternity of the child. Thus, there is no ingredient of evidence to show that the accused and the victim were in sexual relationship and for which reason the victim got pregnant. To prove the case under Section 415/417 of IPC, the prosecution has to prove that at the relevant time of incident or at the initial stage, the accused had the intention to deceive the victim and only to have sexual relationship with her he made the false promise of marriage. But, it is the case of the prosecution that the case was lodged by her brother only when the victim become pregnant

and when the accused refused to marry her. Thus, it will not come under the purview of Section 417 to convict the accused/appellant under the said section of law. But, in the instant case, it is seen that there is no evidence at all that the accused could not marry the victim/prosecutrix only for some unavoidable circumstances nor he had any intention to marry the prosecutrix, when they entered into physical relationship. It is the case of the prosecutrix that initially the accused had committed rape on her by gagging her mouth and by taking the advantage in absence of other person except the presence of old ailing blind lady. But, subsequently, when he promised to marry her, she gave her consent and thereafter, on several occasion they had sexual intercourse and the victim girl remained silent and disclosed nothing about the sexual intercourse with the accused/appellant. She requested the accused/appellant to keep his promise, when she became pregnant. But, the accused had refused to accept her and finding no other alternative she reported the entire incident to her parents. Thus, the evidence of the prosecutrix remained consistent in every stages and defence could not rebut her evidence by cross examining her, rather, the PWs also supported the prosecution case to the extent that in the village 'Mel' the accused/appellant refused to marry her and denied the paternity of the child of the prosecutrix.

20. From the entire discussion made above, it is seen that the accused had the intention to deceive the victim from the very inception of their relationship and he obtained the consent of the victim/prosecutrix only on false promise of marriage. Thus, I find that the learned Sessions Judge had rightly held that the accused appellant is liable to be sentenced for conviction under Section 417 of IPC. And, coming to the sentence imposed on the accused appellant, I find that considering the gravity of the offence, the learned Trial Court had rightly

sentenced the accused appellant to undergo Rigorous Imprisonment for 1(one) year along with a fine of Rs.5,000/-(Rupees five thousand) only and in default RI for another 3(three) months.

21. So, from the discussions made above and also considering the entire facts and circumstances of the case, I am of the opinion that the sentence imposed on the accused/appellant is justified and hence, I find that the impugned Judgment and Order dated 11.11.2010, passed by the learned Sessions Judge, Dibrugarh in Session Case No.153/2008, requires no interference of this Court and accordingly, the same stands affirmed.

22. Resultantly, the appeal stands dismissed.

23. Send back the LCR along with a copy of this Judgment and Order.

JUDGE

Comparing Assistant