

THE HIGH COURT OF TRIPURA
AGARTALA

CRL. REV. P. 83 of 2007

Sri Sukhamoy Debbarma,
S/O. Sri Abhiram Debbarma,
Of Village – Kumar Sadhu Para,
P.S. Kalyanpur, Khowai,
District – West Tripura.

..... *Petitioner*

- Vs. -

The State of Tripura.
Represented by the Secretary,
Home Department, Govt. of Tripura,
Agartala.

..... *Respondent*

BEFORE

HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA

For the Petitioner : Mr. A.C. Bhowmik, Sr. Advocate.
Mr. D.C. Roy, Advocate.

For the respondent : Mr. R.C. Debnath, Addl.P.P.

Date of hearing & : 24.03.2015.
delivery of
Judgment & order

Whether fit for : No.
reporting

JUDGMENT & ORDER (ORAL)

This revision petition is directed against the Order dated 09.07.2007 as well as the order framing charge dated 10.07.2007 passed by the learned Additional Sessions Judge, Khowai, West Tripura in S.T. 42 (WT/K) of 2007 whereby, a Charge under Section 376(1) IPC along with charge under Section 417 IPC was framed against the petitioner-accused.

2. At this stage, this Court does not want to go into the facts in detail because this Court does not want to in any manner to say anything which will affect the trial one way or the other.

3. Briefly stated the facts relevant for disposal of this case are that the prosecutrix filed an FIR which was received in the police station on 09.11.2005. In this complaint, she alleged that she and the accused were neighbours and they had fallen in love with each other. She stated that since 2001 she had an affair with the accused. According to the prosecutrix, initially, she was reluctant, but on believing the accused she started a relationship with him. She alleges that she was raped at Kalyanpur by the accused against her wishes and after she had been raped, the accused told her that they should cohabit as man and wife and that he would soon marry her. According to her, under such circumstances she continued the affair with him. In May, 2003, she became pregnant. Her version is that she was taken to the chamber of one doctor at Agartala by the accused and made to undergo an abortion against her wishes. She agreed to get the child aborted since she believed that the accused will marry her. Later, the accused got appointment to the post of Junior Engineer and then came to Agartala. Even thereafter, he used to visit her and they both continued their relationship. However, on 2nd October, 2005 when she asked him that they should get married he refused to give any clear cut answer and she came to know that

he is set to marry some other lady, who is also in Government service. On these allegations, the police investigated the matter. The statement of the prosecutrix was recorded under Section 164 Cr.P.C. by the Magistrate, which is similar in nature though more detailed.

4. Before the trial Court, it was urged that no offence under Section 375 IPC punishable under Section 376 IPC is made out and at best a Charge under Section 417 IPC can be made. This application was rejected and Charge has been framed both under Section 376 and 417 IPC.

5. Mr. A.C. Bhowmik, learned senior counsel has relied upon the judgment of the Apex Court in **(2003) 4 SCC 46, Uday vs. State of Karnataka** wherein the Apex Court held as follows:-

“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.”

“23. Keeping in view the approach that the court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown-up girl

studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. 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. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.”

6. It is submitted by Mr. Bhowmik, learned senior counsel that the petitioner was having an affair with the accused for 5 years and it cannot be believed that she was raped and she did not have sex under a mistake of fact, but there was consensual sex and therefore, the petitioner is not guilty of offence under Section 376 IPC.

7. On the other hand, Mr. R.C. Debnath, learned Addl. P.P. has placed reliance on a Division Bench judgment of the Gauhati High Court in **2006 (3) GLT 585, Bipul Medhi & Ors. Vs. State of Assam** wherein the Division Bench held that if the woman believing in the promise of marriage made by a man consents to have sex with the man, then the person who made the promise would be liable for rape if the Court finds on examination of the material that the promise of marriage made by the promisor was really a hoax to obtain consent of the woman. The question will be that whether right from the very beginning the accused was

playing a hoax on the woman or not. Reference may also be made to the judgment of the Apex Court in **2014 CRI. L.J. 540, State of U.P. v. Naushad** wherein the Apex Court held that if consent is given by the prosecution under misconception of fact it is vitiated.

8. Each case has to be decided on its own facts. In criminal cases precedents cannot be applied to the factual situation of each case. However, the factual situation will have to be determined after the evidence is recorded. At the stage of framing Charge, every word in the statement made that the prosecutrix has to be taken to be the gospel truth. If her statement is believed to be true then a prima facie case of rape is made out and the petitioner has to face trial.

9. It is again clarified that this Court is not expressing any views on the merits of the case because at the stage of framing Charge there is no cross-examination and the law laid down by the Apex Court is clear that everything which is stated by the prosecution must be accepted true.

10. Therefore, I find no merit in the petition and the same is dismissed.

11. Before parting with the petition, I must observe that it is indeed a sad state of affairs that this petition which was filed in the year 2007 has been decided almost 8 years later. What justice

is being given to the victim or even to the accused if trial of this sort get delayed indefinitely?

12. The accused and the prosecutrix are directed to appear before the learned Additional Sessions Judge, Khowai, West Tripura on 8th April, 2015. The learned Sessions Judge shall ensure that trial in this case which is already more than 10 years old is conducted on day to day basis and the same is completed latest by 31st July, 2015.

13. It is made clear that if the accused does not appear in the case or in any manner tries to delay the trial the learned Additional Sessions Judge will be entitled to cancel the bail of the accused and he shall have to approach this Court for grant of bail.

CHIEF JUSTICE

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