

**IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 469 of 2015

With

CRAN No. 2 of 2019 (old No. CRAN 92 of 2019)

CRAN No. 3 of 2019 (old No. CRAN 93 of 2019)

Dilip Das @ Nani
-vs.-
State of West Bengal

For the Appellant	:	Mr. Prabir Majumder Mr. S. Majumder Mr. S.S. Biswas
For the State of West Bengal	:	Md. Anwar Hossain Ms. Sreyashee Biswas
Heard on	:	07.12.2020, 14.12.2020
Judgment on	:	16th December, 2020.

Tirthankar Ghosh, J:-

Affidavit filed on behalf of the appellant be kept with the record.

The present appeal has been preferred against the judgment and order of conviction and sentence dated 23.06.2015 and 24.06.2015 passed by the

learned Additional Sessions Judge, Fast Track Court No.1, Barrackpore, North 24 Parganas in connection with the Sessions Case No. 10(7)08 corresponding to Sessions Trial No. 7(3)09, thereby holding the appellant guilty and convicting him for commission of offence punishable under Sections 417/376 of the Indian Penal Code. The learned Court thereafter sentenced the appellant to suffer rigorous imprisonment for seven years and to pay a fine of Rs.5,000/- i.d. further RI of two years for the offence under Section 376 of the Indian Penal Code and RI for one year and fine of Rs.1,000/- i.d. to suffer RI for one month for the offence punishable under Section 417 of Indian Penal Code.

Prosecution case in brief is that one Minati Gurung informed the Officer-in-charge, P.S. Nimta to the effect that her youngest daughter (the victim) had a relationship with the appellant (Dilip Das), the youngest son of Nepal Das and they had an affair. The informant further alleged that 15 days prior to the complaint she had taken her daughter to a gynecologist for illness and there it was informed that her daughter was pregnant. The informant further alleged that she had concealed the matter of her pregnancy on the assurance of Dilip Das, however, her daughter was eight months pregnant and as such she requested the police authorities to take proper legal steps against the appellant.

On receipt of such information on 21.09.2007 at about 21.15 hours Nimta P.S. case No. 60/2007 was registered for investigation under Sections 417/376 of the Indian Penal Code. On completion of investigation the Investigating Officer submitted a charge-sheet and the case was thereafter,

committed to the Court of Sessions after compliance of the provisions under Section 207 of the Code of Criminal Procedure and the learned Sessions Court being the trial Court framed charges under Section 417 and Section 376 of the Indian Penal Code. The charges were read over to the accused person who pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 9 witnesses being PW1, Minati Gurung, Mother of the victim; PW2 Papiya Dhamala, elder sister of the victim; PW3, victim; PW4 Gourango Ghosh, a neighbor; PW5 Putul Chandra Pramanik, a neighbor; PW6 Mithun Chakraborty, an acquaintance of the victim and her family; PW7 Dr. Parag Baran Pal, doctor who examined the victim and accused and also collected samples of blood for D.N.A. Test; PW8, Madan Mohan Maity, ASI of police who received the written complaint from PW1; PW9, Ananta Kumar Bhowmick, the Investigating Officer of the case.

Prosecution also relied upon number of documents to prove its case being Exbt.1, which is the signature in the complaint; Exbt1/1 which is identification of PW1's signature; Exbt.2 which is the signature on the seizure list dated 21.09.2007; Exbt.2/1 signature of PW4 in the seizure list dated 21.09.2007; Extb.3 which is her signature for receiving the original copy of the Birth Certificate after seizure; Exbt.4 is the Birth Certificate of the victim; Exbt.5 the signature of the victim PW3 in the statement under section 164 of the Code of Criminal Procedure; Exbt.6 Medical Report prepared by PW7 (doctor) in respect of the victim PW3; Exbt.7 is the Medical Report prepared and signed by PW7 (doctor) in respect of the appellant;

Exbt.8 and Exbt.8/1 are the consent forms of PW3 and the accused; Exbt.9, 9/1 and 9/2 are the Xerox copy of three forms of blood for D.N.A. Test of victim, baby of the victim and the appellant; Exbt.10 is formal FIR which was identified by PW8; Exbt.11 is the rough sketch map along with index prepared by PW9; Exbt.12 is the Xerox copy of discharge certificate of NRS Medical Collage and Hospital; Exbt.13 is the Report of CFSL.

PW1, in her evidence before the Court stated that in the month of September, 2007 she came to know that her daughter became pregnant when she had taken her daughter to the doctor. Thereafter, she came to know from her daughter that in her absence Dilip Das used to visit her. According to the witness Dilip Das promised to marry the victim PW3 and on the basis of such promise the appellant established a relationship like husband and wife with her daughter. As such in course of time her daughter became pregnant and the incident took place between 01.01.2007 to 07.03.2007. The witness further stated that at the time the incident took place her daughter was 17 to 17 ½ years old and after knowing the incident she had been to the police station and filed the complaint which was written by her daughter PW2. She identified her signature in the complaint which was marked as Exbt.1. She also identified her signature in the seizure list by which the birth certificate of her daughter was seized which was marked as Exbt.2 and she also identified the Birth Certificate of her daughter which was marked as Exbt.4, she also identified her signature on the document by which she received back the original Birth Certificate after seizure which was marked as Exbt.3.

PW2 narrated the incident in the same manner as PW1 and further added that after knowing the incident she informed it to her husband and brother-in-law about the incident and the information was also given to the parents of Dilip Das. After a meeting was settled in presence of the local respected people to discuss about the dispute the parents of the appellant Dilip Das denied the relationship and the appellant Dilip Das refused to marry the victim PW3. The witness further deposed that in such meeting Gouranga Ghosh and Putul Pramanik of the locality was present She further stated that having no other alternative they had to inform Nimta Police Station and she wrote the complaint which was signed by her mother PW1 after the same was read over to her. The witness identified the signature of her mother which was marked as Exbt.1/1.

PW3 is the victim she narrated that the incident took place in the year 2007 and on or about 01.01.2007 the appellant came to her house and for the first time they knew each other, gradually a friendship developed between them and the appellant thereafter proposed the victim and with passage of time established a physical relationship with her. The witness further stated that when she refused the proposal, the appellant promised to marry her and in such manner obtained her consent and it was about two months later she was able to understand that she was pregnant. As a consequence, the appellant established her to take her to tenanted house to save the child. However, when the victim/witness along with her mother went for treatment to the doctor, her mother came to know that she was pregnant and when her mother went to the house of the appellant and

informed regarding the pregnancy, the family members of the appellant and the appellant denied such acts and as such having no other alternative her mother informed the police. The witness also identified her signature in her statement before the learned Magistrate under Section 164 of the Code of Criminal Procedure which was marked as Exbt.5. The witness also identified the appellant in Court.

PW4 is a neighbor of the victim as well as the appellant who could not throw any light regarding the incident but narrated that he heard regarding the incident from the local club. The witness identified his signature in the seizure list dated 21.09.2007 which was marked as Exbt.2/1.

PW5 is also a neighbor of both the victim and the appellant. The witness could not throw any light and only stated that she heard altercations between the victim and the appellant.

PW6 introduced himself as a school friend of the appellant and he also could not throw any light regarding the statement. He deposed that he heard regarding the victim delivering a baby.

PW7 is the doctor who at the relevant time was posted at R.G Kar Medical College and Hospital as Assistant Professor and who examined both the victim and the appellant. The doctor also collected blood sample for the D.N.A. Test. The witness identified the report in respect of sexual assault of the victim which was marked as Exbt.6. The report of the appellant's medical examination which was marked as Exbt.7 and also identified the consent forms which were marked as Exbt.8 and Exbt.8/1 and the three

forms for collection of blood for D.N.A. test which were marked as Exbt.9, 9/1 and 9/2.

PW8 is the ASI of police who at the relevant point of time was posted at Nimta Police station. He deposed that on 21.09.2007 he received the written complaint from PW1 which was registered as per law. The witness identified his endorsement on the petition of complaint which was marked as Exbt.1/2 and also the formal FIR which had his signature and was marked as Exbt.10.

PW9 is the Investigating Officer of the case, who narrated regarding the examination and statement of witnesses which were recorded in respect of investigation. The witness also narrated regarding collection of the statement of the victim under Section 164 of Code of Criminal Procedure from Court. The witness further submitted that the victim gave birth of a child and as such he collected the three forms along with samples of blood from the doctor which was sent for D.N.A. test. The D.N.A. test report, so collected from the CFSL was marked as Exbt.13. The witness also identified the sketch map and index which was signed by him marked as Exbt.11 and the copy of the discharge certificate of N.R.S. Medical College & Hospital which was marked as Exbt.12.

Mr. Majumdar, Learned Advocate appearing for the appellant submitted that admittedly a relationship developed between the appellant and consequently a child was born out of the said relationship, as is reflected from the CFSL report – Exbt.13. The Learned Advocate further

submitted that the victim being more than 16 years of age was capable to understand the consequences of the act. She may be said to be a consenting party in the relationship and the plea of refusal to marriage by the appellant is a subsequent plea. The Learned Advocate relies upon **K.P. Thimmappa Gowda -Vs.- State of Karnataka** reported in **AIR 2011 SCC 2564** and MANU/WB/0299/1983 (**Jayanti Rani Panda -Vs. – State of West Bengal and Ors.**). Additionally the Learned Advocate for the appellant also filed an “Affidavit” in course of hearing wherein the father of the appellant has sworn on his behalf that he is ready and willing to pay Rs.1500/- per month to the son of the PW-3, namely, Kunal Das till he attains majority.

Mr. Anwar Hossain, Learned Advocate appearing for the State submitted that in this case consent of PW3 was obtained by fraud and she surrendered only after there was an assurance of marriage by the appellant and the appellant after enjoying the victim, refused to marry her when she got pregnant. The Learned Advocate further submitted that the blood samples so collected of the victim, the baby and the appellant being Exbt.9, 9/1 and 9/2 which were for D.N.A. test report confirms the contention and Exbt.13 which is the opinion of the Director CFSL categorically states “From the above observations, it is concluded that Mr. Dilip Das @ Nani (source of exhibit A: blood sample I) and Miss ... victim (source of exhibit B: blood sample II) are the biological parents of the baby (source of exhibit C: blood sample III)

I have taken into account the submissions advanced by both the parties and having regard to the ratio laid down in **Anurag Soni -Vs.- State**

of Chhattisgarh reported in **(2019)13 SCC 1**, I am of the view that the facts and circumstances of the case which the prosecution has brought in evidence from the very beginning reflects that the accused never intended to marry the prosecutrix. The accused/appellant gave false promises of marriage to prosecutrix on such false promise he had physical relation with PW3; PW3 initially resisted, however, she gave a consent relying upon false promise of the accused that he will marry her therefore such consent is consent of misconception of fact as per Section 90 of IPC and thus, cannot excuse the appellant from the charge of rape.

Accordingly, I am of the opinion that learned trial Court did not commit any illegality while holding the appellant guilty of the charges and consequently convicting him.

However, having regard to the sentence so imposed, considering the age of the appellant as also the approach expressed by him before this Court, I feel the sentence so imposed should be interfered with.

The records reflect that the appellant during pendency of the appeal is in custody for about 5 years 6 months. In view of the period of imprisonment so suffered I am of the opinion that the sentence so imposed upon the appellant should be reduced to that which has already been undergone by him.

It is further clarified that the appellant as per his commitment before this Court (by way of an affidavit) shall pay an amount of Rs.1500/- (Rupees Fifteen Hundred only), per month to the minor son namely, Kunal Das (as

per report of Officer-in-Charge, Nimta Police Station) on and from December, 2020 till the said minor attains majority. Such quantum of Rs.1500/- shall be paid within 10th day of each month and any default of payment would entitle the minor to enforce the provision of Chapter IX of the Code of Criminal Procedure for recovery of the dues as if the said quantum was passed in a proceeding under Section 125 of the Code of Criminal Procedure. The Jurisdictional Magistrate will have the power of execution proceedings.

The appellant therefore, should be released forthwith if he is not wanted in connection with any other case.

Accordingly, **C.R.A. 469 of 2015** along with connected applications are disposed of with the sentence being modified as above.

Department is directed to communicate this order to the Ld. Trial Court and send the LCR forthwith to the Lower Court.

Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Tirthankar Ghosh, J.)