

Form J(2)

**IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
Appellate Side**

**Present :
The Hon'ble Justice Bibek Chaudhuri**

C.R.A. 330 of 2018

**Sujoy Das
Vs.
State of West Bengal**

**For the Appellant : Mr. Sourav Chatterjee, Adv.
Mrs. Subhasree Patel, Adv.
Ms. Saini Das, Adv.**

For the State : Mr. Anand Keshari, Adv.

Heard on : 20.05.2022 & 07.06.2022.

Judgment On : 08.06.2022.

Bibek Chaudhuri, J.

This is an appeal against the judgment and order of conviction dated 12th June, 2018 and 13th June, 2018 respectively passed by the learned Additional Sessions Judge, Fast Track, 5th Court at Alipore in Sessions Trial No.01(01)09 arising out of Sessions Case No.49(11)08 convicting the appellant under Section(s) 417/376 of the Indian Penal Code.

The appellant was sentenced to suffer simple imprisonment for a term of one year for the offence punishable under Section 417 of the

Indian Penal Code with fine and default clause. He was further sentenced to suffer rigorous imprisonment for 7 years with fine and default clause for the offence punishable under Section 376 of the Indian Penal Code. Factual matrix of the case is that the de-facto complainant and the appellant were students of the same college. Initially the appellant proposed her but she did not agree. Subsequently on repeated proposal the de-facto complainant started to have soft corner for the appellant. They fell in love. Their love affair was known to the parents of both the families and other family members. Sometimes in the year 2002 the appellant took her to his house when there was no other person present in the house. It is alleged that the appellant forcibly committed physical relationship upon the de-facto complainant on the assurance that he would marry her. The de-facto complainant did not inform such incident to anybody. However, the family members of the appellant were not agreeable to give marriage of the appellant with the de-facto complainant at that point of time as he was unemployed. Subsequently, he got an employment at Aditya Birla Group situated at 10, Industrial House, Camac Street. The de-facto complainant and her father then requested to appellant to solemnize marriage between them. At last the appellant took her to the office of one Ranjit Dhar Chowdhury, Marriage Registrar. The parents of both the parties were present. The de-facto complainant and the appellant and their relatives

put signatures on some papers and she was informed that her marriage with the appellant was performed. The appellant took her to his house as his wife and stayed together as husband and wife for few days. On 30th March, 2008, the de-facto complainant came to know from the Marriage Registrar that her marriage with the appellant was not registered till date. The de-facto complainant informed the matter to the appellant and his family members but they refused to register her marriage with the appellant. It is alleged by the de-facto complainant that till 29th March, 2008, the appellant had physical relationship with her several times on false assurance that her marriage was solemnized with the appellant.

On the basis of the said complaint, police registered New Alipore Police Station Case No.87 dated 24th April, 2008 against the appellant, his father namely Sudhir Chandra Das and his mother Bijaya Das under Sections 120B/376/420 of the Indian Penal Code. The investigation ended in filing charge-sheet against the accused persons. Trial Court framed charge against all three accused persons under Sections 120B/417 of the Indian Penal Code and against the appellant also under Section 376 of the Indian Penal Code. As the accused persons pleaded not guilty, trial of the case commenced.

During trial prosecution examined 7 witnesses. Amongst them, the de-facto complainant deposed as P.W.1. P.W.2 and P.W.3 are the

parents of the de-facto complainant. P.W.4 is uncle of the appellant who turned hostile during trial of the case. P.W.5, Smt. Dipali Das is the aunt of the appellant. She was also declared hostile by the prosecution. P.W.6, Shyamal Kundu is a neighbour of the de-facto complainant who failed to throw any light in the instant incident. P.W.7, Pabitra Bhattacharjee is the Investigating Officer of this case.

The learned Trial Judge on due appreciation of evidence on record and argument advanced by the prosecution and defence acquitted accused Sudhir Das and Smt. Vijaya Das. However, the appellant, namely, Sujoy Das was convicted under Section 417/376 of the Indian Penal Code and sentenced accordingly. Hence, the instant appeal.

From the evidence of the de-facto complainant who is the victim of this case, it is ascertained that she was a student of New Alipore College of English Honours in B.A. Course. Sometimes in 2001, Sujoy, another student of the same college proposed her through her friends. She did not agree to such proposal. Then Sujoy personally proposed her repeatedly. Finally the de-facto complainant agreed to such proposal which in course of time developed into a strong love relationship. The members of both the families knew about such relationship between the de-facto complainant and the appellant. The appellant informed about their relationship to the parents of the de-facto complainant. In 2002, the appellant took her to his house on the plea that his parents had

called her. When the de-facto complainant went to the house of the appellant, he did not fine anybody. Taking such advantage, the appellant committed rape upon her. After the incident when she was crying the parents of the appellant came with another middle aged lady and they consoled her that the appellant would marry her in future. Subsequently the parents of the de-facto complainant also requested the appellant to marry the de-facto complainant but the appellant wanted time on the ground that he was unemployed. Then he got a job at Hutchison Essar Limited. Subsequently he left the said job and joined Aditya Birla Group. At that point of time, the appellant agreed to marry her and insisted upon the de-facto complainant to leave her job. She left her job. But subsequently the appellant started avoiding the de-facto complainant. Finally on 29th February, 2008 she was taken to the office of one Ranjit Dhar Chowdhury, Marriage Registrar, the father of the de-facto complainant and father and uncle of the appellant were also present there. They put some signatures on some papers and the de-facto complainant was convinced that her marriage was registered with the appellant. On the same date the appellant took her to his house. The de-facto complainant started to lead her conjugal life with the appellant believing that her marriage was really solemnized with the appellant under Special Marriage Act. However, during her stay in the house of the appellant she was assaulted by the appellant as well as his

parents on demand of money. On 30th March, 2008 she came to know that no marriage was actually solemnized between the parties and she was deceived by the appellant. The parents of the de-facto complainant also deposed in the same tune except certain minor contradictions with regard to the dates, which the Trial Court rightly ignored. On careful perusal of evidence on record this Court has no hesitation to hold that both the de-facto complainant and the accused had love relation. If the evidence of the de-facto complainant is accepted on its face value, it would be found that the appellant co-habited with the de-facto complainant for the first time in 2002. Though it is alleged by the de-facto complainant that the appellant committed rape upon her on a day in 2002, she did not lodge any complaint against the appellant Sujoy Das immediately after the occurrence. It is also found from her evidence that she informed the matter to her parents but her parents also did not take any action against the appellant on the ground that the de-facto complainant had love relation with the appellant and in future, they would marry. Thus, this Court can safely hold that the incident that took place in 2002 was consensual sex. Both de-facto complainant and the appellant are major and she knew the result and effect of such physical relationship with the appellant. Therefore, the allegation that the de-facto complainant was raped sometimes in 2002 by the appellant does not have any leg to stand.

At this juncture it is to be considered as to whether the relationship between the appellant and the de-facto complainant, arrangement of fake marriage with the de-facto complainant and staying together from 29th February, 2008 to 29th March, 2008 as husband and wife proved the charge under Section 417/376 of the Indian Penal Code.

In ***Deelip Singh @ Dilip Kumar Vs. State of Bihar*** reported in **(2005) 1 SCC 88**, it was held by the Hon'ble Supreme Court as hereunder:-

".....whether the promise to marry, if made by the accused, was false to his knowledge and belief from the very inception and it was never intended to be acted upon by him. As pointed out by this Court in Uday's case the burden is on the prosecution to prove that there was absence of consent. Of course, the position is different if the case is covered by Section 114A of Evidence Act. Consent or absence of it could be gathered from the attendant circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides."

Section 415 defines cheating in the following words:-

"415. 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".

Plain reading of this section shows that if an offender by deceiving any person fraudulently or dishonestly induces such person to do or omitting to do anything which he would not do or omit if he were not so dissatisfied, and which act or omission causes or likely to cause damage or harm to that person in body, mind, reputation or property is said to cheat.

The case of the de facto complainant in this regard is that the appellant by deceiving the de facto complainant fraudulently or dishonestly induces her to have co-habitation believing the de facto complainant to be her lawful husband and the said act on the part of the appellant caused damage or harm to her body, mind and reputation.

It is needless to say that from the written complaint as well as the evidence on record, the de facto complainant or her parents did not produce any evidence to prove the above point of cheating. In ***Uday vs. State of Karnataka*** reported in **(2003) 4 SCC 46**, the Hon'ble Supreme Court observed as hereunder:-

"25. *There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. 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. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. 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."

In the instant case, the de facto complainant did not allege that her consent was obtained under misconception of fact. The act of co-habitation between the appellant and de facto complainant after 29th February, 2008 was done on free consent of both the parties. Therefore, the ingredients of offence under Section 415 of the IPC cannot be said to be proved against the appellant. Since there is also no evidence that the victim was ravished without her will and against her consent, he also cannot be convicted under Section 376 of the IPC.

Considering such aspect of the matter, this Court is of the opinion that the learned Trial Judge was wrong in convicting the appellant to the charge of Section 417/376 of the IPC.

For the reasons stated above, the instant appeal is **allowed** on contest. The judgement and order of conviction and sentence passed by

the Additional District & Sessions Judge, Fast Tract 5th Court, Alipore in Sessions Trial No.01(01)09 is set aside.

The appellant be discharged from his bail bond.

Urgent photostat certified copy of this judgment, if applied for, be given to the learned Advocates for the parties on the usual undertakings.

(Bibek Chaudhuri, J.)