

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

The Hon'ble **JUSTICE BIBEK CHAUDHURI**

C.R.A 510 of 2017
With
IA NO. CRAN 2 of 2019 (Old No. CRAN 742 of 2019)

Pritam Das
Vs.
The State of West Bengal & Anr.

For the Appellant:	Mr. Swapan Kumar Mullick, Mr. Kazi K. Rahman.
For the State:	Mr. Ranabir Roy Chowdhury, Ms. Faria Hossain, Ms. Baisali Basu.

With
C.R.A 350 of 2018
Smt. Baby Biswas @ Baby Mandal Biswas
Vs.
The State of West Bengal & Anr.

For the Appellant:	Mr. Kazi Safiullah
For the State:	Mr. Ranabir Roy Chowdhury, Ms. Faria Hossain, Ms. Baisali Basu.

Heard on: 22 March, 2021.

Judgment on: 17 March, 2022.

BIBEK CHAUDHURI, J. : –

1. CRA 510 of 2017 is an appeal against the judgment and order of conviction and sentence dated 9th August, 2017 and 10th August, 2017 passed by the learned Additional Sessions Judge, 2nd Court at Malda in Sessions Case No.202 of 2014 corresponding to Sessions Trial No.23 of 2014 thereby convicting the accused under Section 417/354/506 of the Indian Penal Code and sentencing him to suffer simple imprisonment of one year and to pay fine of Rs.1,50,000/- in default, to suffer simple imprisonment of three months further for the offence punishable under Section 417 of the Indian Penal Code, simple imprisonment of two years and to pay a fine of Rs.2,50,000/-, in default, to suffer simple imprisonment of six months for the offence punishable under Section 354 of the Indian Penal Code and the simple imprisonment for one year and to pay a fine of Rs.1,00,000/-, in default, to suffer simple imprisonment of one month further for offence punishable under Section 506 of the Indian Penal Code.

2. The appellant faced trial under the charge of Section 417/376/506 of the Indian Penal Code. In order to prove the charge, prosecution examined ten witnesses. The learned trial judge on appreciation of evidence held the appellant convicted under Section 417/376/506 of the Indian Penal Code assigning the following reasons:-

“The case as made out in the petition of complaint/FIR and evidence of complainant-cum-victim girl as a whole leads to the conclusion that the accused Pritam Das deceived the

complainant-cum-victim girl by giving promise to marry her, but later refused and he also did physical assault to her. She stated to the Doctor (PW9) about the sexual assault by the accused and also stated that the accused threatened her of dire consequences, if she disclosed it, in my opinion attract the provision of Section 417/376/506 of the Indian Penal Code and the accused is held guilty of the said charge.”

3. The written complaint submitted by the de facto complainant contains the following facts:-

4. Accused Pritam Das was known to the de facto complainant for long time. The accused established physical relation with the de facto complainant on promise of marriage. He committed sexual intercourse with her in the absence of her mother after intimidating her against her will. Whenever the de facto complainant tried to resist him, the accused threatened her saying that he would kill her and her mother. The de facto complainant informed the matter to the police vide G.D Entry dated 14th January, 2013 and 9th March, 2013. However, police did not take any action. On 19th March, 2013 the de facto complainant appeared before the Additional Superintendent of Police, Malda and then lodged the complaint before the Inspector-in-Charge, English Bazar Police Station. The accused refused to marry the de facto complainant and threatened her to assault.

5. Police took up the case for investigation and submitted charge-sheet against the appellant under Section 417/376/506 of the Indian Penal Code.

6. In order to prove the charge against the appellant, prosecution examined ten witnesses during trial. Amongst them PW1 is the de facto complainant. PW2 is her mother. PW3 Bappa Biswas is the maternal uncle of the de facto complainant on village courtesy. PW5 Ujjwal Das is a resident of the same locality where the de facto complainant used to reside at the relevant point of time. PW6 is the maternal-grand-mother of the victim girl and PW9 is the Medical Officer who examined the victim girl and issued Medico Legal Examination Report in connection with the case. PW8 Dr. Nimai Chand Sardar is another Medical Officer who conducted medical examination of the accused to ascertain as to whether he was sexually capable or not. PW10 is the Investigating Officer of the case. PW4 Alok Sarkar did not support the prosecution case and was declared hostile.

7. It is needless to say that in a case under Section 376 of the IPC, the victim girl is the best witness and her status is similar to an injured witness. Therefore, if the court finds that the evidence of the victim girl inspires confidence and it is trustworthy, cogent, believable and unblemished and her evidence corroborates with the evidence of the Medical Officer who examined the victim girl during investigation of the case and submits Medico Legal Examination Report, the court generally does not seek for any corroboration. This is due to the reason that the offence of sexual violence is generally committed in secrecy. The accused takes all precaution so that offence may not be witnessed by any third person.

8. In the case of cohabitation on false promise of marriage, it is more difficult to have any eye witness account of the incident except the victim herself because at the time of cohabitation on false promise of marriage, both the victim and the accused unite secretly. Bearing the above circumstance in mind, let me now appreciate the evidence of the de facto complainant (PW1)/prosecutrix.

9. It is ascertained from her evidence that the sister of the accused used to take tuition from mother of the victim girl. The accused used to come to the de facto complainant to drop his sister to her mother. Sometimes in the absence of her mother the de facto complainant used to impart tuition to the sister of the accused. In this way both of them were acquainted with each other. The accused gave her a proposal to marry her. On 19th March, 2013 he committed rape upon the de facto complainant in the absence of her mother. After the incident she informed the same to her mother. Then she lodged a written complaint with the Inspector-in-Charge, English Bazar Police Station. She stated further that during investigation her medical examination was conducted. She also gave a statement under Section 164 of the Code of Criminal Procedure during investigation which was recorded by the jurisdictional magistrate. During cross examination she denied that she had a love relation with the accused for about 2/2½ years prior to lodging the FIR. It is also ascertained from her evidence that she lodged more than one General Diary against the accused prior to lodging the complaint against him.

10. Thus, it is clear from the evidence on record that the prosecutrix was subjected to rape only once on 19th March, 2013.

11. Learned trial judge completely failed to consider that the PW1 herself alleged in her complaint that she had acquaintance with the appellant for long time and the appellant had physical relationship with her on the assurance that he would marry the de facto complainant. In the written complaint she did not state that on 19th March, 2013 the accused committed rape upon her. The learned judge in the trial court failed to appreciate the evidence of the de facto complainant in relation to the incident stated by her in the written complaint. In the written complaint, the de facto complainant stated that she had acquaintance with the appellant for a long time and the appellant had physical relationship with her giving her assurance of marriage. In her statement recorded under Section 164 of the Code of Criminal Procedure the de facto complainant clearly stated that the appellant had physical relationship with her on number of occasions in their house in the absence of her mother on assurance of marriage. However, for last 7/8 months prior to lodging the complaint the appellant refused to marry her. Therefore, statement made by the de facto complainant in her evidence as PW1 does not match with her statement made in the written complaint as well as under Section 164 of the Code of Criminal Procedure.

12. In her evidence the victim girl stated that at the relevant point of time she was aged about 19 years. Therefore, she was major at the time of lodging complaint against the appellant. There is absolutely no evidence

that the victim was forcibly raped by the appellant. On the other hand, it is the specific statement of the victim girl in the written complaint as well as in her statement recorded under Section 164 of the Code of Criminal Procedure that she cohabited with the appellant as a consequence of love affair between them.

13. The victim girl was medically examined by PW9 Dr. Kalyan Mishra. On examination he found no mark of injury on her body and in her private parts. He also recorded that the hymen of the victim was torn, two fingers could be introduced inside her vagina and it seems to the Medical Officer that she is habituated to sexual intercourse. The victim girl made a statement before the Medical Officer that she was sexually violated by the appellant on several occasions since December, 2012. The victim girl could not disclose the said incidents as the appellant threatened her with dire consequences if she had disclosed the said fact. Thus, the victim girl did not state before the Medical Officer that the appellant committed sexual intercourse with her on false promise of marriage.

14. In the case of **Maheshwar Tigga vs. The State Of Jharkhand** reported in **(2020) 10 SCC 108**, the Hon'ble Supreme Court considered the question as to whether the prosecutrix had consented to the physical relationship under any misconception of fact with regard to promise of marriage or her consent was obtained on fraudulent misrepresentation of marriage. The Apex Court was pleased to hold that under Section 90 of the IPC a consent given under a misconception of fact is no consent in the eye of law. But the misconception of fact has to be in proximity of time to

the occurrence and cannot be spread over a period of years together. From the statement of the victim recorded under Section 164 of the Code of Criminal Procedure it is found that the victim had love relationship with the appellant for about two and half years.

15. In a very recent decision of the Division Bench of this Court in **CRA 366 of 2015 (Saddam Hossain vs. State of West Bengal)**, judgment delivered on 7th December, 2021, the ratio of **Deelip Singh @ Dilip Kumar vs. State of Bihar** reported in **(2005) 1 SCC 88** was considered.

In the aforesaid report the Hon'ble Supreme Court held 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."

16. There is absolutely no evidence in the instant case that from the very inception the appellant fraudulently obtained the consent of the victim girl or that the victim girl consented to physical relationship on misconception of fact within the meaning of Section 90 of the IPC. There is no evidence that the appellant did not intend to marry from the inception of the relationship.

17. For the reasons stated above, I am of the view that the impugned judgment and order of conviction and sentence under Section 417/354/506 of the IPC is liable to be set aside.

18. The appeal is therefore allowed on contest.

19. The appellant be discharged from his bail bond.

20. CRA 350 of 2018 is an appeal under the proviso of Section 372 of the Code of Criminal Procedure filed by the de facto complainant of Sessions Case No.202 of 2014 corresponding to Sessions Trial No.23 of 2014 praying for enhancement of sentence for the offence punishable under Section 417 of the IPC and convicting the private respondent for committing offence under Section 376 of the IPC.

21. At the time of hearing of the instant appeal along with CRA 510 of 2017, it was urged by Mr. Kazi Safiullah, learned Advocate for the appellant that the learned trial judge committed grave error in acquitting the private respondent from the charge under Section 376 of the IPC and convicting and sentencing him for lesser offence under Section 354 of the IPC. It is further submitted by the learned Advocate for the appellant that the appellant in his evidence as PW1 deposed that the private respondent committed rape upon her on false assurance of marriage. The Medico Legal Examination Report which was marked exhibit during trial proves that the victim was subjected to sexual intercourse more than once. The evidence on record is sufficient to hold the appellant guilty for committing offence under Section 376 of the IPC. Therefore, the private respondent/accused should be adequately punished.

22. In view of my discussion while disposing of CRA 510 of 2017, the private respondent was held not guilty for committing any offence under Section 417/376 of the IPC. It is found from the materials on record that the appellant was a consenting party and she and the private respondent voluntarily cohabited out of live relationship for a long time. The de facto complainant/appellant failed to prove that her consent was obtained by false promise of marriage from the very beginning and there was a misconception of fact on the part of the de facto complainant and she gave consent to such physical relationship with the private respondent out of misconception of fact.

23. In view of the finding made by this Court in CRA 510 of 2017, the instant appeal is liable to be dismissed.

24. Accordingly CRA 350 of 2018 is dismissed on contest.

25. Let a copy of this judgment along with the lower court record be forthwith sent down to the trial court.

26. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within the week from the date of putting in the requisites.

(Bibek Chaudhuri, J.)