

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 358 of 2019

Latifur Rahaman

-vs.-

The State of West Bengal

For the Appellant : Md. Aslam Khan,

For the State : Mr. Abhra Mukherjee,
Mr. Dipankar Mahata

Heard on : 03.08.2022 & 24.08.2022.

Judgment on : 09.11.2022

Tirthankar Ghosh, J:-

The present appeal has been preferred against the judgment and order of conviction and sentence dated 30.05.2019 & 31.05.2019 passed by the Learned Additional Sessions Judge, Chanchal, Malda in Sessions Trial No.45(12)2017 arising out of Sessions Case No. 30 of 2017 convicting the appellant under Section 376/417 of the Indian Penal Code and sentenced him as follows:

- (i) To suffer Rigorous Imprisonment for 7 years and to pay a fine of Rs10,000/- in default to suffer Rigorous Imprisonment for 6

months for the offence punishable under Section 376 of Indian Penal Code.

(ii) To suffer Simple Imprisonment for 3 months for the offence punishable under Section 417 of the Indian Penal Code.

Chanchal Police Station case no. 65 of 2014 dated 05.02.2014 was registered for investigation against Latifur Rahaman, Mamtaj Hossain, Lutfal Bibi, Ansar Ali and Amjad Ali on the basis of an application filed by the victim (hereinafter referred to as 'X') before the learned ACJM, Chanchal in M.P. Case No. 54/2014. The Learned ACJM, Chanchal was pleased to direct the Officer-in-charge, Chanchal Police Station to register the case treating the petition of complainant as FIR.

The allegations made in the application under Section 156(3) of the Code of Criminal Procedure were to the effect that Latifur Rahaman was married to 'X' about a year ago. Soon after marriage conflict arose due to demand of dowry and on 03.07.2013 the accused gave Talaq to the de facto complainant/'X' at the instigation of the other accused persons named above. After Talaq the complainant was residing at her parental home, however, being aided and abated by the other accused persons the accused Latifur Rahaman allured the complainant with false promise of giving land in her name along with other things. The accused promised to marry her and with the allurements took the de facto complainant to a house in Kolkata from her father's house on 21.12.2013. Both of them stayed there for 20 days and again by promising to

marry her the accused committed raped upon her. It has also been alleged that the complainant heard conversation of the accused Latifur Rahaman with various unknown persons that she was brought to Kolkata for the purpose of being sold to other persons. The complainant disclosed the issue to members of her family and with their help returned to parental home. She also disclosed the incident to her father and the villagers assured them that they would call a 'village salishi', however, the same was not solved in the village salishi, due to that there was a delay in filing the case. She informed the incident to Chanchal Police as well as SP Malda but no steps were taken and as such she was compelled to file the application under Section 156(3) of the Code of Criminal Procedure, before the Court.

On completion of investigation the Investigating Officer submitted charge-sheet being CS No.322/14 dated 24.08.2014 under Section 376/417/109 of the Indian Penal Code against Latifur Rahaman, Mamtaj Hossain, Lutfal Bibi, Ansar Ali and Amjad Ali. Learned ACJM, Chanchal after compliance of the provisions relating to supply of copies committed the case to the Sessions Court for trial.

The trial Court framed charges against accused Latifur Rahaman under Section 376/417 of the Indian Penal Code and against the other accused persons namely, Mamtaj Hossain, Lutfal Bibi, Ansur Ali and Amjad Ali under Section 109 of the Indian Penal Code. The contents of the charge were read

over to the accused persons to which they pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 6 witnesses and number of documents. The witnesses relied upon are PW1, Abdul Mannan, father of the victim; PW2, Hasina Bibi, mother of the victim; PW3, Najrul Islam, uncle of the victim; PW4, 'X' the victim lady; PW5, Asit Kr. Mondal, Sub-Inspector of Police attached to Chanchal Police Station and 2nd Investigation Officer of the case and PW6, Bipul Mondal, ASI of Police attached to Chanchal Police Station who was the first Investigating Officer of the case.

PW1, Abdul Mannan, father of the victim/complainant identified all the accused persons in Court and deposed that his daughter was married to Latifur Rahaman one year prior to the alleged date of incident. Few months before the incident Latifur Rahaman gave Talaq to her daughter and after such Talaq his daughter returned back home and started staying there. Three to four months after Talaq when his daughter was staying with him, Latifur Rahaman allured her with the promise of marriage and property and took her away with him. The other accused persons helped Latifur Rahaman in taking away his daughter. His daughter was taken to Kolkata and at Kolkata Latifur Rahaman established physical relationship with her against her consent. The said accused also planned to sell his daughter with the aid of the other accused persons. The witness alleged that Latifur Rahaman never had the intention of marrying his daughter and only with the ulterior motive of exploiting his

daughter physically, took her away with him. His daughter was kept at Kolkata by Latifur Rahaman and other accused persons for 20 days, thereafter she escaped from there and returned to the house and after returning she lodged the present case.

PW2, Hasina Bibi is mother of the victim, who deposed that Latifur Rahaman was earlier her son-in-law and the other accused persons happened to be family members of Latifur Rahaman. She identified all the accused persons in Court. She deposed that her daughter was married to Latifur Rahaman and after four months of marriage Latifur Rahaman left her daughter and subsequently gave assurance to her daughter to give her property and on such assurance her daughter being allured left for Kolkata. Her daughter was kept at Kolkata by Latifur Rahaman for 20 days and was raped by him. The accused persons planned to sell her daughter and after knowing the same she fled away from Kolkata and returned home. A case was thereafter lodged before the Court against Latifur Rahaman and his other family members.

PW3, Najrul Islam is the uncle of the victim. He identified all the accused persons in Court and deposed that the victim initiated a case which was investigated by the police authorities. He stated that Latifur Rahaman took the victim to Kolkata, kept her for 18 to 20 days and when the victim came to know that Latifur Rahaman was going to sell her to some other person she fled away from Kolkata. After reaching home she divulged about the incident and subsequently lodged the case.

PW4, is 'X'/victim. The victim identified her signatures on the documents relating to the case which she filed in Court and as such the said document along with her signature were marked as Ext.1/1 and Ext.1/2. She stated that she initiated the case against her husband Latifur Rahaman and his family members namely, Momtaj Hossain, Lutful Bibi, Amjad Ali and Ansar Ali. She identified the accused Latifur Rahaman in Court and also stated that she could have identified the other accused persons had they been present in Court. She deposed that she was married to Latifur Rahaman and soon after her marriage there was a dispute with her husband and the other accused persons. As a consequence of which her husband gave her Talaq as per instigation of the other accused persons and as such she had to return and reside with her father. Her husband took her to Kolkata from her father's house to marry her once again and kept her for 20 days in a room and committed rape upon her for the said 20 days. She alleged that while staying in the said room she heard her husband having conversation with some other persons and from such conversation she could learn that her husband was planning to sell her so she fled away from the said place and came to her elder sister's house and initiated the instant case. Police investigated the case which was initiated by her and she was taken to Chanchal Hospital for treatment. She was also taken to the learned Magistrate and her statement was recorded and she signed the same. The said document with the signatures were marked as Ext.2/1 and Ext.2/2 respectively.

PW5, is Asit Kumar Mondal who was posted as Sub-inspector at Chanchal Police during the relevant period and was endorsed Chanchal PS Case no. 65 of 2014 dated 05.02.2014 for investigation. He took charge of investigation of the case and submitted charge-sheet being C.S. No. 322/14 dated 24.08.2014 under Section 376/417/109 of the Indian Penal Code against the accused persons namely, Latifur Rahaman, Mamtaj Hossain, Lutfal Bibi, Ansar Ali and Amjad Ali after consultation with his superior.

PW6, Bipul Mondal is the first Investigating Officer of the case. He deposed that on 05.02.2014 he was posted at Chanchal Police Station and the Officer-in-charge, Chanchal Police Station endorsed Chanchal PS Case no. 65 of 2014 dated 05.02.2014 to him for investigation. He stated regarding his visit to the place of occurrence, preparation of rough sketch map with index, visiting the hospital where the victim was sent for examination, collecting statement of the victim girl which was recorded under Section 164 of the Code of Criminal Procedure, arrested the accused persons and as he was under order of transfer he handed over the case record to the Officer-in-charge.

Mr. Md. Aslam Khan, learned Advocate appearing for the appellant submitted that the prosecution has failed to prove the case against the present appellant and if the version of the prosecution witnesses along with the FIR is accepted to be true in that case also no offence under Section 376 or Section 417 of the IPC has been made out so far as the present appellant is concerned. Additionally it has been submitted that in the present case the evidence on face

of it reflects that there was consent amongst two majors. Further no documents were reflected to show that a lady had been to Kolkata being accompanied by or being allured by the appellant. No independent witnesses also have been produced at least on the issue that for 20 days a lady left her paternal home by assurance or allurement of the appellant. It was prayed that considering the materials appearing in evidence, the order of conviction and sentence so passed by the learned Trial court cannot be sustained and as such the same is liable to be set aside.

Mr. Abhra Mukherjee, learned Advocate appearing for the State opposed the contentions submitted by the Appellant and added that the provisions of Section 376 of the Indian Penal Code do not call for corroboration, as sole testimony of the prosecutrix is sufficient to arrive at a finding of guilt. According to him in this case the evidence of the victim is acceptable as there is nothing in the cross-examination which could reflect that there has been a deviation from the statement which was earlier made. So far as the victim being taken to Kolkata there are corroboration from the evidences of the parents and the uncle as such the contention of the appellant cannot be accepted. Learned Advocate supported the judgment delivered by the learned Trial Court and submitted that there is no scope for interference.

Now, if the prosecution evidence is taken as a whole, the foundational facts leading to the offence are as follows:

- 1) The victim (PW4), was married to appellant Latifur Rahaman and soon after her marriage there was a dispute with her husband and other relations of the matrimonial home.
- 2) As a consequence of the dispute her husband gave her Talaq at the instigation of his relations, so she had to return to her parental home.
- 3) Her husband took her to Kolkata from her father's house to marry her once again and kept her 20 days in a room and raped during the said period.
- 4) Victim alleged that while staying at Kolkata she heard her husband having conversation with some persons and was planning to sell her.
- 5) As such the victim fled away from Kolkata and went to her elder sister's house and thereafter initiated the case.

If the aforesaid chronology of events are accepted then it can be presumed that she was in a position to understand the location where she was staying and how to return from the said place. The lady/victim was major when she went away with the appellant with whom she was earlier married, as such she was in a position to understand the consequences of her act of leaving her father's house and going away with her ex-husband.

In Uday -Vs. - State of Karnataka reported in (2003) 4 SCC 46 the Hon'ble Apex Court dealt with the issue whether consent was voluntary or was

not a legal consent. Paragraphs 12 and 16 of the said judgment are relevant which is as follows:

“12. *The courts in India have by and large adopted these tests to discover whether the consent was voluntary or whether it was vitiated so as not to be legal consent. In Rao Harnarain Singh Sheoji Singh v. State [AIR 1958 Punj 123 : 1958 Cri LJ 563 : 59 Punj LR 519] it was observed: (AIR p. 126, para 7)*

“7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be ‘consent’ as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.”

16. *The High Court of Calcutta has also consistently taken the view that the failure to keep the promise on a future uncertain date does not always amount to misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of*

fact, the fact must have an immediate relevance. In Jayanti Rani Panda v. State of W.B. [1984 Cri LJ 1535 : (1983) 2 CHN 290 (Cal)] the facts were somewhat similar. The accused was a teacher of the local village school and used to visit the residence of the prosecutrix. One day during the absence of the parents of the prosecutrix he expressed his love for her and his desire to marry her. The prosecutrix was also willing and the accused promised to marry her once he obtained the consent of his parents. Acting on such assurance the prosecutrix started cohabiting with the accused and this continued for several months during which period the accused spent several nights with her. Eventually when she conceived and insisted that the marriage should be performed as quickly as possible, the accused suggested an abortion and agreed to marry her later. Since the proposal was not acceptable to the prosecutrix, the accused disowned the promise and stopped visiting her house. A Division Bench of the Calcutta High Court noticed the provisions of Section 90 of the Penal Code, 1860 and concluded: (Cri LJ p. 1538, para 7)

“The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of

fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the Court can be assured that from the very inception the accused never really intended to marry her.””

The Hon’ble Supreme Court in *Raja –Vs. – State of Karnataka* reported in (2016) 10 SCC 506, while dealing with cases under Section 376 of Indian Penal Code and the issue of consent was pleased to observe in paragraph 34 as follows:

“34. *This Court in Raju [Raju v. State of M.P., (2008) 15 SCC 133 : (2009) 3 SCC (Cri) 751] , while reiterating that the evidence of the prosecutrix in cases of rape, molestation and other physical outrages is to be construed to be that of an injured witness so much so that no corroboration is necessary, ruled that an accused must also be protected against the possibility of false implication. It was underlined that the testimony of the victim in such cases, though commands great weight but the same, cannot necessarily be universally and mechanically accepted to be free in all circumstances from embellishment and exaggeration. It was ruled that the presumption of absence of consent of the victim, where sexual intercourse by the accused is proved as contemplated in Section 114-A of the Evidence Act, was extremely restricted in its application compared to the sweep and ambit of the presumption under Sections 113-A and 113-B of the Indian Evidence Act. It was explicated that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth. The essence of this verdict which has stood*

the test of time proclaims that though generally the testimony of a victim of rape or non-consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged.”

In Tilak Raj –Vs. – State of H.P. reported in (2016) 4 SCC 140, in paragraph 16 after considering the evidence the Hon’ble Apex Court was pleased to observe as follows:

“16. *We have carefully heard both the parties at length and have also given our conscious thought to the material on record and the relevant provisions of the Penal Code, 1860 (in short “IPC”). In the instant case, the prosecutrix was an adult and mature lady of around 40 years at the time of the incident. It is admitted by the prosecutrix in her testimony before the trial court that she was in a relationship with the appellant for the last two years prior to the incident and the appellant used to stay overnight at her residence. After perusal of a copy of the FIR and the evidence on record the case set up by the prosecutrix seems to be highly unrealistic and unbelievable.”*

Taking into account the position of law as held in the aforesaid judgments of the Hon’ble Supreme Court and certain peculiar conduct of the family of the victim, especially the parents which includes not reporting to the police regarding the lady not being traceable for 20 days, non-production of any document or witness by the prosecution to show that the lady was taken to Kolkata and stayed at Kolkata for 20 days or for that purpose any evidence to the effect that the appellant intended to sell the lady to some persons, I am of

the considered view that the prosecution case was lacking materials for arriving at a finding of guilt.

Further, having regard to the nature of the evidence which is available on record particularly in the background of the present case in addition to the reasons stated about, where there was a recent matrimonial discord between the appellant and the lady/victim, I am of the opinion that in such factual circumstances it would not be safe to rely upon the uncorroborated testimony of the lady/victim as there is every chance of the appellant being falsely implicated in the instant case.

Thus the judgment and order of conviction and sentence dated 30.05.2019 & 31.05.2019 passed by the Learned Additional Sessions Judge, Chanchal, Malda in Sessions Trial No.45(12)2017 is hereby set aside and the appellant is acquitted of the charges.

Accordingly, the Criminal Appeal being CRA 358 of 2019 is allowed.

The Appellant is on bail, in view of his acquittal, he is discharged from the bail bonds.

Pending Applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records to the respective Courts and communicate this judgment, so that effective steps are taken by the learned trial Court.

All parties shall act on the server copy of this judgment duly downloaded from the official website of this Court.

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

(Tirthankar Ghosh, J.)