

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

PRESENT:

THE HON'BLE JUSTICE TIRTHANKAR GHOSH

CRA 394 of 2018

Raju Mandal & Anr.

-vs.-

The State of West Bengal

For the appellants : Mr. Moyukh Mukherjee,
Mr. Abhijit Singh,
Mr. Koustav Lal Mukherjee

For the State : Mrs. Anasuya Sinha,
Mr. Pinak Kumar Mitra

Heard on : 04.07.2022, 14.07.2022, 20.07.2022,
22.07.2022 & 28.07.2022.

Judgment on : 12.08.2022

Tirthankar Ghosh, J:-

The present appeal has been preferred challenging the judgment and order of conviction and sentence dated 19.07.2018 and 20.07.2018 passed by the Learned Additional District & Sessions Judge, 5th Court, Malda in Sessions Trial No.05 of 2017 corresponding to Sessions Case No. 435/16 wherein the learned trial Court was pleased to convict the appellants under Sections 417/328/34 of the Indian Penal Code.

Learned trial Court after convicting the appellants was pleased to impose the following sentences:

- 1) The appellant Raju Mandal was convicted for the offence under Section 417 of the Indian Penal Code and sentenced to Rigorous Imprisonment for one year and fine of Rs.10,000/- in default to suffer Simple Imprisonment for three months.
- 2) The appellant Raju Mandal was also convicted for the offence under Section 328 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for five years and fine of Rs.20,000/- in default to suffer further simple imprisonment for six months.
- 3) The appellant Archana Mandal was convicted under Section 328 of the Indian Penal Code and sentenced to suffer Rigorous Imprisonment for five years and fine of Rs.20,000/- in default to suffer further Simple Imprisonment for six months.

English Bazar Police Station case no. 980/14 dated 24.11.14 was registered on the basis of a complaint lodged by one Chitta Mandal with the Inspector-in-charge, English Bazar police station to the effect that Laxman Mandal assured him that his son Raju Mandal would marry Rupali Mandal (complainant's daughter). After few days they came to know that Raju Mandal would be married to another lady and hearing such news on 23.11.14 Rupali Mandal went to the house of Raju Mandal early in the morning, when she was abused and insulted and as a result she consumed poison in their house.

Hearing the incident the complainant went to the house of Laxman Mandal along with some other persons and found his daughter to be sick in an unconscious condition, as a result she was shifted and admitted to Malda District Hospital. Complainant further alleged that the said Raju Mandal had a relationship with his daughter and promised to marry her but subsequently decided to marry another lady, as a result the unfortunate incident occurred. The complainant thereafter requested the police authorities to take steps by investigating into the allegations.

On receipt of the written information the police authorities registered aforesaid case and on completion of investigation submitted charge-sheet under Section 417/341/328/34 of the Indian Penal Code. The case was thereafter committed to the Court of Sessions and subsequently to the learned Additional District & Sessions Judge, 5th Court, Malda who framed charges against the accused persons named in the charge-sheet i.e. Laxman Mandal, Archana Mandal and Raju Mandal under Section 341/328/417/34 of the Indian Penal Code. The charges were read over to the accused persons who pleaded not guilty and claimed to be tried.

The prosecution in order to prove its case relied upon 9 witnesses which included PW1, Chitta Mandal, de facto complainant; PW2, Harish Mandal, co-villager; PW3, Hiren Mandal, younger brother-in-law of the de facto complainant; PW4 Nimai Mandal, co-villager; PW5, victim and daughter of the de facto complainant; PW6, Dr. Debashish Sarkar who treated the victim; PW7

Omar Faruque, investigating Officer of the case; PW8, Nandalal @ Naresh Mandal, co-villager and PW9, Farid Ali, scribe of the FIR.

The prosecution also relied upon four documents which included the letter of complaint marked as Ext.1; records of the patient marked as Ext.2; Formal FIR marked as Ext.3 and rough sketch map with index marked as Ext.4.

PW1, Chitta Mandal in his deposition before the Court stated that his daughter Rupali Mandal was kidnapped by Raju Mandal about 2-3 years back and was taken to Kolkata, thereafter she was brought to his house at Naraharipur. However, Raju refused to marry Rupali and as such she consumed poison. She was treated at the hospital for about 5 days. The witness also deposed that he lodged an FIR with English Bazaar police station after the same was written and read over to him, he put his signature over the said document, he identified the said document which was marked as Ext.1/A. The witness also identified two of the accused persons i.e. Laxman Mandal and Archana Mandal in Court and also stated, if Raju Mandal was present in Court, he could have identified him.

PW2, Harish Mandal is a co-villager, who stated that he knew Chitta Mandal's daughter but was unaware of any incident involving Rupali Mandal and the accused persons.

PW3, Hiren Mandal, is the younger brother-in-law of Chitta Mandal. He deposed that an FIR was lodged against Laxman Mandal, Archana Mandal and

Raju Mandal. In Court he identified Laxman Mandal and Archana Mandal and stated that Raju Mandal is not present and he could have identified him if he was present. He narrated that Rupali Mandal is Chitta Mandal's daughter, who had relationship with Raju Mandal, both of them went away and stayed at Kolkata for few days, thereafter at Anondamohanpur. There was a marriage negotiation, but the said marriage did not materialise and as a result Rupali consumed poison at Raju Mandal's house and was admitted to hospital for treatment. He further stated that Raju took Rupali to his house for marriage but did not marry her, so she consumed poison.

PW4, Nimai Mandal is a co-villager. He deposed that Rupali Mandal is the daughter of Chitta Mandal who lodged the case. He deposed that he is also acquainted with the accused persons as they are his co-villagers. However, he had no knowledge regarding any incident which occurred between Rupali and Raju.

PW5, is the victim Rupali Mandal. She stated that her father Chitta Mandal lodged FIR with English Bazar Police Station against Laxman Mandal, Archana Mandal and Raju Mandal. He identified Laxman Mandal and Archana Mandal and stated that had Raju Mandal been present in Court she could have identified him. She stated that she had a four-year relationship with Raju Mandal, who promised to marry her and on such assurance she went on a pleasure trip before marriage, however, Raju later refused to marry her and intended to marry another lady. On 23.11.14 she went to his house when Raju

Mandal tortured her and drove her out. She stated that Laxman Mandal, Archana Mandal and Raju Mandal assaulted her and verbally abused her in filthy languages. She also stated that she consumed poison as on 23.11.14 at about 04.00 am, as she went to ask Raju to marry her as per his earlier assurance, but as he refused to marry her she was compelled to consume poison. After consuming poison she lost her senses and was shifted to hospital where she was admitted and treated for six days.

PW6, Dr. Debasis Sarkar is a Medical Officer of Malda Medical College and Hospital. He deposed that on 23.11.14, he and Dr. D Pramanik treated the patient Rupali Mandal who was admitted at the hospital with history of Organo Phosphorus Poisoning. The report so prepared was marked as Ext.2 on being identified by the doctor. The witness also stated that the patient was smelling of Organo Phosphorus.

PW7, Omar Faruque, is the Investigating Officer of the case. He identified the hand writing of one Abishek Talukdar of English Bazar Police Station and as such the formal FIR was marked as Ext.3. He prepared the rough sketch map along with index of the place of occurrence which was marked as Ext.4 and Ext.4/1. The witness also stated regarding the chronology in which he examined all the witnesses and whose statements were reduced to writing under Section 161 of the Code of Criminal Procedure, chronology of evidences relating to raid, collection of injury report from the hospital and the arrest of accused Laxman Mandal. He claimed that on completion of investigation he

submitted charge-sheet against Raju Mandal, Laxman Mandal and Archana Mandal under Section 341/328/417/34 of the Indian Penal Code and filed charge-sheet no. 128/15.

PW8, Nanda Lal Mandal @ Naresh Mandal is a co-villager, who deposed that Chitta Mandal lodged a case against Archana Mandal, Raju Mandal and Laxman Mandal. He stated that Laxman Mandal expired and as such Raju Mandal and Archana Mandal were present. He identified the accused persons. He also stated that he knew Rupali Mandal and about 10 years ago on a day at about 04.00 am Rupali went to the house of Raju Mandal and consumed poison as Raju refused to marry Rupali.

PW9, Farid Ali is the scribe of the FIR.

Mr. Moyukh Mukherjee learned Advocate appearing for the appellants submitted that no case has been made out against the present appellants and they were convicted based on conjectures and surmises. He stated that even if the prosecution case is accepted to be true, no offence under Section 328 of the Indian Penal Code has been made out against the present appellants and so far as the observation of the learned trial Court for convicting the appellant Raju Mandal under Section 417 of the Indian Penal Code is concerned the same is against the basic foundation of law. Learned advocate emphasises that the deposition of the witnesses clearly shows that she was a consenting party and the relationship continued for more than four years so there is no scope for the lady to subsequently take up a plea that she was unable to understand the

consequences of such relationship. Learned Advocate relies upon Dipak Gulati –Vs. – State of Haryana, (2012) 7 SCC 675 and Kashinath Narayan Gharat –Vs. – State of Maharashtra, 2021 SCC OnLine Bombay 5910. Lastly, he submitted that the manner in which the appellants have been convicted by the learned trial Court calls for interference in appeal and the judgment and order of conviction and sentence is liable to be set aside.

On the other hand Mrs. Anusuya Sinha learned Advocate appearing for the State opposes the contention advanced by Mr. Mukherjee and submitted that the prosecution through cogent and reliable evidences has been able to establish its case beyond reasonable doubt and the learned trial Court rightly convicted the appellants under Section 417 of the Indian Penal Code as consent was obtained by fraud while maintaining relationship and as such Section 90 of the Indian Penal Code is attracted in the present case. Learned Advocate relied upon Anurag Soni –Vs. – State of Chhattisgarh, (2019) 13 SCC 1 and Yedla Srinivasa Rao –Vs. – State of A.P., (2006) 11 SCC 615 and stressed that there is no scope for interference and the order of conviction and sentence so passed by the learned trial Court should be affirmed.

Before assessing the materials appearing in evidence as also the submissions advanced by the learned advocate for the appellants as well as of the State, the provision of Section 328 of the Indian Penal Code and its applicability in the present case is required to be decided. Section 328 of the Indian Penal Code is set out as follows:

“S. 328. Causing hurt by means of poison, etc., with intent to commit an offence.—*Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”*

The interpretation of Section 328 regarding its applicability was considered by the Hon’ble Supreme Court in the case of Joseph Kurian Philip Jose –Vs. – State of Kerala, (1994) 6 SCC 535. Paragraphs 10 and 11 of the said judgment which is relevant about the purpose of this case are set out as follows:

“10. *In order to prove offence under Section 328 the prosecution is required to prove that the substance in question was a poison, or any stupefying, intoxicating or unwholesome drug, etc., that the accused administered the substance to the complainant or caused the complainant to take such substance, that he did so with intent to cause hurt or knowing it to be likely that he would thereby cause hurt, or with the intention to commit or facilitate the commission of an offence. It is, therefore, essential for the prosecution to prove that the accused was directly responsible for administering poison etc. or causing it to be taken by any person, through another. In other words, the accused may accomplish the act by himself or by means of another. In either situation direct, reliable and cogent evidence is necessary.....”*

11. *As it appears both the findings of the trial Judge as also by the High Court are somewhat vague and confusing. The trial court observed, as is evident from the emphasised portion, that it cannot be said that the accused or any of them knew that arrack mixed with small quantity of methyl alcohol (2.64% as found by the chemical analyst) was likely to cause death or serious bodily injury that is likely to cause death. On this finding applicability of Section 302 or even that of Section 304 IPC has been ruled out. This finding on the fact situation is open to doubt. If the finding be correct that the accused did not have guilty knowledge of causing death or of likelihood of causing death or of serious bodily injury likely to cause death, how could the guilty knowledge stop in that slide or grading not coming down to take within its arms hurt also. The act of the accused in adulterating liquor per se, as the law then stood sans amendments, would not attract the provision of Section 328 of IPC unless there is positive evidence that A-1 administered the poisoned liquor directly or caused it to be taken by Sreedharan indirectly with the necessary intent and mens rea. This view of the learned trial Judge as confirmed by the High Court does not appear to us to be sound in the backdrop of the death actually occurring. But since it has taken that view it cannot stop short of hurt and so must slip down to a fall downright. Important links in the prosecution case on this particular (sic aspect) remain otherwise missing. A- I would thus have to be acquitted of the charge under Section 328 IPC in carrying out the findings of the High Court to their logical end.”*

In the present case what we find is that the victim Rupali Mandal consumed poison which she was carrying. There was no scope for administering poison at the instance of the appellants. This would be evident

from the deposition of PW5, victim/Rupali Mandal herself, where she has stated regarding she being abused, assaulted but did not state that the accused persons administered her poison. The same was corroborated by PW1, Chitta Mandal father of the victim girl as also PW3, Hiren Mandal and PW8, Nanda Lal Mandal @ Naresh Mandal Thus if the prosecution evidence is accepted to be gospel truth then also there is no offence under Section 328 of the Indian Penal Code. Both the appellants as such cannot be held guilty for charge under Section 328 of the Indian Penal Code.

Now so far as the offence under Section 417 of the Indian Penal Code is concerned, the same is to be analysed in the background of the present case.

Mr. Moyukh Mukherjee, learned advocate appearing on behalf of the Appellants relied upon Dipak Gulati –Vs. – State of Haryana, (2012) 7 SCC 675. The facts of the reported judgment is in respect of a girl studying at a Secondary School, aged about 19 years and was known to the accused who regularly met each other and consequently an intimate relationship developed between them. The accused convinced the girl to go to Kurukshetra and get married. On the way to Kurukshetra, the accused took her to Karna Lake (Karnal) had sexual intercourse with her against her wishes behind the bushes and thereafter proceeded to Kurukshetra and stayed there for 3/4 days at the house of his relatives, where again the accused committed rape upon her. The prosecutrix was thrown out by the appellant after 4 days and she then returned to hostel. The Hon'ble Court in paragraph 26 as such held as follows:

“26. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived she went with him to Karna Lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to anyone. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in the court at Ambala. However, here they were apprehended by the police.”

Learned Advocate for the appellant also relied upon Kashinath Narayan Gharat –Vs. – State of Maharashtra, 2021 SCC OnLine Bom 5910 the facts of this case as surfaced in the evidence is set out as follows:

“6. The evidence of PW1- Prosecutrix reveals that the accused was known to her. She had sexual relationship with the accused for over about 3 years. Evidence of PW2- sister of the prosecutrix also reveals that there was love affair between the accused and the prosecutrix. The evidence on record thus indicates that sexual

relationship between the prosecutrix and the accused was consensual. The accused has been held guilty of offence under Section 417 of the IPC solely for the reason that he refused to marry the prosecutrix. The question is whether in such circumstances refusal to marry constitutes an offence of cheating.”

As such after relying upon different authorities, the Bombay High Court arrived at its conclusion in paragraph 9 of the judgment which is as follows:

“9. *In the instant case, the evidence on record indicates that the prosecutrix and the accused were known to each other. They had indulged in sexual relationship for a period of over three years. The evidence of PW1-prosecutrix does not indicate that she had sexual relationship with the accused under misconception of fact, with regard to the promise of marriage or that her consent was based on fraudulent misrepresentation of marriage. There is no evidence on record to indicate that since the inception accused did not intend to marry her. In the absence of evidence to prove that the prosecutrix had consented for physical relationship on a misconception of fact, as stipulated under Section 90 of IPC, the mere refusal to marry would not constitute offence under Section 417 of the IPC.”*

Mrs. Sinha, learned advocate appearing on behalf of the State relied upon Yedla Srinibasa Rao –VS. – State of A.P., (2006) 11 SCC 615 and drew the attention of this Court to the relevant part of paragraph 10 of the said judgment which is as follows:

“10. *It appears that the intention of the accused as per the testimony of PW 1 was, right from the beginning, not honest and he kept on promising that he will marry her, till she became pregnant. This kind of consent obtained by the accused cannot be said to be*

*any consent because she was under a misconception of fact that the accused intends to marry her, therefore, she had submitted to sexual intercourse with him. This fact is also admitted by the accused that he had committed sexual intercourse which is apparent from the testimony of PWs 1, 2 and 3 and before the panchayat of elders of the village. It is more than clear that the accused made a false promise that he would marry her. Therefore, the intention of the accused right from the beginning was not bona fide and the poor girl submitted to the lust of the accused, completely being misled by the accused who held out the promise for marriage. This kind of consent taken by the accused with clear intention not to fulfil the promise and persuading the girl to believe that he is going to marry her and obtained her consent for the sexual intercourse under total misconception, cannot be treated to be a consent. In this connection, reference may be made to a decision of the Calcutta High Court in *Jayanti Rani Panda v. State of W.B.* [1984 Cri LJ 1535 (Cal)] In that case it was observed that in order to come within the meaning of misconception of fact, the fact must have an immediate relevance. It was also observed that if a fully grown-up 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 and it was held that Section 90 IPC cannot be invoked unless the court can be assured that from the inception the accused never intended to marry her. Therefore, it depends on case to case that what is the evidence led in the matter. If it is a fully grown-up girl who gave the consent then it is a different case but a girl whose age is very tender and she is giving a consent after persuasion of three months on the promise that the accused will marry her which he never intended to fulfil right from the beginning which is apparent from the conduct of the accused, in our opinion, Section 90 can be*

invoked. Therefore, so far as Jayanti Rani Panda [1984 Cri LJ 1535 (Cal)] is concerned, the prosecutrix was aged 21-22 years old. But, here in the present case the age of the girl was very tender between 15-16 years. Therefore, Jayanti Rani Panda case [1984 Cri LJ 1535 (Cal)] is fully distinguishable on facts. It is always a matter of evidence whether the consent was obtained willingly or consent has been obtained by holding a false promise which the accused never intended to fulfil. If the court of facts comes to the conclusion that the consent has been obtained under misconception and the accused persuaded a girl of tender age that he would marry her then in that case it can always be said that such consent was not obtained voluntarily but under a misconception of fact and the accused right from the beginning never intended to fulfil the promise....”

Learned advocate for the State also relied upon Anurag Soni –Vs. – State of Chattishgarh, (2019) 13 SCC 1 and submitted that the Hon’ble Apex Court took into account a catena of judgments including Deepak Gulati (supra) relied upon by the petitioner and observed in paragraph 11.1 that if the Court reaches the conclusion that the intention of the accused was mala fide, and that he had clandestine motives, then in that case Court should come to a firm conclusion. Thereafter it observed in paragraph 15 as follows:

“15. *Though, in Section 313 CrPC statement, the accused came up with a case that the prosecutrix and his family members were in knowledge that his marriage was already fixed with Priyanka Soni, even then, the prosecutrix and her family members continued to pressurise the accused to marry the prosecutrix, it is required to be noted that first of all the same is not proved by the accused. Even*

otherwise, considering the circumstances and evidence on record, referred to hereinabove, such a story is not believable. The prosecutrix, in the present case, was an educated girl studying in B. Pharmacy. Therefore, it is not believable that despite having knowledge that the appellant's marriage is fixed with another lady Priyanka Soni, she and her family members would continue to pressurise the accused to marry and the prosecutrix will give the consent for physical relation.”

On an assessment of the evidences appearing in the present case as also the settled proposition of law referred to above, I am of the opinion that the provisions of Section 328 of the Indian Penal Code are not attracted in the facts and circumstances of the present case. Accordingly the appellants Raju Mandal and Archana Mandal are acquitted from the said charges.

However, from the materials available against the accused Raju Mandal as is appearing in the evidence of the case which adheres to the factual and legal interpretation made by the Hon'ble Supreme Court in the case of Anurag Soni (supra), the conviction and sentence of Raju Mandal under Section 417 of the Indian Penal Code cannot be interfered with and is hereby affirmed.

Thus, appellant Raju Mandal is directed to surrender before the learned Trial Court, his bail bond stands cancelled.

In view of the observations made above appellant no.2, Archana Mandal being acquitted she is discharged from the bail bonds.

Accordingly, CRA 394 of 2018 is partly allowed.

Pending applications, if any, are consequently disposed of.

Department is directed to send back the Lower Court Records 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.)