

IN THE HIGH COURT AT CALCUTTA
(CRIMINAL APPELLATE JURISDICTION)

PRESENT:

THE HON'BLE JUSTICE SIDDHARTHA ROY CHOWDHURY

CRA 26 of 2020

GAURAV BIR BASNET @ GAURAV BASNET
VS.
THE STATE OF WEST BENGAL & ANR.

For the Appellant	: Mr. Bibaswan Bhattacharyya, Adv. Ms. Bindia Paul, Adv.
For the O.P. No. 2	: Mr. Rahul Ganguly, Adv. Mr. A Santra, Adv.
For the State	: Mr. Joydeep Das, Adv. Ms. Sujata Das, Adv.
Hearing concluded on	: 19 th April, 2023
Judgement on	: 25 th April, 2023

Siddhartha Roy Chowdhury, J.:

1. This criminal appeal impeaches the judgment and order of conviction passed by learned Additional District and Sessions Judge, Fast Track, 7th Court, Alipore, South 24 Parganas in Sessions Case No. ST 04(3) 17 SC 29(8) 16 under Section 417/376 of the I.P.C. By the impugned judgment learned Trial Court recorded an order of conviction against Gaurav Bir Basnet for committing offence within the meaning of Section 417 of the I.P.C. and sentenced him to pay fine of Rs. 10,00,000/- out of which Rs. 8,00,000/- shall be paid to the victim as compensation and Rs. 2,00,000/- shall be deposited in the State Exchequer with a default clause of rigorous imprisonment

for one year. Before entering into the merit of the appeal, I wish to point out that in a proceeding under Section 376/417 of the Indian Penal Code, learned Trial Court ought not to have disclosed the identity of the victim lady, which she has done. However, in this judgement identity of the victim shall not be disclosed and shall be referred to as “the victim Ms. X”.

2. Briefly stated, on 13th March, 2015, the victim lady informed the Officer-in-charge of Pragati Maidan Police Station in writing that sometime in the month of February, 2014 she went to attend an interview for job to ITC Sonar, Kolkata where she met Mr. Gaurav Bir Basnet, the Front Office Manager. During the interview Mr. Basnet showed his interest in the personal life of the informant than her professional life. His behaviour was informal, he kept flirting with the informant by putting several compliments. Finally he asked for the telephone number of the informant and he was obliged. Within few days Mr. Basnet started sending messages to the informant, invited her for a meal. Initially the informant avoided such request but finally she paid him a visit at the Aqua, at Park Hotel. During such meeting Mr. Basnet depicted himself as unhappy man who has been living separately from his wife on mutual agreement and enduring the trauma of a virtually broken marriage, and thus won the heart of the informant. He even invited the informant at his flat at 54A/BC Road Building Complex and Active Acre, Veronica Building, Tower 6B, flat no. 12F, Kolkata-700015. Job of the informant was confirmed in ITC Sonar on the 1st March, 2014 and soon after the accused asked her to

move into his flat at the aforesaid address, an accommodation, that was given to him by Company. The informant though was hesitant, ultimately started living together with Mr. Basnet and everyone in the building thought that they were a married couple. They went for trips together. Parents of the informant were aware of such development but at the same time they wanted their daughter to get married. When the informant shared the thoughts of her parents to Mr. Basnet he did not give any positive response. However, Mr. Basnet spoke to her parents and assured them of his divorce proceeding with his wife. From January, 2015, however, things took a drastic turn. The accused person started pestering the informant to quit the job and also started making various excuses regarding delay in filing the suit for divorce. The informant agreed to quit her job. In the mean time, Mr. Basnet informed her that his wife might come to Kolkata to create a scene and for that they decided to take refuge to her friend's place to avoid any untoward situation. For about fortnight they stayed in the friend's home of the informant at Lake Gardens. On 14th February, 2015, Mr. Basnet showed certain messages and ultimately he left for Bombay being told by the relatives of his wife. The informant further disclosed that she indulged in sexual relationship with Mr. Basnet who gave her a rosy picture of happily married conjugal life. After coming back Mr. Basnet said that he had to change his mind as divorce would adversely affect his daughter who was his priority, as well as, it would affect the prestige of his family in the society. The informant felt cheated by the accused person.

3. The information since disclosed offence cognizable in nature Pragati Maidan Police Station Case No. 93 of 2015 was registered. Police took up investigation which culminated into submission of charge sheet against the accused person under Section 417/376 of the I.P.C. The accused person stood the trial by pleading his innocence to the charges. To bring home charges prosecution examined as many as 4 witnesses and learned Trial Court after considering the evidence on record was pleased to pass the impugned judgement.
4. Mr. Bibaswan Bhattacharyya, learned Counsel for the appellant assails the impugned judgement by submitting that Mr. Basnet did not suppress any fact pertaining to his personal life, about his failed marriage, about his daughter. The victim thereafter, took a decision to live together with the appellant. Had there been any evil intention the accused person would not have disclosed every minute details of his personal life to the victim. There is no evidence to suggest that since the inception of their relationship Mr. Basnet had the *mens rea* to dupe the victim. He was sincere in the relationship but he had to change his mind at a subsequent point of time taking into consideration the future of his daughter. In her testimony as P.W. 1 the victim Ms. X stated that she found a changed man after the appellant came back from Bombay.

According to Mr. Bhattacharyya, learned Trial Court committed an error in recording the order of conviction under Section 417 of the I.P.C.

5. Drawing my attention to the written information as well as the oral testimony of the victim lady as P.W. 1, Mr. Bhattacharyya submits that the victim being an adult lady consciously took the decision to live together with the accused person to the knowledge of her parents. She knew that the man was married and fathered a child. Therefore, there is no reason to hold that she took the decision to stay with the accused person under any misconception of fact. There is no ingredient of offence within the meaning of Section 415 of the I.P.C.
6. It is further submitted by Mr. Bhattacharyya that there are discrepancies galore. The victim as P.W. 1 and her father as P.W. 2 made embellishment while adducing evidence. This exaggeration escaped the notice of learned Trial Court and ignoring the same the order of conviction was recorded.
7. Mr. Rahul Ganguly, learned Counsel for the victim lady submits that the victim would not have agreed to stay together with the accused person, had there been no such assurance that the accused person would take step to dissolve the marital knot, subsisting between him and his estranged wife. The victim took the decision relying upon the promise made by the accused person to file a petition for divorce on mutual consent. But after 11 months he drifted away from his promise and informed the victim about his inability to walk out of the marriage in the interest of his daughter which came as a disaster to the victim lady. The accused person by his conduct thus cheated the victim and learned Trial Court was absolutely justified in recording the order of conviction.

8. Ms. Sujata Das, learned Counsel representing the State also supports the judgement impugned. According to Ms. Das, there was breach of promise resulting into deception on the part of accused person. The victim being the unmarried lady was made to surrender to the lust of the accused person and she was sexually exploited. The accused person induced the victim lady by making false promise of marriage and since inception he had the evil design in his mind not to marry her.

9. I have carefully perused the evidence on record. Apart from the victim who adduced evidence as P.W. 1, her father Prabir Banerjee adduced evidence as P.W. 2, Goutam Mondal as P.W. 3 did not support the prosecution case and P.W. 4 Tarun Kumar Bairagi is the Investigating Officer.

10. Section 415 of the I.P.C. reads thus:-

“Section 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".

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.”

11. One of the essential ingredients of cheating is deception which must precede and thereby induce the other person and thereby lead

into error by causing a person to believe what is false or disbelieve what is true.

Section 415 of I.P.C. has two parts, in the first part inducement must be dishonest or fraudulent and in the second part it should be intentional. In both the cases, deception is common element.

In this case prosecution is to prove that promise to marry made by the accused person, for inducing the victim Ms. X to have sexual relation with him was false, since the very inception when he made such promise.

12. From the attending facts of the case it is admitted that the victim Ms. X was aware of the following facts since inception of her relationship with the appellant:- (i) The accused person was a married man. (ii) He was living apart from his wife upon mutual agreement. (iii) He had a daughter.

Thereafter, she agreed to live together with the appellant and for that she shifted to the flat of the appellant, as there was a promise, made by the appellant to marry her, after the dissolution of his first marriage. They stayed together as couple for 11 months. During such stay, father of the victim took the accused to a lawyer, who prepared a legal notice for the appellant, as we find from the testimony of P.W. 2. P.W. 1 in her testimony stated on oath that after Gaurav Bir Basnet came back from Bombay, she found a changed man, who expressed his inability to go for divorce, as it would affect his daughter adversely and would cause damage to his family reputation.

Thus it can be safely said that the promise of marriage, so made by the accused person, was not a promise simplicitor - it was contingent on dissolution of his marriage, that was subsisting. Victim was aware of the situation and decided to live together with the accused. Accused person did not have the competence to dissolve the marriage, either his wife would have to agree or he would have to make out a case for decree for divorce. Therefore, element of uncertainty was there since inception of such relationship. Victim, consciously accepted such risk of uncertainty. The 'changed man' could not go for divorce. Therefore, the promise of marriage, after divorce, by itself does not amount to cheating.

13. In order to invoke the provision of Section 415 of I.P.C., prosecution is under obligation to prove that the accused person induced the victim to indulge in any such sexual relationship with him. P.W. 1 when stated that accused person had unveiled his unhappy married life, and his status as father of his daughter, it cannot be said by any stretch of imagination that there was concealment of fact resulting into deception.
14. In my opinion, prosecution has not been able to prove that since the inception the accused person had this evil design to exploit the victim both financially and sexually.
15. In my humble opinion, learned Trial Court got swayed by extraneous issues and committed error in recording the order of conviction which should not be allowed to remain in force and should be set aside, which I accordingly do.

16. Consequently the appeal is allowed on contest, however, without cost. The accused person is found not guilty to the charge under Section 417 of I.P.C. He be set at liberty and be released from bail bonds subject to execution of bond under Section 437A of the Cr.P.C. for six months.
17. Let a copy of the judgement along with L.C.R. be sent to the learned Trial Court for information and necessary action.
18. Urgent photostat certified copy of this judgement, if applied therefor, should be made available to the parties upon compliance with the requisite formalities.

SIDDHARTHA
ROYCHOWDHURY

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(SIDDHARTHA ROY CHOWDHURY, J.)