

31.08.2023
SL No.20
Court No.3

***Circuit Bench of Calcutta High Court
At Jalpaiguri***

CRR 223 of 2023

In the matter of : Basu Barman & Ors.
-petitioners.

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Ms. Esha Acharya
... For the Amicus Curiae.

Learned Additional Sessions Judge, Tufanganj while disposing of the Sessions Case being SC 31/TFG-19 ST 01(08)2019 recorded an order of acquittal against two out of three accused persons and expressing his doubt about constitutionality of the definition of rape as given under Section 375 description fourthly-learned Trial Judge has invoked the provision of Section 395 of Code of Criminal Procedure and forwarded the matter for reference on the folloing point:-

“If Section 375(Fourthly) of I.P.C. is declared ultra vires by the Hon’ble High Court at Calcutta, the accused is liable to be acquitted, if not the accused is liable to be convicted” .

To answer the reference I need to appreciate the fact of the case. The victim lady, (who will be referred to as Ms. X) admittedly is married to Mr. B.D.Sharma. Mr. Sharma is working for gain in a hotel and he is staying in Hyderabad. It is also admitted that Ms. X, in absence of her husband, fell

in love with the accused Basu Barman. She indulged in sexual relationship with Mr. Barman on the understanding that the accused would marry her. The accused person, however, refused to marry the married lady and such refusal goaded her to approach the police. She informed the jurisdictional police authority in writing on 8th August, 2017. Having found disclosure of offence cognizable in nature Tufanganj P.S. Case No. 337 was registered under Section 417/376(2)(n)/313/323/109 of the Indian Penal Code. Police took up investigation which culminated into submission of charge-sheet.

In this case, the victim Ms. X is the best witness and in her evidence she disclosed her status as legally married wife of Mr. B. D.Sharma. She also admitted that she indulged in extra-marital relationship with the accused Basu Barman which let to sexual intercourse and she further stated that the accused person never used force upon her. Basu did not want to marry her as she is already married.

It is really surprising as to what prompted learned trial court to consider the definition of rape precisely with the description fourthly that says:- “A man is said to commit rape” if he-

(First)- Against her will

(Secondly)- Without her consent.

(Thirdly)-With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

(Fourthly)- With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married”.

Here in this case, admittedly a married lady indulged herself to a sexual relationship with another man, knowing fully well that the accused person is not her husband.

There is no hesitation to hold that it was consensual act of physical union between the two adult persons, conscious about their marital status. The lady never considered the accused person as her husband nor the accused person created any impression to make the lady believe and consider him as her husband.

The fact involved in this case, no way deserves any consideration in the light of the definition of rape with the description fourthly.

Learned trial court absolutely failed to appreciate the fact of the case and upon utter misreading of evidence invoked the provision of Section 395 of the

Code of Criminal Procedure. The reference does not merit any consideration and is rejected.

Learned trial court is directed to issue notice upon the accused person to ensure his presence before the court and to pronounce the judgment, according to law and in order to secure the right of the accused to have expeditious trial, the entire process shall have to be completed by 15th September, 2023.

The registry is directed to send back the case record along with the copy of this judgment keeping skeleton record with the department.

Before parting with the case, I record my appreciation for able assistance of Ms. Esha Acharya as Amicus Curiae.

(Siddhartha Roy Chowdhury,J)