

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 9 of 2008

**Md. Sahajan Molla @ Sajahan Molla
-Vs-
The State of West Bengal**

For the Appellants : Mr. Sabir Ahmed
Ms. Mamata Khatun
Ms. Sayani Ahmed

For the State : Ms. Faria Hossain
Mr. Anand Keshari

Heard on : 15.09.2023, 13.02.2024, 01.05.2024

Judgment on : 22.05.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 11th day of December, 2007 passed by the Learned Additional Sessions Judge, 11th Court, Alipore, South 24-Parganas in Sessions Trial No. 4(3)06 thereby convicting the accused-appellant under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 (seven) years and also to pay a fine of Rs.2,000/- and , in default, to suffer further rigorous imprisonment for 6 (six) months.
2. On 27th September, 1998 a written complaint was lodged at Baruipur Police Station by one Karima Khatoon, daughter of Md. Karim Molla of Village –

Ratanpur, Police Station – Baruipur, District – 24-Parganas (South), and the said case of the de facto complainant was to the following effect:

- (i) One Sajahan Molla, son of late Noor Hossain Molla, used to disturb the complainant on various occasions when she used to pass on the way.
- (ii) About two years ago suddenly one evening said Sajahan Molla asked the complainant to stand on the way when she was returning to her home after taking water from the tube-well and she replied in refusal.
- (iii) Sajahan thereafter caught the complainant and stated to marry her. The complainant disagreed to the proposal and the accused caught her to a vacant place and she cried aloud.
- (iv) After hearing hue and cry of the complainant, one Farida Bibi, wife of Nur Islam Gazi, came to the spot. Sajahan released her and requested Farida Bibi not to disclose the fact to anybody as he would marry her.
- (v) When the accused repeatedly proposed to marry her in front of said Farida Bibi, the complainant thought that as the accused had damaged her modesty in the manner, it would not be possible on the part of her parents to marry her to anybody in future and accordingly she agreed to that proposal and returned home from the place of occurrence.
- (vi) On the next day at about 1 p.m. Sajahan Molla came to the house of the complainant in presence of her parents and asked the

complainant to provide water and when the complainant went to take water from the jar inside the home the accused Sajahan caught the complainant inside the home and forcibly laid down the complainant on the cot and thereafter he undressed the complainant and raped her against her will resulting in bleeding from her private parts.

(vii) At that moment, one neighbour Kazi Badiar Jaman came to the house of the complainant for meeting her father and saw the incident from the window and that thereafter Sajahan released the complainant and implored him not to state the fact to anybody as he would marry her.

(viii) Thereafter when the said neighbour went away from the house of the complainant the accused again raped her forcibly and after 15-20 minutes when he released the complainant she became unconscious and that after some time when she regained her sense, Sajahan promised to marry her and requested her not to state the fact to anybody.

(ix) Thereafter on many occasions the said Sajahan contacted the complainant in the market, cinema hall and gave clothes and other articles and in the meantime the complainant became pregnant and Sajahan aborted the same by giving medicines and that thereafter at the time of intercourse, he used condom and contraceptive medicine.

(x) After two years said Sajahan informed the complainant that he would not marry her and after hearing the same, the complainant informed the fact to her parents and also to the other neighbours and as per their advice, she made general diaries being G.D.E. Nos. 1755 dated 26.07.1998, 435 dated 06.08.1998 and 1003 dated 16.09.1998 to the police station.

(xi) Thereafter the accused threatened the complainant to murder her if she informed the fact to the police and that in the circumstances the complainant prayed before the police to arrange her marriage with Sajahan according to law and she would be highly obliged and if he did not agree to marry her, sufficient punishment should be imposed on him so that he would not be successful to indulge in aforesaid act with other women like her in future.

3. The written complaint dated 27.09.1998 as lodged at Baruipur Police Station was treated as First Information Report in the case and on the basis thereof Baruipur Police Station Case No. 237 dated 27.09.1998 was initiated by the police under Section 376 of the Indian Penal Code.

4. After completion of investigation, police submitted charge-sheet bearing No. 6 dated 06.01.2000 in the Court of the Learned Chief Judicial Magistrate, Alipore, as against the accused-appellant abovenamed under Section 376 of the Indian Penal Code.

5. After taking cognizance, the Learned Chief Judicial Magistrate, Alipore, committed the case to the Court of Sessions as the alleged offence was exclusively triable by the Court of Sessions and after committal the case was

transferred to the Court of the Learned Additional Sessions Judge, 11th Court, Alipore and the case was registered as Sessions Trial No. 4(3)2006.

6. Formal charge was framed by the Learned Additional Sessions Judge, 11th Court, Alipore, under Sections 376 of the Indian Penal Code against the accused-appellant to which he pleaded not guilty and claimed to be tried.
7. The prosecution examined as many as 5 witnesses and exhibited certain documents.
8. The Learned Advocate for the appellant submitted that the appellant had been falsely implicated in the instant criminal case since the victim being an adult lady had been in consensual relationship with the appellant and the complaint was lodged after a lapse of two years of their relationship. There are contradictions and omissions in the evidence of the prosecution witnesses. The sole evidence of the prosecutrix cannot be relied upon in absence of an intention or promise to marry the victim from the inception. The appeal shall be allowed.
9. The Learned Advocate for the State submitted that the victim was ravished on a promise to marry her based on a false impression. The victim was subjected to sexual molestation. Apart from the victim, there are other prosecution witnesses supported the prosecution case and as such the appeal shall be dismissed.
10. A circumspection of the evidence of the prosecution witnesses revealed as follows:-
 - i. The victim Karima Khatoon was examined as PW-1 who lodged the complaint before the police and in course of her deposition, inter

alia, stated that the incident took place on 27.09.1998 and on that day in between 5 to 5:30 p.m., she went to fetch water and on her return, the appellant asked her to stop which she refused. Eventually one Farida Bibi came and Sajahan released her and told Farida that he would marry her. Thereafter, the victim returned home. On the next day at 1 p.m., while she was alone at her house, Sajahan came to her house and asked for water. When she went inside her house, the appellant followed her, caught her, undressed her and thereafter threw her on the 'cot' and raped her. After some time, her neighbour came and saw through window that accused was raping her. After that accused Sajahan told that neighbour that he would marry her and also asked her not to report to anybody about it.

- ii. During cross-examination, PW-1 stated that her relation with accused continued for 7 years. She could not state the date and month on which the appellant for the first time had sexual intercourse with her. She lodged complaint to the P.S. after about 3 months from the date when the appellant had come to her house and asked water, caught her and had raped her. She did not state to Farida Bibi that she and accused Sajahan were living as husband and wife and having physical relation with each other and they had been using contraceptive so that she could not become pregnant. She had gone to Diamond Harbour on one occasion with accused Sajahan.

- iii. Kazi Badiar Zaman, one neighbour of the victim-complainant, was examined as PW-2 and he stated 8 years prior to the date of his deposition, he went to the house of the victim in the afternoon at about 1:00 p.m. He called the name of victim's father. The door of the house was closed from inside. One panel of a window was open. He saw that blood was coming out from the private part of the victim and Sahajan was wiping it. Sahajan saw him and came to him and caught his legs and told that he would marry the victim and also asked him not to disclose this fact to anybody.
- iv. During cross-examination, PW-2 deposed that he did not meet the father of the victim on that day. On that next day he met the father of the victim. The victim told him that Sahajan would marry her on the same day which he stated to police.
- v. Farida Bibi was examined as PW-3 in the case and in course of her deposition she was declared hostile as she stated that she did not know about the incident and in course of her cross-examination, she deposed that she was not interrogated by the I.O.
- vi. Tapan Barooah was a constable attached to the police station and examined as PW-4 in the case and in course of his cross-examination he deposed that he took the accused to the hospital as per instruction of the I.O. of the case and further stated that he did not have any personal knowledge of the incident.
- vii. Ram Kumar Mondal who was attached with Baruipur Police Station as Sub-Inspector of Police and acted as the Investigating

Officer in the case, was examined in the case as PW-5 and in the course of his cross-examination he stated, inter alia, that he examined PW-3. She stated before him that when she went to bring water, she heard the 'shout' of Karima Bibi and went towards the police. She also stated to him that after going she saw accused Sahajan Molla was dragging Karima Bibi and seeing PW-3, Sahajan told "*Tomar paye pari kaukey bolbe na*".

- viii. PW-5 in course of his cross-examination stated he did not record the statement of the victim under Section 161 Cr.P.C. PW-2 did not state to him that he saw the door closed from inside. PW-3 stated to him that Karima Bibi used to mix with Sahajan as his wife and took all measures of family planning.

11. In ***Maheshwar Tigga v. State of Jharkhand***¹, the following was held by the Hon'ble Supreme Court:-

"20. We have no hesitation in concluding that the consent of the prosecutrix was but a conscious and deliberated choice, as distinct from an involuntary action or denial and which opportunity was available to her, because of her deep-seated love for the appellant leading her to willingly permit him liberties with her body, which according to normal human behaviour are permitted only to a person with whom one is deeply in love. The observations in this regard in Uday [Uday v. State of Karnataka, (2003) 4 SCC 46 : 2003 SCC (Cri) 775] are considered relevant : (SCC p. 58, para 25)

"25. ... It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix

¹(2020) 10 SCC 108

the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.”

12. The following was held by the Hon’ble Supreme Court in **Naim Ahamed v. State (NCT of Delhi)**² -

“17. Again in Dr.Dhruvaram Murlidhar Sonar v. State of Maharashtra (supra), this Court interpreting the Section 90 and the Clause - Secondly in Section 375 of IPC, observed as under:—

“23. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual

²2023 SCC OnLine SC 89

intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.”

13. Though the written complaint is not an encyclopaedia but it can be a corroborative piece of evidence. The victim lady in the written complaint stated to have been in a relationship with the appellant after being ravished as narrated by her. She continued her relationship with the appellant, went to cinema house and accepted gifts from the appellant. She stated to have become pregnant and the appellant administered certain drugs causing the abortion of the child. The entire episode went on for two years and the victim lady was secretive about it. The complaint was lodged primarily to coerce the appellant to marry her and in refusal to the same be subjected to exemplary punishment. During her deposition before the Court the victim did not allude to any such incident of getting pregnant and subsequent abortion at the instance of the appellant. The victim further stated that the appellant refused to marry her as he intended to marry a girl from a rich family. During her cross-examination, the victim deposed as follows:-

“I had not answered his proposal of marriage to me. My parents, two younger brothers and myself reside at the house. There are three rooms in my house. The house is opened from all sides. I lodged complaint to

the P.S. after about 3 months from the date when accused had came to my house and asking water, has caught me and had raped me. I never like Sajahan. I did not state to Farida Bibi that I and accused Sahajahan were living as husband and wife and having physical relation with each other and we are using contraceptive so that I could not become pregnant. I stated to police that at the time of having intercourse accused Sajahan used to adopt different contraceptive for preventing my pregnancy. Without any work any villager visits my house. I had gone to Diamond Harbour on one occasion with accused Sajahan. I did not state to my parents that accused Sajahan used to give clothes, articles to me as he has worned me. I have stated before the Learned Magistrate that I have love affairs with accused Md. Sajahan Molla. I do not remember whether I stated before the Learned Magistrate that accused had given a proposal of marriage to me. I had agreed to that. I stated to Magistrate that we are taken joint photograph.”

14. There are contradictions and deviations in the testimony of the victim. If the victim and the appellant resided together as a couple there might be certain differences arising out of such relationship contrary to the intention of the parties to get married. The victim lady being an adult could not have been oblivious of the consequences and repercussions of being in a relationship with the appellant voluntarily consenting to the sexual relationship which cannot be termed as misconception of fact. The evidence of the prosecutrix elucidated an initial intention to marry her on the part of the appellant

which she refused. She further stated her discontentment towards the appellant however gave in to a consensual relationship reason being unfathomable. She went to several places along with the appellant and accepted gifts from him despite her aversion towards him. She further exaggerated of being pregnant and subsequently undergoing abortion which was not proved. The contradictions and variations in the testimony of PW-1 are beyond reliance and trust. Such inconsistent depositions are devoid of credibility. The love affair between the victim and the appellant is probable which may have deteriorated resulting in the complaint against the appellant to seek vengeance.

15. The prosecution failed to prove its case beyond reasonable doubt and accordingly the instant criminal appeal is allowed.
16. Accordingly, the instant criminal appeal being CRA 9 of 2008 is disposed of.
17. There is no order as to costs.
18. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
19. Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

(Ananya Bandyopadhyay, J.)