

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

Present:

The Hon'ble Justice Tirthankar Ghosh

**C.R.A. 168 of 2019
With
C.R.A. 59 of 2019**

**Gobinda @ Rabindranath Roy @ Bhuttu
versus
The State of West Bengal & Anr.**

For the Appellant : Mr. Kushal Kumar Mukherjee
Mr. Surajit Basu.

For the State : Mr. Debasish Roy, Ld. P.P.
Ms. Rajnadini Das.

Heard On : 24.07.2024, 02.08.2024 & 19.08.2024.

Judgement On : 22.08.2024.

Tirthankar Ghosh, J. :

The present appeal has been preferred against the judgment and order of conviction and sentence dated 01.12.2018 and 03.12.2018 passed by the Learned Additional Sessions Judge, Dinhata, Cooch Behar in Sessions Trial No. 04 (02)/2018 arising out of Sessions Case No. 82 of 2017, thereby holding the appellant guilty of the offence under Sections 417/376 of the Indian Penal Code and sentencing him as follows:

- (i) For the offence under Section 376 of the Indian Penal Code - rigorous imprisonment for 7 (seven) years and to pay fine of Rs. 10,000/- and in default to suffer simple imprisonment for 1 (one) year.

- (ii) For the offence under Section 417 of the Indian Penal Code – rigorous imprisonment for a period of six (6) months.

Dinhata Police Station case No. 808 of 2016 dated 09.09.2016 was registered for investigation on the basis of a complaint submitted by the victim 'X' with the Inspector-in-Charge, Dinhata Police Station to the effect that for about a year she had relationship with the accused Gobinda @ Robindranath Roy @ Bhuttu and on the pretext of marrying her the accused on several occasions raped her. On 07.09.2016 when the accused came to their house, as earlier, her family members enquired from him and came to know that he was already married and had a child. The complainant/victim alleged that the accused raped her several times on the false plea of marrying her. On 08.09.2016 a village Salishi was called by the Pradhan of Gram Panchayat but the accused person did not obey the decision of Salishi and as such she was compelled to lodge the complaint requesting the Police authorities to investigate and take legal action.

Relying on the aforesaid complaint Dinhata Police Station registered case under Section 493/376 of the Indian Penal Code. The case was endorsed to Sub-Inspector Pradip Chakraborty who after collecting the materials and on conclusion of investigation, submitted Charge-sheet under Sections 493/376 of the Indian Penal Code. The case was thereafter committed by the Learned ACJM, Dinhata to the Court of Sessions being the Trial Court.

The Learned Trial Court on consideration of the materials so relied upon by the prosecution framed charges under Sections 493/376 of the Indian Penal Code. The contents of the charge were read over to the accused to which the appellant pleaded not guilty and claimed to be tried. Here, it would be relevant to state that on conclusion of trial the learned Trial Court found that there were materials to frame additional charges and consequently framed charges under Section 417 of the Indian Penal Code.

The prosecution in order to prove its case relied upon nine (9) witnesses which included, P.W.1 'X', victim girl/complainant; P.W.2 'Y' father of the victim girl; P.W.3 'Z' mother of the victim girl; P.W.4 'A' sister-in-law (brother's wife) of the victim girl; P.W.5 Dr. Purna Chandra Hansda, who conducted medical examination of the victim girl; P.W.6 Gouranga Adhikary, NVF of Dinhata Police Station; P.W.7 Tapan Kumar Barman, Civic Volunteer of Dinhata Police Station; P.W.8 Anita Roy, lady constable attached to the Dinhata Police Station; P.W.9 Pradip Chakraborty, Sub-Inspector of Police attached to Dinhata Police Station, Investigating Officer of the case.

PW-1 is the victim and the complainant of the case who deposed that she had an affair with accused for about one year prior to the date of submitting the written complaint for which he used to mix with the accused and also had communication over telephone. On having promised to marry her, she cohabitated with the accused several occasions. However, the accused suppressed that he was married and had a child. She came to know of such

marriage and the accused who was having a child on 07-09-2016 in the evening only after being enquired by her family members. On a false pretext of marrying her the accused on several occasions raped her which she had divulged to her family members on 08-09-2016. She also deposed that her family members took information regarding the particulars furnished by the accused but on verification it was found that he did not reside at the said address. Subsequently, a written complaint was submitted with Dinhata PS. She identified the written complaint along with her signature which was admitted in evidence. She also deposed that she was referred for Medico-legal examination and she identified her signature in the Medico legal examination report. Additionally, it was submitted that she made a statement before the learned Magistrate, her signatures in the statement were marked as exhibits.

In cross-examination, she deposed that her family consists of her parents, two brothers and sister-in-law (wife of her elder brother) and one minor nephew who reside in a joint mess. She was unable to tell the exact date when the accused proposed her for marriage. She denied the suggestion relating to her relationship with the accused prior to the complaint being lodged as also the fact that on the promise to marry she cohabited on several occasions with the accused.

PW-2, 'Y' is the father of the victim girl who deposed that PW-1 is her daughter and after identifying the accused he deposed that the accused being married came to his residence and proposed for marrying his daughter. Additionally, he deposed that the residential address furnished by the accused

on being cross-checked was found to be incorrect. In cross-examination, the witness stated that he did not agree with the marriage of his daughter with the present accused as he provided wrong address and subsequently gave marriage of his daughter elsewhere.

PW-3, 'Z' is the mother of the victim girl who deposed that her daughter submitted a written complaint on 09-09-2016. According to her on 05-09-2016 the accused came to their residence and proposed to marry her daughter. An enquiry was conducted by the family members regarding the whereabouts of the accused when it was found that the residential address so furnished by him was wrong. Thereafter, again the accused was asked to furnish proper address and on verification it was found that the accused was already married and had a child. She deposed that she came to know that prior to 05-09-2016 the accused raped her daughter. In cross-examination she deposed that her daughter had affair with the present accused.

PW-4, 'A' is the sister-in-law (wife of the elder sister) who identified the accused in court and deposed in the same manner as PW-3.

PW-5 is Dr. Purna Chandra Hansda, Medical Officer of Dinhata Sub-Divisional Hospital who examined the victim PW-1 in presence of staff nurse. He deposed that on consent of the victim girl he held her cross-examination and the victim signed on the report. He also opined that on examination he found that the hymen of the victim girl was ruptured, clinically no foreign body or injury marks were detected on her private parts or body parts, her vaginal

swab was taken. He identified the Medico-legal examination which was prepared and signed by him which was admitted in evidence. In cross-examination he stated that hymen of the victim girl may or may not be ruptured by cycling, swimming and playing.

PW-6, Gouranga Adhikary, a NVF attached to Dinhata Police Station, was a signatory in the seizure list by which the investigating officer seized vaginal swab of the victim girl from the lady constable Anita Roy. His signature in the seizure list was admitted in evidence.

PW-7, Tapan Kumar Barman, a Civic Volunteer attached to Dinhata Police Station, reiterated as PW-6 as a signatory to the seized seizure list. His signature was admitted in evidence.

PW-8, Anita Roy, is a lady constable who at the relevant point of time was attached to Dinhata Police Station and collected the vaginal swab of the victim girl and handed it over to the police. She further deposed that police seized the same from her under the seizure list and obtained her signature. She identified her signature in the seizure list.

PW-9, SI Pradip Chakraborty, is the investigating officer who was at the relevant point of time attached to Dinhata Police Station. He deposed that after being endorsed for conducting the investigation of the case, he visited the place of occurrence, prepared rough sketch map with index of the place of occurrence, examined available witnesses and recorded their statements under

Section 161 of the Code of Criminal Procedure. He identified the sketch map with index which was admitted in evidence. He also deposed that he arrested the accused and produced him before the learned court and also sent the victim girl for examination to Dinhata SD hospital for medico-legal examination. The victim girl was also subsequently sent for her statement to be recorded by the Judicial Magistrate. He also collected the medico-legal examination report and the statement of the victim girl under Section 164 of the Code of Criminal Procedure. The investigating officer collected the vaginal swab of the victim girl by way of seizure which was marked as evidence. The potency test of the accused was also done and for that the test report was also collected. The vaginal swab of the victim girl was sent to RFSL, Jalpaiguri for chemical examination and the said report was also collected. The report was produced before the court and was admitted in evidence. On completion of investigation, he submitted charge-sheet before the jurisdictional court under Sections 493/376 of the Indian Penal Code. In cross-examination, he stated that though letter A in the sketch map indicates north side room of the house of Sachindranath Barman as the main place where the alleged incident took place but no witnesses whose statement was recorded by him under Section 161 of the Code of Criminal Procedure including the victim girl and her parents had disclosed such relevant fact.

Mr. Kushal Kumar Mukherjee, learned advocate appearing for the appellant submitted that the prosecution case is full of inconsistencies and the learned trial court accepting the same to be gospel truth arrived at a finding of

guilt. It was pointed out that there was no endeavour on the part of the investigating agency to check whether the accused was married or not or that he had a child and the same having been accepted, the culpability was fixed upon the accused. Additionally it was argued on behalf of the appellant that even if the prosecution case is accepted to be true, hardly it makes out any offence under Section 376 of the Indian Penal Code as the lady, PW-1, was able to understand the consequences of her act as she was a matured lady and has admitted in evidence that she had a love affair with the accused appellant. It was submitted that the learned trial court after conclusion of the prosecution evidence as well as the examination of the accused under Section 313 of the Code of Criminal Procedure, framed additional charge under Section 417 of the Indian Penal Code which has seriously prejudiced the defence/accused and as such, the very foundation of the case which has the essence and spirit of deceit being committed upon the victim girl and thereby ravishing her is introduced without affording any opportunity of cross-examination during the course of prosecution evidence.

In order to substantiate his contention, learned advocate for the appellant has relied upon the judgement of Dhruvaram Murlidhar Sonar Vs. State of Maharashtra & Ors. reported in (2019) 18 SCC 191. Reference has been made to paragraphs 18, 19, 20, 21, 22 and 23. By referring to the said paragraphs, it was emphasised that the victim girl has admitted in her evidence that she had a relationship and there was love affair and as such, there was consensual sex

which is distinguished from what is termed as ‘rape’. Paragraph 22 of the aforesaid judgement held as follows:

“22. Recently, this Court, in *Shivashankar v. State of Karnataka* [*Shivashankar v. State of Karnataka*, (2019) 18 SCC 204], disposed of on 6-4-2018, has observed that it is difficult to hold that sexual intercourse in the course of a relationship which has continued for eight years is “rape”, especially in the face of the complainant's own allegation that they lived together as man and wife. It was held as under: (*Shivashankar case* [*Shivashankar v. State of Karnataka*, (2019) 18 SCC 204] , SCC p. 205, para 4)

“4. In the facts and circumstances of the present case, it is difficult to sustain the charges levelled against the appellant who may have possibly, made a false promise of marriage to the complainant. It is, however, difficult to hold sexual intercourse in the course of a relationship which has continued for eight years, as “rape” especially in the face of the complainant's own allegation that they lived together as man and wife.””

Lastly, the learned advocate for the appellant submitted that the prosecution having failed to make out any case and there being failure of justice in providing proper opportunity in course of the trial, the appellant has made out a case in appeal for interference for which the judgement and order of learned trial court is required to be set aside.

Ms. Das, learned advocate appearing on behalf of the State has resisted the contentions advanced by the appellant and submitted that the emphasis in the present case is that the accused allured the victim girl by way of promising to marry her knowing fully well that he would not be able to marry her as he was already married having a child. It is also evident from the deposition of the

witnesses including the victim PW1 and the evidence of doctor, PW5 that the victim had a physical relationship and the same was on the assurance, which was given by the accused for marrying her. The attending circumstances also support the fact that the accused/appellant had the intention of enjoying the victim girl and not marrying her which would be evident from the address furnished by him. The consistent version of PWs. 2, 3 and 4 are that the address so furnished by the accused was enquired by them and on enquiry they found the accused was not residing at the said address. On further clarification when the proper address was furnished, it was discovered that the accused was married and he had a child.

It has been contended on behalf of the State that on an overall assessment of the conduct of the accused, it is transparent that from the inception he did not have any intention to marry the victim but on the garb of promising to marry her, cohabited with her for about a period of one year and when the issue relating to marriage cropped up the subsequent circumstances came to light.

Learned advocate for the State contradicted the contentions particularly the judgment relied upon by the learned advocate for the appellant. By relying upon the judgment in Anurag Soni Vs. State of Chhattisgarh reported in 2019 6 S.C.R. 972 the attention of the Court was drawn to paragraph 10.1 and emphasis was made to Section 90 of the Indian Penal Code wherein there is reference to the expression consent. In the referred judgment, according to the

learned advocate, it has been held that whether there was consent or not is to be ascertained only on a careful study of all the relevant circumstances and there is no straight jacket formula for ascertaining the same. Learned advocate also emphasised on the factum that it has been reiterated by the Hon'ble Apex Court in a number of judgments that the intention of the accused is to be assessed, whether the same is mala fide or he had clandestine motives. In a similar set of circumstances, whether there is a love affair or there is cohabitation and/or rape for which the accused is facing trial, a further reference was made by the learned advocate for the State in the case of *In Yedla Srinivasa Rao v. State of A.P.*, (2006) 11 SCC 615. Reference was made to paragraph 9 of the said judgment which held as follows:

“9. The question in the present case is whether this conduct of the accused apparently falls under any of the six descriptions of Section 375 IPC as mentioned above. It is clear that the prosecutrix had sexual intercourse with the accused on the representation made by the accused that he would marry her. This was a false promise held out by the accused. Had this promise not been given perhaps, she would not have permitted the accused to have sexual intercourse. Therefore, whether this amounts to a consent or the accused obtained a consent by playing fraud on her. Section 90 of the Penal Code says that if the consent has been given under fear of injury or a misconception of fact, such consent obtained, cannot be construed to be a valid consent.....”

The attention of the Court was also drawn to question nos.5, 6 and 7 of the examination of the accused under Section 313 of the Code of Criminal Procedure along with answers which are set out as follows:

“Q.5) PW-1 also deposes that on promise to marry you cohabitated with her for several times. Exhibit-1 corroborates it. What do you say in this regard?”

Ans: I am innocent.

Q.6) PW-1 further states that you, suppressed her that you were married and had one child and she came to learn it on 07-09-2016 in the evening when you came to her house and after being inquired by her family members. PW-2 Sachindranath Barman (father of PW-1), PW-3 Minati Barman (mother of PW-1), PW-4 support it. Exhibit-1 corroborates it. What do you say in this regard?”

Ans: I am innocent.

Q.7) PW-1 also deposes that you on false pretext telling lie committed rape upon her for several times. Exhibit-1 corroborates it. What do you say in this regard.

Ans: I am innocent.”

Having regard to the relevant questions, learned advocate emphasises that the circumstances required for charging the accused under Section 417 of the Indian Penal Code and its opportunity of answering has been provided at this stage by the learned trial court. Had there been any other answer the accused could have claimed as a matter of right that there was failure of justice or prejudice which has been caused to him. In each of the answers the accused in a routine manner has said “I am innocent”.

Reference was made to Section 464 of the Code of Criminal Procedure and the judgment of the Hon’ble Supreme Court in *Fainul Khan v. State of*

Jharkhand, (2019) 9 SCC 549 wherein paragraph 12 has been emphasized, is quoted below:

“12. Section 313 CrPC incorporates the principle of *audi alteram partem*. It provides an opportunity to the accused for his defence by making him aware fully of the prosecution allegations against him and to answer the same in support of his innocence. The importance of the provision for a fair trial brooks no debate:

.....

But equally there cannot be a generalised presumption of prejudice to an accused merely by reason of any omission or inadequate questions put to an accused thereunder. Ultimately it will be a question to be considered in the facts and circumstances of each case including the nature of other evidence available, the kind of questions put to an accused, considered with anything further that the accused may state in his defence. In other words, there will have to be a cumulative balancing of several factors. While the rights of an accused to a fair trial are undoubtedly important, the rights of the victim and the society at large for correction of deviant behaviour cannot be made subservient to the rights of an accused by placing the latter at a pedestal higher than necessary for a fair trial.”

Having regard to the issues so canvassed, both by the appellant and the State, I find that a relationship existed between the victim and the accused. There was a suppression by the accused that he was married and he had a child. However, as the relationship is admitted it was incumbent at the inception by the accused to divulge regarding the marriage. The medical evidence reflects that there was cohabitation. The complaint of the lady is that

he was compelled to have physical relationship on a promise being made by the accused for marrying her.

Taking into account the chronology of events, which would reflect that the accused at the relevant point of time could not have married the victim girl, PW-1 and, therefore, the promise to marry her was because of the purposes of cohabitation, distinguishes the case of the appellant from 'consensual sex' and would fall within the ambit of 'rape' as the consent of the victim girl was obtained by fraud. Additionally, the consistent version of the witnesses who are relation of the victim that incorrect address was furnished when the issue relating to marriage cropped up and subsequently when the correct address was provided it was discovered that the accused was married and had a child.

On an assessment of the factual circumstances of the present case and the settled proposition of law in the given set of circumstances particularly the factual foundation of the present case, I am of the opinion that the prosecution has not been able to prove the case beyond all reasonable doubt and the judgement and order of conviction and sentence so passed by the learned trial court do not call for any interference.

Thus, the appeals being CRA 168 of 2019 with CRA 59 of 2019 are dismissed.

Pending connected application, if any, is consequently disposed of.

The appellant is on bail. His bail bonds stand cancelled and he is directed to surrender before the learned trial court immediately.

Department is directed to send back the lower court records along with a copy of this judgment immediately to the learned trial court so that prompt action may be taken as a consequence of the verdict so delivered.

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

Urgent photostat certified copy of this judgement, if applied for, be given to the parties upon compliance with all requisite formalities.

(Tirthankar Ghosh, J.)