

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 210 of 2010

Kabir Seikh

-Vs-

The State of West Bengal

For the Appellant	: Mr. Debapratim Guha Mr. Diptendu Banerjee Ms. Anchita Sarkar
For the State	: Mr. Debashish Roy Mr. Avishek Sinha
Heard on	: 08.01.2024, 06.02.2024, 19.02.2024, 01.05.2024
Judgment on	: 11.07.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 06.03.2010 passed in connection with Sessions Case No. 49/2006 Sessions Trial No. 22/2006 by the Learned Additional Sessions Judge, Fast Track Court, Katwa, convicting the accused/petitioner/appellant on the charge under Section 376(1) of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to pay a fine of Rs.25,000/- in default to suffer further imprisonment for 6 months.

2. The prosecution case emanated on the basis of a complaint filed by the victim, inter alia, stating to have been in an amorous relationship with the appellant as vividly described in the complaint whereby the appellant ravished her whereby she conceived. The complainant admitted to have consented to such cohabitation on a promise to marry which the appellant subsequently declined. The complainant was impregnated by the appellant with a child of eight (8) months being borne by her at the time of filing the complaint.
3. Based on the aforesaid complaint, Ketugram Police Case No. 39/04 dated 05.07.2004 under Section 376 of the Indian Penal Code was registered.
4. On completion of investigation, charge-sheet was submitted against the appellant under Section 376 of the Indian Penal Code to which the appellant pleaded not guilty and claimed to be tried.
5. In order to prove charge against the petitioner/appellant the prosecution has examined 11 witnesses and had exhibited some documents.
6. Heard the rival submissions of the Learned Advocates for the appellant as well as the State.
7. A circumspection of the prosecution witnesses revealed as follows:-
 - i. PW-1 was the prosecutrix who in her examination-in-chief deposed about 4 years ago a love affair developed between herself and the appellant which impregnated her. During her cross-examination, PW-1 deposed that she came to learn in the month of Agrahayan about her pregnancy. Consequently she asked the accused to marry her when she was in her 4th month of pregnancy but the accused

refused. After the refusal of the appellant, PW-1 stated *“prior to filing the case she had disclosed that she became pregnant by Kabir”*.

- ii. PW-2 Anowara Bibi, mother of PW-1, in her examination-in-chief, deposed witnessing physical and mental condition as also the natural behavior of her daughter, she inquired her daughter and learnt that PW-1 became pregnant due to sexual intercourse with the appellant.
- iii. PW-3 the father of the victim was a hearsay witness who denied having personal knowledge about the love affair and coitus between PW-1 and the appellant, who learnt the whole incident from his wife.
- iv. PW-4's evidence was based on hearsay. From his evidence, it appeared that the prosecutrix whom she knew from her childhood was aged about 18/19 years. PW-4 heard from the father of prosecutrix that his daughter was impregnated by Kabir Seikh.
- v. PW-6 stated that he heard the love affair between the victim and Kabir Seikh, without any further knowledge.
- vi. PW-7 the investigating officer, admitted that he did not examine Babu Seikh. PW-7 did not pray for D.N.A. test of the victim, accused and child of the victim before the Learned Trial Court.
- vii. PW-9, Dr. Kamal Mandal examined the victim girl and found her to be pregnant for 34 weeks.
- viii. PW-10, an S.I. of Police was a witness of formal character.
- ix. PW-11 was the police officer who conducted investigation in part.

8. 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 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.”

¹ (2020) 10 SCC 108

9. 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 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.”

10. The evidence adduced by the prosecution portrayed a consensual relationship between the appellant and the adult victim. The victim did not disclose application of force or any kind of coercive compulsion on the part of the appellant subjecting her to sexual molestation against her will or

² 2023 SCC OnLine SC 89

desire. It had been successive acts on the part of the appellant over a considerable period of time which could have been detested and protested by the victim to the contrary, denigrating her personal interest being repulsive and condemning. The victim did not state initiation of the physical relationship to have been based on a promise to marry. The victim being an adult lady was aware of the consequences if the appellant declined to marry her.

11. There had been inconsistencies in the statements of the prosecutrix. Vital witnesses were not examined. Moreover, the Investigating Officer did not endeavor to conduct the D.N.A. test of the appellant, victim and the child which could have unravelled the paternity of the child. The consensual relationship between the parties do not indict the appellant under Section 376 of the Indian Penal Code.
12. Under the facts and circumstances, the prosecution has failed to establish its case beyond reasonable doubt and as such the instant criminal appeal is allowed.
13. Accordingly, the criminal appeal being CRA 210 of 2010 stands disposed of.
14. There is no order as to costs.
15. Lower court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
16. 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.)