

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 562 of 2011

Biswanath Murmu

-Vs-

The State of West Bengal

For the Appellant : Mr. Malay Bhattacharya
Mr. Sudipa Sengupta

For the State : Mr. Rudradipta Nandy
Mr. Iqbal Kabir

Heard on : 09.01.2024, 26.02.2024, 12.03.2024,
18.04.2024, 22.08.2024

Judgment on : 05.11.2024

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against judgment and order dated 12.07.2011 passed by the Learned Additional Sessions Judge, 2nd Court, Bankura in Sessions Trial No.11(3)2010 arising out of Sessions Case No.8(2)2010, thereby convicting the appellant for the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and to fine of Rs.1000/- and in default to suffer simple imprisonment for another 3 months.
2. The prosecution case precisely stated the victim lodged a written complaint at Chhatna P.S., inter alia, alleging the complainant and the appellant being

romantically involved, had eloped. On an assurance of marriage the appellant and the complainant indulged in physical relationship several times at her house in the absence of her parents and thereafter the complainant became pregnant. The appellant insisted her to abort and refused to marry her and the complainant on the ninth month of her pregnancy lodged the complaint.

3. On completion of the investigation, charge-sheet was submitted on 22.07.2009 against the appellant under Sections 376/493/417 of the Indian Penal Code.
4. Charges were framed under Sections 376/417 of the Indian Penal Code to which the appellant pleaded not guilty and claimed to be tried.
5. The prosecution cited 9 witnesses and exhibited certain documents.
6. Learned Advocate for the appellant submitted as follows: –
 - i. PW-1 being the victim girl as well as the de facto complainant stated in the complaint, as well as in her testimony that she did not raise any objection to the physical intimacy and consented to the same and as such in no way the said incident can be termed as rape as it was a consensual act between the victim as well as the appellant. The victim girl also deposed that she narrated the fact of intimacy to her friend namely Makali Soren but the said Makali Soren was not examined.
 - ii. It was further submitted that Section 375 of the Indian Penal Code stated that a man was said to commit “rape” who, except in the case hereinafter excepted, had sexual intercourse with a woman under circumstances falling under any of the six following descriptions – (i)

- Against her will. (ii) Without her consent. (iii) 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. (iv) 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. (v) With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent. (vi) With or without her consent, when she is under sixteen years of age.
- iii. It was further submitted that a belief that the promise of marriage was meant to be fulfilled was not a misconception of fact. The question of misconception of fact will arise only if the act consented to, is believed by the person consenting to be something else, and on that pretext sexual intercourse is committed. In such cases it could not be said that she consented to sexual intercourse but in this instant case the consent was not obtained by fraud rather on a promise of an act at a future uncertain date and the same did not fall within the definition of rape and from the said complaint it could never be construed that the consent of the victim was obtained on the basis of false promises and only for sexual pleasure and as such the allegations against the appellant were unjustified.

- iv. Reliance was placed by the Learned Advocate for the appellant upon the judgment of Hon'ble Apex Court in ***Uday Vs. State of Karnataka*** and in ***Jayanti Rani Panda vs. State of West Bengal*** of this Court.
 - v. The depositions of prosecution witnesses revealed that the victim gave her consent to the physical relationship which was not obtained through fraud and as such the allegations as against the appellant did not come within the definition of "rape" and as such the Learned Trial Judge should have acquitted the appellant from the said case and as such the judgment dated 12.07.2011 and order dated 14.07.2011 is baseless and has no legs to stand and is liable to be set aside.
7. The victim girl deposed that she was abandoned just after being pregnant. She gave birth to a female child and the father of the victim girl deposed the victim to have been in a romantic relationship with the appellant who on promise to marry her ravished her.
8. Learned Advocate for the State further submitted that the prosecution was able to prove its case based on corroborative evidence of the prosecution witnesses and the appeal shall be dismissed.
9. A circumspection of the prosecution witnesses revealed as follows:-
- i. PW-1 deposed to be aged about 21 years. Biswanath Murmu the appellant was known to her, who resided at their village at his maternal uncle's home. During his stay at their village a love affair developed between them and the appellant promised to marry her and committed rape upon her. Due to sexual intercourse nearly a year ago

- prior to the institution of the case she became pregnant. She disclosed the fact to her parents and requested the appellant to keep his promise and to marry her but he refused to marry her and was asked to terminate her pregnancy. Being helpless she lodged a complaint at Chhatna P.S. She gave birth to a female child. She was alive and aged about 10/11 months. The appellant was the father of her child/daughter.
- ii. The prosecution witness namely PW-2, the father of the victim deposed to have been aware of the relationship of his daughter, the victim with the appellant and stated that the victim was duped by the appellant. PW-2 further deposed that his family consisted of five daughters, two sons and his wife. Out of two rooms in his house his sons and daughters occupied one room. Such disclosure in the evidence of PW-2 improbabilized and nullified the statement of PW-1, the victim recorded under Section 164 of the Code of Criminal Procedure Code wherein she stated that the appellant used to spend the entire night at her house continuously for the month of Baisakh.
 - iii. PW-4 deposed his ignorance regarding the incident.
 - iv. PW-5 in his deposition stated that he was Sub-Inspector of Police and posted at Ranibandh P.S. On 15.01.09 when he was posted at O.C. Chhatna P.S., he received a written complaint from the victim. As the written complaint disclosed cognizable offence so he initiated Chhatna P.S. Case No.07/09 dated 15.01.09 under Section 376/493/417 of the I.P.C., and he endorsed on the margin of the written complaint,

marked as Exbt.1/1 and he filled up the formal F.I.R., marked as Exbt.-3. He endorsed the case to S.I. Sanatan Mondal for investigation.

- v. PW-5 in his cross-examination stated due to ignorance he did not fill up the Col. No. 14 & 15 of the formal F.I.R.
- vi. PW-6 in his deposition stated that he was a Medical Officer and was posted at Chhatna B.P.H.C. On 08.02.09, he examined the victim and issued a certificate to the effect that victim gave birth to a female child on the way to B.P.H.C. and name of the husband of the victim was written as Biswanath Murmu and the hospital catered post-delivery treatment to mother and baby.
- vii. PW-3 and PW-8 were declared hostile by the prosecution who however had stated to the Investigating Officer i.e. PW-9 to have been aware of the romantic affair between the victim and the appellant.
- viii. PW-9 the Investigating Officer did not submit any prayer for conducting DNA test of the appellant as well as the victim during his tenure of his investigation to unravel the truthfulness of the claim of the victim girl.
- ix. PW-9 deposed that on completion of investigation S.I. M. Sinha Roy submitted charge-sheet vide C.S. No.43 dated 22.07.2009. The witnesses whom he examined did not state the appellant forcefully committed rape upon the victim girl but he associated with the victim girl freely due to love affair, for which victim girl became pregnant. He

did not submit any prayer for D.N.A. test of the appellant and the victim girl during his tenure of investigation.

10. 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

¹(2020) 10 SCC 108

prosecutrix when she consented, because there were more reasons than one for her to consent.”

11. 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.”

12. The victim lady being an adult admitted of an affair to have been developed with the appellant and subsequently did not resist a sexual relationship with

²2023 SCC OnLine SC 89

the appellant on promise of marriage. Due to a prolonged sexual relationship the victim eventually became pregnant and on such revelation the appellant refused to marry her and suggested for termination of her pregnancy. The victim after a lapse of considerable time being nearly a year on her 9th month of pregnancy lodged a complaint at the police station against the appellant. The statement of the victim was recorded under Section 164 of the Criminal Procedure Code wherein she stated that the victim stayed at her residence for an entire month whereby both of them used to engage in physical relationship. The victim thereafter gave birth to her female child. The appellant did not marry her. The relationship between the parties was indubitably consensual. The victim lady being an adult was aware of the consequences of such relationship and denial on the part of the appellant to marry her would entail wide ramification.

13. Mere assertion or claim on the part of the victim to have been impregnated by the appellant without proper evidence in case of consenting parties to a sexual relationship cannot possibly indict a person. The victim being an adult lady suppressed in her complaint as well as the statement recorded under Section 164 of the Code of Criminal Procedure to have been a day labourer who used to leave the house and go for an earning for her livelihood in the company of other people.
14. PW-2, the father of the victim was informed by PW-1 about the scope and manner of access as stated by the victim. The victim has categorically stated that she willingly and without resistance got physically involved with the appellant reaffirming and fortifying her consent to such an act.

15. The victim being an adult lady could not have been a prey to the promise to marry concept foregoing her knowledge of subsequent possibilities, probabilities and eventualities if such promise was not acted upon.
16. The failure on the part of the prosecution to ascertain the paternity of the child weakened its case even further.
17. In view of the above discussions, the prosecution failed to prove its case and the appeal is allowed.
18. Accordingly, the criminal appeal being CRA 562 of 2011 is disposed of.
19. There is no order as to costs.
20. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
21. 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.)