

Court No. 29
(266041)

24.09.2024

(AD 2)

(S. Banerjee)

CRMSPL 67 of 2023

State of West Bengal

Vs.

Sambit Banerjee & Ors.

Mr. Suman Dey, Adv.

..... for the State

Mr. Apalak Basu
Mr. Shibaji Shankar Dhar
Mr. Nazir Ahmed
Ms. Sanghamitra Mridha

... for the OP 1, 3, 4, 5 and 6

Soumen Sen, J.(Oral)

1. The special leave to appeal is taken up for consideration.
2. The opposite parties have been acquitted on merits.
3. Surprisingly the victim has not preferred any appeal under Section 372 Cr.P.C. and it seems that she has accepted the judgment.
4. The State has preferred an application for special leave to appeal.
5. We are not disputing the competence of the State to file an appeal with a prayer for special leave merely because the victim has not approached the court.
6. The maintainability of the application for Special Leave to Appeal is not in doubt. The State can always file such application without the victim having approached the court under Section 372 of the Cr.P.C., inter alia, against an order of acquittal. The right of victim to prefer an appeal under

Section 372 Cr.P.C. in the context of the definition of victim in Section 2(wa) was considered in ***Mallikarjun Kodagali (Dead) represented through Legal Representatives vs. State of Karnataka and Ors.; 2019(2) SCC 752.***

7. In the instant case, the victim seems to have accepted the judgment of the trial court acquitting the respondents/opposite parties. In the absence of the victim the State can file an application under Section 378(3) for leave to prefer an appeal. The distinction is required to be drawn between the statutory appeal and an application for special leave to appeal. The original Sub-section (3) was substituted by Section 31(iii) of the Act of 25 of 2005 by which the phrase “to the High Court” was inserted. The said sub-section has cast a duty upon the court to exercise its discretion judicially at the time of granting such special leave. The High court would be required to consider any special feature in a particular case and cannot ignore the effect which the granting of leave to appeal without due discrimination may be on the principles of normal presumption of innocence of the accused in our criminal law which has been further reinforced and strengthened by the order of acquittal by the trial court (see. ***Thiagaraja Bhagavathar v. Emperor ;AIR 1947 PC 113***).
8. No right of hearing in favour of the accused can be read into the statute while the court considers the question of admission of appeal against the acquittal and for that

reason we did not allow Mr. Apalak Basu learned Counsel appearing on behalf of the opposite parties no. 1, 3, 4, 5 and 6 to argue at this stage. The trial court has acquitted the opposite parties. It is now well settled that the power of an appellate court to review evidence in appeal against acquittal is as extensive as its power in appeal against the conviction. It is equally well settled that before an appellate court can set aside the order of acquittal, it must carefully consider the reasons given by the trial court in support of its order and must give its own reason to reject those reasons.

9. The presumption of innocence of the accused is required to be kept in mind. The fact that the trial court had the advantage of seeing and hearing the witnesses is a relevant factor in assessing the findings of the trial court. Unless there are exceptional circumstances the appellate court should not disturb an order of acquittal. There must be existence of strong cogent grounds to justify an interference with the order. [see. ***Mathai Mathews v. State of Maharashtra***; 1970(3) SCC 772 and ***Chowdikodlu Asuralli Dyavappa v. State of Gujarat***; 1980 SCC (Cri) 251]
10. If it appears to the appellate court that the trial court has taken a probable view to acquit an accused, the fact that another probable view would lead to conviction cannot

be a ground to interfere with acquittal as held in ***Union of India v. Pravat Kumar Behuria, 2019(10) SCC 220.***

11. Leave may be granted when it appears to the appellate court that the acquittal by the trial court is patently unreasonable or demands a standard of proof amounting to certainty which the law does not require. [see. ***State v. Sunil Biswas, 1990 Cr.LJ 2093 (Cal)***]
12. Keeping these principles in mind we requested Mr. Suman Dey learned Counsel for the appellant/State to demonstrate from the grounds a prima facie arguable case on merits in favour of the leave.
13. Mr. Suman Dey, learned advocate for the State has submitted that the trial court has wrongly shifted the burden of proof with regard to commission of an offence under Section 376 of the Indian Penal Code overlooking the fact that the presumption is in favour of the victim in view of Section 114A of the Indian Evidence Act. It is further submitted that the evidence of false promise would be clear from the evidence of the victim and the other prosecution witnesses and the very fact that the Opposite Party no. 1 refused to marry the victim after having been in intimate physical relationship for almost 10 years. It is submitted that the defence has not produced any witness to dispute the veracity of the evidence of the prosecutrix or other prosecution witnesses. It is further submitted that gold

ornaments and jewellery purchased for the purpose of marriage and handed over to the would be son-in-law, were not returned. The allegation with regard to the offence under Section 509 IPC was not even discussed. In the aforesaid background we have to decide whether this is a fit case for admission.

14. The prosecutrix is a qualified lady and in service at TCS.

Her evidence shows that her sexual intercourse with the principal accused had happened more than once at different places. Although such behavior appears to her to be unethical she allowed it multiple times without inhibition in expectation of getting married to the said male partner. It is sought to be argued that the opposite party no.1 has conducted himself in such a manner that had induced a feeling in her that the opposite party no.1 would marry her. In this respect the conduct of the family members of the opposite party no.1 in creating such an impression was highlighted. In this background it is now argued that the circumstances under which a sexual intercourse had taken place was not a result of free consent so as to exonerate the male partner from being prosecuted for the offence.

15. The Hon'ble Supreme Court in ***Uday v. State of Karnataka*, 2003 (1) C Cr.LR (SC) 555: 2003 AIR SCW 1035** has held:

“that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning of the code. There is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent.....” (emphasis supplied)

16. The term consent has been considered by the Hon’ble Supreme Court in **Promod Suryabhan Pawar v. State of Maharashtra and Anr. 2019(9) SCC 608**. The meaning of the term ‘consent’ as laid down in the second description of Section 375 of IPC has been authoritatively observed by the Hon’ble Supreme Court in paragraphs 9 to 12 in the following words:

“9. The present proceedings concern an FIR registered against the Appellant Under Sections 376, 417, 504, and 506(2) of the Indian Penal Code and Sections 3(1)(u), (w) and 3(2)(vii) of SC/ST Act. Section 376 of the Indian Penal Code prescribes the punishment for the offence of rape which is set out in Section 375. Section 375 prescribes seven descriptions of how the offence of rape may be committed. For the present purposes only the second such description, along with Section 90 of the Indian Penal Code is relevant and is set out below.

375. Rape - A man is said to commit "rape" if he -

...

under the circumstances falling under any of the following seven descriptions-

Firstly ...

Secondly. - Without her consent.

...

Explanation 2. - Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

90. Consent known to be given under fear or misconception- *A consent is not such a consent as is intended by any Section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or...*

10. Where a woman does not "consent" to the sexual acts described in the main body of Section 375, the offence of rape has occurred. While Section 90 does not define the term "consent", a "consent" based on a "misconception of fact" is not consent in the eyes of the law.

11. The primary contention advanced by the complainant is that the Appellant engaged in sexual relations with her on the false promise of marrying her, and therefore her "consent", being premised on a "misconception of fact" (the promise to marry), stands vitiated.

12. This Court has repeatedly held that consent with respect to Section 375 of the Indian Penal Code involves an active understanding of the circumstances, actions and consequences of the proposed act. An individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as the various possible consequences flowing from such action or inaction, consents to such action. In Dhruvaram Sonar which was a case involving the invoking of the jurisdiction Under Section 482, this Court observed:

15. ... An inference as to consent can be drawn if only based on evidence or probabilities of the case. "Consent" is also stated to be an act of reason coupled with deliberation. It denotes an active will in mind of a person to permit the doing of the act complained of.

This understanding was also emphasised in the decision of this Court in Kaini Rajan v. State of Kerala:

12. ... "Consent", for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance of the moral quality of the act but after having fully exercised the choice between resistance and assent. Whether there was consent or not, is to be ascertained only on a careful study of all relevant circumstances." (emphasis supplied)

It has been observed further in paragraph 16 thus:

"16. Where the promise to marry is false and the intention of the maker at the time of making the promise itself was not to abide by it but to deceive the woman to convince her to engage in sexual relations, there is a "misconception of fact" that vitiates the woman's "consent". On the other hand, a breach of a promise cannot be said to be a false promise. To establish a false promise, the maker of the promise should have had no intention of upholding his word at the time of

giving it. The "consent" of a woman Under Section 375 is vitiated on the ground of a "misconception of fact" where such misconception was the basis for her choosing to engage in the said act. In Deepak Gulati this Court observed:

21. ... There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the Accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. 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 misrepresentation made to her by the 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 so. Such cases must be treated differently.

...

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the Accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must

have an immediate relevance". Section 90 Indian Penal Code cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the Accused had never really intended to marry her. (emphasis supplied)

17. The aforesaid decision clearly suggests that an individual is said to have consented to an act, when such individual exercised a reasoned choice after being fully aware with the circumstances, actions and consequences of the Act. Further the ratio of the decision states that a promise to marry if made with the intention not to abide by it but to deceive the woman to convince her to engage in sexual relation amounts to deception and a 'misconception of fact' that vitiates the woman's purported consent.
18. There is a clear distinction between rape and consensual sex. The court is required to carefully examine whether the accused had actually wanted to marry the victim or had mala fide motives and had made false promise to this effect only to satisfy his lust as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise and not fulfilling a false promise as clearly stated in **Deepak Gulati v. State of Haryana, 2013 CRI. L.J. 2990**. The court observed that:

“The court must examine whether at an early stage a false promise of marriage was made by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.”

19. Facts reveal that Sambit Banerjee was the classmate of the victim at Moulana Azad College for three years during the period 2003-06 and they developed a relationship. The victim alleged that taking advantage of such relationship, the accused forcefully had intercourse with her at her house, at the house of the accused at Serampore and at his workplace at Guwahati as recent as in the years 2014. The evidence does not show that the opposite party no.1 had no intention of upholding his promise at the time the relationship developed. There is also no evidence suggestive of any promise made to each other of any marriage. Nonetheless that both of them had developed intimate physical relationship leading to ‘patipatra’ is undeniable.

20. It has not been proved that the accused had no intention to marry the prosecutrix at the first time of intercourse or on subsequent occasion. There was no criminal intent or mala fide on the part of the accused while the accused was in relationship with the victim. Every breach of promise to marry cannot be treated as a false

promise and on that basis to prosecute a person for the offence under Section 376 would be a manifest injustice.

21. The evidence clearly shows that they were in a relationship and steps were taken towards a marriage which, however, did not fructify as the opposite party no.1 was pressurized for leaving his job at Guwahati and to take up a job in Kolkata and to live with her along with her parents.

22. The opposite party no. 1 felt that no self-respecting person could agree to such a demand. It seems that the relationship became unpleasant and bitter because of such demand and insistence and had ultimately resulted in several criminal complaints being lodged against the prospective son-in-law by the family of the prosecutrix. The accused has stated in his examination under Section 313 Cr.P.C. that the prosecutrix and her father held him by his collar and assaulted him. It further transpires from the evidence of PW-1 that several police complaints were also made by the mother of the victim alleging such incidents.

23. The aforesaid background furnishes reason for the marriage not being finalized and in the light of the aforesaid events the allegation of a forceful intercourse needs to be considered. The court cannot shut its eyes to such evidence on record as the presumption under Section 114A is rebuttable. The evidence on record would show that the

accused had given satisfactory explanation to rebut the presumption under Section 114A. The acrimonious relationship developing in and around the ceremony of patipatra seems to be the reason for the marriage not happening. In this regard the finding of the learned Trial Judge is relevant. The learned trial judge on consideration of the evidence and testimony of the prosecutrix held that the couple had physical relation more than once. PW1 alleged that the principal accused convinced her each time in the backdrop of a promise to marry her. She even alleged forceful intercourse. The evidence on record establishes the fact that the prosecutrix is a highly qualified lady pursuing an independent job and also carrying out her task not only within the country but also abroad. The question that arises is how far a lady with such background and independence can be forced to act against her will. It is to be considered in the backdrop of the fact that, no complaint was made by the prosecutrix before her family members or before the prospective in laws against any such unwanted advances of the principal accused at any point of time after their relation was known to both the families. The evidence clearly discloses consensual sex by two adult persons knowing fully well the consequences of such relationship.

24. The learned trial judge in the backdrop of evidence discussed in detail observed:

“Now, no close scrutiny of the materials on record, shows that the principal accused defended his cause by alleging that after the execution of the ‘patipatra’ the prosecutrix pressurized him for leaving the job at Guwahati and to take a job at Kolkata and to live at her home as domesticated son. Viewing the annulment of marriage in this backdrop, I find that here is no such fact to hold that the principal accused had intention to deceive from the very inception of his relation with the prosecutrix.”

25. The learned Single judge has taken into consideration the several complaints lodged against the prospective son in law and his family members and the assault on the accused no.1 by the prosecutrix and her father. It was on such consideration we are of the view that the allegation of rape is not established.
26. There is nothing on record to show that any search or seizure was carried out for recovery of articles alleged to have been parted with in furtherance of promise to marry.
27. The learned trial court has considered the evidence of the parties and arrived at a finding that there is no criminal intention attached with regard to the purchase of the articles in expectation of the marriage. Although the FIR was lodged both under Sections 420 and 406 IPC but, there is a difference between two offences. In a criminal breach of trust, the initial entrustment was lawful whereas in a cheating there is a dishonest inducement to deliver any property. The prosecution has to make out a clear case of

either cheating or criminal breach of trust. The prosecution has failed on both counts. The demand for dowry was also not proved.

28. Learned advocate for the State could not place any evidence to show wherefrom the allegation of cheating or criminal misappropriation or a demand for dowry was established. The victim and the opposite party were highly placed in the society and in their respective organizations and were not in the need of money or dependent on each other.

29. The appellate court should be extremely chary to interfere with an order of acquittal unless the impugned order is patently illegal and unreasonable and contrary to law. Where the trial court has overlooked a material piece of evidence could also be a ground for interference.

30. The trial court in our view has taken a probable view on appreciation of facts and law in acquitting the accused.

31. Therefore, we do not find any reason to admit the appeal.

32. The appeal has abated against the opposite party no. 2.

33. The prayer for special leave to appeal is rejected.

(Soumen Sen, J.)

(Uday Kumar, J.)