

IN THE HIGH COURT AT CALCUTTA

(Criminal Appellate Jurisdiction)

APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

CRA 698 of 2016

Sahidul Islam

Vs

The State of West Bengal

For the Appellant : Mr. Angshuman Chakraborty,
Mr. Sasanka Sekhar Saha.

For the State : Mr. Debashis Roy, Ld. P.P.
Mr. Saryati Datta.

Hearing concluded on : 15.03.2024

Judgment on : 25.04.2024

Shampa Dutt (Paul), J.:**The Appeal:-**

1. The appeal is against a Judgment and Order of conviction and sentence dated 15.11.2016 and 17.11.2016 respectively passed by the Learned Additional Sessions Judge, 7th Court, Barasat, North 24 Parganas in connection with Session Trial Case no. 05(01)2012 arising out Session case no. 02(06)2011 whereby the Learned Judge was pleased to convict the appellant herein for the offences punishable under Section 376 of the Indian Penal Code and further pleased to sentence the appellant to suffer rigorous imprisonment for 7 years and pay fine of a sum of Rs. Rs. 10000/- in default to suffer rigorous imprisonment for six months.

The Prosecution:-

2. The appellant states that the genesis of the prosecution case relates back to a written complaint made by Rahima Khatun before the officer-in-Charge, Deganga Police Station stating that:-

“There was love relationship between the complainant and the appellant herein since last one year. Thereafter they started to mix up physically and the appellant promised to marry her. The said accused person used to come to her bed room and used to make physical relation with her. On 17.06.2009 at about 1 a.m. the accused entered into her bed room and started physical relation and he was caught red handed.”

3. In course of trial 12 witnesses were examined on behalf of the prosecution and certain documents were exhibited.
4. On completion of trial, the Appellant was convicted as above.
5. Hence the appeal.

The Evidence :-

6. 12 witnesses including the victim were examined.
7. The written complaint (Exhibit 1), statement under Section 164 of Cr.P.C., (Exhibit 3), medical report (Exhibit 2, 8, & 9) along with other documents have been proved and marked Exhibits.

Analysis of Evidence:-

8. The written complaint was filed on 22.06.2009 at 9.15 p.m., though the alleged incident occurred on 17.06.2009. The delay has been explained, as the police refused to accept the initial complaint and the threat of the appellant/accused/convict.
9. The ossification test has shown that the victim was aged more than 17 years but less than 20 years. The trial Court held that the victim was thus **aged about 18 years from the ossification report** and statement of the victim. The medical reports of the victim has not shown any injury but the hymen has been found ruptured.
10. **The contents (relevant) in the written complaint are as follows:-**

“I am Mst. Rahima Khatun, aged about 18 years, D/o Amirali Molla, village – Bhaslia, P.S. Deganga, District – North 24 Parganas. I beg to inform you that a love affair had been developed between Sahidul Islam, aged 23 years, son of

*Hasha Sardar. Village – Bhaslia (Padmapukur), P.S. Deganga, District – North 24 Parganas for about one year and **having sworn by touching the mosque that he would marry me, frequently coming to our house and entering my bed room, he used to have sexual intercourse with me and he used condoms for preventing a child** and on 17.06.2009 at about 1 a.m. the said person entered into my room and like other days, he made sexual intercourse with me and having understood, the members of my family caught him red-handed and when they proposed to marry me, he refused and fled away therefrom.”*

11. The appellant/convict has been found capable of sexual inter course.
12. It thus appears from the written complaint that there was admittedly a love affair between the parties for about one year prior to the incident in this case. The accused having allegedly sworn by touching the mosque that he would marry the victim, started to frequently visit her house and have intercourse with her, a young girl of about 17/18 years of age.
13. The medical report shows that she is capable of intercourse. Her hymen has been found ‘Ruptured’.
14. **The Appellant/Convict at the relevant time was aged about 23 years and unmarried. He had promised the victim by touching the mosque that he would marry her and the victim believing the same cohabited with the Appellant.**

15. The Supreme Court in **Deepak Gulati vs State of Haryana, Criminal Appeal No. 2322 of 2010, on 20 May, 2013**, held:-

*“15. Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the ‘Act 1872’) provides, that if the prosecutrix deposes that she did not give her consent, then the Court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the Act 1872 be pressed into service. Hence, **the sole question involved herein is whether her consent had been obtained on the false promise of marriage.** Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, alongwith the provisions of Section 90 of the Act 1872. Section 90 of the Act 1872 provides, that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.*

*16. This Court considered the issue involved herein at length in the case of Uday v. State of Karnataka, AIR 2003 SC 1639; Deelip Singh @ Dilip Kumar v. State of Bihar, AIR 2005 SC 203; Yedla Srinivasa Rao v. State of A.P., (2006) 11 SCC 615; and Pradeep Kumar Verma v. State of Bihar & Anr., AIR 2007 SC 3059, and came to the conclusion that in the event that the accused’s promise is not false and has not been made with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act(s) would not amount to rape. **Thus, the same would only hold that where the prosecutrix, under a misconception of fact to the extent that the accused is likely to marry her, submits to the lust of the accused, such a fraudulent act cannot be said to be consensual, so far as the offence of the accused is concerned.***

*17. Rape is the most morally and physically reprehensible crime in a society, as it is an assault on the body, mind and privacy of the victim. While a murderer destroys the physical frame of the victim, a rapist degrades and defiles the soul of a helpless female. Rape reduces a woman to an animal, as it shakes the very core of her life. By no means can a rape victim be called an accomplice. **Rape leaves a permanent scar on the life of the victim, and therefore a rape victim is placed on a higher pedestal than an injured***

witness. Rape is a crime against the entire society and violates the human rights of the victim. Being the most hated crime, rape tantamounts to a serious blow to the supreme honour of a woman, and offends both, her esteem and dignity. It causes psychological and physical harm to the victim, leaving upon her indelible marks.

18. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. **There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused 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 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 mis-representation 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. 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. In *Deelip Singh* (supra), it has been observed as under:

“20. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the

parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.”

20. *This Court, while deciding Pradeep Kumar Verma (Supra), placed reliance upon the judgment of the Madras High Court delivered in N. Jaladu, Re ILR (1913) 36 Mad 453, wherein it has been observed:*

“We are of opinion that the expression “under a misconception of fact” is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) states that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married..... “thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person”. ... Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence.”

21. *Hence, it is evident that there must be adequate evidence to show that at the relevant time, i.e. at 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 IPC 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.”

16. The Supreme Court in *Naim Ahamed vs State (NCT of Delhi)*,

Criminal Appeal no. 257 of 2023, on 30.01.2023, held:-

*“20. The bone of contention raised on behalf of the respondents is that the prosecutrix had given her consent for sexual relationship under the misconception of fact, as the accused had given a false promise to marry her and subsequently he did not marry, and therefore such consent was no consent in the eye of law and the case fell under the Clause – Secondly of Section 375 IPC. In this regard, it is pertinent to note that there is a difference between giving a false promise and committing breach of promise by the accused. **In case of false promise, the accused right from the beginning would not have any intention to marry the prosecutrix and would have cheated or deceived the prosecutrix by giving a false promise to marry her only with a view to satisfy his lust, whereas in case of breach of promise, one cannot deny a possibility that the accused might have given a promise with all seriousness to marry her, and subsequently might have encountered certain circumstances unforeseen by him or the circumstances beyond his control, which prevented him to fulfill his promise.** So, it would be a folly to treat each breach of promise to marry as a false promise and to prosecute a person for the offence under Section 376. **As stated earlier, each case would depend upon its proved facts before the court.**”*

17. In the present case the physical relationship between the prosecutrix and the accused started a year prior to the filing of the written complaint, when the victim was only aged about 17 years, when the

appellant/convict with promise to marry her by touching a mosque cohabited with her.

18. The conduct of the appellant clearly shows that right from the beginning he had no intention to marry the prosecutrix/victim and by promising to marry her by touching the mosque, had physical relationship, with a girl aged 17 years, when the relationship started. The prosecutrix believed the false promise of marriage, which was further sought to be strengthened with the appellant touching the mosque.
19. The trial Court has convicted the appellant and imposed the minimum sentence.
20. The evidence on record proves beyond all reasonable doubt that the appellant is guilty of the offence punishable under Section 376 of IPC.
21. The judgment under appeal thus being in accordance with law requires no interference and is affirmed.
22. **CRA 698 of 2016 is dismissed.**
23. Appellant's bail bonds stand cancelled.
24. Appellant/convict to surrender before the trial Court within 30 days from the date of this order to serve out the sentence, in default, the trial shall proceed in accordance with law.
25. All connected applications, if any, stand disposed of.
26. Interim order, if any, stands vacated.

- 27.** Copy of this judgment be sent to the learned Trial Court for necessary compliance.
- 28.** Urgent certified website copy of this judgment, if applied for, be supplied expeditiously after complying with all, necessary legal formalities.

(Shampa Dutt (Paul), J.)