

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

Present:

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 521 of 2006

Ashim Ghosh

-Vs-

The State of West Bengal

For the Appellant : Mr. Ramashis Mukherjee
(Amicus Curiae)

For the State : Mr. Avishek Sinha

Heard on : 07.02.2024, 02.04.2024, 12.06.2024

Judgment on : 02.05.2025

Ananya Bandyopadhyay, J.:-

1. This appeal is preferred against the judgment and order dated 16.06.2006 passed by the Learned Additional Sessions Judge, Fast Track Court 1st, Paschim Medinipur in Sessions Trial Case No.25 of December, 2005 arising out of Kharagpur Town P.S. Case No.09 dated 12.01.2003 convicting the appellant under Section 313 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for 7 years and a fine of Rs.7000/- in default to suffer further rigorous imprisonment for 7 months and also convicting the appellant under Section 376 of the Indian Penal Code and sentencing to suffer rigorous imprisonment for 7 years and also to pay a fine of Rs.7000/-

in default rigorous imprisonment for 7 months and also convicting the appellant under Section 417 of the Indian Penal Code and sentencing to suffer rigorous imprisonment for 1 year and a fine of Rs.1000/- in default rigorous imprisonment for 1 month and all the substantive sentences will run concurrently.

2. The prosecution case precisely stated on 12.01.2003 a written complaint was filed by the complainant of being romantically involved with the appellant for few years, with frequent visits to his house and vice versa. One day the appellant took her to a temple and swore to marry her soon. Subsequently, they were intimate enough for the complainant to become pregnant for five months. The appellant's father learning of her pregnancy, demanded Rs. 50,000/- to be procured from her parents, for solemnizing the marriage which the complainant did not disclose to her father, who was impoverished and bed ridden. On, 19.10.2002 in the evening, the appellant's father invited the complainant to his house where the appellant's parents, uncle, aunt, asked her to undergo D.N.C., in default, she was threatened to be killed. As the complainant did not accede, she was slapped and confined in the house. In the early morning, the complainant was taken to Midnapore Happy Health Homo Nursing Home where she was aborted, with the assistance of a local doctor Sujit Kanungo. On regaining senses, the complainant did not find the appellant's parents and the said doctor. Only the appellant boarded her into a bus and fled on the pretext of taking betel leaf. She reached Kharagpur and took a rickshaw for going home. Thereafter, the appellant's parents shifted, the appellant out of the house to prevent complainant's entry in

their house. The appellant's family members registered a missing diary vide no.1254 in her absence. She filed the complaint belatedly as the relatives of the appellant assured to bring her to their house after two months of their marriage.

3. On the basis of the aforesaid complaint, the Police initiated Kharagpur P.S. Case No.09 dated 12.01.2003 under Sections 493/376/313/420 of Indian Penal Code against the appellant.
4. After completion of investigation, the Police submitted charge-sheet being no.139 dated 30.09.2003 under Sections 493/376/313/420 of the Indian Penal Code.
5. Charges were framed against the appellant to whom they pleaded not guilty and claimed to be tried.
6. In order to prove its case, the prosecution examined as many as 11 witnesses and exhibited certain documents.
7. The Learned Amicus Curiae representing the appellant submitted as follows:-
 - i. Apparently, the prosecutrix being a major as deposed by her to be of 21 years of age, was involved in a romantic relationship with the appellant for 4 years prior to lodge the complaint. She used to visit the house of the appellant often and the appellant also used to visit her house. It was the further case of the prosecution as well as the deposition of PW-7, the prosecutrix that they were mixing freely for 4 years and once the appellant took her to a village Temple where he promised to marry her and since then they became closer. She used

to go to the house of the appellant and had sexual intercourse with him and became pregnant. Such allegation did not fall within the ambit of Section 376 of the Indian Penal Code because first, she was a major and secondly she had consented to sexual intercourse with the appellant as evidence from her deposition.

- ii. The Learned Judge ought to have taken into consideration that Section 375 of the Indian Penal Code had to be read along with Section 90 of the Code regarding consent compared with “will” and “submission”. Consent given by a woman believing the man’s promise to marry her would fall within the expression “without her consent” only if it was established that from the very inception the man never really intended to marry her and the promise was just a hoax. From the instant case it had not been established by the prosecution that the appellant had no intention to marry the prosecutrix from the very beginning. As such the said fact did not constitute misconception of fact as a false promise was not such a fact for which no offence either under Section 376 of the Indian Penal Code or under Section 417 of the Indian Penal Code had been made out against the appellant.
- iii. The Learned Judge did not take notice of the fact that the other prosecutions witnesses mainly the relatives of the prosecutrix fully corroborated with the version of PW-7 as regards her love affair with the appellant for a considerable period and intimacy between them which resulted in the submission of the prosecution to the appellant with full consent which going to establish that the prosecution had

failed to prove the case against the appellant beyond all reasonable doubt.

- iv. The Learned Judge totally lost sight of the fact that PW-7 herself stated in her evidence that she did not try to get out from the house of the appellant in the night of 19.10.2002. In the morning also she did not scream and also while going by the road in a taxi she did not object to the abortion at the nursing home. She did not lodge any diary at the police station after returning from nursing home and also regarding forceful confinement of her by appellant and others which clearly establishes that she was a connecting party to the aforesaid incident which in no way could fasten the appellant with the alleged commission of offence under Section 313 of the I.P.C. along with other Sections of the Indian Penal Code.
- v. The Learned Judge also did not take into consideration the evidence of PW-11, the Investigating Officer who stated in his deposition that all the prosecution witnesses in their statements under Section 161 of the Code of Criminal Procedure stated one Annapurna, the mother of PW-7 accompanied her to the nursing home for abortion which totally nullifies the story of the prosecution that PW-7 was taken forcibly by the appellant and others to the nursing home for abortion. However, the evidence as given by the witnesses during trial was a complete new story which did not find place in their earlier statements before the Investigating Officer, as such, such evidence

for the first time before court had got no value at all and significance in the eye of law.

8. The Learned Advocate representing the State submitted that the prosecution was able to prove its case based corroborative evidence of the prosecution witnesses and the appeal shall be dismissed.

9. A circumspection of the evidence of the prosecution witnesses revealed as follows:-

- i. PW-1 deposed that the appellant was in frequent contact with his family and his sister. The victim reciprocally visited the residence of the appellant. With passage of time, a relationship developed between them. On 19.10.2002 the victim who was approximately 4-5 months' pregnant as a result of the intimate relationship between both the parties, was called to the appellant's residence. The victim did not return on that date despite extensive searches amongst the houses of relatives, her whereabouts could not be ascertained. Consequently, a missing diary was lodged at Kharagpur Town Police Station the following day. On the next day at about 01:30-02:00 P.M., the victim returned home visibly fatigued and exhausted. On being questioned, the victim disclosed to have been detained overnight at the appellant's residence and, thereafter, taken to Happy Health Nursing Home, Midnapore on the next morning where medical procedures were conducted in the presence of the appellant and his parents. Thereafter, PW-1 went to the house of the appellant to be informed of the appellant's absence at home who could not be located for the next

7-8 months. The appellant's father was not present at a meeting held with the local people for settlement of the issue. Thereafter, the victim lodged the criminal case. The Investigating Officer did not examine PW-1.

- ii. PW-2 a neighbor confirmed of knowing the relationship which existed between the families of the disputants and also the victim to have aborted and undergone D.N.C. at Midnapore from local people barring the victim herself who had been the commissioner of the ward. PW-2 was also not examined by the Investigating Officer.
- iii. PW-3 in essence reiterated the evidence of PW-1 supplementing the same stating that the victim under duress and coercion was subjected to abort her pregnancy of 5 months at the aforesaid nursing home in the presence of the appellant and his parents and in the presence of one Dr. Kanungo.
- iv. PW-4 being sister-in-law of the victim corroborated the evidence of PW-1 and PW-3.
- v. PW-5 being the brother of the victim conceded to the evidence of PW-1, PW-3 and PW-4. The evidence of PW-1, PW-3, PW-4 and PW-5 in the context of abortion and the D.N.C. procedure had been hearsay since none of them were present at the hospital as aforesaid at the relevant time.
- vi. PW-6 deposed to be in-charge of Medical Unit of Midnapore Zilla Parishad and also working as part time R.M.O. in a nursing home owned by his wife Malarani Mondal namely Happy Health Home. On

20.10.2002 the victim visited the nursing home with a complaint of bleeding in her private part along with pain in abdomen and was accordingly admitted. She was subjected to a complete abortion by D.N.C. on 20.10.2002 and was discharged on 21.10.2002. The certificate issued by him bearing his signature and seal was marked as Exhibit-1. He further stated one Maya Santra gave consent of the abortion as the mother of the girl, however, the same could not be verified by him. The victim had identified Maya Santra to be her mother who signed on the paper and gave consent along with the oral consent of the victim without which the abortion could not have been undertaken. He further submitted to have explained the full consequences of abortion to the victim and her mother prior to have obtained the consent from them. Neither the victim nor her mother told him that the victim had been pressurized or persuaded by anybody else to undergo abortion. Apart from the victim and her mother no one else appeared before him.

- vii. PW-7 the victim narrated the entire incident along with the relationship between the parties in consonance with the evidence of PW-1, 2, 3, 4 and 5.
- viii. PW-8 deposed the father of the victim admitted to have known the relationship that existed between the victim and the appellant for about 4 years which initially was not known to him in depth apart from near speaking terms. Subsequently, he was informed that the victim was called to the appellant's house and thereafter detained

and taken to nursing home at Midnapore for abortion. The appellant and his family subsequently denied the entire episode and disclaimed to attend the meeting for settlement in the locality. PW-8 further submitted to have learnt about her daughter's pregnancy after she underwent abortion.

- ix. PW-9 affirmed the evidence of PW-1 being the brother of the victim.
- x. PW-10, the Medical Officer, deposed to have examined the victim in connection with the instant criminal case whereupon the victim stated her age to be 22 years. On examination, injury over the private parts of the victim as well as foreign body were not detected. His report had been marked as Exhibit-3/1. He obliterated the possibility of immediate forcible sexual relationship which might have occurred in the past. However, the victim at the time of examination did not blame anybody or complaint against anybody.
- xi. PW-11 was entrusted to investigate the Kharagpur P.S. case as aforesaid. He prepared the rough sketch map along with index marked as Exhibit-6. He examined the available witnesses and recorded their statements on different dates and arrested Kalana Ghosh on 14.01.2004. The ossification test of the victim along with medical examination were conducted. The victim statement was recorded under Section 164 of the Code of Criminal Procedure. The medical examination of the appellant was also conducted on 16.07.2003 and the report of the same was marked as Exhibit-7. The medical report of examination of the victim was marked as Exhibit-1.

On completion of the investigation, he filed charge-sheet on 30.09.2003 against six accused persons. He collected the Xerox copy of admit card of the Board of Secondary Education of the victim girl which was marked as Exhibit-8.

10. The Hon'ble Supreme Court in **Tilak Raj v. State of H.P.**¹ held the following:-

“17. The evidence as a whole, including the FIR, testimony of the prosecutrix and the MLC report prepared by the medical practitioner clearly indicates that the story of the prosecutrix regarding sexual intercourse on false pretext of marrying her is concocted and not believable. In fact, the said act of the appellant seems to be consensual in nature. The trial court has rightly held thus:

“23. If the story set up by the prosecutrix herself in the court is to be believed, it does come to the fore that the two were in a relationship and she well knew that the accused was duping her throughout. Per the prosecutrix, she had not succumbed to the proposal of the accused. Having allowed access to the accused to her residential quarter, so much so, even having allowed him to stay overnight, she knew the likely outcome of her reaction. Seeing the age of the prosecutrix which is around 40 years, it can be easily inferred that she knew what could be the consequences of allowing a male friend into her bedroom at night.

24. The entire circumstances discussed above and which have come to the fore from the testimony of none else but the prosecutrix, it cannot be said that the sexual intercourse was without her consent. The act seems to be consensual in nature.

25. It is also not the case that the consent had been given by the prosecutrix believing the accused's promise to marry her. For, her

¹(2016) 4 SCC 140

testimony itself shows that the entire story of marriage has unfolded after 5-1-2010 when the accused was stated to have been summoned to the office of the DSP. Prior to 5-1-2010, there is nothing on record to show that the accused had been pestering the prosecutrix for any alliance. The prosecutrix has said a line in her examination-in-chief, but her cross-examination shows that no doubt the two were in a relationship, but the question of marriage apparently had not been deliberated upon by any of the two. After the sexual contact, some talk about marriage had cropped up between the two. Thus, it also cannot be said that the consent for sexual intercourse had been given by the prosecutrix under some misconception of marriage.”

18. *As far as the conviction of the appellant under Sections 417 and 506, Part I IPC is concerned, a close scrutiny of evidence of the prosecutrix (PW 2) along with other prosecution witnesses is done by this Court. Section 417 IPC prescribes punishment for the offence of cheating as defined under Section 415 IPC. Section 415 IPC reads thus:*

“415. Cheating.—Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to ‘cheat’.

Explanation.—A dishonest concealment of facts is a deception within the meaning of this section.”

19. *The ingredients required to constitute the offence of cheating have been discussed by this Court in Ram Jas v. State of U.P. [Ram Jas v. State of U.P., (1970) 2 SCC 740 : 1970 SCC (Cri) 516] as under: (SCC p. 743, para 3)*

“(i) there should be fraudulent or dishonest inducement of a person by deceiving him;

(ii)(a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or

(b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and

(iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.”

20. *A careful reading of the evidence on record clearly shows that there is no evidence against the appellant from which it can be conclusively inferred by this Court that there was any fraudulent or dishonest inducement of the prosecutrix by the appellant to constitute an offence under Section 415 IPC. For conviction of the appellant for the abovesaid offence, it is important that all the necessary ingredients constituting an offence under the said section must be proved beyond reasonable doubt. In the instant case, the appellant cannot be convicted for the offence of cheating punishable under Section 417 IPC as the prosecution has failed to prove all ingredients of the said offence beyond reasonable doubt.”*

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 relationship between the parties existed for more than 4 years prior to the incident which provoked the victim to lodge a complaint. Admittedly, both the victim and the appellant being adult were in a relationship proximate enough to be noticed by the local people who were aware of such intimacy for a prolonged period. The physical intimacy between the parties bore the consent of the victim on the promise to marry her as demanded by the victim. The consent of the victim in a physical relationship is apparent and cannot be considered to be forcible contracted beyond her Will and consent to be ravished on protest. The victim did not raise objection to such acts and was pregnant which evinced the fact of the victim subjugating herself to the control of the appellant. Such circumstances of a consensual

relationship for nearly 4 years without protest cannot fall within the purview of commission of an offence of rape. Secondly, the prosecution failed to prove that the appellant had deception intention from the very inception to ravish the victim, impregnate her and thereafter devastatingly abandon her.

13. The prosecution failed to prove further that the victim was unlawfully confined and detained in the house of the appellant and that the parents of the victim along with the appellant were present at the time the victim underwent abortion as per the version of PW-6.

14. If the mother of the victim was present at the hospital while she was undergoing in the process of D.N.C., the possibility of the victim returning home on the next day in a disabled and weakened state on her own without the mother as stated by PW-1, 3, 4 and 5 seemed and reliable and unbelievable. Both the victim and her mother according to PW-6 had consented for the abortion. In the instant case, indubitably there had been a moral turpitude and a condemnable abandonment of the victim, however, the prosecution could not prove its case of cheating under Section 417 of committing the offence of rape upon the victim with an intention to violate her to her detriment, causing damage and harm to her body from the very inception continuing for a period of 4 years as would appear from the evidence of PW-7.

15. It is a classic example where victim falls prey to her own folly and cause harm to her dignity on account of differences and fall-out between the families. The prosecution case faltered on the following grounds:-

- i. Delay in filing complaint without reasonable explanation.

- ii. Serious contradictions in the depositions, several discrepancies and uncorroborated statements observed in the deposition of witnesses.
 - iii. Alleged abortion was conducted on free consent of the victim as well as her mother in her presence, corroborated by the deposition of the doctors.
 - iv. Absence of ingredients of Section 417 of the Indian Penal Code to have premeditatedly committed the offence with dubious intention of violation, deprivation and deception from the beginning of their relationship.
 - v. Ingredients of Section 313 as well as Section 376 of the Indian Penal Code were not proved.
16. In view of the above discussions, the prosecution could not able to prove its case beyond reasonable doubt and as such the instant criminal appeal being CRA 521 of 2006 is allowed.
17. Under such circumstances, the judgment and order dated 16.06.2006 passed by the Learned Additional Sessions Judge, Fast Track Court 1st, Paschim Medinipur in Sessions Trial Case No.25 of December, 2005 arising out of Kharagpur Town P.S. Case No.09 dated 12.01.2003 is set aside.
18. Accordingly, the instant criminal appeal being CRA 521 of 2006 is disposed of.
19. There is no order as to costs.
20. I record my appreciation for the able assistance rendered by the Learned Advocate Mr. Ramashis Mukherjee as *Amicus Curiae*, appearing for the appellant, in disposing of this appeal.

21. Trial Court records along with a copy of this judgment be sent down at once to the Learned Trial Court for necessary action.
22. 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.)