

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

HON'BLE JUSTICE PARTHA SARATHI SEN

C.R.A. No. 591 of 2013

With

CRAN 1 of 2013 (Old No. CRAN 3383 of 2013)

Sk. Sahadat

-Versus-

The State of West Bengal

For the appellant: Mr. Amal Krishna Samanta, Adv.

For the respondent/State: Ms. Sreyashee Biswas, Adv.

Last Heard on : 13.02.2025

Judgment on : 18.02.2025

PARTHA SARATHI SEN, J. : -

1. In this appeal the judgement of conviction dated 27.06.2013 and order of sentence dated 28.06.2013 as passed in Sessions Trial no.01 (01)/2013/Sessions Case no.201 (07)/ 2012 by the learned Additional Sessions Judge, Fast Track, 1st Court, Tamluk, Purba Mednipur is impugned. By the said judgement and order of sentence learned trial court found one Sk. Sahadat guilty under Section 376 IPC and thus sentenced him to suffer RI for seven years and also to pay fine of Rs.5000/- i.d. to suffer SI for six months. The said Sk. Sahadat felt aggrieved and thus preferred the instant appeal.

2. For effective adjudication of the instant appeal the facts leading to initiation of the aforesaid sessions trial is required to be dealt with in a nutshell.

3. One XXX (name of the victim not disclosed as per direction of the Hon'ble Supreme Court) of village -YYY, P.S Tamluk and District Purba Mednipur filed a petition under Section 156 (3) CrPC in the court of Learned Chief Judicial Magistrate, Purba Mednipur against the present appellant as well as against his four relatives stating inter alia that near to her house there was a meat shop belonging to the elder brother of the present appellant. It has been stated further that the present appellant being accused no.1 used to work in the said meat shop and since the victim used to purchase meat from the said shop, she came into contact with the appellant and subsequently a love relationship developed between her and the accused no.1 (the appellant herein). In the said petition it has been stated that the present appellant made false promise to marry her and the other co-accused persons used to instigate the accused no.1 to develop such relationship with the victim.

4. It is the further case of the informant that with the assistance and abetment of the other co-accused persons, the accused no.1 (the appellant herein) on 20.04.2011 at about 7/7:30 p.m took her to a lonely place and raped her. It has been further disclosed in the said petition that thereafter the accused no.1 repeatedly raped the victim and as a consequence thereof, the victim became pregnant. The victim insisted the accused no.1 to marry her to which the accused no.1 asked her to terminate such pregnancy with an assurance that he would marry her after such termination.

5. It has been stated further in the said petition that finding no other alternative the victim had to terminate her pregnancy and even thereafter the accused no.1 did not marry her and subsequently she came to learn that accused no.1 was already married.

6. On the basis of such petition as filed under Section 156 (3) CrPC and as directed by the learned CJM, Purba Mednipur, Tamluk P.S Case no. 492 of 2011 dated 04.11.2011 under Sections 376/417/109 IPC was started. Investigation was taken up and on completion of the same charge sheet was submitted under Sections 376/417/109 against all the accused persons. After commitment and transfer the learned trial court on 02.01.2013 considered the charges against the accused persons and on the said date charge under Section 376 was framed against the accused no.1 Sk. Sahadat (the appellant herein) and charges under Section 109 read with Section 376 were framed against the rest of the accused persons.

7. As discussed hereinabove learned trial court after considering the evidence as adduced by the prosecution, both oral and documentary found the present appellant guilty under Section 376 IPC and thus sentenced him to suffer imprisonment as indicated hereinabove. However, by the self same judgment the said trial court found that the charges under Section 376 read with Section 109 IPC have not been proved against the rest of the accused persons and thus were acquitted from the said case.

8. On perusal of the trial court record it reveals that in order to bring home the charges against the accused persons the prosecution has examined 10 witnesses in all and several documents have been exhibited on their behalf. On behalf of the defence no evidence was adduced. However, from the trend of cross-examination of the prosecution witnesses as well as from the answers as given by the accused persons in their respective examinations under Section 313 CrPC it appears to this Court that the defence case is based on clear denial and false implication.

9. Trial court record reveals that the victim girl has been tendered as PW1. PW2, PW3 and PW 4 are the co-villagers of the victim as well as of the accused persons. PW5 and PW6 are the father and mother of the victim girl. PW7 is a Judicial Magistrate who recorded the statement of the victim under Section 164 CrPC. PW8 is a medical officer of Purba Mednipur District Hospital who examined the accused. PW10 is the IO of the said session case.

10. Since in the impugned judgment the learned trial court has elaborately discussed the evidence of all the prosecution witnesses as well as with regard to the exhibited documents this Court thus find it unnecessary to discuss the evidence of all the prosecution witnesses all over again except to the extent it is necessary for effective disposal of the instant appeal.

11. In course of his argument Mr. Samanta, learned advocate appearing on behalf of the appellant at the very outset draws attention of this Court to the petition under Section 156(3) CrPC as filed by the victim and as has

been exhibited before the learned trial court with the mark Exhibit 1. Attention of this Court is also drawn to Exhibit 2, being the statement of the victim girl as recorded under Section 164 CrPC. Mr. Samanta also draws attention of this Court to the evidence of PW1. It is submitted by Mr. Samanta that learned trial court while passing the impugned judgement has failed to notice the variance of place of occurrence of the alleged incident as well as the time of the occurrence of the alleged incident. It is submitted by Mr. Samanta that from the written complaint of the victim it would reveal that the alleged rape upon her was committed firstly on 20.04.2011 at about 7/7:30 pm at a lonely place. It is further submitted by Mr. Samanta that from the statement of the victim as recorded under Section 164 CrPC (Exhibit 2) it would reveal that it was the version of the victim that on the relevant night she spent the entire night in the company of the appellant no.1 and at about 2 pm the appellant raped her. It is further submitted that from the evidence of PW1 it would reveal that the alleged incident of rape occurred on the relevant day at 9:30 pm near a bush near Rakhal Memorial Maidan, Tamluk while the victim girl was returning from a fair with all the accused persons. It is thus submitted that such variance of place of occurrence of the alleged incident as well as the variance of time raised a serious doubt with regard to the genuineness of the complaint as lodged by the victim girl.

12. In his next fold of submission Mr. Samanta draws attention of this Court to the un-amended provision of Section 375 IPC as well as to Section 90 of the Indian Penal Code. It is submitted by Mr. Samanta that

from the evidence of PW1 it would reveal that at the time of the alleged incident she was 17 years of age and therefore *clause Sixthly* of Section 375(un-amended) IPC has got no manner of application since at the relevant time the victim was over 16 years of age. Mr. Samanta further submits that provisions of Section 90 IPC, more specifically the consent given by the victim under misconception to the alleged co-habitation has got no manner of application since it would reveal from the trial court record that there was love relationship between the victim and the accused no.1 and thus by no stretch of imagination it can be said that the consent of the victim was obtained either under misconception or in a fraudulent manner.

13. Mr. Samanta further submits that the learned trial court has also miserably failed to visualize that the prosecutrix has failed to explain the delay in lodging the FIR which raises a serious doubt with regard to the genuineness of the written complaint. It is further submitted by Mr. Samanta that in absence of cogent medical document more specifically with regard to the alleged abortion of the victim for terminating her five months pregnancy the learned trial court is not at all justified in passing the impugned judgement.

14. Mr. Samanta places his reliance upon the following reported decisions namely:-

i.K.P Thimmappa Gowda vs. State of Karnataka reported in (2011) 14 SCC 475;

ii.Hari Majhi @ Hari Malik vs. The State reported in 1989 SCC Online Cal 255;(1990) 1 CHN 191: 1990 Cri LJ 650: (1989-90_ 94 CWN 752.

15. Per contra, Ms. Biswas, learned advocate appearing on behalf of respondent/State in course of her argument draws attention of this Court to page nos. 50, 51 and 52 of paper book. It is submitted by Ms. Biswas that in the impugned judgement learned trial court has assigned sufficient reason as to why he believed the testimony of the victim girl. It is further submitted by Ms. Biswas that the learned trial court after careful consideration of the evidence of PW1 rightly found that the victim girl who at the time was a minor was simply allured and enjoyed by the present appellant to fulfil his lust. Ms. Biswas thus submits that the learned trial court is also very much justified in not considering the minimal laches in investigation holding that the victim girl has got no control over the process of investigation as done by the IO.

16. It is further submitted by Ms. Biswas that the learned trial court also noticed due corroboration of the evidence of PW1 from the evidence of her parents (PW5 and PW6). It is thus submitted that it is a fit case for dismissal of the instant appeal.

17. On careful perusal of the entire materials as placed before this Court and after giving due consideration over the submissions of the learned advocates for the contending parties it appears to this Court that undoubtedly there lies a variance with regard to the place of occurrence of the alleged incident as well as with regard to the time of occurrence of the alleged incident. As rightly pointed out by Mr. Samanta the victim in her petition under Section 156 (3) CrPC categorically stated that on 20.04.2011 at about 7/7:30 pm the alleged incident of rape took place for

the first time near a bush and thereafter the same was continued day after day. Trial court record reveals that at the earliest opportunity the victim was produced before PW7 (Judicial Magistrate) for recording her statement under Section 164 CrPC wherein the victim stated that the occurrence of rape took place at 2 am in the meat shop room of the appellant where she spent her night with the appellant. From the evidence adduced by PW1 it would reveal however that on the relevant day she was raped by the appellant no.1 near a bush on the way to her home at 9:30 pm. No plausible explanation could be advanced on behalf of the prosecution with regard variance of the P.O and the time of occurrence which definitely, in considered view of this Court, weakens the case of the prosecution.

18. This Court has also noticed another glaring discrepancy in the evidence of PW1 inasmuch as in her deposition she stated that on the relevant day immediately prior to her rape by the appellant herein at about 9:30 pm she was coming back from fair not only with the appellant but also with the other co-accused persons who are the close relatives of the present appellant. On careful scrutiny of the petition under Section 156 (3) CrPC and the statement of the victim as recorded under Section 164 CrPC this Court finds no whisper with regard to such assertion.

19. At this juncture if I look to the cross-examination of PW 10 (IO) it reveals that in course of his cross-examination PW10 being the IO categorically stated that the PW1 did not state to him that she was raped by the appellant at 9:30 pm at the instigation of the other co-accused

persons. This Court thus finds serious contradiction and/or omission in the evidence of PW1. This Court also noticed contradiction in the evidence of PW5 and PW6, since in his examination –in-chief PW5 being the father of the victim deposed to the effect that after commission of the alleged rape by the appellant he and his family members requested the appellant to marry the victim while PW6 testified that she made such approach after abortion of her daughter.

20. From the evidence of PW8 i.e. the medical officer of the Purba Mednipur Distirct Hospital as well as from Exhibit 3 being the medical examination report of the victim this Court finds no whisper with regard to the alleged abortion and/or with regard to the alleged previous pregnancy of the victim. The IO in course of investigation made no attempt to seize any paper with regard to the said alleged abortion.

21. Since in the instant appeal it has been argued on behalf of the respondent/State that consent of the minor victim was obtained on a false pretext of marriage and under misconception that the present appellant would marry her, such consent ought not to be considered as a valid consent under Section 90 of the IPC.

22. This Court proposes to look to the propositions of law in this regard as has been enunciated in the reported decision of ***Pramod Suryabhan Pawar vs. The State of Maharashtra and Anr.*** reported in **(2019) 4 CCrLR (SC)15** wherein the Hon'ble Apex Court while dealing with the proposition of Section 90 IPC read with Section 175 IPC expressed the following view:-

“37. The sum and substance of the aforesaid decisions would be that if it is established and proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 of the IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Sections 375 of the IPC and can be convicted for the offence under Section 376 of the IPC.

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.

To summarise the legal position that emerges from the above cases, the “consent” of a woman with respect to Section 375 must involve an active and reasoned deliberation towards the proposed act. To establish whether the “consent” was vitiated by a “misconception of fact” arising out of a promise to marry, two propositions must be established. The promise of marriage must have been a false promise, given in bad faith and with no intention of being adhered to at the time it was given. The false promise itself must be of immediate relevance, or bear a direct nexus to the woman’s decision to engage in the sexual act.”

23. The same view was taken in another reported decision namely ***Anurag Soni vs. State of Chhattisgarh*** reported in ***(2019) SCC Online 509: (2019) 13 SCC 1.***

24. Keeping in mind the settled position of law as discussed supra and as has been held by the Hon'ble Apex Court in the aforementioned two reported decisions namely; ***Pramod Suryabhan Pawar (supra)*** and ***Anurag Soni (supra)*** if I once again look to the evidence of PW1 it appears from her examination-in-chief that on the relevant day she was raped near a bush at about 9:30 pm by the appellant practically in presence of the other co-accused persons. She further testified that thereafter she used to go to the shop of the appellant and at that time she disclosed to the appellant that she became pregnant. She further testified that she requested the appellant to marry her but the appellant assured her that in the event she aborts her child, he will marry her and subsequent to her abortion the appellant refused to marry her. It thus appears from the testimony of PW1 that practically she led no evidence that at any point of time the appellant co-habited with her with a false assurance to marry her and on such assurance he obtained her consent on misconception of fact within the meaning of Section 90 IPC.

25. In view of the discussion made hereinabove this Court thus finds sufficient merit in the instant appeal. Accordingly the instant appeal is hereby allowed.

26. Consequently the judgment of conviction dated 27.06.2013 and order of sentence dated 28.06.2013 as passed in Sessions Trial no.01

(01)/2013/Sessions Case no.201 (07)/ 2012 by the learned Additional Sessions Judge, Fast Track, 1st Court Tamluk, Purba Mednipur is hereby set aside.

27. The appellant Sk. Sahadat is thus found not guilty under Section 376 in connection with Sessions Trial no.01 (01)/2013/Sessions Case no.201 (07)/ 2012 as disposed of by the learned Additional Sessions Judge, Fast Track, 1st Court Tamluk, Purba Mednipur.

28. The appellant Sk. Sahadat is thus discharged from his bail bonds and be set at liberty at once if not wanted in connection with any other case with the disposal of the instant appeal.

29. All pending applications including CRAN 1 of 2013 (Old No. CRAN 3383 of 2013) are also disposed of.

30. Department is hereby directed to send down the trial court record along with a copy of this judgement to the trial court forthwith.

31. Urgent Photostat certified copy of this judgement, if applied for, be given to the parties on completion of usual formalities.

(Partha Sarathi Sen, J.)