

Bombay High Court

Jagdish Raghunath Mankar vs State Of Maharashtra on 24 February, 2021

Bench: S. K. Shinde

Shambhavi

16-APEAL-354-1998.o

N. Shivgan

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Shambhavi N.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

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Date: 2021.02.26

CRIMINAL APPELLATE JURISDICTION

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CRIMINAL APPEAL NO.354 OF 1998

Jagdish Raghunath Mankar

Age 27 years, Occ: Tempo

Driver, Residing at

Manikpur Tal: Vasai,

District: Thane

... Appellant

Vs

The State of Maharashtra

... Respondents

...

Mr. Advait M. Sethna appointed advocate with Mr. Pravan A. Gohil with Mr. Eshaan Saroop for the Appellant.

Mrs. Sharmila Kaushik, APP for the Respondent-State.

CORAM : SANDEEP K. SHINDE J.

DATE : 24th FEBRUARY, 2021.

ORAL JUDGMENT :

The appellant herein is convicted of the offence punishable under Section 417 of the Indian Penal Code, 1860 ('IPC' for short) and sentenced to suffer rigorous Shivgan 1/13 16-APEAL-354-1998.odt imprisonment for six months and to pay fine of Rs.200/- in default to suffer simple imprisonment for one month. 2 It is against the conviction and sentence passed in Sessions Case No.256 of 1996 by the Additional Sessions Judge, Palghar, convict has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C.' for short).

3 Prosecution case in brief, is that, prosecutrix was working on construction site where she be-friended with the accused and in short span, they engaged in sexual relations, on more than one time. She would allege, appellant did not disclose his marital status but presuming, he would marry her, she submitted to his sexual desires on more than one occasion. Later, when she learnt that applicant was married, but by the time, she was pregnant, Soon thereafter, she lodged the complaint in September, 1990 whereupon the offence punishable under Section 376 Shivgan 2/13

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5 The learned Trial Court upon appreciating the evidence of the prosecutrix, recorded the finding, that it was consensual act and, thus, acquitted the accused of the offence punishable under Section 376 of the IPC. The learned Trial Court while acquitting the accused of the charge under Section 376, has observed and held, 'From the version of the complainant, as stated earlier, accused did not have sexual intercourse with the complainant against her will and without her consent. Sexual intercourse by a lady of 20 years age with consent cannot be said to be rape, as the lady is capable of giving her consent. In such background charge for offence punishable under Section 376 of the I.P.C. against the accused must fail.' Shivgan 3/13 16-APEAL-354-1998.odt 6 The State has not preferred the appeal against the order of acquittal as stated above. 7 The learned Trial Judge, however, convicted the accused of the offence punishable under Section 417 of the IPC and sentenced to suffer rigorous imprisonment for six months.

8 Mr. Sethna, the learned counsel for the appellant, in support of the appeal would argue that offence of cheating falls under Chapter XVII of the IPC, which relates to the, "offence against the properties" and, therefore, offence under Section 415 read with Section 417, necessarily relate to the property, which in the instant case is not involved and, therefore, the conviction under Section 417 of the IPC is erroneous. Mr. Sethna further submits the appellant has been acquitted of the charge of rape on the Shivgan 4/13 16-APEAL-354-1998.odt ground that it was consensual act and, therefore, it is irrational, to hold appellant guilty of offence of cheating by intentional deception and therefore, once the Court concludes, it was consensual act, on the same set of facts and evidence, accused cannot be convicted for falsehood or concealment of his marital status. On these grounds, Mr. Sethna seeks acquittal of the appellant. 9 On the other hand, the learned Additional Public Prosecutor, Mrs. Kaushik supported the conviction and sentence and would contend that the learned Trial Court has correctly applied penal provisions of Section 417 of the IPC to the facts of the case. The learned Additional Public Prosecutor submits that, proposition canvassed by Mr. Sethna that Section 415 of IPC only relates to the property is incorrect and would submit that second part of Section 415 squarely applies to the facts of the case and in support of this submission, she has relied on the judgment of the Hon'ble Apex Court in the case of G.V.Rao v.

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L.H.V.Prasad and Others

and judgment of this Court in

the case of Mangesh Madusudan Kotiyan v. The State of Maharashtra & Anr. in Criminal Appeal No.892 of 2012 decided on 2nd July, 2013.

10 I have carefully considered the submissions of the learned counsel for the appellant and the learned Additional Public Prosecutor for the State. Also perused the evidence and the judgment

cited by the respective counsel in support of their case.

11 Before dealing with the submissions, qua the application of Section 417 of IPC to the facts of the case, let me advert to the evidence of the prosecutrix. In her testimony, she testified that she was living on construction site and be-friended with the accused, whereafter they fell in love with each other. Her evidence in no uncertain terms, let-out, that she presumed, appellant was not married and 1 (2000) 3 Supreme Court Cases 693 Shivgan 6/13 16-APEAL-354-1998.odt believing that he would marry her, she indulged into sexual relationship with him. Her evidence reads as under:

"vkeph vksG[k lqekjs efgU;kiwohZp >kyh- eh fcxkjh dkekyk jk=kS lw/nk lkbZMyk jgkr vls- Pkkj efgU;kr vkeps vksG[khps #ikarj izsekr >kys- R;kus eyk izseklaca/kh pkaxys pkaxys lkaxwu rqb;k'kh eh yXu djhu vls xksMhr lakxwu eyk ,dnept toG dsyh- R;kus R;kps iwohZ yXu >kys vLY;kckcr u lkaxrkp ek>s'kh izse d#u laca/k Bsoys- eyk R;kaps yXu >kys ulkos o rks ek>s'kh yXu djsy Eg.kwu eh R;kyk dkgh vkMdkBh dsyh ukgh- uarj R;kps 3@ efgus jk=kS vijk=kS ek>sdMs ;s.kstk.ks pkyw >kys- R;k eqnrhr 3@ osGk vkeps "kkjhjhd laca/k vkys-" "(emphasis supplied) 12 Thus, the evidence of the prosecutrix does not suggests that the appellant made false promise to marry her, soon after they be-friended. What appears from her evidence is, that prosecutrix consented for sexual relations, initially, for more than one time but when she learnt that he was married, she fled the report with police whereupon crime came to be registered.

13 Thus, on plain reading of the prosecutrix's evidence, it cannot be said that the appellant lured the Shivgan 7/13 16-APEAL-354-1998.odt prosecutrix to engage in sexual relations with him on false promise of marrying her.

14 In the context of the facts of the case and the evidence on record, question that falls for my consideration is whether conviction of the accused under Section 417 of the IPC is sustainable.

15 As the application of penal provisions of Section 417, to the facts of the case is concerned, it may be stated that the Hon'ble Apex Court in G.V.Rao (Supra) has held that, the first part of Section 415 pertains to the property and second part need not necessarily relate to the property. In the cited case, petitioner had fled private complaint against his wife since allegedly after marriage, he came to know his wife was belonging to Kondakapu community, which is scheduled tribe and it was then that he realised that by misrepresenting that she belongs to advanced community, wife and her family members lured petitioner Shivgan 8/13 16-APEAL-354-1998.odt in wed-lock for which he would not have agreed at all having known that wife did not belong to forward community but belongs to scheduled tribe. It was in these circumstances, he had fled complaint under Sections 415, 419 and 420 read with Section 34 of the IPC. Wife- respondent therein, approached the High Court under Section 482 of the Cr.P.C., seeking quashing of the FIR, which allowed by the High Court. It appears, High Court quashed the FIR principally on the ground that Chapter XVII of the Indian Penal Code, 1860 deals with offences of the property and, therefore, Section 415 must also necessarily relate to the property, which in the instant case, is not involved and consequently, FIR was quashed. . The Hon'ble Apex Court, however, held that, while the first part of the definition of

Section 415 relates to the property, second part need not necessarily relate to the property. Thus, upon analysing provisions of Section 415, the Apex Court in G.V.Rao (Supra) held in paragraphs 6,7 and 8 as under:

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"6 This part speaks of intentional deception

which must be intended not only to induce the person deceived to do or omit to do something but also to cause damage or harm to that person in body, mind, reputation or property. The intentional deception presupposes the existence of a dominant motive of the person making the inducement. Such inducement should have led the person deceived or induced to do or omit to do anything which he would not have done or omitted to do if he were not deceived. The further requirement is that such act or omission should have caused damage or harm to body, mind, reputation or property. 7 As mentioned above, Section 415 has two parts. While in the first part, the person must "dishonestly" or "fraudulently" induce the complainant to deliver any property; in the second part, the person should intentionally induce the complainant to do or omit to do a thing. That is to say, in the first part, inducement must be dishonest or fraudulent. In the second part, the inducement should be intentional. As observed by this Court in Jaswantrao Manilal Akhaney vs. State of Bombay, AIR 1956 SC 575 = 1956 Cr.L.J. 1611 = 1956 SCR 483, a guilty intention is an essential ingredient of the offence of cheating. In order, therefore, to secure conviction of a person for the offence of cheating, "mens rea" on the part of that person, must be established. It was also observed in Mahadeo Prasad vs. State of West Bengal, AIR 1954 SC 724 = 1954 Cr.L.J. 1806, that in order to constitute the offence of cheating, the intention to deceive should be in existence at the time when the inducement was offered.

8 Thus, so far as second part of Section 415 is concerned, "property", at no stage, is involved. Here it is the doing of an act or omission to do an act by the complainant, as a result of intentional inducement by the accused, which is material. Such inducement should result in the doing of an act or omission to do an act as a result of which the person concerned should have suffered or was Shivgan 16-APEAL-354-1998.odt likely to suffer damage or harm in body, mind, reputation or property. In an old decision of the Allahabad High Court in *Empress v. Sheoram and another*, (1882) 2 A.W.N. 237, it was held by Mahmood, J.:-

"That to palm off a young woman as belonging to a caste different to the one to which she really belongs, with the object of obtaining money, amounts to the offence of cheating by personation as defined in s.416 of the Indian Penal Code, which must be read in the light of the preceding, s.415."

9 In another old decision in *Queen-*

Empress v. Ramka Kom Sadhu, ILR (1887) 2 Bombay 59, it was held that a prostitute may be charged for cheating under Section 417 if the intercourse was induced by any misrepresentation on her part that she did not suffer from syphilis." 16 Thus, having regard to the facts of the case and the

law laid down by the Hon'ble Apex Court, argument of Mr. Sethna that the penal provisions of Section 417 must also necessarily relate to the property is rejected. It may be stated that in G.V.Rao (Supra), facts were altogether different than the facts in the present case. Herein there was no 'promise to marry' nor intentional deception by misrepresentation or deceitfulness practised before establishing physical relationship with prosecutrix. In fact Shivgan 16-APEAL-354-1998.odt her evidence suggests that she presumed that he was not married and further assumed that he would marry her. Therefore, absence of 'dishonest concealment of fact', which is essential ingredient of offence, within the meaning of explanation, appended to Section 415 of IPC, conviction under Section 417 of IPC is not sustainable. 17 The Trial Court as it appears from the judgment, was impressed by the fact that though appellant was married but since he did not disclose his marital status to the prosecutrix, it constitutes and amounts to deliberate and intentional concealment of facts, which lured the prosecutrix to engage in sexual relations. That even otherwise, there is no evidence on record to suggest and establish that the appellant was married person as could be discerned from his statement recorded under Section 313 of the Cr.P.C.

Shivgan 16-APEAL-354-1998.odt 18 In consideration of the facts of the case and for the reasons stated above, impugned conviction and sentence passed in Sessions Case No.256 of 1996 by the learned Additional Sessions Judge, Palghar is quashed and set aside and appeal is allowed.

19 Bail bonds of the appellant stand cancelled and sureties are discharged. Fine amount, if paid, be refunded to the appellant.

20 Appeal is disposed of in aforesaid terms.

(SANDEEP K. SHINDE, J.) Shivgan