

IN THE HIGH COURT AT CALCUTTA

Criminal Appellate Jurisdiction

Before: **The Hon'ble Mr. Justice Shivakant Prasad**

CRA 83 of 2016
(Via video conference)

Tapan Porel
Vs.
The State of West Bengal

For the appellant : Mr. Ujjal Kumar Roy
Mr. Arpa Chakraborty

For the respondent/State : Mr. S.G. Mukherjee, Ld. P.P.
Mr. Imran Ali,
Mr. Mirza Firoj Ahmed Begg

Heard on : 17.08.2021

Judgement delivered on : 17.08.2021

Shivakant Prasad, J. :

The instant appeal is directed against the judgment and order of conviction and sentence dated 27/29.01.2016 respectively passed by the Additional District and Sessions Judge, Chandernagore, Hooghly in Sessions Trial No. 15 of 2011 arising out of Sessions Case No. 50 of 2011 wherein the appellant was convicted for the charge under Section 376 of the Indian Penal Code and sentenced to suffer for rigorous imprisonment of 7 years and to pay a fine of Rs. 25,000/- in default to suffer rigorous

imprisonment for one year. The appellant was also convicted for the charge under Section 417 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for 6 months and both the sentences were directed to run concurrently with a further direction to set off the pre-trial detention undergone by the appellant under the provision of Section 428 of the Code of Criminal Procedure.

The brief facts leading to the instant appeal as emerged from the written complaint is that the son of the complainant, namely, Tapas Ruidas the accused (herein after referred to as the appellant) worked as a professional cook and that the accused had frequent visiting terms in their house for last 7-8 years. The accused and family members of the *de facto* informant have cordial relation. Her niece-in-law, namely, Jharna Ruidas, aged about 22 years has also developed intimacy with the accused. Their intimacy deepened as the accused assured Jharna to marry her. She consented to the sexual intercourse with the accused over such assurance of marriage. On the relevant night of 18/19.02.2008 at about 12 hours Tapas Ruidas, Laltu Ruidas and Sanjoy Ruidas found Jharna and the accused in the kitchen without dress. There was round of meeting with the accused asking him to marry Jharna but he refused to marry a dumb girl. Then the *de facto* informant had to lodge a written complaint on 21.02.2008.

Based on the said complaint, the Singur P.S. Case No. 26/08 dated 12.2.2008 under Section 376 IPC was registered for investigation and on usual investigation, the Investigating Officer submitted Charge-Sheet.

After the commitment of the case to the Court of Sessions, the Sessions Judge took cognizance under Section 193 of the Cr.P.C and transferred the said case to the Additional Sessions Judge, Chandernagore for trial. Trial started after framing by charges under Section 376 and Section 420 of the IPC to which the appellant abjured his guilt and claimed a trial. The prosecution thereafter adduced as many as 16 witnesses and on closure of prosecution evidence, the appellant-accused was examined under Section 313 Cr.P.C. to which he declined to adduce any defence witness.

The defence is one of denial of charges which emerged from the trend of cross-examine of prosecution witnesses.

The trial court having heard both the prosecution and the defence, held that the appellant guilty of the charges under Section 376 and Section 417 of the IPC and after giving an opportunity of being heard on the question of sentence as per the provision of Section 235(2) of the Cr.P.C., sentenced the appellant by the impugned judgment which is appealed against, *inter alia*, on the grounds that initiation of the proceedings is illegal and with ill motive, to malign, harass, humiliate and to put the appellant behind the bar as the defacto complainant PW1

alleged in the complaint that the appellant had refused to marry the victim girl.

Now the question raised on behalf of the defence is that since the victim girl is a deaf and dumb, how was it possible for her to narrate about the allegation leveled against the appellant.

Mr. Ujjal Kumar Roy, learned Advocate for the appellant submits that the parents of the victim girl were compelled by the villagers and the relatives of the *de facto* complainant to lodge an FIR as the villagers held out threat on the complainant party to oust them from the village. It is contended that appellant had taken Rs.4500/- but could not pay back the same to the brother of the victim girl for which he developed animosity and FIR filed against the appellant to teach him a lesson.

Mr. Roy adverts to the evidence of PW. 14, the Sub-Inspector of Police who has proved Exhibit 8 to submit that the victim girl was aged 22 years as on the date of alleged occurrence and she was a consenting party having consensual relationship with the appellant having physical relationship by consent on several occasions. It is also argued that PW 14 the Investigating Officer has pointed out in his evidence that since the matter was reported after 10 days, he had not sent the wearing apparel of the appellant and the victim girl seized under seizure list because the victim girl had already washed her cloth and contends that there is no sign of rape allegedly committed on the victim girl on proof by medical

evidence. It is common knowledge that if after the occurrence, there is delay in lodging the FIR there may not be presence of semen or spermatozoa in the private part of the victim girl after 3 to 4 days. So, no step for forensic examination of the wearing apparels would not be fatal for the prosecution case in the given case of offence under Section 376 IPC on promise to marry.

It is understood from the evidence on record that the victim girl is deaf and dumb and her version given before the Judicial Magistrate, recording her statement under Section 164 Cr.P.C. and evidence given before the Trial Court were interpreted by the interpreter. I do not find any doubt in the evidence of the victim girl who has corroborated the prosecution case of commission of rape on extracting her consent on the promise to marry.

The question is whether the consent given was an extracted consent or not within the meaning of Section 90 of the IPC as spelled out in the provisions of Section 90 of the IPC with respect to Section 375 of IPC. It involves an active understanding of circumstances, actions and consequences of proposed act. Individual who makes a reasoned choice to act after evaluating various alternative actions (or inaction) as well as various possible consequences flowing from such action or inaction, consents to such action. Where a woman does not "consent" to sexual acts described in main body of Section 375, offence of rape has occurred.

While Section 90 IPC does not define term “consent”, “consent” based on a “misconception of fact” is not consent in the eye of law. Thus, in case of woman engaging in sexual relations on false promise to marriage, her “consent” is based on “misconception of fact”, and such sexual act(s) will amount to rape. (See: *Pramod Suryabhan Pawar Vs. Satte of Maharashtra*, (2019) 9 SCC 608).

It would be profitable to take notice of a decision in case of *Kaini Rajan v. State of Kerala* reported in (2013) 9 SCC 113, wherein the Hon’ble Supreme Court has explained the essentials and parameters of the offence of rape as under:

*“12. Section 375 IPC defines the expression “rape”, which indicates that the first clause operates, where the woman is in possession of her senses, and therefore, capable of consenting but the act is done against her will; and second, where it is done without her consent; the third, fourth and fifth, when there is consent, but it is not such a consent as excuses the offender, because it is obtained by putting her on any person in whom she is interested in fear of death or of hurt. The expression “against her will” means that the act must have been done in spite of the opposition of the woman. 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 the mind of a person to permit the doing of an act complained of. Section 90 IPC refers to the expression “consent”. Section 90, though, does not define “consent”, but describes what is not consent. “Consent”, for the purpose of Section 375, requires voluntary participation not only after the exercise of intelligence based on the knowledge of the significance and 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. (See *State of H.P. v. Mango Ram* (2000) 7 SCC 224”*

*10.2 In the case of *Deepak Gulati v. State of Haryana* (2013) 7 SCC 675, this Court observed and held in paragraph 21 as under:*

“21. 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 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. 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.”

Having regard to the principle laid down in the above cited decision and on appraisal of totality of the evidence on record upon critical analysis, this Court is convinced that the prosecution has been able to substantiate the charge under Section 376 of the Indian Penal Code against the appellant, as I find adequate evidence that from the very beginning the appellant had no intention of keeping his promise to marry a victim girl and for the failure to keep his promise, this Court is of the view that the victim girl had given her consent for physical relationship with the appellant relying upon the false promise of the appellant to marry her, therefore, such an act on the part of the appellant can be construed as a consent given to the victim girl on misconception of fact under Section 90 of the IPC. That apart the legislature has incorporated a provision under Section 114A of Indian Evidence Act whereunder the Trial Court has to presume that the victim girl had given the consent for

physical relationship with the accused appellant relying upon the promise that he would marry her.

However, in my considered view, the sentence for the charge under Section 417 of the IPC is of no account, as the punishment and the punishment thereof is liable to be set aside and is hereby set aside acquitting the appellant of the said charge because the appellant has been punished with a substantive punishment for the major charge under Section 376 of the Indian Penal Code.

Mr. Ujjal Kumar Roy, learned Advocate, appearing for the appellant submits by inviting my attention to the earlier order that the appellant is going to complete his sentence of imprisonment of seven years within 22 days. Accordingly, the appellant prays for modification of sentence for a period to be undergone by him.

I have heard Mr. Imran Ali, learned Advocate for the State, as well with regard to the sentence imposed by the Trial Court. The appellant has been sentenced for the offence under Section 376 of the Indian Penal Code to undergo rigorous imprisonment for seven years with a fine of Rs. 25,000/- in default to suffer R.I. for one year.

It is true that the question of sentence is a matter of discretion resting with the Trial Court. It is well settled that when the discretion has been properly exercised, an Appellate Court should not interfere unless

there are very strong reasons and in case where the sentence cannot be said to be so grossly inadequate as to amount to a miscarriage of justice.

Though discretion in the matter of sentencing applied by the Trial Court should not be interfered with by the Appellate Court unless there is mitigating circumstance to do so.

However, in my considered view, the sentence of seven years is adequate sentence given to the appellant and he is likely to serve out within the shortest span of time as discussed above. Having regard to the normal course of events I am of the view that the sentence of R.I. of 7 years being substantive punishment would suffice the ends of justice by waiving the imposition of fine of Rs. 25,000/-.

Consequently, the appellant should be released from Correctional Home after completion of R.I for 7 years.

Accordingly, the impugned Judgment and Order of conviction and sentence dated 27.01.2016 and 29.01.2016 respectively passed by Additional District & Sessions Judge, Chandernagore, Hooghly, in Sessions Trial No. 15/2011 arising out of Sessions Case No. 50 of 2011 is hereby affirming the Judgment of conviction for the charge under Section 376 of the Indian Penal Code, is hereby affirmed with above modification.

Accordingly, the appeal being CRA 83 of 2016 is disposed of.

An extract copy of this Judgment be sent to the Superintendent Correctional Home, Chinsurah for his information and doing the needful.

Let a copy of the judgment be supplied to the appellant free of cost through his learned Advocate.

Moreover, all parties shall act in terms of copy of this order downloaded from the official website of this Court.

Lower Court records be sent down to the learned Trial Court below for necessary note in the Sessions Register and for his information.

(Shivakant Prasad, J.)

sb/bd, A.R.(Court)