

IN THE HIGH COURT AT CALCUTTA
Criminal Appellate Jurisdiction
APPELLATE SIDE

BEFORE:-

THE HON'BLE JUSTICE RAJASEKHAR MANTHA

C.R.A. No. 384 of 2008

KALAM SK.

VERSUS

THE STATE OF WEST BENGAL

For the Appellant : Mr. Subhrajyoti Dey, Adv.

Judgment On : 20.09.2018

Rajasekhar Mantha, J.:-

1. The instant appeal is directed against a judgment and order dated 13th and 14th March 2008 passed by the Additional District and Sessions Judge, 5th Fast Track Court, Malda, in Trial No. 20 (5) 07 arising out of a Sessions Case No. 24/07, in which the appellant was convicted under Section 376 of the IPC.
2. The prosecution case in brief is that on the 17th of July 2003 when the prosecutrix, one Santara Khatun, filed a complaint with the Manikchak P.S., wherein she alleged that for 1 and ½ years she had love affair with the appellant. She regularly cohabited with the appellant after the first occasion of intercourse on Muharram date when she claimed that she raped by the appellant. During the said

period of 1 ½ years she had sexual intercourse with the appellant a number of times. It is further stated that the appellant had promised to marry her based on which she had intercourse with him. She became pregnant. But the appellant ultimately refused to marry her. The appellant pleaded not guilty. Ten witnesses were examined.

3. Fifteen days prior to the complaint the appellant visited the house of the prosecutrix at 11:00 p.m. while she was sleeping with her mother. The appellant is stated to have called out the victim when her mother woke up. Upon being asked by the mother of the prosecutrix as to why the appellant was calling her, the appellant fled away.
4. In cross-examination, the prosecutrix admitted that she had a love affair with Kalam and he had not married her. She further stated that on the first occasion of intercourse the appellant is stated to have told her that he was her husband and forced himself upon her. She also stated that the appellant did not marry her and hence, she knew that the statement of the appellant was false. The factum of promise to marry is, however, admitted by the prosecutrix. She also stated that had her mother not woken up on the said date (15 days prior to the complaint) she had gone away voluntarily with the appellant. The prosecutrix also stated that the appellant promised to take her away and marry after he became financially independent. On the said night 15 days prior to the complaint, upon being confronted, for the first time the prosecutrix told her mother of her physical and emotional relationship with the appellant for 1 ½ years.

5. When the mother of the prosecutrix went to the house of the appellant and asked his father to arrange a marriage of the prosecutrix with the appellant, the said father refused. The story of love affair for 1 ½ years was also told by the prosecutrix to her brother and that she was four months pregnant. The prosecutrix later on gave birth to a child. A DNA test conducted on the child revealed that the appellant was the father of the said child.

6. The Learned Sessions Judge found that the first instance of intercourse was against wishes of the victim and the same amounted to rape under Section 376 of the IPC. The Learned Sessions Judge, however, ignored certain very vital facts:
 - (a) Immediately after the first instance and if it were against the consent of the prosecutrix, she should have informed her mother immediately which she did not.
 - (b) The appellant is stated to have promised to marry her at the relevant point of time when he would subsequently become financially sound. This fact has not been disproved.
 - (c) The prosecutrix continued to have intercourse on numerous occasions for one year four months with the appellant.
 - (d) It was never proved that the appellant on the first occasion did not have intention to marry the prosecutrix. It is only the father of the appellant who refused to take the prosecutrix as his daughter-in-law.

(e) There was admittedly a love affair and mutual attraction between the appellant and the prosecutrix.

7. From the above, it appears that there was no misconception of fact on the part of the prosecutrix based on which she had intercourse with the appellant. Consent in this case has neither been obtained under threat of injury or misconception of fact. The prosecutrix in fact continued to have sexual relationship with the appellant for a period of 1 ½ years thereafter.
8. In this regard useful reference may be made to the decision of the Hon'ble Supreme Court in the case of **Deelip Singh @ Dilip Kumar Versus State of Bihar reported in 2005 1 SCC Page 88**. After discussing in detail the various aspects of consent, the Hon'ble Supreme Court at Paragraph 27 and 28 held as follows:

“27. Having discussed the legal aspects bearing on the interpretation of the term consent with special reference to Section 90 IPC, we must now turn our attention to the factual aspects of the case related to consent.

28. It is a case of passive submission in the face of psychological pressure exerted or allurements made by the accused or was it a conscious decision on the part of the prosecutrix knowing fully the nature and consequences of the act she was asked to indulge in? Whether the tacit consent given by the prosecutrix was the result of a misconception created in her mind as to the intention of the accused to marry her? These are the questions which have to be answered on an analysis of the evidence. The last question raises the allied question, whether the promise to marry, if made by the accused, was false to his knowledge and belief from the very inception and it was never intended to be acted upon by him. As pointed out by this Court in Uday's case the burden is on the prosecution to prove that there was absence of consent. Of course, the position is different if the case is covered by Section 114-A of Evidence Act. Consent or absence of it could be gathered from the attendant

circumstances. The previous or contemporaneous acts or the subsequent conduct can be legitimate guides.”

9. The said Deelip Singh case was also followed in the case of **Deepak Gulati Versus State of Haryana reported in 2013 7 SCC Page 675.**

At Paragraph 24 the Hon'ble Supreme Court held as follows following the dicta laid down in Deelip Singh (Supra).

“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.”

10. In **Uday Vs State of Karnataka reported in AIR 2003 SC 1639**, the facts of which case are similar to that of the instant case, after analysing all the case law related to the subject the it was held as follows;-

“It therefore appears that the consensus of judicial opinion is in favour of the view that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date, cannot be said to be given under a misconception of fact. A false promise is not a fact within the meaning [of the Code](#). We are inclined to agree with this view, but we must add that there is no strait jacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must also weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.”

11. From the facts of the instant case as set out hereinabove it has not been proved that the appellant had no intention to marry the prosecutrix at the first time of intercourse. In fact it has not been proved even subsequently that the appellant had no intention to marry the prosecutrix. It is only when the father of the appellant had refused to accept the prosecutrix as his daughter-in-law that the actual marriage did not take place. In addition to that the repeated occasions on which the prosecutrix voluntarily had intercourse with the appellant totally disproves absence of consent. On the contrary consent is established by the fact that on the particular night 15 days prior to the complaint the prosecutrix admitted that had her mother not intervened she would have accompanied the appellant.
12. The above clearly indicates that the sexual intercourse between the appellant and the prosecutrix was neither without consent nor performed under any false promise of marriage. By reason of the aforesaid the appellant could not have been convicted under Section 376 of the IPC.
13. The conviction of the appellant is set aside. The appellant is granted benefit of doubt and freed of the stigma of conviction under rape.
14. It is sad to note that the appellant has already undergone the entire sentence since no bail has been granted by this Court. The prosecutrix shall refund the amount of Rs.30,000/- paid by the appellant with interest at the rate of 6 % per annum from the date of

the conviction till the date of actual repayment, if payment was made by the appellant.

15. The appeal is thus allowed. No order as to costs.
16. Urgent Xerox certified copy of this judgment, if applied for, be supplied to the parties on urgent basis.

(Rajasekhar Mantha, J.)