

(2012) 02 GAU CK 0039
In the Gauhati High Court
Case No : Criminal Appeal No. 12 of 2005

Manik Das Baishnav

APPELLANT

Vs

State of Tripura.

RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 374
Penal Code, 1860 (IPC) — Section 24, 25, 376, 376(1), 415

Citation : (2012) CriLJ 1954 : (2012) 2 GLD 640

Hon'ble Judges : Swapan Chandra Das, J

Bench : Single Bench

Advocate : R. Debnath, Amicus Curiae, for the Appellant; R.C. Debnath, Spl. P.P., for the Respondent

Final Decision : Dismissed

Judgement

S.C. Das, J.—This criminal appeal, u/s 374 of Cr.P.C. is directed against the judgment and order of conviction and sentence, dated 11-2-2005, passed by learned Sessions Judge, South Tripura, Udaipur, in Case No. ST.55(ST/S) of 2004.

The learned Sessions Judge found the accused appellant guilty of committing offence, punishable u/s 420 of IPC and sentence him to suffer RI for 4 (four) years and to pay a fine of Rs. 10,000/- (Rupees ten thousand), in default of payment to suffer further imprisonment for 5 (five) months.

Being aggrieved and dissatisfied with the judgment & order of conviction and sentence the convict-appellant preferred the appeal before this Court.

Heard learned amicus curiae, Mr. R. Debnath, for the appellant and learned Special Public Prosecutor, Mr. R.C. Debnath, for the State-respondent.

2. Prosecution case, in short, is that the accused appellant, Manik Das Baishnav and the victim. Smt. Basanti Das, were residents of village Dolbari under P.S. Sabroom, District-South Tripura. The accused, Manik, being friend of Rabindra Das, elder brother of Basanti, used to frequently visit her house, as a neighbour

and with the promise of marrying her, the accused developed love affairs with her and with the allurements of such marriage in future the accused enjoyed sex with her at different places and different points of time. The victim, Basanti, believed the accused, on good faith and surrendered her person to the accused for enjoyment of sex and that continued for a few years. The accused even took her to a hotel at Udaipur and introduced the victim as his wife and he put vermilion on her forehead and also made her to wear coach bangles and, thereafter, they resided in the hotel for one night and the accused enjoyed sex with her for the whole night. He wrote his name in the hotel register as "Ratan Das" but the victim wrote his name as Basanti Das as wife of the accused. On the following morning they returned and the accused asked her to wipe out vermilion from the forehead and also to unwear the coach bangles stating that he will marry her after arranging marriage of his sisters. But after marriage of his sisters was over the accused started avoiding her and ultimately refused to marry her. There was a village meeting at the instance of the victim and her father but the issue was not settled. Thereafter, the victim, Basanti Das, lodged FIR and police on investigation submitted charge-sheet against the accused for commission of offence punishable under Sections 493 and 376 of IPC.

3. In course of trial learned Sessions Judge framed charges against the accused for commission of offence punishable under Sections 376(1) and 493 of IPC to which the accused appellant pleaded not guilty and claimed to be tried.

Prosecution in course of trial examined 14 witnesses and defense cross-examined them.

After the closure of prosecution evidence, accused was examined, u/s 313 of Cr.P.C. and the accused declined to adduce any defence evidence.

4. The defence case so far ascertained from the trend of cross-examination as well as from the statement of the accused made while examination u/s 313 of Cr.P.C. is that of total denial of the prosecution case.

5. The trial Court, at the conclusion of trial, acquitted the accused from the charges under Sections 376 and 493 of IPC but found him guilty of committing offence, punishable u/s 420 of IPC, relying on the ratio of a decision of this Court in the case of *Maran Ch. Pal v. State of Tripura*, reported in 1997 Cri J 715, for cheating and sentenced him as aforesaid.

6. Learned amicus curie, Mr. Debnath, has made a lengthy submission assailing the judgment and order of conviction and sentence, passed by learned Sessions Judge, u/s 420 of IPC stating that the ingredients of Section 420 of IPC has not been proved at all and that the ratio of the decision of this Court, reported in the case of *Maran Ch. Pal* (supra), is not applicable in this case since the victim in this case was aged about 23 years, as stated by herself, in the FIR and that in the reported case the victim was aged about 16 years and the facts and circumstances of both the cases cannot be identified to be similar. He further argued that, even if, the victim is believed of the fact of alleged love and sexual

intercourse with the assurance of marriage, the ratio of decision of the Hon'ble Apex Court in the case of Deelip Singh @ Dilip Kumar Vs. State of Bihar, is applicable in the facts and circumstances of the case.

Referring to the fact of Deelip Singh (supra) learned counsel also submitted that in the case in hand the victim Basanti Das had voluntarily undergone sexual intercourse with the accused on the assurance made by the accused that he would marry her in future. The allegation made by her is that the accused now refused to marry her. It is submitted by learned counsel that the refusal cannot be termed as "cheating" since there is no evidence to show that the promise made by the accused from the very inception was false and that he never really intended to marry her and that the promise or assurance was a mere hoax. Burden lies on the prosecution to prove that the accused obtained the consent with a false assurance from the very inception and since there is no such evidence in the case, the ratio of the decision of Deelip Singh (supra) shall be applied and the accused is entitled to get an order of acquittal.

7. Learned Spl. PP, on the other hand, has submitted that the evidence of the victim inspires confidence that she had love affairs with the accused and that the accused with the assurance of marrying her undergone intercourse with her at different places including once at Udaipur, in a hotel where the accused introduced her as his married wife and he put vermilion on the forehead of the victim as well as coach bangles and after the blissful night was over the accused asked her to wipe out vermilion and put off the coach bangles and asked her to go back home assuring to marry her later on after marriage of his sisters. The victim was insisting the accused to marry her but the accused was avoiding her. After marriage of the sisters of the accused while he was trying to conduct marriage with another girl, the victim reported, to Panchayat and the Panchayat meeting was also held where the accused denied the affairs and to marry her. Under such circumstances, the ratio of the decision of Deelip Singh (supra) cannot be applied in this case since the evidence and materials on record does not even whisper that the accused ever intended to marry the victim and that his assurance was genuine at the inception and subsequently, his assurance could not be mate realized for the interference by his parents or otherwise. It is also submitted that there is nothing on record that the victim was unchaste women or that she made a false and baseless allegations against the accused. Learned counsel, therefore, prayed for sustaining the judgment and order of conviction and sentence passed by the learned Sessions Judge.

8. I have considered the rival contention of the learned counsels and meticulously gone through the evidence and materials on record. The victim (P.W. 12) lodged the FIR herself. She has narrated before the trial Court her tales. In her deposition she stated that the accused. Manik Das Baishnav used to come to their house with her brother. From that time they started loving each other. Accused took her wherever he likes and he Used to have sexual intercourse with her. He assured her that he would marry her and she believed

him and as such, she agreed with his activities. She indulged the accused in such matters for last three and half years. One day he took her to Udaipur town and they resided in a hotel as husband and wife. He gave coach bangles and vermillion and she used those to show that they were married. The accused had sexual intercourse with her during that night. He told her that he would take her to his house after performing a social marriage as per Hindu rites and customs. In the hotel he wrote her name but accused, Manik Das Baishnav, wrote his name as Ratan Das. He told that it was his nick name. She identified the signatures in the hotel register, marked as Ext. 1. On the next morning the accused asked her to remove the coach bangles and vermillion and he told her that some difficulties were there, and as such, those should be removed and assured her that he will marry her. Thereafter, on several occasions he enjoyed sex with her but the accused was trying to get himself married with another girl. She informed the matter to his brother's wife Gita Das. The matter was reported to Panchayat also. The accused did not abide by the "Salishi" of the Panchayat. Thereafter, she filed the case.

Her evidence has not been shaken in cross-examination. There is nothing that the victim girl was an unchaste women or that she made any such allegation against any other person before. There is also nothing that the accused was compelled by his parents or anybody else and therefore, he was not in a position to keep his assurance given to the victim.

9. No doubt in the present case the victim was a consenting party of the alleged sexual intercourse with the accused. A mere act of submission normally does not amount to consent. Consent to be a valid defence must be voluntary participation after exercises of intelligence and a choice between resistance and consent. It is a question depending on circumstances of each case, whether the alleged consent by the victim was mere passive submission or willing consent.

In the present case, according to the victim, the accused used to frequently visit to her house and that they fell in love. The accused assured to marry her and took her to different places, according to his wisdom and enjoyed sex with her. Her contention is supported by P.Ws. 1, 2, 3 and P.W. 10 substantially.

P.W. 10 is a Pradhan of nearby Gram Panchayat and she also wrote the FIR, as per the statement of the victim.

P.W. 4 is the Pradhan of the Gram Panchayat of the victim and accused, who was reported in writing by the victim about the occurrence and she stated that there was a village meeting and in the village meeting since it was not proved, the matter was referred to the women's commission.

P.W. 7 is the owner of hotel at Udaipur where the victim with the accused passed a night, as alleged and P.Ws. 8 and 9, were the employee of the hotel.

The sum and substance of the evidence on record shows that the accused and the victim used to mix freely and that the accused had undergone intercourse

with the victim, as stated by her, frequently and once in hotel at Udaipur and such intercourse was indulged by the victim on the assurance made by the accused to marry her. She would not allow him to have such intercourse had no such assurance been given by the accused.

10. Section 415 of IPC defined "Cheating" 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.

To prove the ingredients of cheating, the ingredients of fraudulently or dishonestly are also required to be proved. The word "fraudulently" defined in Section 25 of IPC thus :

25. Fraudulently -- A person is said to do a thing if he does that thing with intent to defraud but not otherwise.

The word "dishonesty" is defined in Section 24 of IPC thus :

24. Dishonestly :-- Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing "dishonestly".

11. In the case in hand, the victim girl was an unmarried woman and the accused with the assurance of marriage undergone intercourse with her. The victim girl would not undergo intercourse had there been no such assurance of marriage by the accused to marry her and the accused subsequently disowned the assurance, given by him and so, the ingredients of "cheating", as defined in Section 415 of IPC, has been established and the learned Sessions Judge rightly relied on the ratio of the decision of the accused of this count in the case of Maran Chandra (supra).

The fact of the case of Maran Chandra (supra) is almost similar and identical to the fact of the present case. This Court in the given facts and circumstances while setting aside the judgment and order of conviction and sentence u/s 376 of IPC has held that though the conviction and sentence u/s 376 of IPC was not warranted it cannot be said that the appellant has not committed any offence at all. The Court held -- "the evidence of Smt. Saraswati Pal (P.W. 2) is clear that she was induced to sexual intercourse with the appellant on a word being given by the appellant that he will marry her and such evidence of a woman of a society given at the cost of her reputation cannot be disbelieved by the Court except for extraordinary reasons.....". The appellant, therefore, was guilty of the offence of cheating, as defined in Section 415 of IPC and accordingly liable to be punished u/s 417 of the IPC.

12. The accused undergone intercourse with the victim assuring to marry her but the conduct of the accused from the beginning to end shows that his assurance, given to the victim, was a mere hoax. He never intended to marry her. He always made the assurance and what was in his mind can be reflected in his action while after enjoying sex with her he asked her to wipe out vermilion and put off the coach bangles. He assured that after his sisters' marriage he will marry her but thereafter he was trying to marry another girl. Such conduct of the accused makes the case clearly distinguishable from the fact of the case of Deelip Singh (supra). Therefore, I cannot agree with the submission of learned amicus curie that the ratio of decision of Deelip Singh (supra) is applicable in the present case.

13. In the facts and circumstances and the evidence on record, I have no hesitation to come to conclusion that the ratio of the decision of Maran Ch. (supra) has been rightly applied in the present case and the accused may be held guilty of committing offence punishable u/s 417 of IPC. The punishment given by the learned Sessions Judge, South Tripura, Udaipur, u/s 420 cannot sustain, as there is no evidence that there was any delivery of property by dishonest inducement made by the accused. The case, therefore, shall be one u/s 417 of IPC. The convict, accordingly sentenced to suffer R.I. for (1) one year and to pay a fine of Rs. 10,000/- (Rupees ten thousand), in default of payment, suffer further SI for 5 (five) months. Fine, money if realize be given to the victim P.W. 12, Smt. Basanti Das, as compensation.

14. With the above modification of sentence, the appeal stands dismissed. Send back the LC records along with a copy of this judgment.