

(2014) 07 TP CK 0013

In the Tripura High Court

Case No : Crl. A. Nos. 16 of 2011 and 05 of 2012

**Mongal Debbarma VsThe State of Tripura
Sumati Rupini
(Debbarma) VsMangal Debbarma**

Date of Decision : 28-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 313
Penal Code, 1860 (IPC) — Section 376, 376(1), 415, 417

Citation : (2014) 07 TP CK 0013

Hon'ble Judges : S. Talapatra, J

Bench : Single Bench

Advocate : A. Bhowmik and D.R. Choudhury, Advocate for the Appellant; A. Ghosh, P.P. and A. Bhowmik, Advocate for the Respondent

Final Decision : Allowed

Judgement

S. Talapatra, J.—These two appeals are tied up together for disposal by a common judgment as by means of those appeals the judgment of the trial court is under challenge. The one appeal has been filed by the convict whereas the other appeal being Crl. A. No. 05 of 2012 has been filed by the victim being aggrieved by inadequacy of the sentence. For purpose of convenience, the convict is referred to as the appellant for Crl. A. No. 16 of 2011. The appellant has challenged by means of his appeal the judgment and order of conviction and sentence dated 20.04.2011 delivered in Sessions Trial 65(NT/K) of 2010 by the Sessions Judge, North Tripura, Kailashahar whereby the appellant has been convicted u/s 417 of the I.P.C. for cheating the victim, PW-1 by way of having the sexual intercourse on promise of marriage and later on, refusing to marry her. The appellant has been sentenced as consequence of that conviction to pay a fine of Rs. 1,00,000/-(Rupees one lakh), in default to payment of fine, to suffer 4(four) months imprisonment with a direction that fine money if realised is to be paid to the victim as compensation.

2. At the instance of the victim, Manu P.S. case No. 42 of 2010 under Sections 376 and 417 of the I.P.C. was registered and taken up for investigation, as by a

written Ejahar it had been disclosed that on assurance of marriage, the appellant on 30.12.2009 brought her to Panisagar and on the following day, she was taken to his relative's house at Agartala. There had been negotiations of marriage during that time. It has been stated that the accused person and the victim resided in the relative's house and had "cohabitation". After investigation, the charge sheet was filed under Sections 376(1) and 417 of the I.P.C. Having the case committed to the Sessions Judge, North Tripura, Kailashahar the charge was framed against the appellant under Sections 376(1) and 417 of the I.P.C. to which the appellant pleaded total innocence and claimed to face the trial.

3. To substantiate the charge, the prosecution has adduced as many as 13 witnesses including the parents of the victim and the Doctor, who examined the victim. The prosecution has also introduced as many as 4(four) documents whereas the defence has brought in the evidence 7(seven) documents or part of the documents. After recording the prosecution evidence, the appellant was examined u/s 313 of the Cr. P.C. when the appellant had denied the incriminating materials so surfaced in the records. Based on the evidence, the impugned finding of conviction has been returned. It is to be noted that the appellant has been acquitted from the charge of Section 376(1) of the I.P.C. The order of acquittal has also been questioned in the appeal filed by the appellant. After appreciation of the evidence, the question of inadequacy of the sentence or of upturning the finding of the acquittal would be considered.

4. Mr. A. Bhowmik, learned counsel appearing for the appellant has submitted that the essential ingredient of dishonest intention from the outset is totally absent in the evidence. That apart, two sets of witnesses have clearly surfaced. Their statements are poised irreconcilably and mutually destructive as regards the marriage in terms of the customs prevalent in the Rupini Community and as such, the benefit must go to the appellant.

5. From the other side, Mr. A. Ghosh, learned P.P. appearing for the State has submitted that there cannot be any reason to disbelieve the victim, PW-1. Her statement has been corroborated by other witnesses. In the circumstances, no interference is called for.

6. For appreciating the rival contentions as noted above, it would apposite to have a brief survey of the evidence led by the prosecution.

The victim, whose name has been concealed for protecting her identity (PW-1) has stated that she had love affair with the appellant. The appellant had promised her to marry and took her to the house of his brother-in-law and stayed there for one day and night. The appellant committed sexual intercourse with her in that place. On 31.12.2009, the appellant took her to the official quarters of his uncle Manik Debbarma at Agartala. She was there for 22 days. Everyday the appellant and the victim had sexual intercourse. After 22 days, the appellant sent her back to his parents' house. The father of the appellant went to their house for "Mangalacharan" but the "Mangalacharan" did never take

place. But Mongal, the appellant, did not turn up to take her back. On a subsequent occasion when she met the appellant in his place of posting, he did not recognize her. Thereafter, she had filed a complaint in the court of the Chief Judicial Magistrate, North Tripura, Kailashahar which was forwarded for investigation to the police.

In the cross-examination, she has admitted that appellant's father had accepted her as her son's wife and all other relatives as well. In the cross-examination, she has further stated that according to their customary law "Mangalacharan" is equivalent to marriage.

7. The father of the victim, Bikramjoy Rupini, PW-2 has stated nothing about the sexual intercourse on promise of marriage. He has simply stated that his daughter was pregnant due to sexual intercourse with Mangal. According to him, there was no marriage. In the course of cross-examination, the defence has proved a part of the statement previously recorded by the police u/s 161 of the Cr. P.C. (Exbt. D/1) where PW-2 had stated that "Mangalacharan" was done. He has also stated that "Mangalacharan" is treated as marriage in their community.

8. PW-3, Manju Rupini being the mother of the victim has stated that her daughter was kidnapped by the appellant. She has stated that even though the guardians of the appellant had informed them that they would arrange "Mangalacharan" but in fact they did not do so.

In the cross-examination, the defence has admitted a part of the statement recorded previously u/s 161 of the Cr. P.C. where PW-3 had stated that "Mangalacharan" was done. She however, denied that there was any love affair.

9. PW-4, Purba Rani Koloy has stated that she had accompanied the victim when she went to meet the appellant in his place of posting. She was also present when the appellant had refused to recognize the victim. From her previous statement as well it has surfaced that she had stated to the Police Officer that "Mangalacharan" was performed.

10. PW-5, Sri. Binoy Rupini has stated that despite assurance of solemnizing the "Mangalacharan", the parents of the appellant did not complete that ceremony. But he has admitted that the appellant and the parents of the appellant had visited the house of the victim for finalizing the date of "Mangalacharan". However, he had stated to the police in his previous statement (Exbt. D/6) that the "Mangalacharan" was done. In the trial, he had denied to have made such statement.

11. PW-6, Romi Rupini has stated that the victim became pregnant for mixing with the appellant. In the cross-examination, she has stated that "Danda" was given to the parents of Mongal, the appellant. According to the customs, after "Danda" is given it is presumed that the marriage has been solemnized.

12. PW-7, Manik Debbarma has corroborated what PW-6 has stated in the trial. He has stated that the victim told him that "Mangalacharan" was performed. So

they were staying together. Similarly PW-8, Smt. Sovalaxmi Debbarma has stated that the victim had stated to her that "Mangalacharan" ceremony had been solemnized. PW-8 is the aunt of the appellant. The victim and the appellant stayed in their house at Agartala.

13. PW-9, Mali Debbarma has stated that both the appellant and victim told her that they were married each other.

14. PW-10, Dr. Naresh Tripura, who had examined the victim on 16.07.2010 has stated that he found the victim carrying 26 weeks pregnancy.

15. PW-11, Bishnu Debbarma has denied that there was any "Mangalacharan" ceremony. However, when the defence had confronted him on the basis of his previous statement made to the police he has admitted that he had stated to the police that the "Mangalacharan" ceremony was held.

16. PW-12, Sravan Tripura has stated that he had participated in the discussion between the parents of the victim and the appellant. It was decided that "Mangalacharan" will be solemnized very soon.

17. PW-13, Bikash Debbarma, who is a recording officer has stated how he had endorsed the case to Paramita Saha, who conducted the investigation. He had identified the writings and signatures of Paramita Saha in the case diary and stated that Exbt. D-1 to Exbt. D-7 are the writings of said Paramita Saha. However, the prosecutions did not adduce Paramita Saha in the trial.

18. The appellant's case as projected hinges primarily on two questions namely,

(i) Whether there is two sets of witnesses as regards the performance of "Mangalacharan" and

(ii) Whether there is any evidence as regards the dishonest inducement for purpose of convicting the appellant u/s 417 of the I.P.C.?

19. For purpose of convicting someone u/s 417 of the I.P.C., the requirement of Section 415 of the I.P.C. has to be fulfilled. For purpose of reference, Section 415 of the I.P.C. (excluding the explanation) is extracted hereunder:

"415. 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 to be 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"."

This section requires:

(i) deception of any person,

(ii) fraudulently or dishonestly inducing that person,

(iii) either to delivery any property or to consent that any person shall retain any property or intentionally inducing that person 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.

There are two separate classes of acts. One by way of fraudulent or dishonest inducement and the other by inducing intentionally, which may not be fraudulent or dishonest.

20. The charge against the appellant was that he induced dishonestly the victim on promise of marriage to have intercourse which she would not do if she were not so deceived. For that purpose, the distinction between mere breach of contract and the offence of cheating has to be made, as has been done by the apex court in *Hridaya Ranjan Pd. Verma and Others Vs. State of Bihar and Another*, It has been held in *Hridaya Ranjan Prasad Verma* thus:

"In determining the question it has to be kept in mind that the distinction between mere breach of contract and the offence of cheating is a fine one. It depends upon the intention of the accused at the time of inducement which may be judged by his subsequent conduct but for this subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent or dishonest intention is shown right at the beginning of the transaction, that is the time when the offence is said to have been committed. Therefore it is the intention which is the gist of the offence. To hold a person guilty of cheating it is necessary to show that he had fraudulent or dishonest intention at the time of making the promise. From his mere failure to keep up promise subsequently such a culpable intention right at the beginning, that is, when he made the promise cannot be presumed."

21. Whether the accused had intention to dishonestly induce the victim right at the beginning of the transaction? That can be judged from his subsequent conduct, however, the subsequent conduct is not the sole test. Unless such dishonest inducement is established conforming to the standard of proof at the beginning of the transaction, that is the time when the offence is said to have been committed, the offence of cheating cannot be held to be established. Whether in this case the prosecution has been successful to establish the fraudulent or dishonest intention at the time of making the alleged promise, keeping the question at bay whether there was promise or not? It appears from the subsequent conduct of the appellant that he had sent his parents for holding *Mangalacharan*. This would show that at the outset he had no intention to cheat the victim. That apart, there are two sets of the prosecution witnesses as regards performance of "*Mangalacharan*" and according to all the witnesses performance of "*Mangalacharan*" is treated as the marriage in the *Rupini Community*. Two views have surfaced from testimonies. If "*Mangalacharan*" had been performed then it cannot be stated that there was breach of promise at all. The dishonest inducement for purpose of cheating or breach of promise becomes relevant if no

marriage does take place. Having situated thus, the appellant is entitled to get the benefit as one view stands in his favour.

22. Having held so, the impugned judgment and order are set aside and quashed. The appellant is acquitted from the charge on benefit of doubt. The challenge against the acquittal u/s 376(1) of the I.P.C. cannot be sustained inasmuch as PW-1, the victim has in unequivocal terms stated that she had lover affair with the appellant and she had eloped with the appellant and on promise of marriage they had cohabitated for 22 days within the knowledge of their parents and family. It is definitely a case of consensual sex. Therefore, the order of acquittal in respect of offence punishable u/s 376(1) of the I.P.C. cannot be faulted with and it has been held that the charge u/s 417 of the I.P.C. has as well fallen through. Hence, the appeal filed by the victim being Crl. A. No. 05 of 2012 is dismissed.

23. The appeal by the convict being Crl. A. No. 16 of 2011 is allowed. Before parting, it is observed that this Court has not decided any issue relating to paternity of the child as delivered by the victim nor to the status of the victim as per the customs prevalent in the Rupini Community or otherwise.

Send down the LCRs forthwith.