
(2009) 03 CAL CK 0062
In the Calcutta High Court
Case No : CRR No. 1329 of 2008

Pranay Jana

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156(3), 482
Penal Code, 1860 (IPC) — Section 375, 376, 417, 420, 90

Citation : (2009) 03 CAL CK 0062

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Arup. C. Chatterjee, for the Appellant; Barin Roy, for the Respondent

Final Decision : Dismissed

Judgement

Partha Sakha Datta, J.—By this application prayer is made for quashing of a proceeding being Tamluk P.S. Case No. 86 of 2006 dated 06-05-2006 u/s 417/420/376 IPC corresponding to G.R. Case No. 302 of 2006 now pending before learned CJM, Purba Medinipur at Tamluk.

2. The opposite party No. 2 who has been served with notice but did not appear lodged a complaint against the present petitioner and his parents alleging that, when the complainant was a Higher Secondary student she got herself acquainted with the accused No. 1 as both of them were under a same tutor and that, the accused No. 1 in the year of 2003 proposed to the complainant to marry her though the complainant at that stage did not accede to the proposal of the accused No. 1. The complainant told him that she would prosecute further studies and her negotiation for marriage would only be done by her parents and guardian and that, at the instance of the complainant the accused No. 1 met her father's sister and her husband who are the witnesses No. 5 & 6, and the accused No. 1 agreed to her proposal for the wedlock with the complainant. Both her father's sister and her husband advised the accused No. 1 to meet the parents of the complainant and advanced the proposal of marriage with the

complainant and that during that period, the accused No. 1 wrote a good number of love letters to the complainant and in July 2003, the accused No. 1 met the parents of the complainant in the presence of her father's sister and her husband, her aunt and that of her husband and proposed to them to marry the complainant. The parents and other kins told the accused No. 1 to have a dialogue with his parents before finalizing the proposal. The accused No. 1 told the complainant and his kins that he already had discussion with his parents to marry the complainant, and since then he used to meet her very frequently at the Mecheda Railway Station while the complainant was in her way to Bagnan college and the accused tried to have physical relation with the complainant and wrote a number of letters seeking her permission for co-habitation, and that, one evening in July, 2005 while the complainant was alone in her home, the accused No. 1 came to complainant's paternal house and promised the complainant to marry her very soon and induced her to have physical relation with him, and that, though the complainant was not agreeable till the marriage is completed the accused No. 1 could impress her that the marriage with her was only a matter of days and she should rely upon him and have physical relation with him at that moment, and that as the complainant relied upon the promise of the accused No. 1 exploited the advantages and had co-habitation with the complainant on several occasion in her paternal house while her parents were absent, and that after that incident the complainant urged the accused No. 1 to finalize the date of marriage as early as possible, and that, being afraid of the aforesaid cohabitation without the knowledge of the parents the complainant asked her parents to have a dialogue on the proposal of wedlock with the parents of the accused No. 1 at the earliest, and then the father of the complainant contacted the parents of the accused, accused No. 2 and 3; and after negotiation the parents of the accused No. 1 along with him came to the house of the complainant on 15th August, 2005, and thus the parents of the complainant met the accused No. 2 & 3, the parents of accused No. 1, and invited them to come to the paternal house of the complainant to finalize the date of marriage, and that on 28th August, 2005 Sunday the parents along with their son, the accused Nos. 2,3 & 1 came to the paternal house of the complainant while the complainant, her parents, complainant's father's sister & her husband, aunt and her husband were present and told them that the complainant is their only choice to take her to their house as the wife of their only son but told the complainant her parents and other kins that as they were to remodel their house, the date of marriage will be fixed in January/February, 2006, and that after the aforesaid meeting of both the sides, the accused No. 1 would very often come to the paternal house of the complainant and as complainant's parents took him as their son-in-law, the accused No. 1 along with his photographer friend came to stay at the paternal house of the complainant. The complainant taking the accused No. 1 as her husband during the absence of her parents and at the instance of the accused No. 1 had intercourse with him on several occasion and at the request of the accused No. 1 a good number of photographs of the close posture of the complainant and accused No. 1 were taken. This

continued for months, and in February, 2006 the complainant and her parents asked the accused No. 1 to fix up a date for a meeting with their parents to finalize the date of marriage but the accused No. 1 tried to evade. Her father and her aunt's husband went to the paternal house of the accused No. 1 on 26-02-2006 and as per their previous assurance requested the parents of the accused No. 1 to fix up a date of marriage while the accused No. 1 was also present but to their surprise the accused Nos. 1,2 & 3 denied having made any promise of marriage. In this situation the complainant along with her father's sister and her husband met the accused No. 1 at Mecheda the complainant asked the accused No. 1 the reason for denial of the proposal of marriage in between them. The complainant also asked him why the accused No. 1 on the plea of promise marriage fraudulently enjoyed her and had intercourse with her on occasion and took photographs in closed postures with her. The accused told them that, all those were to enjoy complainant for his physical pleasure and he would never marry her, and that the promise of marriage as given by the accused No. 1 which the complainant believed in body and mind was ultimately proved to be fraudulent and as a result the complainant sacrificed her virginity at the assurance of the accused No. 1. Learned CJM sent the petition to the police for investigation u/s 156(3) Cr.P.C.

3. The parents of the petitioner by filing a revisional application being CRR No. 2683 of 2008 prayed for quashing of the proceeding as against them and this Court by order dated 15 of February, 2008 quashed the proceeding as against them only.

4. Upon completion of investigation charge sheet has been submitted against the present petitioner u/s 417/420/376 IPC.

5. It has been submitted by the learned advocate appearing for the petitioner that the complainant, an adult girl who had an affair with the present petitioner and developed intimacy, and had willful sexual intercourse with the petitioner cannot complain that such an act of intercourse do come within the purview of Section 417/420/376 of the IPC. Learned Advocate for the petitioner referred to the decision in *Uday v. State of Karnataka* (2003) 1 C.Cr. LR (SC) 555, *Hari Majhi Vs. The State*, *Krishna Pada Mahato v. The State of West Bengal* 2004 C Cri LR (Cal) 945, *Shri Shamsad Ali v. The State* 2004 C Cr LR (Cal) 216, *Sudhangshu Pramanik and Ors. v. State of West Bengal* (2005) 2 C Cr LR (Cal) 67, *Bablu Pramanik v. The State of West Bengal* 2001 C Cr LR (Cal) 166, *Jayanti Rani Panda Vs. State of West Bengal and Another*, in support of his contention.

6. Mr. Barin Roy, learned advocate appearing for the State of West Bengal submitted that whether the petitioner had really intended to marry or whether expression of intention to marry was false to the knowledge of the petitioner is a matter of evidence and since charge sheet has been submitted the parties must go to the trial.

7. In *Uday v. State of Karnataka* (supra) their Lordships of the Supreme Court at

para 21 of the Judgment 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 straitjacket 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. (emphasis mine). 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.

8. Interestingly, the Hon''ble Supreme Court had occasion to refer to the two Division Bench decisions of this Court i.e. Jayanti Rani Panda (supra) and Hari Majhi (supra) along with the decisions of other High Courts. The case of Pradeep Kumar (supra) was decided by the Hon''ble Supreme Court with reference to the decisions in Uday v. State of Karnataka, Deelip Singh @ Deelip Kumar v. State of Bihar 2005 SCC (Cri) 253 and Jayanti Rani Panda of this Court and also decisions of other High Courts. In Hari Majhi's (supra) case it was held by the Division Bench of this Court that where the prosecutrix agreed to have sexual intercourse as accused promised to marry her it cannot be said that the accused could be held guilty of rape. In Jayanti Rani Panda's case (supra) it was held that if a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activities until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 of the IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the accused, unless the court can be assured that from the very inception the accused never really intended to marry her.

9. Mr. Roy also relied on Deelip Singh @ Deelip Kumar (supra) and also the decision in Uday v. Karnataka (supra) to argue that this is not a stage where it can be conclusively held that the opposite party's allowing the petitioner to have sexual enjoyment with her on a promise to marry did not suffer from misconception of fact because according to Mr. Ahmed whether the petitioner never really intended to marry the opposite party or not is basically a question of fact which can only be decided at the trial and this Court cannot prematurely dismiss the petition of complaint u/s 482 of the Cr.P.C. merely at the asking of the accused. It is the submission of Mr. Roy that each case has to be decided on its own facts and evidence and Uday v. karnataka (supra) has laid down the law

that there cannot be any strait jacket formula for determining whether the consent of the prosecutrix to sexual intercourse is voluntary or whether it is given under a misconception of fact.

10. I have gone through the decisions of the Hon''ble Supreme Court and of this High Court as have been referred to by the learned advocates for the parties. The question is whether the consent given by the opposite party to sexual intercourse was voluntary or whether it is given under a misconception of fact. The question would revive in the shape: Whether the representation by the petitioner was false to the knowledge of the petitioner or not at the time when it was made. It has to be noted that all the decisions referred to by the learned advocates for the parties in relation to offences u/s 376/417/420 of the IPC were rendered in appeal where the Hon''ble Supreme Court, or the Division Bench of this Court in deciding Hari Majhi and Jayanti Rani Panda had occasion to refer to evidence of the parties and upon consideration of evidence adduced by the parties the decisions came into being. The question therefore is should this Court acting upon the decisions in Uday v. State of Karnataka (supra), Deelip Singh @ Deelip Kumar (supra), Hari Majhi (supra) and Jayanti Rani Panda (supra) decide the question without asking the parties to go to the trial? Their Lordships of the Supreme Court referred to the decision in Rao Harnarain Singh v. State AIR 1958 Punjab 123 where the word consent was defined as:

Consent is an act of reason, accompanied by deliberation, a mere act of helpless resignation in the face of inevitable compulsion, non-resistance and passive giving in cannot be deemed to be consent.

11. If we rely on Uday v. State of Karnataka (supra) then also quashing of the proceeding u/s 482 of the Cr.P.C. does not appear to be warranted because their Lordships observed "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 was given under a misconception of fact." (emphasis supplied) In the ultimate analysis the court has to consider the evidence before it and the surrounding circumstances before reaching a conclusion. Again it has been reiterated that the court must weigh 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. Whether the court can be assured that from the very inception the accused never really intended to marry her or not has to be decided only upon trial; or in other words the question whether the promise or representation of the petitioner was or was not false to the knowledge of the petitioner at the time it was made cannot be decided by this Court in the revisional jurisdiction. In Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Another, their Lordship held at para 20 of the judgment that.

If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly

given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375, clause second. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda's case (supra) which was approvingly referred to in Uday's case (supra). The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end - "unless the court can be assured that from the very inception the accused never really intended to marry her.

12. In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu's case (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it can not be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out." The case of Deelip Singh @ Dilip Kumar (supra) was referred to in Pradip Kumar and their Lordships of the Supreme Court in Deelip Singh's case held that the evidence has to be carefully analyzed as the ultimate conclusion depends on the facts of each case. Their Lordships further observed that a representation deliberately made by the accused with a view to elicit assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If it is established that at the very inception of the making of promise the accused did not really entertain the intention of marrying her and the promise to marry was a hoax the consent would be of no avail. Therefore, on the authorities referred to above it can be said that to arrive at a decision on the question a trial is necessary where the parties are to adduce evidence and it is not a case where the proceedings should be nipped in the bud on the basis of generalized statement that sexual exercise with consent of the prosecutrix does not fasten the accused with any criminal liability either of rape or of cheating.

13. In the circumstances, I do not find that the proceeding should be quashed at this stage.

14. Application is dismissed.

15. Urgent xerox certified copies, if applied for, be given to the parties as expeditiously as possible.