
(2011) 05 AHC CK 0174
In the Allahabad High Court
Case No : Criminal Revision No. 1169 of 2011

Shivalik Ghosh and Another	Vs	APPELLANT
State of U.P. and Another		RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 323, 328, 375, 376, 90

Citation : (2011) 61 ACR 2487 : (2011) 7 RCR(Criminal) 332

Hon'ble Judges : Vinod Prasad, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Vinod Prasad, J.—Challenge in this revision by mother Chitali Ghosh (A2) and her son Shivalik Ghosh (A1), is to their summoning dated 24.1.2011 in Criminal Case No. 771 of 2011, State v. Shivalik Ghosh and Anr., relating to crime No. 32 of 2010, for offences under Sections 323, 328, 376 I.P.C., P.S. Mahila Thana, Sector 32, NOIDA, District G.B. Nagar by A.C.J.M.-I, G.B. Nagar.

2. A glimpse of background facts, as are perceptible from the affidavit of Shivalik Ghosh filed in support of this revision, counter affidavit and rejoinder affidavits are that on 3.12.2010 at 12.45 p.m., victim-informant Barnali Baishya (R2) lodged an FIR at P.S. Mahila Thana NOIDA, G.B. Nagar as crime No. 32 of 2010 u/s s 323, 328, 376 I.P.C. vide annexure No. 1 to the affidavit alleging therein that informant is a resident of H-137, Sector 22, NOIDA and was employed in a Software Company. In the month of August, 2010 while surfing on internet on Jeewan Sathi. Com she developed acquaintance with A1revisionist Shivalik Ghosh, resident of Maipal Krishna Apartment, I-1305, Shushant Lok, C-Block, Gurgaon, who was working with Hero Honda Private Ltd., Dharo Heda, Jaipur Road. On the faithful date 18.8.2010, A1 picked up R-2 from her company and carried her to Gurgaon where, he dissolved some intoxication in her cold drink and when R2 lost her senses that A1 outraged her modesty by raping her. After

regaining consciousness, R2 resisted sexual assault on her but was pacified on a false deceitful assurance of solemnizing marriage with her. Taking advantage of the situation A1 started often visiting victim's abode and indulge in carnal intercourse both at NOIDA and Gurgaon and he continued to assure R2 regarding false promise of solemnizing marriage. Having some apprehension R2 demanded telephone number of A2 which was given to her by A1 after repeated insistence. Mother of R2 also conversed with A2 who did not object to tying up nuptial knot between A1 and R2 but postponed it for two years. When victim R2 telephoned A2 then also no objection was shown to the tying of knots by A2 and therefore, R2 being assured of marriage continued to succumb to the lustrous overtures of A1 and physical sexual contact between A1 and R2 continued. Cheating and deceiving R2 revisionist A1 even took loan of Rs. 50,000/-from her which was not paid back till the date of lodging of FIR by R2. In telephonic conversation between R2 and A2, on 1.9.2010, she was informed that Rs. 15 lacs loan is due on A1 and marriage between them shall be solemnized only after the said money is paid by the victim. When informed about physical relationship A2 replied that in between opposite sexes it not very unethical and is a normal conduct. On 13.9.2010,A1 consented to tie knots with R 2 in the presence of one Deepak but informed R 2 that details shall be finalized on arrival of A2 following day. R2 accompanied A1 to the airport to receive A2 but there, she was assaulted. A2 separated A1 from R2 who also refused to marry R2. Since R2 was deceived and cheated and her most precious honour was robbed off by A1 in conspiracy and connivance with A2 that victim R2 was left with no other option and hence she approached the police and lodged her FIR annexure 1 at PS Mahila Thana, Sector 32 NOIDA, district G.B. Nagar.

3. After registration of the crime investigation ensued and I.O. recorded statements of the victim and her mother, filed cumulatively as annexure No. 4 and finally concluding investigation charge sheeted revisionist on 11.1.11, for offences u/s s 323, 328, 376 IPC vide annexure No. 7.

4. A.C.J.M.-Ist, G.B. Nagar, in whose court charge sheet , annexure No. 7, was submitted took cognizance of the offences on 24.1.2011 and registered case No. 771 of 2011 against the revisionist and summoned them to stand trial for those offences by passing impugned order, which has now been challenged by the accused revisionists in instant revision.

5. Sri G.S. Chaturvedi, learned Senior Counsel assisted by Sri Swetashwa Agarwal, advocate was heard for the revisionists and Sri Mayank Srivastava, and Miss Poonam Dubey, advocates were heard for the informant and Sri K.N. Bajpai, learned AGA, was heard for the Respondent No. 1 State. Memo of revision along with the affidavit, counter affidavit and rejoinder affidavits was also perused and considered.

6. Assailing the impugned judgment learned Senior Counsel contended that it is a case of consent. Victim is major employed in a Software Company and was capable of giving consent to carnal intercourse. Whatever happened between A1

and R2 was with census-id-idem and hence no criminality can be attached to it and consequently charge of rape is not disclosed and it must fail. In contemporary times of modern world physical living relationships between opposite sexes is not abhorred and are gaining grounds and, therefore, once the victim was a consenting party, revisionists should not be prosecuted submits learned Sr. counsel. Summated from such an angle impugned summoning order not infallible and be quashed. In support of his contentions, reliance was placed on an apex court decision in Uday Vs. State of Karnataka, Concludingly, it was argued that the revision be allowed and impugned order of summoning be quashed and the revisionists be set free.

7. All the Respondent counsel contended conversely and submitted that the entire submissions of the revisionist counsel centers around the submission that victims allegations are false and truthfulness of these allegations by the victim have been questioned. It is contended that at the stage of summoning no such exercise can be under taken and truthfulness or other wise of victims allegations can be adjudged only during trial and on this submission impugned order can not be assailed. A legitimate prosecution instituted after due investigation based on cogent and reliable statements prima facie disclosing commission of session's triable offences cannot be scuttled at its threshold by making a roving inquiry into the allegations leveled by the victim and accepting accused defence. There cannot be any pre-trial decision even before framing of charges. Consent or no consent has to established as a fact and that can be done only by affording opportunity to the victim and examining her as a witness. Whether R2 was consenting party or not can be divulged only by her and no body else and therefore she must of given chance to state that fact submitted learned Respondent counsel. They further contended that it is not a case of no evidence and sketched facts discloses that after taking advantage of rape on victim damsel, she was blackmailed on deceitful assurances of marriage for many months which ultimately was refused. The deceit was played to silence victims outcry against crime committed by the revisionist. It was to muzzle her voice. Emotions of the victim were blackmailed to compel her to succumb to the lustrous design by A1 and hence there is no scope for intervention by this Court in impugned summoning order. It was further contended that the rape was committed against the will and consent at the very initial stage of the incident and consequently crime was complete on that day. Learned AGA additionally contended that it is a case of cheating as well and the accused should be prosecuted for that charge also. In support of their submissions reliance is placed on clause fifth of Section 375 I.P.C. Drawing curtain of the submissions it was stated that revision lacks merit and be dismissed.

8. I have considered the arguments by the rival contesting sides and have perused the entire material on record.

9. It is alleged by the victim that taking advantage of her acquaintance developed on the internet, A1, accused revisionist Shivalik Ghosh carried R2 to

Gurgaon, where by offering her an intoxicated cold drink, her chastity was outraged. For this charge there is unambiguous clear and cogent allegation mention in the FIR, Annexure 1 and statement u/s 161 Code of Criminal Procedure annexure 4 by the victim informant and resultantly there is credible material exist on record to prosecute revisionists for offence u/s 376 I.P.C. Further allegations by R2 are that by taking advantage of criminal act, A1 blackmailed her to commit future sexual assault at both placed in NOIDA and Gurgaon. To escape punishment for his depraved lustrous activities A1 practiced deceitful dexterity of giving false promises of solemnizing marriage with the victim and thereby continued to indulge in carnal intercourse with her. Such a representation by the accused was a fraud played upon the victim and therefore alleged consent obtained by A1 was of no consequence . A legal act cannot be generated on fraud. Clause fifth of Section 375 IPC provides for such a situation. If a accused takes advantage of a lady on deceitful promise of solemnizing marriage and indulges into sexual intercourse with her it is rape. This has been so held by the Apex Court in the decision of Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Another, wherein Apex Court has observed as under:

19.. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could be regarded as consent for the purpose of Section 375 IPC, was dealt with by a Division Bench of the Calcutta High Court in Jayanti Rani Panda Vs. State of West Bengal and Another, The relevant passage in this case has been cited in several other decisions. This is one of the cases referred to by this Court in Uday"s case (supra) approvingly. Without going into the details of that case, the crux of the case can be discerned from the following summary given at para 7:

Here the allegation of the complainant is that the accused used to visit her house and proposed to marry her. She consented to have sexual intercourse with the accused on a belief that the accused would really marry her. But one thing that strikes us is ... why should she keep it a secret from her parents if really she had belief in that promise. Assuming that she had believed the accused when he held out a promise, if he did at all, there is no evidence that at that time the accused had no intention of keeping that promise. It may be that subsequently when the girl conceived the accused might have felt otherwise. But even then the case in the petition of complainant is that the accused did not till then back out. Therefore it cannot be said that till then the accused had no intention of marrying the complainant even if he had held out any promise at all as alleged.

The discussion that follows the above passage is important and is extracted hereunder:

The failure to keep the promise at a future uncertain date due to reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter

would have been different if the consent was obtained by creating a belief that they were already married. In such a case the consent could be said to result from a misconception of fact. But here the fact alleged is a promise to marry we do not know when. If a full-grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90 IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability on the other, unless the court can be assured that from the very inception the accused never really intended to marry her.

(Emphasis supplied)

The learned Judges referred to the decision of the Chancery Court in *Edgington v. Fitzmaurice* 1885 (29) Ch.D. 459 and observed:

This decision lays down that a misstatement of the intention of the Defendant in doing a particular act may be a misstatement of fact, and if the Plaintiff was misled by it, an action of deceit may be founded on it. The particular observation at p. 483 runs to the following effect: There must be a misstatement of an existing fact. Therefore, in order to amount to a misstatement of fact the existing state of things and a misstatement as to that becomes relevant. In the absence of such evidence Section 90 cannot be called in aid in support of the contention that the consent of the complainant was obtained on a misconception of fact.

After referring to the case-law on the subject, it was observed in *Uday's case* (supra):

It therefore appears that the consensus of judicial opinion is in favor 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.

20. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90, it needs to be clarified

that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. 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. (emphasis supplied). 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 case (vide passage "ed supra). By making the solitary observation that a false promise is not a fact within the meaning of the Code, it cannot 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 strait-jacket 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.

10. In view of above exposition of law by the Apex Court, there is no scope for this Court to take a contrary view. Contention of learned Senior Counsel that it is a case consent, therefore, cannot be accepted and is hereby repelled.

11. Another significant aspect of the matter is that offence of rape can be made out against an accused, if the rape is committed against the will of the victim or her consent. There may be instances where the victim may consent for rapuit carnaliter cognovit without having a will for the same and vice versa. For example an unmarried major girl though may have desire for sexual entanglement with her beloved but may not consent for performance of such an act prior to marriage. Thus she may have will but no consent. If in such a situation a sexual assault is made upon her, it will be a case of rape against her consent falling under clause second of 375 IPC. Under the first clause, if a sexual intercourse is done against the will of the victim then also it is rape. In the present case, there was total absence of will and consent both as according to victim's allegations she was in capable of having a will and giving of consent both before she was raped by A1. At subsequent occasions her consent was

obtained by fraud and misconception of facts and therefore it was not a free consent and accused can not be conferred any benefit on that score. The case of the revisionists, therefore false in both the above categories mentioned in clause first and second of Section 375 I.P.C.

12. Judging from another angle harangued submission by revisionist counsel is based upon truthfulness or otherwise of the allegations leveled by the victim. This Court cannot scuttle the prosecution at its inception on that basis. Genuineness of the allegations have to be tested on the touchstone of probability or improbability during the trial after affording fullest opportunity to the victim. To castigate her allegations as untruthful at the very threshold of the prosecution without affording any opportunity to the victim to substantiate her charge, will be against principles of natural justice and fair play and will thwart course of justice. Attour question involved in the present case is not that the victim was a consenting party to the sexual overtures of A1 but the question is whether rape was committed upon her on the occasion complained of with her consent or not?. Even if hypothetically it is accepted that victim had lost her virginity at any single point of time on any occasion is no reason to commit rape upon her at subsequent occasions on false promises, which accused never intended to fulfill and abide by. This question has invited attention of Hon"ble Apex Court in the decision of State of U.P. v. Munshi AIR 2009 SC 370 wherein it has been observed by Hon"ble Apex Court vide paragraph No. 8 thereof as follows:

8. Even assuming that the victim was previously accustomed to sexual intercourse, that is not a determinative question. On the contrary, the question which was required to be adjudicated was did the accused commit rape on the victim on the occasion complained of. Even if it is hypothetically accepted that the victim had lost her virginity earlier, it did not and cannot in law give licence to any person to rape her. It is the accused who was on trial and not the victim. Even if the victim in a given case has been promiscuous in her sexual behaviour earlier, she has a right to refuse to submit herself to sexual intercourse to anyone and everyone because she is not a vulnerable object or prey for being sexually assaulted by anyone and everyone.

13. Turning towards decision relied upon by the revisionists" counsel it is of no help to the revisionists. Firstly, that decision was rendered after full fledged trial which is not the case in the instant revision. Secondly, in that case, friendship had developed earlier and on that a proposal for marriage was given but caste of both the girl and boy was an impediment. Both the victim and the accused were neighbours and resided in a close vicinity. It was at 12"O clock in the night, on the date of incident, that accused had appeared on the window of victim"s room and called her out for having conversation. Since victim was in deep affection with him, she accepted invitation and both of them thereafter went to a constructed house of the Appellant. Some cuddling etc. took place and thereafter both of them had entered into sexual intercourse.

14. Facts of the present case are however, entirely different. Here, at the first

instance, after alluring the victim, her chastity was ravished under administration of intoxication. False promises were made subsequent to the said rape to shield skin from clutches of law by the accused. At no point of time, there was any love and affection between A1 and R2. In fact, victim was at the receiving ends because of rape committed upon her at the very first instance by A1. All subsequent promises were deceitful means to keep mouth of the victim shut and which promises were never intended to be fulfilled. First of all half a lac of rupees were obtained and thereafter fifteen lacs were demanded to solemnize the marriage. Happening of the incident is indicative of the fact that the accused never intended to marry R2. Thus facts of the present case are entirely different from the decision of Uday's case (Supra).

15. Wrapping up discussions, I do not find any illegality or legal infirmity either of facts or that of law in the impugned summoning order, which has been passed on the basis of a charge sheet submitted against the revisionists after due investigation conducted in consonance with statutory provisions of law.

16. This revision being bereft of merits, is dismissed. Interim order dated 25.2.2011 stands vacated.

17. Revisionists are directed to surrender and face trial.