
(2012) 04 GAU CK 0001
In the Gauhati High Court
Case No : Criminal Rev. Petition 61 of 2004

Shri Durjoy Chakraborty

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 17-04-2012

Acts Referred:

Constitution of India, 1950 — Article 142
Criminal Procedure Code, 1973 (CrPC) — Section 313, 357, 397, 401
Evidence Act, 1872 — Section 114A
Penal Code, 1860 (IPC) — Section 24, 25, 357A, 375, 376

Citation : (2012) 2 GLD 694

Hon'ble Judges : Swapan Chandra Das, J

Bench : Single Bench

Advocate : P.K. Biswas, Mr. H.K. Bhowmik and Mr. P. Majumder, for the Appellant; A. Ghosh, Spl. P.P., for the Respondent

Final Decision : Allowed

Judgement

S.C. Das

1. This revisional application, u/s 397 read with Section 401 of Cr.P.C., is directed against the judgment and order dated 24.07.2004, passed by learned Sessions Judge, West Tripura, Agartala, in Criminal Appeal No. 37 (2) of 2001, under which the learned Sessions Judge affirmed the judgment and order of conviction and sentence dated 22.05.2001, passed by learned Judicial Magistrate, First Class, Agartala, West Tripura, in case No. GR 379 of 1993, whereby and whereunder the learned Magistrate found the accused-petitioner guilty of committing offence u/s 417 of IPC and sentenced him to suffer RI for one year. Brief Fact:-

Smt. Gayatri Acharjee(PW. 1), lodged an FIR with the O/C of Airport P.S. on 13.03.1993, alleging that in the Bengali calendar months of Baisakh to Falgun of the year 1399 B.S., she with her father, sister and brothers, were residing as a tenant in the house of the father of accused petitioner Durjoy Chakraborty at

Vibekananda Pally, Narsingarh and the accused-petitioner with the assurance of marriage undergone intercourse with her, and as a result, she became pregnant. She insisted the accused to marry her but the accused was not ready to do so, and, in the meantime, her pregnancy became seven months. The accused advised her to terminate the pregnancy and also threatened her and her family members. She reported the incident to the Chairman of the Village Panchayat but Panchayat did nothing in the matter, and therefore, she lodged FIR with the police.

Airport P.S. case No. 8 (3)/1993 under Sections 493, 420 and 376 of IPC was registered and after investigation police submitted charge sheet against the accused-petitioner for commission of offence punishable under Sections 493 and 376 of IPC, and accordingly, on the basis of charge sheet, cognizance was taken and the case was committed to the Court of Sessions for trial.

Learned Sessions Judge, considering the materials on record found no ingredient of offence under Sections 376 and 493 of IPC and framed charge u/s 417 of IPC and remanded the case to the Court of Chief Judicial Magistrate, West Tripura, Agartala for trial. Learned Judicial Magistrate, First Class, West Tripura, Agartala was entrusted to try the case, and on completion of trial, learned Magistrate passed impugned judgment and order of conviction dated 22.05.2001 and sentenced the accused-petitioner to suffer RI for one year. The accused-petitioner challenged the judgment and order of conviction and sentence before the learned Sessions Judge but the learned Sessions Judge dismissed the appeal, and, hence, this revisional application.

2. Heard learned counsel, Mr. P.K. Biswas for the petitioner and learned Addl. P.P., Mr. A. Ghosh for the State respondent.

3. It is submitted by learned counsel, Mr. Biswas that the victim Gayatri Acharjee was admittedly aged about 21 years at the time of alleged occurrence, and she was a consenting party to the sexual intercourse with the accused petitioner, and therefore, there was no case of rape as was rightly decided by the learned Sessions Judge. He has further submitted that there is no evidence at all to show that the accused petitioner cheated the victim in any manner or that her consent was obtained under fear or misconception. She was a full-grown girl and she consented to have sexual intercourse having understanding the consequence of such intercourse before her marriage and her allegation that the accused promised to marry her and subsequently refused to do so is of no consequence at all to prove a criminal offence against the accused petitioner. In support of his contention, learned counsel referred the following case laws:

(i) K.P. Thimmappa Gowda vs. State of Karnataka, reported in AIR 2011 SCW 2281.

(ii) Deelip Singh @ Dilip Kumar Vs. State of Bihar, .

(iii) Uday Vs. State of Karnataka, .

4. Learned Addl. P.P., on the other hand, has submitted that no doubt the victim woman was aged about 21 years at the time when the FIR was lodged but her evidence speaks that she was cheated by the accused with the assurance of marriage. He has frequently undergone intercourse with her and had there been no such promise made by the accused, she would not surrender herself for having sexual intercourse by the accused. She became pregnant as a result of such premarital sexual nexus and when she requested the accused to marry her, the accused refused. She gave birth of a female child and at the time, when she deposed before the Court i.e. in the year 1999, her daughter was about seven years. It was none but the accused, who was responsible for the birth of the legitimate child, and therefore, the accused petitioner should suffer the sentence, as otherwise, it will set an instance in the society if a wrong doer escaped punishment from a Court of law.

5. The evidence of PWs. 1, 2 and 6 is in support of the prosecution case. PW. 1, the victim woman, in her deposition stated that she along with her father, brothers and sister were residing as a tenant during the period from Baisakh to Falgun in the house of the accused Durjoy Chakraborty. The accused Durjoy Chakraborty promised to marry her and in that belief she had sexual intercourse with the accused from time to time and she became pregnant. The accused refused to marry her after she conceived. She lived in the house of the accused as tenant for about seven months after the pregnancy, but ultimately, the accused did not marry her. Therefore, she lodged the FIR.

PWs. 2 and 6 supported the contention of PW. 1.

PWs. 3, 4 and 5 were all neighbours of the accused and they turned hostile. The previous statement of those witnesses recorded by the I.O. has been proved and that is in support of the prosecution case.

PW. 7, Dr. Ashim Saha medically examined the victim on 16.03.1993 and he found the victim was carrying pregnancy of 32 weeks.

In her deposition, PW. 1, the victim, stated that she delivered a female child and on the date of her deposition before the Court of learned Magistrate i.e. 19.06.1999 her child was aged about seven years. She also stated that she got married about 18 months before the date of her deposition.

6. The evidence, on record, undoubtedly established the version of PW. 1 that she with her family was residing in the house of the accused as a tenant and at that time she developed love affair with the accused and the accused with the assurance of marrying her has undergone intercourse, and as a result, she got pregnant and, ultimately, she delivered a female child. It is also in the evidence on record that she requested the accused to marry her but the accused refused. In her deposition, she stated that there was a village meeting and it was decided in the meeting that the accused must marry her but parents of the accused did not agree and when she lodged the FIR the accused left the village.

Since the victim (PW. 1) was aged about 21 years at the time of alleged offence and since she was a consenting party, the learned Sessions Judge rightly decided that there was no case of rape. Charge was framed u/s 417 of IPC and the learned Magistrate found the accused guilty of cheating the victim with false assurance.

Section 415 of IPC defined "cheating" thus:

"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".

Explanation,--A dishonest concealment of facts is a deception within the meaning of this section."

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, "dishonestly, 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"."

7. The victim girl was an unmarried woman and according to her the accused made an assurance of marriage and therefore she has undergone intercourse with him. There is no statement made by her that had there been no such assurance she would not undergo intercourse with him. There is also no evidence that on misconception of fact she has undergone intercourse with the accused. The risk of having such intercourse before her marriage may be presumed to have understood by the victim but still she has consented to the act of having sexual relation with the accused and frequently undergone intercourse. Section 90 of IPC, therefore, cannot be said to be to the aid of the victim.

8. In the case of K.P. Thimmappa Gowda(supra), almost in a similar case, the trial court acquitted the accused but the High Court found the accused guilty of committing offence under Sections 376 and 417 of IPC, but on appeal the Apex Court considering the fact that the victim was aged above sixteen years and was a consenting party to the sexual intercourse held that the accused was entitled to get benefit of doubt and accordingly acquitted the accused and also considered the circumstances that the accused agreed to transfer two acres of land for the breach of promise to marry the victim and she had consented to accept the same.

9. In another almost similar case of having sexual intercourse with the promise of marriage, the Apex Court in the case of Udai(supra) observed thus:

"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. 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. The court 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.

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. In the instant case, the prosecutrix was a grown-up girl studying in a college. She was deeply in love with the appellant. She was, however, aware of the fact that since they belonged to different castes, marriage was not possible. In any event, the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did not resist the overtures of the appellant, and in fact succumbed to them. The circumstances show that she freely, voluntarily and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.

Further, there is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother, the appellant distanced himself from her.

That apart, in a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of act. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. But in the instant case, there is doubt that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant because the prosecutrix knew that her marriage with the appellant was difficult on account of caste considerations.

Further, there is no evidence to prove that the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course.

The prosecutrix and the appellant were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it.

In view of the above findings, it is not necessary to consider the question as to whether in a case of rape the misconception of fact must be confined to the circumstances falling u/s 375 fourthly and fifthly, or whether consent given under a misconception of fact contemplated by Section 90 has a wider application so as to include circumstances not enumerated in Section 375 IPC."

10. In the case of Deelip Singh (supra) the accused with a promise to marry the victim girl undergone intercourse with her frequently and when she got pregnant, she asked the accused to marry her but the accused did not marry and to avoid the marriage father of the accused took him out of the village to thwart the bid of marriage. The victim girl delivered a female child, who was living with her. The Apex Court, considering the facts and circumstances, acquitted the accused but with a view to render complete justice, a compensation of Rs. 50,000/- , which was paid by the accused for his breach of promise to marry the victim, was accepted and paid to the victim. The Court held thus:

"The Penal Code does not define "consent" in positive terms, but what cannot be regarded as "consent" under the Code is explained by Section 90 IPC.. Consent given firstly under fear of injury and secondly under a misconception of fact is not "consent" at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other countries. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to

believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.

Section 90 cannot, however, be construed as an exhaustive definition of consent for the purposes of the Indian Penal Code. The normal connotation and concept of "consent" is not intended to be excluded. Various decisions of the High Court and of this Court have not merely gone by the language of Section 90, but travelled a wider field, guided by the etymology of the word "consent".

As regards the factual aspect of the present case related to consent questions pertinent are:- Is it 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. 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 the 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. Whether on the basis of the evidence adduced by the prosecution, it is reasonably possible to infer the lack of consent on the part of the prosecutrix is the ultimate point to be decided.

In the present case, part from the evidence of the prosecutrix, there is no other evidence which could throw light on the point in issue. First of all, there was no forcible sexual indulgence in this case, it is clear from the evidence of the prosecutrix that the predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her of the prospect of marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the first information report. There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a weak moment. Nor does her evidence

indicate that she was incapable of understanding the nature and implications of the act which she consented to. On the other hand, the scrutiny of evidence of the prosecutrix gives a contra-indication. She was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act. The prospect of the marriage proposal not materialising had also entered her mind. Thus, her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening. The remaining question is whether on the basis of the evidence on record, it is reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. The accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. The prosecutrix was also too keen to marry him as she said so specifically. But there is no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of the prosecutrix that "later on" the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialise on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry for which the accused is prima facie accountable for damages under civil law. Therefore, conviction and sentence u/s 376 IPC against the accused-appellant is liable to be set aside.

The appellant by promising to marry the victim woman, persuaded her to have sexual relations and caused pregnancy. The reprehensible conduct of the appellant left behind him a trail of misery, ignominy and trauma. The only solace is that she married subsequently. The female child born out of the illicit relationship is now living with her married mother and she is about 14 years old now. Though there is no evidence to establish beyond reasonable doubt that the appellant made a false or fraudulent promise to marry, there can be no denial of the fact that the appellant did commit breach of the promise to marry for which the accused is prima facie accountable for damages under civil law. The appellant on being asked for his response on this aspect so as to enable the Supreme Court to pass a suitable order in exercise of power vested under Article 142 of the Constitution, informed that he is prepared to pay a sum of Rs. 50,000 by way of monetary compensation irrespective of acquittal. Though the said amount is not an adequate compensation, the appellant need not be called upon to pay more for more than one reason: firstly, the appellant has been in jail for about two years by now; secondly, the accused belongs to a backward class and his family is not affluent though they have some agricultural lands; lastly, the incident took place about 15 years back and in the supervening period, the prosecutrix as well as the appellant married and he has two children. In these

circumstances, the offer of the appellant is accepted. The appellant's counsel has brought a demand draft for Rs. 50,000 drawn in favour of the Chief Judicial Magistrate. The Registrar concerned of the Supreme Court shall send the draft to the CJM concerned for being credited to his account in the first instance. The CJM shall take immediate steps to summon the prosecutrix whose name and address shall be furnished by the counsel for the appellant in the course of the day to the Registrar of the Supreme Court. Out of the amount of Rs. 50,000, a sum of Rs. 10,000 shall be paid over to the prosecutrix in cash if she makes a request and the remaining amount of Rs. 40,000 shall be kept in a fixed deposit in a bank in the name of the minor girl."

11. In the case in hand, the victim neither in the FIR nor in her deposition in the Court made an allegation that she was raped by the accused against her will or without her consent. She made a very simple statement that the accused with an assurance to marry her undergone intercourse with her frequently, and as a result, she got pregnant but the accused ultimately did not keep his promise and did not marry her. She delivered a female child and as already stated above on the date of her deposition before Court i.e. 19.06.1999, the female child, so born to her, was aged about seven years and now, obviously she is about nineteen/twenty years. The statement of fact inspires all confidence that she made a true statement all along before the police as well as the Court that the accused undergone intercourse with her and as a result she got pregnant and delivered a female child. She made no allegation that she undergone intercourse without knowing the consequence of such act or that there was any sort of misconception in her mind that the accused did not really intend to marry her and made false promise to have intercourse with her. In her deposition she clearly stated that in the village meeting it was decided that the accused must marry her but the father of the accused did not agree and the accused was, thereafter, not available in the village. It might happen that because of the intervention of the parents of the accused, ultimately, could not marry her. In his examination u/s 313 of Cr.P.C. the accused simply denied the allegation made against him and stated nothing about character, chastity, etc. of the victim.

12. Under such circumstances, in view of the law laid down by the Apex Court as discussed above, the ingredients of offence u/s 417 of IPC in the facts and circumstances and the evidence on records, as reproduced above, are not available, and hence, the accused is entitled to get an order of acquittal on benefit of doubt.

13. Section 357 of Cr.P.C. prescribes provision to order payment of compensation in the event of an accused found guilty of committing an offence. But in the circumstances of the present case, where the ingredients of offence are not strictly proved, whereas it is found with all certainty that the conduct of the accused-petitioner left behind him a trail of misery, ignominy and trauma, because of his illicit relation with the victim woman, he should not be left free which will definitely send a wrong message to the society. Section 357(A) IPC

prescribes provision of "Victim Compensation Scheme" but it is submitted at the Bar that no such Scheme has been formulated as yet. Under such circumstances, I think, for rendering complete justice, this Court in exercise of its inherent jurisdiction is empowered to impose a reasonable amount on the accused petitioner to pay a compensation to the child, who was born out of the illicit relation between the accused petitioner and the victim woman for the false and fraudulent promise made by the accused petitioner. Taking into consideration all aspects, I think an amount of Rs. 50,000/- (rupees fifty thousand) may be a reasonable compensation for the girl, and the amount should be paid to the said girl and may be kept in her name in a fixed deposit scheme, which the girl may spend for her settlement in life.

14. Accordingly, the revisional application is allowed. The judgment and order of conviction and sentence is set aside. The accused petitioner is set at liberty from the charge levelled against him. He should pay a compensation of Rs. 50,000/- (rupees fifty thousand) within 45 days from today and deposit the amount before the learned Chief Judicial Magistrate, West Tripura, Agartala, and on such payment been made by the accused petitioner, the learned Chief Judicial Magistrate shall issue notice to the victim woman to appear before the Court with her daughter, who was born to her because of her relationship with the accused, and, on such appearance, being satisfied, the learned Chief Judicial Magistrate shall arrange payment by way of making a fixed deposit in the name of the said girl for her future settlement. Send back the LC records along with a copy of this judgment.