
(2011) 01 CAL CK 0043
In the Calcutta High Court
Case No : C.R.R No. 2611 of 2007

Sk. Jalal	Vs	APPELLANT
The State of West Bengal and Others		RESPONDENT

Date of Decision : 25-01-2011

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 164, 482
Evidence Act, 1872 — Section 3
Penal Code, 1860 (IPC) — Section 120(B), 375, 376, 406, 493

Citation : (2011) 7 RCR(Criminal) 2340

Hon'ble Judges : Kanchan Chakraborty, J

Bench : Single Bench

Advocate : Kallol Mondal and Arnab Chatterjee, for the Appellant; Swapan Kumar Mallick, for the Respondent

Final Decision : Dismissed

Judgement

Kanchan Chakraborty, J.—Sk. Saheb Ali and Sk. Kutubuddin the opposite party No. 1 and 2, respectively, were found not guilty to the charge u/s 376 IPC by the learned Additional District and Sessions Judge, Fast Track Court No. 1, Howrah in Sessions Trial No. 305 of 2006 and were acquitted therefrom. Sk. Jalal, father of the victim girl Jahanara Khatoon has challenged the legality, validity and correctness of the order of acquittal of the opposite party No. 1 and 2 in this revision application.

2. The factual aspect is stated below in short:

3. On 13.12.2004, Jahanara Khatoon daughter of Sk. Jalal was found missing since 7 P.M. A missing diary being No. GDE No. 1431 dated 14.12.2004, was noted by the Panchla Police station to that effect. Sk. Jalal and others made thorough searching for Jahanara and on 14.12.2004 one Sk. Hara and Sk. Liakat of village Nabghara brought Jahanara and opposite party No. 2 Sk. Saheb Ali back to their village and disclosed that they were caught when moving in the

village together. Over the issue, local people together had taken a decision that marriage between Jahanara and Sk. Saheb Ali would be performed. Sk. Kutubuddin elder brother of Sk. Saheb Ali also agreed to the said decision. It was decided by the local Gram Panchayat that the marriage between them would be performed on 6.2.2005. On that date, opposite party No. 1 Sk. Saheb Ali left his house. Thereafter, Sk. Jalal learnt from Jahanara that she had love affairs with Sk. Saheb Ali who on assurance to marry her, had sexual intercourse with her on 13.12.2004 in a hotel at Digha. Sk. Jalal also learnt that Sk. Kutubuddin Ali was trying to give marriage of SK. Saheb Ali with another girl. So, on 16.3.2005 Sk. Jalal lodged a written FIR with Panchla Police Station on the basis of which Panchla police station case No. 46 of 2005 dated 16.3.2005, was registered against Sk. Kutubuddin and Sk. Saheb Ali under Sections 493/376/120B IPC. The case was investigated into and ended in charge-sheet against both the accused persons u/s 376 IPC. The opposite party No. 2 and 3 were arrayed to face the charge u/s 376 IPC in the Trial Court as they pleaded not guilty to the charge. Accordingly the Trial commenced and they were found not guilty to the charge leveled against them and acquitted therefrom by the order which has been impugned in this revision application.

4. Mr. Kallol Mondal, the learned Counsel appearing for the Petitioner made manifold contention. The main thrust of his contention is that the learned Trial Court completely erred and was misconceived in coming to a conclusion that the prosecutrix was a consenting party to the alleged sexual intercourse. He has taken me to the paragraph 2 at page 8 of the impugned judgment and contended that the learned Trial Court put unnecessary stress on the fact that the opposite party No. 1 had taken the prosecutrix to one Kazi for the purpose of marriage immediately after having sexual intercourse on 13.12.2004 at Digha. Mr. Mondal further contended that the fact alone does not necessarily imply that the prosecutrix had free consent to the sexual intercourse with the opposite party No. 1 and this will not come within the mischief of Section 90 of the Indian Penal Code.

5. Mr. Mondal submitted that the prosecutrix i.e. Jaharana Khatoon who has examined as P.W. 3 in the Trial has stated that Sk. Saheb the Respondent No. 2 forced her to go inside the taxi on 13.12.2004 about 7 P.M. According to the P.W. 3, Sk. Saheb came to her house and promised to marry her and after giving assurance to marry forced her to go inside the taxi. They came to Digha at night by the same taxi and checked in a hotel.

They resided there as husband and wife and co-habited. When Sk. Saheb co-habiting with her she raised resistance on the plea that their marriage was not solemnized. She further stated that on her protest, Sk. Saheb told her that he would marry her and after his assurance to marry he co-habited with her. Mr. Mondal contended that since Sk. Saheb assured her that he would marry her, the prosecutrix (P.W. 3) allowed him to co-habit with her. Mr. Mondal submitted that have not there been any such assurance, the prosecutrix (P.W. 3) would not

have allowed Sk. Saheb to co-habit with her. Therefore, he submits, there was misconception on the part of the prosecutrix upon misrepresentation by Sk. Saheb. Therefore, it can not be said that the prosecutrix was a consenting party. Learned Trial Court adjudged the matter from an erroneous angle and has come to a wrong findings that the prosecutrix was a consenting party.

6. In support of his contention Mr. Mallick referred to the following decisions:

(a) Pradeep Kumar Verma v. State of Bihar and Anr. (2008) 1 C Cr LR (SC) 173 ,

(b) Bhupinder Singh v. Union Territory of Chandigarh (2008) 3 SCC (Cri) 553.

(c) Yedla Srinivasa Rao v. State of Andhra Pradesh (2007) 1 SCC (Cri) 557 and

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

7. In Deelip Singh v. State of Bihar , the victim girl was aged above 16 years. The Hon''ble Court came to a finding that the consent by the victim girl can not said to be given on misconception u/s 90 of the Indian Penal Code. The Hon''ble Apex Court was of view that the accused was entitled to acquitted.

8. In Yedla Srinivasa Rao v. State of A.P. (supra). The victim girl was of tender age obtained by the accused by making a false promise to marry her which he never intended to fulfil. By invoking of Section 90 IPC the Hon''ble Court was pleased to hold that such fraudulent consent can not said to be a consent. The said consent was of no consequence. The fact of the case before Hon''ble Court was that the accused therein used to come to her place and asking the prosecutrix for sexual intercourse with her but was refused initially. The accused kept on persisting and persuading her. The prosecutrix resisted for about three months. But one day the accused came there, closed the door and committed a sexual intercourse with her forcibly without her consent and against her will. When the prosecutrix asked the accused as to why he spoiled her life he gave assurance that he would marry her and asked her not to cry. On the basis of the assurance given by the accused, the process of sexual intercourse continued when she became pregnant. The matter was came into light.

9. The factual aspects in the case in Deelip Singh v. State of Bihar (supra), Yedla Srinivasa Rao v. State of A.P.(supra) are quite different than that of the fact of this case in hand. In this case the prosecutrix is a lady aged 23 years i.e. of considerable age who understands the implication of sexual intercourse. She was in love with accused Sk. Saheb but had no physical connection till 13.12.2004. If her statement made intercourse of trial as the P.W. 3 is read minutely it is to be accepted that she was forced to leave her house and to go to Digha. She checked in a hotel where she stayed for a night with Sk. Saheb as husband and wife and co-habited. In Course of Co-habitation she raised resistance on the plea that her marriage with Sk. Saheb was not solemnised yet. Sk. Saheb told her that he would marry her and after his assurance he co-habited with her. That being the fact, it is pertinent to take note down of certain factors which are available from above statement of the prosecutrix. Firstly, she was forced to go out of her house

at 7 P.M. on 13.12.2004 and to go to Digha by hired taxi. Subsequently they checked in a hotel and stayed there as husband and wife and co-habited. Thirdly in course of co-habitation, she alleged to have raised resistance only by saying that their marriage was not solemnised. Sk. Saheb assured her of marriage and continued co-habitation. That being the fact, the factual aspect in *Yedla Srinivasa Rao v. State of A.P(supra)* can well be distinguished. There was no persisting approach from Sk. Saheb to have sexual intercourse with the prosecutrix before 13.12.2004. Sk. Saheb never committed sexual intercourse with the prosecutrix forcibly. The prosecutrix in that case continued the process of sexual intercourse with the accused till she became pregnant. She was a girl of tender age at that time.

10. In *Bhupindar Singh (Supra)* the accused married her during subsistence of his first marriage and co-habiting with her for about 4 years. The Hon"ble Court found that the marriage of the prosecutrix with the accused had no sanctity in law and void ab initio. Therefore, conviction of accused under the "fourthly" of Section 375 sustainable. I find that the factual that case is quite different than the case in hand. In *Pradip Kumar Verma v. The State of Bihar (Supra)* the Hon"ble Court held that although upon facts and circumstances, Section 376, 406, prima facie, do not appear to have any application, it would have been appropriate for the High Court to deal with various submissions and consider the applicability which was not done. Hon"ble Apex Court further held that a promise to marry without any thing 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 illicit 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 inspection of the making of promise, the accused did not really entertain the intention of marry 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.

11. For proper appreciation of the point raise by Mr. Mondal relevant provisions of Section 90 IPC is required to looked into.

Section 90 A Consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception; or if the consent is given by a person who, from unsoundness of mind, intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

12. The unequivocal language of Section 90 makes it clear that there are two grounds specified in Section 90 which are analogous (a) coercion and (b) mistake of fact which can vitiate transaction. In the case in hand the first ground, i.e.,

coercion is not applicable. In this revision application, the Petitioner has taken the second ground, i.e., mistake of fact. The second ground lays emphasis on the knowledge or reasonable believe of the person who obtains the tainted consent. Court is to see whether the person giving the consent has actually given it under misconception of fact and the person doing the act, i.e., alleged offender is conscious of the fact, should have reason to think that but for the misconception, the consent would not have been given. In the other words, the consent has been given on a representation which at the relevant point of time, was not false or the person making it seriously believed it to be truth, in that case it can not be said that the person giving the consent has given it under misconception of fact. It is to be kept in mind also that a false promise is not a fact within the meaning of the Code. u/s 3(b) of the evidence act, a person has a certain intention is treated to be a fact. Since, intention, good or bad, is a mental state of affairs, there is hardly any possibility of getting direct evidence to establish that a person makes a statement knowing fully well that what he makes is false. So, Court, in such a case is to look at the circumstances and facts of each case to clear the doubt.

13. The Hon"ble Apex Court in Pradip Kumar Verma (Supra) discussed elaborately about the expression for the word "consent" and given much weight on the decision of this Court in Jayanti Rani Panda Vs. State of West Bengal and Another, The Hon"ble Apex Court was pleased to quote the discussion of the Hon"ble Division Bench of this Court in Jayanti Rani Panda which is set out below:

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, I.P.C. 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.

14. I reiterate that if consent has been given on a representation which at the relevant point of time was not false or the person making it seriously believed it to be truth in that case it can not be categorised as consent given on misconception of fact. Therefore, what is required to probe into from the circumstances, fact and evidence of the case in hand is that whether Sk. Saheb had no intention at all to marry the prosecutrix at the time of first co-habitation on 13.12.2004 at Digha or he seriously believed that he would marry her in

future.

15. On careful perusal of the evidence of the P.W. 3 the prosecutrix who is the best witness in this case, I find that her statement is not at all inspiring confidence to accept that she co-habited with Sk. Saheb only on promise to marry her. Rather she allowed to have sexual intercourse with her and after having completed the course of sexual intercourse, without any real resistance came back to her village and were caught by co-villagers while roaming around the village on the next date. The prosecutrix made statement u/s 164 of the Code of Criminal Procedure before the learned Magistrate which has been marked as exhibit 3. The exhibit 3 clearly indicates that she was a consenting party to the sexual intercourse with Sk. Saheb. She has stated that she had love affairs with Sk. Saheb for last 2/3 years and according to their plan, she left her house and came to Digha with Sk. Saheb by a hired taxi. In her statement u/s 164 Code of Criminal Procedure she has not stated that on 13.12.2004 she had any sexual intercourse with Sk. Saheb. The statement of the prosecutrix as P.W. 3 is entirely contradictory to the statement made by her u/s 164 Code of Criminal Procedure She stated further in her statement u/s 164 Code of Criminal Procedure that she went to the house of the elder sister of Sk. Saheb on the next date and the brother of Sk. Saheb took her back to her father's house and disclosed that her marriage would given with Sk. Saheb. She stated that she was forced to go to her father house. The statement of the prosecutrix u/s 164 Code of Criminal Procedure is not only contradictory to her statement as P.W. 4 but also indicates clearly that she had consent in sexual intercourse with Sk. Saheb if at all it had taken place.

16. Even if the case of prosecution is accepted that Sk. Saheb had sexual intercourse with Jaharana in that case also nowhere it has been spelt out that Sk. Saheb made a false promise to marry her. In fact he had taken the prosecutrix to the house of one Kazi at Munsirhat for the purpose of marriage which could not be materialised for want of witnesses. In the FIR which has been lodged by the P.W. 1 ,i.e., is Sk. Jalal it has been stated that matter was taken up by the local people as well as Gram Panchayat. It was decided unanimously that there would be marriage between Sk. Saheb and Jaharana. Neither Sk. Saheb nor his family members disagreed to that decision. For reason unknown, Sk. Saheb fled away on the date the marriage was fixed with Jaharana to be commenced. Since Sk. Saheb was not found from that date there is no reason to jump into a conclusion that he had no intention to marry Jaharana on 13.12.2004. In the circumstances of the facts as well as the evidence on record altogether suggests no such presumption. I reiterate that intention, good or bad, being mental state of affairs, can hardly be proved by direct evidence. Court is to look into the circumstances, facts - pre-occurrence and post-occurrence, and evidence on record in order to ascertain the intention of the maker of promise. I find from the facts and circumstances as well as evidence on record that the prosecution has failed to establish that Sk. Saheb had no intention to marry the prosecutrix at the time of co-habitation on 13.12.2004 or made mis-

representation knowing fully well that he would not marry her ever in future. That being the fact, the decision of Hon"ble Division Bench of this Court in Jayanti Rani Panda (supra) squarely applies in this case. " Failure to keep promise at a future uncertain date due to reason not very clear on the evidence does not always amount to a mis-conception of fact at the inception of the act itself". Herein it is not the case of the prosecution that consent was obtained by creating belief that the prosecutrix and Sk. Saheb were already married. In such a case, as observed by Hon"ble Apex Court in Pradeep Kumar Verma (Supra) Section 90 IPC can not be called in aid to pardon the act of the girl and fasten criminal liability on the other.

17. Upon considering the fact and circumstances of the case, evidence on record and judgment under challenge, I find no substance in the submission of Mr. Mondal. It is not to be forgotten that this is not an appeal but revision. This Court is not dealing with a petition under Article 227 of the Constitution or Section 482 of Code of Criminal Procedure In a criminal revision while a judgment of acquittal has been challenged, Court can not go deep into the matter, reappraise the entire evidence and record conviction of the acquitted person, save and except where there is grave mistake or error on the part of Court amounting to perversity revisional Court can, at best, direct retrial. I find that the judgment passed by the learned Trial Court is not at all perverse and warrants interference in this revision application necessitating an order of retrial.

18. Accordingly, the revision application fails and is disposed of.

19. The judgment of the learned Trial Court is hereby affirmed.