

(2017) 02 TP CK 0017
In the Tripura High Court
Case No : 70 of 2015

Sri Bapi Datta, S/o Sri Dipu Datta alias Dipak Datta

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 06-02-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 161](#), [Section 313](#) - Examination of witnesses by police - Power to examine the accused
[Indian Penal Code, 1860](#), [Section 376](#), [Section 325](#), [Section 375](#), [Section 90](#), [Section 417](#), [Section 366](#), [Section 376\(1\)](#), [Section 375\(4\)](#) - Punishment for rape - Punishment for voluntarily causing grievous hurt - Rape - Consent known to be given under fear or misconception - Punishment for cheating - Kidnapping, abducting or inducing woman to compel her marriage, etc - Punishment for rape - Rape
[Evidence Act, 1872](#), [Section 3](#) - Interpretation clause

Citation : (2017) 02 TP CK 0017

Hon'ble Judges : T. Vaiphei, S. Talapatra

Bench : Division Bench

Advocate : S Ghosh, A Ghosh

Judgement

1. This jail appeal is directed against the judgment dated 4-12-2015 passed by the learned Additional Sessions Judge, Court No.5, West Tripura in S.T. No.13 of 2013 convicting the appellant U/s 376(1)/417 IPC and sentencing him to undergo seven years of rigorous imprisonment with a fine of Rs.10,000/- and, in default of payment of fine, to suffer a simple imprisonment of six months and another one year of rigorous imprisonment for the offence of Section 417 IPC with a fine of Rs.1,000/- and to undergo another three months of imprisonment in default of payment of the fine.

2. The case of the prosecution is that on 14-2-2012 at about 7 PM, the appellant went to the house of the victim (hereinafter to as "X") situate at Khas Noagaon

and took her to the house of her neighbour, Shymal Das, on assuring to marry her. The appellant on that night put vermilion on the forehead of X and conch and co-habitated with as husband and wife. On 15-2-2012, the appellant took her to the house of his cousin sister at Bislamganj on the pretext of getting their marriage registered and cohabitated with her on that night. On 16-2-2012, the appellant again took X to Debipur (Kamalasagar) at the house of his aunt who accepted her as the wife of the appellant. However, in the evening at about 7 PM, the uncle of the appellant, Pradip Datta, and the appellant forcibly took X from the house of his aunt by auto-rickshaw and threw her out of the auto-rickshaw when they reached her house and left her. Aggrieved by that, X lodged a complaint with the O.C., Bodhjungnagar P.S. on 23-2-2012, which was registered as Bhodjungnagar P.S. Case No. 11/2012 U/s 366/376/325 IPCV against the appellant and his uncle, Pradip Datta. After investigation of the case, the police submitted the charge-sheet U/s 376/417 IPC against the appellant only.

3. On receipt of the charge sheet, the case was committed to the Court of Sessions Judge, West Tripura, who then transferred it to the file of the learned Assistant Sessions Judge, Court No.2, West Tripura for trial. After framing of the charge and recording the evidence of 7 prosecution witnesses, the learned Sessions Judge, West Tripura withdrew the case from the file of the learned Sessions Judge, Court No.2, Agartala and made it over to the learned Additional Sessions Judge, West Tripura for completion of the trial. After examining three more witnesses and after examining the appellant U/s 313 Cr.PC, the learned Additional Sessions Judge passed the impugned judgment in the manner as stated earlier.

4. There is no dispute that there was sexual intercourse between the appellant and the prosecutrix. That is not the issue. The question is whether, on the proved facts and circumstances, the appellant is guilty of rape as defined in the second and fourth of Section 375 of IPC. Before proceeding further, the provisions of Section 375 IPC may be reproduced below:

"375. Rape.-A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions-

First.-Against her will.

Secondly.-Without her consent.

Thirdly.-With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.-With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.-With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.-With or without her consent, when she is under eighteen years of age.

Seventhly.-When she is unable to communicate consent.

Explanation 1.-For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.-Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.-A medical procedure or intervention shall not constitute rape.

Exception 2.-Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

(Underlined for emphasis)

5. We may also refer to the crucial parts of the findings of the learned Additional Sessions Judge holding the appellant guilty of the offence with respect to the second and fourth clauses of Section 375 IPC. This is what he said:

"19. On the other hand I find that the victim left her parents house with an assurance that the accused would marry her and from her evidence as well as from the evidence of PW-2, it is revealed that before going to the house of PW-2, accused put vermilion on her forehead and also give her conch shell bangles. The victim at her belief (??) knew that she was newly married to accused. After that purported marriage, the accused went to the house of PW-2 and spent night with the victim in a single room. The victim categorically stated that accused did sexual intercourse with him at night at the house of PW-2 and on the following date accused took her to the house of his aunt. From the said house the accused

took her back at Khayerpur Banikya Chowmuhanani nearby the house of the victim and thrown (threw?) her away denying to accept her as his wife. The proximity of the time of her living with the accused and thrown away (sic) by him is too short which clearly indicates that the accused had the intention to enjoy her sexually and with that intention, he pretended himself to be her husband by putting vermilion on her forehead and giving conch shell bangles on her hand as a symbol of the marriage though the said marriage (was?) not solemnized as per customs or Hindu Marriage Act. This is not the case that the victim agreed to have sexual intercourse merely on account of her love or passion for the accused but she offered herself for sexual intercourse when she believed that there was a marriage solemnized. This is not the case that the accused abandoned her on account of the circumstances which he could not have foreseen or which were beyond his control and was unable to marry her despite having every intention to do so. The circumstances under which the accused thrown (?) away the victim just within a short period of cohabitation with her. I have no hesitation to reach to a conclusion that the intention of the accused was mala fide and he had clandestine motive just to sexually enjoy her. So, it is evident that the accused had knowledge and there is reason to believe that the consent was given by the victim in consequence of misconception of fact within the meaning of Section 90 of the Indian Penal Code. Thus, it is apparent from the evidence on record that the accused obtained the consent of the victim for sexual intercourse under misconception of fact that the marriage was (?) took place.

Apart from the above, the fourth clause of Section 375 IPC speaks that a man is said to commit rape who has committed sexual intercourse with a woman with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married. In this case, the aforesaid provision is clearly attracted. In the case at hand, it is evident from the evidence of the victim that she allowed (?) to have sexually intercourse with her under the belief that accused is her legally married husband whereas from the conduct of the accused Bapi Datta it is clearly established that he from the beginning knew that there was no legal marriage solemnized in between the victim and him knowing that fact, he committed sexual intercourse with the victim. Thus, I find that the accused Bapi Datta is guilty for commission of offence punishable under Section 376(1) of the India Penal Code.

The accused for sexual intercourse with the victim obtained her consent in fraudulent and dishonest inducement and thereby she was deceived. He intentionally induced the victim to go with him and to do the sexual intercourse with him obtaining her consent out of misconception and in the cumulative facts and circumstances I find that the accused is also guilty for commission of offence under Section 417 IPC"

6. The trial court relied on the evidence of PW-6 (the victim), which, according to it, is corroborated by the evidence of PW-2. It is seen from the evidence of PW-6

that one day at about 11 PM about 3 years back, the appellant met with her at their residence at Khayerpur Banikya, Chowmuhani and requested her to accompany him to Pratapgarh, Agartala expressing his intention to marry her. She accordingly accompanied him to the house of one Shyamal Hrishidas at Pratapgarh, Agartala, stayed there and had sexual intercourse with him. She further testified that on the following day, the appellant took her to the house of his sister situate at a place somewhere between Udaipur and Agartala and that on that day, he put her vermilion on her forehead and conch shell made bangles in her hands. She went on to say that on that night also, they slept together in a room and had sexual intercourse with him and that on the following day, they went to the house of his aunt at one place under Bishalgarh Sub- Division on the way to Kashba Kalibari. She also deposed that on the same day, the father and uncle of the appellant visited the house of their sister (?) and took her and the appellant out from that house and all of them thence returned to Khayerpur Banikya Chowmuhani and left her alone in front of the house of her father and the appellant at that point of time refused to accept her as his wife. She thereafter lodged the FIR. In her crossexamination, she revealed that she was earlier given in marriage to another person. It is significant to note that in her statement recorded U/s 161 Cr.PC by the IO of the case, her statement in the examination-in-chief that the appellant put vermilion on her forehead and placed conch shell made bangles in her hands at the house of his sister did not find a place. The IO of the case, who was examined as PW-10, in his evidence confirmed in his cross-examination that the victim never stated to him that the appellant offered her vermilion on her forehead and conch shell bangles on her hand. Therefore, this particular statement of the victim about the appellant putting vermilion on her forehead and placing conch shell made bangles on her hands is a first time statement in Court. In such circumstances, no credibility can be given to this particular statement of the prosecutrix. It is true that conviction can be made on the basis of the sole testimony of the prosecutrix, but there is rider that the evidence of the prosecutrix must inspire confidence and appears to be natural and truthful. There is no question of corroborating the unreliable statement of the prosecutrix, who alone is the witness to the alleged commission of rape, by the statement of PW-2.

7. The question to be determined now is whether, shorn of the statement that the appellant offered vermilion on her forehead and placed conch shell made bangles on her hands, there are sufficient materials to hold that the appellant even at the initial stage had no intention to marry her. This question is crucial. The law in this field is reiterated by the Apex Court in *Deepak Gulati v. State of Haryana*, (2013) 7 SCC 675 in the following manner:

"21. Consent may be express or implied, coerced or misguided, obtained willingly or through deceit. Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry

the victim, or had mala fide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must examine whether there was made, at an early stage a false promise of marriage by the accused; and whether the consent involved was given after wholly understanding the nature and consequences of sexual indulgence. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused, and not solely on account of misrepresentation made to her by the accused, or where an accused on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry her, despite having every intention to do so. Such cases must be treated differently. An accused can be convicted for rape only if the court reaches a conclusion that the intention of the accused was mala fide, and that he had clandestine motives.

22. In *Deelip Singh, Deleep Singh v. State of Bihar*, (2005) 1 SCC 88 it has been observed as under:

"19. 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."

23. This Court, while deciding *Pradeep Kumar, Pradeep Kumar v. State of Bihar*, (2007) 7 SCC 413, placed reliance upon the judgment of the Madras High Court in *N. Jaladu, In re*, ILR (1913) 36 Mad 453, wherein it has been observed: (*Pradeep Kumar case*)

"11. "26. ... "... We are of opinion that the expression "under a misconception of fact" is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act Illustration (d) [states] that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. ... "thus ... if the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person". ... Although in cases of

contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90 IPC is that such consent cannot, under the criminal law, be availed of to justify what would otherwise be an offence." (N. Jaladu, In re case)" (Deelip Singh case)"

24. Hence, it is evident that there must be adequate evidence to show that at the relevant time i.e. at the initial stage itself, the accused had no intention whatsoever, of keeping his promise to marry the victim. There may, of course, be circumstances, when a person having the best of intentions is unable to marry the victim owing to various unavoidable circumstances. The "failure to keep a promise made with respect to a future uncertain date, due to reasons that are not very clear from the evidence available, does not always amount to misconception of fact. In order to come within the meaning of the term "misconception of fact", the fact must have an immediate relevance". Section 90 IPC cannot be called into aid in such a situation, to pardon the act of a girl in entirety, and fasten criminal liability on the other, unless the court is assured of the fact that from the very beginning, the accused had never really intended to marry her."

8. In the instant case, as already noticed, the statement of the prosecutrix that appellant offered vermilion on the forehead of the prosecutrix or placed conch shell made bangles on her hands, lacks credibility and cannot be relied upon. The fact remains that the prosecutrix was about 20 years old at the time of the alleged incident and was apparently mature enough to understand the significance and morality associated with the act she was consenting. It is difficult to impute to the appellant, knowledge of the fact that the prosecutrix had consented as a consequence of a misconception of fact that had arisen from his promise to marry her. There is no evidence to prove conclusively that the appellant had never intended to marry the prosecutrix. On the contrary, there is evidence on her own showing that she voluntarily and of her own free will accompanied the appellant on the night at about 9 PM on his promising to marry her and immediately chose to have sex with him on that night itself. From the evidence of PW-2, it is seen that the prosecutrix had told her that she had love affairs with the appellant for the previous six months. Assuming that the appellant had actually put vermilion on her forehead and placed conch shell made bangles on her hands the day after they spent a night at the residence of PW-2, it is obvious that she voluntarily had sex with him out of love and passion the previous night and not solely on account of misrepresentation made to her by the appellant. After all, for the next three days, she voluntarily followed and lived with the appellant wherever she was taken. Moreover, there is delay of 7 days in lodging the FIR, which could not be explained either by the prosecutrix or by the IO of the case, much less, satisfactorily. On the other hand, the appellant in his examination under Section 313 CrPC in answer to Question No. 22 stated that the prosecutrix is a married woman; that she gave him proposal for marriage, but when he came to know that she was married, he refused to marry her whereupon she lodged a false case against him. The prosecutrix in her cross-

examination also revealed that earlier in her childhood, she had been given in marriage with another man. In other words, she is a divorcee. It is quite apparent from the statement of the appellant and the surrounding circumstances that the appellant had a second thought about his intention to marry her when he came to know that she is a divorcee; may be he does not want to marry someone who has already warmed the bed of somebody else. Therefore, this could be a case where the appellant on account of circumstances which he could not have foreseen, or which were beyond his control, was unable to marry, despite having every intention to do so. Thus, on the facts found by us, we are of the firm view that the prosecution is unable to prove beyond reasonable doubt that the appellant falsely promised to marry the prosecutrix, but subsequently refused to marry her and, therefore, cheated her or committed rape upon her, which are the offences punishable under Section 417 IPC and 376 IPC respectively.

9. Coming now to the question as to whether the appellant is guilty of the offence with respect to the fourth clause of Section 375(4) IPC. What is punishable under this Section is that the accused expressly or impliedly conceals his identity with a dishonest intention inducing prosecutrix to give her consent to sex on the mistaken belief that he is another man to whom she is married or believes herself to be lawfully married. It may happen that a lady X married to C has come into contact with A and mistaking A to be C entered into sexual intercourse with A and A had full knowledge that X was not his wife, then and then only A is guilty of rape, he answering the clause fourthly of Section 375, IPC. In other words, to attract Section 375(4), consent had to be given under the belief that accused was another person to whom she believed herself to be married. However, when consent is given by the prosecutrix to sexual intercourse in the belief that she had been married to the accused, Section 375(4) clause fourthly is not attracted. Under Section 375(4), the accused expressly or impliedly conceals his identity with a dishonest intention; at times he might obtain the consent recklessly. Conversely, the mistake or misconception is self-made from the prosecutrix's point of view.

10. The best illustration of commission of rape under the fourthly of Section 375 IPC is found in *A. Krishna Raj v. State of Mysore*, 1969 (1) Mys LJ 304. In that case, the accused asked the prosecutrix to go with him that night to a house which he had taken in Mandi Mohalla. She consented, but after returning to her house she slept away. On the next day, when she went to the house of her friend, the accused came and rebuked her and asked her to accompany him on the following night. Accordingly, on that night, she went out of her house from the rear door and found the accused standing there with a bicycle. The accused took her to a room in Kyathamahalli. The house belonged to PW-7. PW-7 and her daughter were in the house. The accused told them that the prosecutrix was his wife. That night, the accused had sexual intercourse with the prosecutrix. By then, the father of the prosecutrix had given information to the police. The question which fell for consideration, on those facts, was whether the acts of

commission or omission on the part of the accused came within the mischief of Section 375(4) IPC. The Mysore High Court held that they did not. This is what it said:

"It will be seen that in order that "Fourthly" may be attracted, the consent by the woman must have been given because she believes that the offender is another man to who she is or believes, or believes herself to be, lawfully married. "Fourthly" will not be applicable in the present case, because consent by Shanthakumari to the accused having sexual intercourse with her was not given under the belief that the accused was another person to whom she believed herself to be married. Shanthakumari believed that she had been married to the accused. This is not a case in which her consent was given in the belief that the accused was some other person to whom she believed herself to be lawfully married. The deception, if any, practiced by the accused is not that type of deception contemplated by "Fourthly". Therefore, the conviction under S. 376, on the basis that "Fourthly" was applicable, will have to be set aside."

In the instant also, admittedly, there is no concealment of identity by the appellant when he had sexual intercourse with the prosecutrix, who knew the identity of appellant as he was not another man to whom she believed herself to be lawfully married. There is, therefore, no deception of the kind contemplated under Section 375(4) IPC. In this view of the matter, we hold that the view taken by the learned Additional Sessions Judge that the appellant is also guilty of the offence of Section 375(4) IPC cannot be sustained in law.

11. For what has been stated in the foregoing, the appellant is entitled to the benefit of doubt. The appeal, therefore, succeeds. The impugned judgment of conviction and sentence stands set aside. The appellant is, therefore, acquitted of the charges. He is, accordingly, set at liberty forthwith. Transmit the L.C. record forthwith.