

Md. Jakir Ali Vs. the State of Assam

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Court : Guwahati

Decided On : Jan-02-2007

Judge : I.A. Ansari, J.

Appellant : Md. Jakir Ali

Respondent : The State of Assam

Disposition : Appeal dismissed

Judgement :

I.A. Ansari, J.

1. By the impugned judgment and order, dated 21-6-05, passed, in Sessions Case No. 104(S-S)/2004, learned Additional Sessions Judge, Sivasagar, has convicted the accused-appellant under Sections 376 and 417 of the I. P. C. and sentenced him to undergo, for his conviction under Sections 376, I. P. C., rigorous imprisonment for a period of seven years and pay fine of Rs. 5,000/- and, in default of payment of fine, undergo rigorous imprisonment for a further period of one year and to suffer, for his conviction under Section 417, I. P. C., rigorous imprisonment for one year and pay fine of Rs. 500/- and, in default of payment of fine, suffer rigorous imprisonment for a further period of one month, both the sentences having been directed to run concurrently.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described thus : In the month of June or July, 2000, when AB, aged about 13 years and a daughter of PW1 and PW3, was alone at home, the accused, who was a visitor to the house of AB, came there and induced her to have sexual intercourse with him by making a promise to marry her. So induced by the promise of marriage made by the accused and believing that the promise was bona fide, AB allowed the accused to have sexual intercourse with her. In this way, the accused had sexual intercourse with AB once again. As a result of the sexual intercourse, which AB had with the accused, she conceived and when she was carrying pregnancy of about three months, she had to report the matter to her mother (PW 3), who, in turn, informed her husband (PW 1). AB's parent's, along with some of their co-villagers, then, went to the house of the accused and asked him to marry her; but the accused refused to marry her. AB's father, JA (PW 1), then, lodged an F. I. R. Based on this F. I. R., a case was registered against the accused under Sections 376/493,1. P. C. During the course of investigation, AB was medically examined and, on completion of investigation, a charge-sheet was laid against the accused under Sections 417/376, I. P. C.

3. To the charges framed against him, at the trial, under Sections 376 and 417 of the I. P. C., the accused pleaded not guilty. In support of their case, prosecution examined seven witnesses. The accused was, then, examined under Section 313, Cr. P. C. and in his examination aforementioned, the accused denied that he had committed the offences alleged to have been committed by him, the case of the defence being, in brief, that AB was a woman of easy virtue, she had illicit relation with her brother-in-law and might have conceived through her brother-in-law, AB suffered from mental disorder and the accused had neither promised to marry AB nor did he have sexual intercourse with her. The case of the defence was, thus, a case of complete denial. The defence also adduced evidence by examining as many as five witnesses. Having, however, found the accused guilty of the offences charged with, the learned trial Court convicted him accordingly and passed sentences against him as mentioned hereinabove. Aggrieved by his conviction and the sentences passed against him, the accused has preferred this appeal.

4. I have heard Mr. T. H. Hazarika, learned Counsel for the accused-appellant, and Mr. B. S. Sinha, learned Additional Public Prosecutor, Assam.

5. While considering the present appeal, what needs to be noted is that though it is the case of the prosecution that the alleged victim, AB, was aged about 13 years, when the accused had sexual intercourse with her, the fact remains that the clear evidence of PW1, i.e., father of AB (PW 2), is that he is not aware of the year in which his daughter AB was born. AB's mother, SB (PW 3), too has clearly deposed that she does not remember the date of birth of AB. There is absolutely no evidence on record to show the year in which AB was born. Though the evidence given by PW 1, PW 2 and PW 3 go to show that AB (PW 2) had studied in school, no paper, document or certificate was produced from the school to indicate as to what the date of birth of AB was in terms of what stood recorded in the school in which AB had studied.

6. In the case of the above evidence on record, which does not give any definite indication as to when AB (PW 2) was really born, when I turn to the evidence of PW 4 (Dr. Lalit Bora), I notice, that according to him, he had examined AB on 21-12-2000 and found as follows:

(1) Weight - 44 kg.

(2) Height -5'1'.

(3) Total Nos. of teeth - 7/8, 8/7

(4) Axillary and pubic hairs - present.

(5) Breast - developed. Areolac - Dark and colostium can be squeezed out of nipples. No mark of injury could be detected.

(6) Labia major a and labia minora developed without any mark of injury.

(7) Vagina - Bluish in colour.

(8) Hymen - absent.

(9) On examination of abdomen uterus was of 20 weeks gravid size. Foetal heart sound present. Foetal movement was present.

On radiological examination of anterior -posterior and lateral view of the left elbow and wrist joints revealed 'skiagram of the left wrist joint reveals complete fusion of the left epiphyses around the left wrist joint' Skiagram of the left elbow joint reveals complete fusion of the epiphyses around the left elbow joint.

Ultra sonography obstetrical revealed single viable intra-uterine pregnancy of 20.5 weeks of gestation with short cervical length.

Vainal smear for spermatozoa. No spermatozoa seen.

7. In the opinion of the doctor (PW 4), age of the girl (AB) was above 18 years with 20 weeks of single viable intra-uterine pregnancy.

8. The evidence given by PW 1 has remained completely unchallenged by the prosecution as well as the defence and his evidence clearly shows that according to the radiological examination of AB, her age was above 18 years at the time, when she was medically examined. Though the medical opinion with regard to age may vary by two years on either side, the fact remains that when the evidence could have been adduced, but has not been adduced by the prosecution by producing necessary materials from the school, where AB had studied, to show her age, the medical evidence on record, which goes in favour of the accused, cannot be ignored. Situated thus, one has no option, but to proceed on the premises that AB was above 18 years of age at the time, when she allegedly had sexual intercourse with the accused.

9. Bearing in mind what has been indicated above, when I turn to the evidence of AB (PW 2), I notice that according to her evidence, the accused was a visitor to her house, the accused, one day, came there, when her parents were away and, inducing her with his promise that he would marry her, the accused had sexual intercourse with her on two different occasions and as a result thereof, her menstruation cycle stopped and when she was carrying pregnancy of three months, she reported to her mother (PW 3) about what had happened to her. AB

(PW 2) has also deposed that her parents and her co-villagers had requested the accused to marry her, but the accused refused to marry her and instead married another girl. Though PW 2 has been subjected to cross-examination, not even an iota of material could be elicited from her cross-examination to show that what she had deposed was false or untrue. In fact, except offering suggestions to her to the effect that the accused never had sexual intercourse with her, the defence did not really cross-examine PW 2 with regard to her evidence that the accused had come to their house, when her parents were not present there. promised to marry her and, on the strength of such a promise, the accused had sexual intercourse with her.

10. Coupled with the above, the evidence of PW 1 and PW 3, i.e., parents of AB, is to the effect that the accused was a visitor to their house and when PW 2 was carrying pregnancy of two months, she reported to PW 3 about how she had become pregnant and though efforts were made by requesting the accused to marry her, the accused did not marry her. Thus, the fact that the accused was a visitor to the house of PW 2 and that PW 2, while carrying pregnancy of about three months, reported to her mother (PW 3) that she had conceived through the accused and that the accused had sexual intercourse with her by promising to marry her, stand convincingly proved by the evidence on record. Though attempts have been made by the accused to show that brother-in-law of PW 2 used to visit and stay at the house of PW 2, there is absolutely no evidence on record to show that PW 2 ever had any sexual relation with her brother-in-law or had conceived through him. Though it has been elicited by the defence from the cross-examination of PW 2 that she had consulted doctors at the Mental Hospital at Tezpur, there is nothing to show, from either her cross-examination or from other evidence on record, that at the time, when the accused allegedly had sexual intercourse with PW 2, she was mentally abnormal. It is also worth pointing out that though, by adducing evidence, the accused has tried to establish that PW 2 was a woman of easy virtue or that several boys used to visit the house of PW 2, there is absolutely no convincing evidence on record to probabalise this plea of the defence.

11. What emerges from the above discussion is that the evidence on record convincingly proves that the accused induced AB (PW 2) by promising to marry her and on being so induced, AB (PW 2) allowed the accused to have sexual intercourse with her and became pregnant, It is in the face of these proven facts that one has to, now, determine if the conviction of the accused under Sections 417 and 376 of the I. P. C. can be sustained. This necessarily requires the Court to ascertain if the accused had sexual intercourse with AB with her consent by, fraudulently or dishonestly, Inducing. In her the belief that he would marry her.

12. While considering the above facts of the case, It needs to be pointed out that the Indian Penal Code does not define 'consent' in positive terms. There is, however, a negative definition of the word 'consent' in Section 90 of the Indian Penal Code, which lays down as to what cannot be regarded as 'consent' under the Indian Penal Code. The relevant provisions of Section 90, I. P. C. read as under:

90. Consent known to be given under fear or misconception.- 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...

13. From a minute reading of Section 90, I. P. C., which explains as to what cannot be regarded as 'consent' for the purpose of the Indian Penal Code, it becomes clear that 'consent' given under fear of injury, or under a misconception of fact, is not a 'consent' at all. It is, however, worth noticing that giving of 'consent' under fear of injury or misconception of fact is not sufficient to hold that no consent existed unless it is further established that the wrongdoer knew, or had reason to believe, that the consent given was in consequence of such, fear or misconception. The factors, set out in the first part of Section 90, namely, that the consent given by a person under fear of injury or under misconception of fact is not consent are from the point of view of the victim; whereas the factors, set out in the second part of Section 90, namely, that the person doing the act knows, or has reason to believe, that consent was given in consequence of such fear or

misconception are corresponding provisions from the point of view of the accused. Thus, the second part of Section 90 lays emphasis on the knowledge or reasonable belief of the person, who obtains consent, that the consent given by the victim is in consequence of fear of injury or misconception of fact, What is, however, of paramount Importance to note is that the existence of the twin requirements of Section 90 must be cumulatively satisfied in order to enable a Court to hold that no consent in law existed at the relevant time. In other words, when these two conditions precedent are co-existent in a case, It can be safely held that no consent, as envisaged under the Indian Penal Code, existed, Such a finding can be reached by examining as to whether the person, giving consent, had given the same under fear of injury or misconception of fact and, further, whether the offender knew, or had reason to believe, that but for fear or misconception of fact, 'consent' would not have been given. These aspects of the word 'consent', as envisaged under the Indian Penal Code, have been succinctly described in *Deelip Singh alias Dilip Kumar v. State of Bihar* reported in : AIR 2005 SC203 .

14. In the light of what has been indicated above, it becomes clear that the submission of the body by a woman under fear or misconception of fact cannot be construed as consented sexual act for the purpose of Section 375, I. P. C., for. Section 375, I. P. C. requires voluntary participation by the victim not only after the exercise of intelligence based on the knowledge of the significance and moral quality of the act, but after having fully exercised the choice between resistance and assent. Whether consent existed or not has to be ascertained on the basis of the facts of a given case. See *State of Himachal Pradesh v. Mango Ram*, reported in : 2000 CriLJ4027 .

15. However subtle may be, there is, indeed, a firm and fine distinction between 'consent' and 'submission'. Every 'consent' involves 'submission', but every 'submission' is not 'consent' and the mere fact that a woman had submitted to the promise of the accused does not necessarily indicate that her 'consent' existed unless the evidence on record establishes that the sexual act, which the prosecutrix had allowed, was accompanied with deliberation after the mind had weighed, as in a balance, the good and the evil on each side with the existing

capacity and power to withdraw the assent according to one's will or pleasure.

16. It is also of immense importance to note that though a cursory reading or hurried look into the decision of Uday v, State of Karnataka, reported in : 2003 CriLJ1539 , reflects as if the Supreme Court has held that 'consent' given by a prosecutrix to sexual intercourse with a person with whom she is deeply in love, on the basis of a promise made by such a person that he would marry her on a latter day, can never be said to have been given under a misconception of a fact, a careful and cautions reading of the Supreme Court's latter decision, in Deelip Singh : AIR 2005 SC203 (supra), which, if I may point out, has considered and explained the decision rendered in Uday (supra), shows that while a promise to marry without anything more will not give rise to .misconception of fact within the meaning of Section 90, a representation deliberately made by the accused with a view to obtaining assent of the victim without having intended to marry her will vitiate the consent. If the facts of a given case reveal that at the very Inception of making of the promise to marry, the accused did not really entertain the intention to marry the victim and the promise to marry held out by him was a mere hoax, 'consent' ostensibly given by the victim will not exculpate the accused from the ambit of Section 375, I. P. C.

17. Explaining as to what the decision in Uday (2003 Cri LJ 1539) (supra) conveys, or should be read as, the Apex Court, in Deelip Singh : AIR 2005 SC203 (supra), has pointed out that in Uday's case (supra), the Court was cautious enough to add that no straight-jacket formula can be evolved for determining whether the 'consent' was given under a misconception of fact and, in the ultimate analysis, it is on the basis of the ' facts of each case, as may be discernible from the evidence on record and the surrounding circumstances, that the Court has to decide the question as to whether the 'consent' given was voluntary or was under a misconception of fact.

18. The Apex Court has also emphasized, in Deelip Singh (AIR 2005 SC 203) (supra), that for the purpose of determining as to whether 'consent' existed or not, not only the previous conduct of the accused, but even his contemporaneous acts or the subsequent conduct can be legitimate guides. This, in turn, shows that while

determining the question whether 'consent' existed or not, the Court has to take into account not only the previous or contemporaneous acts of the accused, but also his subsequent conduct. To put it differently, the previous or the contemporaneous acts of an accused or even his subsequent conduct may help the Court determine as to whether the offer of marriage made by the accused was a mere hoax to obtain 'consent' or was an honestly made promise of marriage, I must, however, hasten to add that mere failure of an accused to keep to his promise of marriage, on a future date, will not be sufficient proof, In the absence of anything more, that the promise made by the accused was never intended to be acted upon by him.

19. Referring to its observations, made in Uday's case (2003 Cri LJ 1539) (supra), that it is the prosecution's burden to prove absence of a valid 'consent' in order to attract the ingredients of the offence of rape, the Apex Court in Deelip Singh (AIR 2005 SC 203) (supra), has clarified that while reading its said observations made in Uday (supra), the Courts must remember that this proportion would not apply if a case is covered by the provisions of Section 114A of the Evidence Act, which, I may point out, lays down that in a prosecution for rape under Sub-section (2) of Section 376, I. P. C., where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

20. What transpires from the above observations made in Deelip Singh (AIR 2005 SC 203) (supra) is that in a prosecution under Section 376(2), I. P. C., when sexual intercourse by the accused with the prosecutrix is proved to have taken place and the prosecutrix, in such a case, claims, in her evidence before the Court, that she had not consented to the sexual act, the Court shall draw a presumption that she had not consented to the sexual act and the burden would, then, shift to the accused to prove that his sexual act with the prosecutrix was with her consent. The burden on the accused to discharge such presumption would, however, not be as heavy as on the prosecution if the prosecution, in a given case, is required to prove that the consent did not exist.

21. It may, however, be borne in mind that even if a prosecutrix had consented believing in the words of the accused that the promise for marriage made to her by the accused is honest and genuine, this will not be sufficient to hold that no 'consent' existed for the purpose of Section 90, I. P. C. unless it is further established that the accused, at the time, when he had made the promise, did not have the intention of keeping to his promise. In a given case, thus, even a strong probability, if revealed from the materials on record, that the accused intended to marry the prosecutrix at the time, when he had made the promise for marriage, may absolve the accused, for, in such a case, it cannot be said that the 'consent' was given under a misconception of fact and/or that the accused knew, or had reason to believe, that the consent given was under such misconception of fact.

22. Conversely, if a woman, believing in the promise of marriage made by a man, consents to the promisor having sexual intercourse with her, the promisor would be liable for the offence of rape if the Court finds, on examination of the materials on record, that the promise of marriage made by the promisor was really a hoax to obtain 'consent' of the woman, for, such a 'consent' given by the woman would not, in the light of the provisions of Section 90, I. P. C., amount to 'consent' in law and the sexual intercourse by such a promisor with a woman, so induced, would constitute offence of rape. What is imperative to bear in mind, in such cases, is that killing of a man is, ordinarily, conceived as murder by a common man; but in law, every killing does not amount to murder. Similarly, the word 'consent', as is understood in common parlance, may not be, for the purpose of the Indian Penal Code, consent at all.

23. In the backdrop of the fact that the accused has been proved to have had sexual intercourse with PW 2 and in view of the fact that the consent of PW 2 for sexual intercourse was obtained by the accused by making promise of marriage, it is the duty of the prosecution to prove that the accused, at the time, when he had obtained the consent of PW 2 to his act of having sexual intercourse with her, did not intend to marry her or that the promise of marriage by him to PW 2 was in hoax to obtain her consent to sexual intercourse and that the accused knew that the consent of PW 2 had been given on the strength of the promise, which he had so made. In this regard, it is worth pointing out that the accused has flatly denied

that he ever had sexual intercourse with PW 2 and/or that he had ever made any promise to marry her. There is absolutely no evidence on record to show that the accused intended to marry PW 2 at the time, when he had made the promise of marriage to PW 2. It is not merely the previous conduct of the accused, but even his contemporaneous and subsequent conduct, which may help the Court to determine the motive of the accused. The evidence on record speak loud and clear that the accused never intended to marry PW 2 and yet he had made promise of marriage to her and, on the strength of such a promise, he induced PW 2 to have sexual intercourse with him. Viewed thus, it is clear that the 'consent' obtained by the accused was by misrepresentation of fact and such a 'consent' is not a 'consent' within the meaning of the word 'consent' under Section 90 of the I. P. C. It, therefore, logically follows that when the accused had sexual intercourse with PW 2, no consent, in law, of PW 2 had existed and, hence, the sexual intercourse, which the accused so had with PW 2, amounted to an offence of rape. In short, the evidence on record clearly and convincingly prove that the accused-appellant had made to AB a false promise of marriage, which he never intended to carry out, and induced thereby the victim (AB) to allow him to have sexual intercourse with her; hence, the sexual intercourse by the accused-appellant with AB was without her consent, as understood in law, and such sexual intercourse by the accused-appellant with AB amounted to an offence of rape.

24. Turning to Section 417, I. P. C., it needs to be noted that Section 417, I. P. C. makes punishable offence of cheating. Cheating has been defined in Section 415, I. P. C. The ingredients of the offence of cheating require (i) deception of a person, (ii) whereby, fraudulently or dishonestly, inducing the person, so deceived, to deliver any property to any person or to consent that any person shall retain any property, or (iii) intentionally inducing that person 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. Deception of a person is common to the second and third requirements of the provisions of Section 145. The ingredients, as pointed out under (i) and (ii) hereinbefore, are alternative to each other and this is made significantly clear by use of disjunctive conjunction 'or'. The definition of the offence of cheating embraces cases in which no transfer of property is occasioned

by the deception and also cases in which such a transfer occurs. Deception is the quintessence of the offence. (See *Devender Kumar Singhla v. Baldev Krishan Singla* reported in : 2004 CriLJ1774 .

25. When an accused makes a false promise to marry, which he never intends to carry out, and induces thereby the victim, so deceived, to have with him sexual act, which the victim would not have indulged in or permitted, had she not been induced by such deception and when such act of having sexual intercourse by her with the accused causes, or is likely to cause, damage or harm to her body, mind or reputation, the act of the accused would amount to cheating. Thus, when a woman is induced to part with her chastity or virginity, which is the most valued possession of hers, the person, who so induces the woman by making false representation, would be liable for punishment under Section 417, I. P. C. if the victim's having sexual intercourse, with such a person, causes, or is likely to cause, harm to her body, mind or reputation, for, in such a case, unless so deceived, the victim would not have permitted sexual act by the accused. To put it differently, had such a victim not been deceived, she would not have permitted sexual act or would have refrained from allowing such sexual act and clearly in such a case, but for her permitting such sexual act, she would not have suffered harm to her body, mind or reputation.

26. Since the definition of the offence of cheating indicates, as already pointed out above, that even when no parting of property is occasioned by deception, the deception may still amount to cheating if, as a result of the deception, a woman does anything or omits to do anything, which she would not have, but for such deception, done or omitted to do, it logically follows that when an accused, not intending to marry a woman, induces the woman, so deceived, to have sexual intercourse with him or induces such a woman to omit from resisting the act of sexual intercourse by him with her, the act of the accused of having sexual intercourse with such a woman would amount to offence of cheating if the act of the woman in letting such a man have sexual inter-course with her or the act of the woman in omitting to resist the act of sexual intercourse by such a man with her causes or is likely to cause damage or harm to the person of such a woman, her mind or reputation.

27. In the case at hand, the evidence on record convincingly proves that by the deception, practiced on AB, the accused-appellant had induced her to have sexual intercourse with him. This, in turn, proves that but for the deception practiced by the accused-appellant on AB, she would not have had sexual intercourse with him. The sexual intercourse, which AB was so induced, by deception, to have had with the accused-appellant, has, undoubtedly, caused harm to her mind and reputation. In such circumstances, there can be no escape from the conclusion that the act of the accused-appellant also amounted to an offence punishable under Section 417, I. P. C.

28. Because of what have been discussed and pointed out above, I do not find any infirmity, legal or factual, in the findings of guilt reached by the learned trial Court against the accused-appellant and/or in the conviction of the accused-appellant under Sections 376 and 417 of the I. P. C.

29. Turning to the sentences passed against the accused-appellant, what may be noted is that in the facts and circumstances of the present case, I not see any reason, which could have impelled the learned trial Court to impose, on the accused-appellant, sentence's lower than what have been imposed on him. Considered thus, the sentences, passed against the accused-appellant, call for no interference by this Court in appeal.

30. In the result, and for the reasons discussed above, this appeal, being wholly without merit, fails and the same shall accordingly stand dismissed.

31. Send back the LCR.