

Hari Majhi Vs. the State

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Court : Kolkata

Decided On : Sep-26-1989

Reported in : 1990CriLJ650

Judge : Ajit Kumar Sengupta and ;J.N. Hore, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 90, 375, 376 and 417

Appeal No. : Criminal Appeal No. 432 of 1987

Appellant : Hari Majhi

Respondent : The State

Advocate for Def. : P.N. Ghosh, Adv.

Advocate for Pet/Ap. : Bikash Ranjan Bhattacharya and ;Sanat Chowdhury, Adv.

Disposition : Appeal allowed

Judgement :

Ajit Kumar Sengupta, J.

1. The appellant/has been convicted and sentenced by Additional Sessions Judge, 2nd Court, Hooghly, to rigorous imprisonment for a period of ten years and to pay a fine of Rs. 6,000/- in default rigorous imprisonment for two years more under

Section 376 of the Penal Code. He was also sentenced to suffer rigorous imprisonment for one year for offence under Section 417 of the Penal Code. Both sentences were directed to run consecutively. The case of the prosecution is briefly stated as under:

2. The complainant Aloka Majhi (P. W. 1), a young unlettered village girl, and the accused Hari Majhi alias Hari Malik, a young man, were living in the same village Banna under Police Station Dhaniakhali within District Hooghly. At the relevant time Aloka used to do the work of cultivation of her land in a field of her village; she was unmarried and aged about 21 years, The accused also used to work in the same field at that time. In Jaistha 1387 B.S. (corresponding to May 1981) one day while Aloka was working in her land in that field the accused was also then working in an adjacent land there and at that time the accused picked up acquaintance with her. From that day onwards the accused gradually developed intimacy with Aloka in course of their working in the same field. Thereafter one day the accused taking advantage of that intimacy wanted to have sexual intercourse with her but Aloka expressed her disagreement to that. The accused at that time gave her assurance that he would marry her and in reply to that she told him to make that proposal before her parents. Then the accused went to her house and expressed his desire before her parents that he would marry her. After about 3/4 days from that incident the accused came near the house of Aloka and called her to come outside her house, took her to a field and performed sexual intercourse with Aloka forcibly against her will. Since after this incident of rape, the accused frequently used to have sexual intercourse with her after every 3/4 days. Aloka during that period repeatedly requested the accused to marry her as per his assurance but the accused passed time and yet persuaded her to believe that he would marry her. In this manner about, one year elapsed. In the meantime Aloka became pregnant for three months in consequence of sexual intercourse with her by the accused as above. The parents of Aloka intimated that fact to some persons of their locality who then called the accused before them. The accused confessed before those persons that he had sexual intercourse with Aloka and as a result thereof she was impregnated by him. He assured before the persons of the locality that he would marry her. But the accused did not marry Aloka and passed time and finally he told her as well as her parents that he would not marry

her and left for a village named Kanajuli to marry another woman.

3. It may be mentioned that the first sexual intercourse took place sometime in May 1981 and the First Information Report was lodged on 7th March, 1983.

4. The first charge against the accused is that he had sexual intercourse with Aloka Majhi against her will or without her consent. The second charge is that the accused cheated the said Aloka Majhi is that he induced her intentionally by giving false assurance to her that the accused would marry her and by such inducement she was seduced by the accused for making sexual intercourse. The entire case of the prosecution depends on the evidence of Aloka Majhi, the complainant, P.W. 1. She has said in her evidence as follows:-

'About four years back, one day at about 11 a.m. while I was working in the field of our village accused Haru Majhi told me that he would marry me and saying that he caught hold of me. I protested against him for his such act as there were many persons in the field at that time. I then extricated myself from the clutches of the accused. The accused again told that he would marry me and I need not be afraid of him. After that incident he used to visit my father's place and to assure me that he would marry me. He on that assurance wanted to have sexual intercourse with me. I did not at first agree to his proposal. The accused then approached my father and my elder brother with a proposal that he would marry me. He also told my grandmother that he would marry me. On his persuasion I believed that he would actually marry me. Thereupon I started mixing with him and I also went to see Cinema show with him for two times. While I was returning with him from the Cinema show for the second time the accused performed sexual intercourse with me in a field. I at (first) did not agree to have sexual intercoruse with him, but as he gave me assurance that he would marry me, I consented to his proposal and he accordingly performed sexual intercourse with me on that day. Afterwards the accused used to have sexual intercourse with me once or twice in a month regularly. As a result of his sexual intercourse with me I conceived.... While I was carrying for one month, the accused married a woman of Kanajuli, P. S. Dhaniakhali. After his above marriage, he also married me during the pendency of this case after observing all the Hindu rites and formalities on the persuasion of

the members of Gram Panchayat and my parents. I am now staying at my father's house. Accused gave me assurance the he would take me to his house after eight days of my marriage. But the accused did not take me to his house. He did not turn up to my father's house after my marriage with him. I allowed the accused to have sexual intercourse with me as he assured that he would marry me. I would not have accorded my consent to his said act had I known that he would deceive me in the above way. As a result of my conception by the accused I delivered a female child. That female child is now aged four years. The accused does not give maintenance either to me or to my female child.'

5. It appears to us that the petitioner fell in love with the accused and, accordingly, she allowed him to have sexual intercourse with her.

6. It would be evident from the said evidence that the accused had sexual intercourse with the girl with her consent which she, being above the age of 16 years, was competent to give. The prosecution case is that she agreed to sexual intercourse because the accused promised to marry her. But on this ground he cannot be held guilty of rape. The prosecution case does not cover any of the circumstances in Section 375 of the Penal Code. In our view, the accused cannot be held guilty of rape for having sexual intercourse with P.W 1 after having promised to marry her.

7. We have now to consider the charge under Section 417 of the Penal Code. This charge also could not be brought home. Where the charge of cheating, as in this case, rests upon a representation, which is false and which relates not to an existing fact but to a certain future event, it must be shown by the prosecution that the representation is false to the knowledge of the accused when it was made. It will be of no consequence to show that in fact the representation has ultimately turned out to be untrue.

8. It is well settled that in order to bring home the charge of cheating, it is not sufficient to prove that a false representation had been made, but it is further necessary to prove that the representation was false to the knowledge of the accused and was made in order to deceive the complainant. The prosecution case is that the accused had frequent sexual intercourse with P. W. 1 for more than a

year before she conceived. Even if it is assumed that P. W. 1 agreed to sexual intercourse with the accused on account of promise of the marriage, the charge under Section 417 cannot be substantiated in the absence of any evidence to show that the said representation by the accused was false to the knowledge of the accused at the time it was made.

8A. On the other hand, the evidence of P. W. 1 and some of her neighbours is that even after P. W. 1 conceived as a result of sexual intercourse with the accused, the accused agreed to marry P.W. 1. In this case the question of any false representation or assurance would not arise at all because the accused ultimately married P.W. 1 following 'Hindu rites and formalities'. He kept his promise. We are not concerned with the circumstances under which such marriage was solemnised. Even if the accused did not ultimately marry her, to hold him guilty of the offence of cheating, it has to be shown that his intention was dishonest at the time of making the promise. Such a dishonest intention cannot be inferred from the mere fact that he could not subsequently fulfil the promise, which, however, is not the case here.

9. Moreover, on the basis of the evidence on record, it cannot be held that the P. W. 1 would not have agreed to have sexual intercourse with the accused but for the alleged promise. There was love between the accused and the complainant. The accused used to give her assurance at the time of sexual intercourse that he would marry her. No one has said that she would not have agreed to the sexual intercourse but for the alleged promise of marriage. She admits that she loved the accused. The trouble really started, as it appears, when the accused, perhaps, intended to marry another girl. In our view, the learned Judge proceeded on an erroneous assumption and approach. The evidence would go to show that the appellant had no doubt committed sexual intercourse with the prosecutrix, but such an intercourse was done with the tacit consent, if not express consent of the prosecutrix. Reliance has been placed in the case of *Jayanti Rana Panda v. State* reported in (1983) 2 Cal HN 290 : (1984 Cri LJ 1535) where this Court held that 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 act induced by misconception of fact. Section 90 of

the Penal Code 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.

10. For the reasons aforesaid, this appeal is allowed. The conviction and sentence of the accused are set aside. He shall be set at liberty forthwith if not wanted in connection with any other case.

J.N. Hore, J.

11. I agree.

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