State By Bannur Police Station vs Dayananda Kumar @ Dayananda on 22 September, 2020

Bench: B.Veerappa, K.Natarajan

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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 22ND DAY OF SEPTEMBER, 2020

PRESENT

THE HON' BLE MR. JUSTICE B. VEERAPPA

AND

THE HON'BLE MR. JUSTICE K.NATARAJAN

CRIMINAL APPEAL No.405/2014
C/W
CRIMINAL APPEAL NO.786/2013

IN CRL.A 405/2014

BETWEEN:

STATE BY BANNUR
POLICE STATION.
... APPELLANT
(BY SRI VIJAYAKUMAR MAJAGE, ADDL. SPP)

AND:

DAYANANDA KUMAR @
DAYANANDA,
S/O LATE SIDDAPPA @
JOGI KULLASIDDAPPA,
AGED ABOUT 37 YEARS,
R/AT HANUMANALU VILLAGE,
T. NARASIPURA TALUK-571124.
... RESPONDENT
(BY SRI A.H. BHAGAVAN, ADVOCATE)

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2

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 378(1) AND (3) OF THE CODE OF CRIMINAL PROCEDURE, 1973,

PRAYING TO SET ASIDE THE JUDGMENT OF ACQUITTAL DATED 22.07.2013 PASSED BY THE II ADDITIONAL SESSIONS JUDGE, MYSORE IN S.C. No.87/2010 ACQUITTING THE RESPONDENT/ACCUSED FOR THE OFFENCES PUNISHABLE UNDER SECTION 376, 506 AND 313 OF IPC AND TO CONVICT AND SENTENCE THE ACCUSED FOR THE SAID OFFENCES.

IN CRL.A 786/2013:

BETWEEN:

DAYANANDA KUMAR ALIAS
DAYANANDA,
AGED ABOUT 36 YEARS,
S/O LATE SIDDAPPA ALIAS
JOGI KULLASIDDAPPA,
HANUMANALU VILLAGE,
T. NARASIPURA TALUK,
MYSORE DISTRICT-571101.

... APPELLANT

(BY SRI A.H. BHAGAVAN, ADVOCATE)

AND:

STATE OF KARNATAKA,
BY BANNUR POLICE STATION,
MYSORE DISTRICT,
REPRESENTED BY
STATE PUBLIC PROSECUTOR,
HIGH COURT BUILDING,
BANGALORE-560001.

... RESPONDENT

(BY SRI VIJAYAKUMAR MAJAGE, ADDL. SPP)

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3

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374(2) OF THE CODE OF CRIMINAL PROCEDURE, 1973, PRAYING TO SET ASIDE THE JUDGMENT OF CONVICTION AND ORDER OF SENTENCE DATED 22/24.07.2013 PASSED BY THE II ADDITIONAL SESSIONS JUDGE, MYSORE IN S.C. No.87/2010 CONVICTING THE APPELLANT/ACCUSED FOR THE OFFENCE PUNISHABLE UNDER SECTION 417 OF IPC AND TO ACQUIT THE ACCUSED FOR THE SAID OFFENCE.

THESE CRIMINAL APPEALS COMING ON FOR HEARING

THIS DAY, B.VEERAPPA, J, DELIVERED THE FOLLOWING:

JUDGMENT

Criminal Appeal No.405/2014 is filed by the State against the judgment and order of acquittal dated 22.7.2013 passed by the II Additional Sessions Judge, Mysore (hereinafter referred to as 'Trial Court') in S.C. No.87/2010 acquitting the accused for the offences punishable under Sections 376, 506 and 313 of the Indian Penal Code (hereinafter referred to as 'IPC' for the sake of brevity).

2. Criminal Appeal No.786/2013 is filed by the accused against the judgment of conviction and order of sentence dated 22/24.07.2013 passed by the trial Court in S.C. No.87/2010 convicting the accused for the offence punishable under Section 417 of IPC and sentencing him to undergo simple imprisonment for six months and to pay fine of Rs.15,000/-, in default to undergo simple imprisonment for a further period of three months.

3. Since both the appeals are arising out of the common Judgment, they are taken up together for final disposal.

4. For the sake of convenience, parties are referred to as per their ranking before the trial Court.

I. FACTS OF THE CASE

5. It is the case of the prosecution that prior to 13.1.2009 the complainant - Sumithra at Hanumanahalli, Bannur Hobli, T. Narasipura taluk, was working in the house of the accused by assisting his mother - Smt. Yashoda in household work, as she has lost her parents and no one to look after her. When things stood thus, on 13.1.2009 at about 4.00 p.m. and also subsequently once in a week or fortnight in the house of the complainant - H.N. Sumithra in Hanumanahalli, the accused forcibly had sexual intercourse with her against her will and without her consent. When she tried to raise alarm, the accused threatened to kill her if she makes any quarrel or if she discloses the incident to anybody. Further, the accused had sexual intercourse with her on a promise that he is going to marry her. She believed the words of the accused and also he threatened to kill her if she discloses the act to anybody. Thereafter, she became pregnant and she informed the same to the accused and on 2.9.2009, the accused gave two pills to her. Out of which, she took one on 2.9.2009 and another on 3.9.2009. Due to taking of pills, blood discharged from her vagina and she was suffering from pain in her abdomen and then she informed the same to the accused and also to his mother - Yashodamma. The accused and his mother - Yashodamma took her to Surya Nursing Home, Mysore, on 3.9.2009 and admitted her for abortion and after she came from the hospital, complainant's grand-mother viz., Jayamma (CW.5) and the complainant asked the accused to marry the complainant, but he refused to marry her and then panchayath was convened on 7.9.2009 and in the panchayath though the accused agreed regarding forcible sexual intercourse with the complainant - Sumithra and also that he voluntarily caused her to miscarriage by giving pills to her, but he refused to marry her. Therefore, the complainant lodged the complaint before the jurisdictional Police on 9.9.2009 and the jurisdictional Police registered the Crime No.124/2009 for

the offences punishable under Sections 376, 313, 315 and 506 of IPC.

6. After committal of the case to the Sessions Court, the learned Session Judge framed the charge against the accused for the offences punishable under sections 376, 506, 417 and 312 of IPC on 29.7.2010 and the same was read over and explained to the accused. The accused pleaded not plead guilty and claimed to be tried. Thereafter, on 16.3.2013, the charge under Section 312 of IPC was altered into one under Section 313 of IPC.

7. In order to prove the guilt of the accused, the prosecution in all examined 22 witnesses as per PWs.1 to 22 and got marked Ex.P1 to Ex.P30. On behalf of the defence, no witnesses were examined, but got marked Ex.D1 to Ex.D6.

8. After completion of evidence of the prosecution witnesses, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded. He denied all the incriminating evidence adduced against him and also the case set up by the prosecution. The accused has not chosen to lead any defence evidence.

9. The learned Sessions Judge considering both the oral and documentary evidence on record, has recorded a finding that the prosecution failed to prove beyond reasonable doubt that on 13.1.2009 at about 4.00 p.m. and subsequently once in a week or fortnight in the house of father of the complainant - Sumithra, the accused had sexual intercourse with her against her will and without her consent and thereby failed to prove that the accused has committed the offence punishable under Section 376 IPC.

10. Further, the learned Sessions Judge recorded a finding that the prosecution failed to prove beyond reasonable doubt that on the above said date, time and place, the accused threatened to kill the complainant, if she were to disclose the incident to anyone and thereby failed to prove that the accused has committed the offence punishable under Section 506 IPC.

11. The learned Sessions Judge further recorded a finding that the prosecution proved beyond all reasonable doubt that the accused had sexual intercourse with complainant in the above said place on a promise of marriage, but failed to marry her and thereby committed the offence punishable under Section 417 IPC.

12. The learned Sessions Judge also recorded a finding that the prosecution failed to prove beyond all reasonable doubt that the accused had come to know that the complainant had conceived and he gave two pills to her on 2.9.2009, out of which she consumed one on 2.9.2009 and another on 3.9.2009 and he voluntarily caused her to miscarriage and such miscarriage was not done in good faith for the purpose of saving the life of complainant and thereby failed to prove that the accused has committed the offence punishable under Section 313 IPC.

13. Accordingly, the learned Sessions Judge proceeded to pass the impugned Judgment acquitting the accused for the offences punishable under Sections 376, 506 and 313 of IPC and convicting the accused for the offence punishable under Section 417 of IPC and sentencing him to undergo simple

imprisonment for six months and to pay fine of Rs.15,000/-, in default to undergo simple imprisonment for further period of three months. Hence, the Criminal Appeal No.405/2014 is filed by the State against acquittal of the accused for the offences punishable under Sections 376, 506 and 313 of IPC and Criminal Appeal No.786/2013 is filed by the accused against his conviction for the offence punishable under Section 417 IPC.

14. We have heard the learned counsel for the parties.

II. ARGUMENTS ADVANCED BY THE LEARNED ADDITIONAL SPP FOR THE STATE

15. Sri Vijayakumar Majage, learned Additional State Public Prosecutor appearing for the State contended that the impugned Judgment passed by the learned Sessions Judge acquitting the accused for the offences punishable under Sections 376, 506 and 313 of IPC, is without any basis. He would further contend that the evidence of PW.1 coupled with the medical evidence of PW.5 - Doctor clearly indicates that the accused had sexual intercourse with the victim on several occasions and he has promised the victim to marry her. Believing his words, she gave her consent, thereby the accused cheated the victim. He contended that the learned Sessions Judge rightly convicted the accused for the offence punishable under Section 417 of IPC.

16. He further contended that the learned Sessions Judge has not appreciated the evidence of PWs.2,3 and 6 so also the evidence of doctors - PWs.4 and 5. He also contended that the learned Sessions Judge has not considered the evidence of PWs.7,8,9 and 10, in the right perspective. He further contended that the learned Sessions Judge has not considered the evidence of PW.12, who has issued the certificate as to the date of birth of the victim in the proper perspective. He also contended that the learned Sessions Judge failed to appreciate the evidence of PWs.11,14,15, 20 and 22, which supports the case of the prosecution. He further contended that the learned Sessions Judge failed to appreciate the evidence of PW.16 - Medical Officer so also the evidence of PWs.17, 18, 19 and 21, who are independent witnesses. Thus, the learned Sessions failed to appreciate the evidence of the prosecution witnesses, which clearly prove that the accused has committed the offences punishable under Sections 376, 506 and 313 of IPC and thereby, the learned Sessions Judge committed an error in acquitting the accused for the said offences. Therefore, he sought to allow the appeal filed by the State and to dismiss the appeal filed by the accused.

III. ARGUMENTS ADVANCED BY THE LEARNED COUNSEL FOR THE ACCUSED

17. Per contra, Sri A.H. Bhagawan, learned counsel for the accused in both the appeals contended that the learned Sessions Judge while acquitting the accused for the offences punishable under Sections 376, 506 and 313 of IPC, has clearly recorded a finding that it was with the consent of the prosecutrix and not against her Will. Therefore, the learned Sessions Judge is justified in acquitting the accused for the offence punishable under Section 376 of IPC. Though it is alleged that the accused had sexual intercourse with the complainant from 13.1.2009 against her will, the complaint was not lodged by her through her relatives or mother of the accused and complaint was lodged by her only on 9.9.2009. He would further contend that in the complaint, it is not stated about the false promise made by the accused to marry the complainant before the act was done. Therefore, it does

not amount to cheating and the learned Sessions Judge erroneously held it is cheating. He further contended that in the complaint, there is no mention regarding giving pills to the victim and it is stated only in the evidence and there are improvements in the evidence of PW.1, which are not supported by the material documents.

18. He further contended that the scope of the appeal filed by the State against the order of acquittal is very limited and unless this Court while considering the material on record finds that findings of the learned Sessions Judge are perverse, this Court cannot interfere. He would further contend that the learned Sessions Judge while convicting the accused under Section 417 of IPC, has not considered the fact that in the entire complaint, there is no mention of the promise to marry before the alleged act committed by the accused. Therefore, he contended that the ingredients of Section 415 of IPC would not attract and therefore, the question of conviction of the accused under Section 417 of IPC would not arise.

19. He further contended that the evidence of the doctor - PW.5 clearly depicts that the complainant has stated before her that she is the wife of one Srinivas and she has not disclosed the fact about pregnancy from the accused. PW.5 - Doctor admitted several aspects in her evidence with regard to abortion and pregnancy of the complainant and further stated that the abortion was with the consent of the complainant. Learned counsel would further contend that if there was any forcible sexual intercourse by the accused, what prevented for the victim to lodge the complaint or to inform the relatives i.e., PW.7, PW,17 and CW.5 (maternal uncle, cousin and grand- mother of the complainant) or mother of the accused, is not forthcoming. Therefore, it was consensual sexual intercourse between the accused and the victim. As on the date of the alleged incident i.e., on 13.1.2009, the victim was aged about 17 ½ or 18 years. Therefore, even the provisions of Clause - sixthly of Section 375 of IPC would not attract. Hence, the learned Sessions Judge rightly acquitted the accused for the offences under Sections 376, 506 and 313 of IPC and erred in convicting the accused for the offence under section 417 of IPC. Hence, he sought to allow the appeal filed by the accused and dismiss the appeal filed by the State.

IV. POINTS FOR CONSIDERATION

20. In view of the aforesaid rival contentions urged by the learned counsel for the parties, the points that would arise for consideration in these criminal appeals are :-

> " 1. Whether the prosecution has made out any case to interfere with the impugned Judgment in so far as acquitting the accused for the offences punishable under Sections 376, 506 and 313 of IPC ?
>
> 2. Whether the accused in Criminal Appeal No.786/2013 has made out a case to interfere with the impugned Judgment of conviction and order of sentence, in so far as convicting the accused for the offence punishable under Section 417 of IPC and sentencing him to undergo simple imprisonment for six months and to pay fine of Rs.15,000/-, in the facts and circumstances of the case ? "

21. We have given our anxious consideration to the arguments advanced by the learned counsel for the parties and perused the entire material on record, including the original records carefully.

V. EVIDENCE OF THE PROSECUTION WITNESSES AND THE DOCUMENTS RELIED UPON

22. In order to re-appreciate the entire material on record, it is relevant to consider the evidence of the prosecution witnesses and the material documents relied upon.

PW.1 - Sumithra is the complainant, who filed the complaint on 9.9.2009 as per Ex.P1. She stated about the spot mahazar - Ex.P2.

PWs.2 and 3 - Chinnaswamy and Revanna, are panchayathdars, who supported the case of the prosecution about sexual intercourse by the accused with the victim.

PW.4 - Dr. Mukunda examined the accused and issued Ex.P4 stating that the accused is capable of having sexual intercourse. Accordingly, he sent the medico legal extract to the jurisdictional Police.

PW.5 - Dr. Poornima, who examined the victim, has made abortion on 3.9.2009 and issued Ex.P6 - case sheet, Ex.P7 - report and Ex.P8 - opinion with regard to the treatment given to the victim etc., PW.6 - Nagaraju, who is the Panchayathdar between the accused and the victim, has turned hostile to the case of the prosecution.

PW.7 - Nagaraju is the maternal uncle of the victim, who conducted panchayath and supported the case of the prosecution.

PWs. 8 and 10 - Siddegowda and Ramegowda are Panchayathdars, who partly supported the case of the prosecution.

PW.9 - Mahadeva is the Panchayathdar, who supported the prosecution case.

PW.11 - Chandrashekhara is the Police Constable, who carried the FIR to the jurisdictional Court.

PW.12 is the Principal, who issued the Certificate of the victim stating date of birth as 3.2.1991.

PW.13 - Dr. Hemalatha issued the report dated Ex.P22.

PW.14 - Gajendra Prasad is the Sub-Inspector of Police and Investigating Officer who conducted the investigation and filed the charge sheet.

PW.15 - Gopikrishna is the PSI, who received the complaint on 9.9.2009 and registered FIR.

PW.16 - Dr. Anupama examined the victim on 9.9.2009 and issued the report of miscarriage as per Ex.P23.

PW.17 is the relative of PW.1 and Panchayathdar and he supported the prosecution case.

PW.18 is the Panchayathdar, who partly supported the case of the prosecution.

PW.19 is the Panchayath Development Officer, who issued Ex.P24 - Demand Register and Ex.P25 - certificate.

PW.20 is the Police Constable, who carried the articles to the FSL.

PW.21 is the Panchayathdar between the accused and the complainant and received complaint and partly supported the case of the prosecution.

PW.22 is the woman Police Constable, who taken PW.1 to the hospital for medical examination.

VI. FINDINGS OF THE TRIAL COURT

23. Based on the aforesaid oral and documentary evidence on record, the learned Sessions Judge recorded a finding that the evidence of PW.1 is satisfactory and acceptable regarding the sexual assault ie., sexual intercourse made by the accused with PW.1 and further the cross-examination of PW.1 does not dislodge her evidence regarding the accused having sexual intercourse with her on many occasions including the incident dated 13.1.2009. In all probabilities, PW.1 had allowed the accused to have sexual intercourse with her on his promise of marrying her. It is not in dispute that in this case the victim girl - PW.1 was aged about 17 ½ - 18 years in the year 2009, which was the period during which the accused had sexual intercourse with her. The evidence of PW.1 discloses that the she had sexual intercourse with accused on several occasions. According to PW.1, she allowed the accused to have sexual intercourse as he promised to marry her. Her evidence discloses that she has allowed the accused to commit an act of sexual intercourse with her, as he told to her that he will marry her. Hence, it is evidencing that PW.1 has given consent to sexual intercourse on the basis of the inducement by the accused. The learned Sessions Judge further recorded a finding that the evidence on record suggests that according to PW.1, the reason for her to agree to have sexual intercourse with the accused is that he had promised to marry her. Therefore, she had not made any alarm (galata) or she never disclosed the act previously. The learned Sessions Judge further recorded a finding that the evidence on record clearly discloses that the consent to have sexual intercourse with accused is quite voluntary in view of the promise made by the accused to marry her. Therefore, essential ingredient of Section 376 of IPC is lacking and it is not attracted.

24. The learned Sessions Judge further recorded a finding that the consent of PW.1 for having sexual intercourse with the accused was not under fear of injury, but it was because of accused had agreed to marry her. Thus, it cannot be said that the consent of the victim girl is a tainted consent. So, the evidence on record depicts that the act of the victim in participating in the act of sexual intercourse with the accused is with the consent in view of the promise made by the accused of marrying her. In other words, the evidence on record and circumstances depict that there was voluntary consent of PW.1 in having sexual act with accused, many times within eight months. Accordingly, the learned Sessions Judge held that the prosecution failed to prove that the alleged sexual intercourse of the

accused with the complainant attract the ingredients of Section 375 of IPC so as to convict him for the offence punishable under Section 376 of IPC.

25. The learned Sessions Judge though acquitted the accused for the offences punishable under Sections 376, 506 and 313 of IPC, convicted the accused for the offence punishable under Section 417 of IPC mainly on the ground that the evidence of PWs.1,2,3,6,8 and 10 depicts that the accused had sexual intercourse with PW.1 and obtained her consent on his promise of marriage. So, the accused induced PW.1 for sexual intercourse on the promise of marriage. There is no reason to disbelieve the evidence of PW.1 and the evidence of PWs.2,3,8 and 10 corroborate the evidence of PW.1. No iota of materials placed by the accused in order to prove his defence. He has simply stated that there is some political ill-will between him and the maternal uncle of the complainant. Though the story put up by the accused planting Auto Prakash in between him and PW.1, it is only a make believe story, but he has not proved the same. The accused obtained consent of PW.1 to have sexual intercourse with her on the promise of marriage and thereafter refused to marry and therefore, the learned Sessions Judge proceeded to convict the accused for the offence punishable under section 417 of IPC.

VII. CONSIDERATION

26. On re-appreciation of entire oral and documentary evidence on record, it clearly depicts that at the inception on 13.1.2009 at about 4.00 pm when the accused had forcible sexual intercourse with the victim, she neither lodged any complaint nor raised alarm and she has not intimated to her relatives - PW.7, PW.17 and CW.5 (maternal uncle, cousin and grand-mother of the complainant) or to the mother of the accused. If there was any forcible sexual intercourse by the accused with her, what prevented the victim to lodge the complaint or to inform the relatives or mother of the accused, is not forthcoming. The evidence on record and the circumstances depict that there was voluntary consent of the complainant (PW.1) in having sexual act with accused, many times from 13.1.2009 to 2.9.2009. She started taking objection only in the 1st week of September 2009 after becoming pregnant.

27. It is also not in dispute that the complainant (PW.1) in her evidence has stated that accused and mother of the accused admitted her to the nursing home, but according to the evidence of PW.5 - Doctor, the victim has come to their nursing home along with her grand-mother stating that she is the wife of one Srinivas. Thus, there are some inconsistencies.

28. It is the case of the complainant that she informed about her pregnancy to the accused on 2.9.2009 and the accused and his mother took her to the nursing home for abortion on 3.9.2009 and after she came back from the hospital, she and her grand-mother - Jayamma asked the accused to marry the complainant, but he refused to marry her and then panchayath was convened and even in the panchayath, the accused refused to marry and therefore, she filed the complaint before the jurisdictional Police. This also clearly depicts that she all along had consensual sexual intercourse with the accused on many occasions from 13.1.2009 to 2.9.2009 without raising any alarm.

29. The learned Sessions Judge considering the evidence of PW.1 and the material documents, has recorded a finding that there was consensual sex between the accused and the victim on the promise made by the accused. But the material evidence does not prove the case of the complainant that the accused had promised her before inducing her for the sexual intercourse. Even in the complaint, it is not stated about the promise made by the accused to marry the complainant before the sexual act was committed. The complainant being educated, having passed SSLC and having allowed the accused to have sexual intercourse with her on several occasions, cannot raise alarm after becoming the pregnant. It is also brought to our notice by the learned counsel for the accused that after the impugned judgment, the complainant married and settled in her life.

30. At this stage, it is appropriate to refer to the Clause-sixthly of Section 375 of IPC, which reads as under:

> "375. Rape:- A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:
>
> Xxx Xxx Xxx Xxx Xxx Sixthly: With or without her consent, when she is under sixteen years of age. "

31. The material on record clearly depicts that as per the entries in the certificate issued by PW.12 - Principal, where the victim has studied, her date of birth is 3.2.1991 and on the date of the incident i.e., 13.1.2009, she was aged nearly 18 years. Thus, as on the date of the incident, the accused was not within age of 16 years and she was aged nearly 18 years. Therefore, the provisions of Clause - sixthly of Section 375 of IPC are not attracted.

32. The provisions of Section 506 of IPC prescribes punishment for the offence of a criminal intimidation as defined under Section 503 of IPC. Section 503 of IPC reads as under:

> "503.Criminal intimidation.- Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.
>
> "Explanation.- A threat to injure the reputation of any deceased person in whom the person threatened is interested, is within this section."

A careful reading of the evidence on record in the light of the aforesaid legal provision under Section 503 IPC depicts the insufficiency of evidence to hold the conviction of the accused for the offence of criminal intimidation punishable under Section 506 of IPC.

33. Based on the material placed on record, it is clear that the evidence of the prosecutrix in neither believable nor reliable to bring home the charges leveled against the accused. We are of the view that the impugned judgment of acquittal passed by the learned Sessions Judge is based on a careful appraisal of the evidence on record and there is no material evidence on record to show that the accused guilty of the offences under Sections 376, 506 and 313 of IPC.

34 On re-appreciation of the entire oral and documentary evidence on record, we are of the considered view that the learned Sessions Judge is justified in acquitting the accused for the offences punishable under Sections 376, 506 and 313 of IPC in the peculiar facts and circumstances of the case and the prosecution has not made out any case to interfere with the impugned Judgment of acquittal.

35. The learned Sessions Judge proceeded to convict the accused for the offence under Section 417 of IPC and sentenced him to undergo simple imprisonment for six months and to pay fine of Rs.15,000/-.

36. At this stage, it is relevant to refer to the provisions of Section 415 of IPC, which reads as under:

> 415. Cheating.--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".

A careful reading of the provisions of Section 415 makes it clear that the ingredients required to constitute the offence of cheating are as under:

> (i) there should be fraudulent or dishonest inducement of a person by deceiving him;
>
> (ii) (a) the person so deceived should be induced to deliver any property to any person, or to consent that any person shall retain any property; or
>
> (b) the person so deceived should be intentionally induced to do or omit to do anything which he would not do or omit if he were not so deceived; and
>
> (iii) in cases covered by (ii)(b), the act or omission should be one which causes or is likely to cause damage or harm to the person induced in body, mind, reputation or property.

37. In the present case, it is not the case of the complainant that before the sexual act by the accused on 13.1.2009, he induced her for sexual intercourse on the promise to marry her. The material on record clearly depicts that from 13.1.2009 to 2.9.2009, she was all along cooperated with the accused for sexual intercourse. As has been admitted by PW.1 in the examination-in-chief as well as

cross-examination, there was no inducement by the accused before he having the sexual intercourse with her for the first time, which clearly depicts the ingredients of Section 415 of IPC are not attracted and therefore, question of conviction of the accused under Section 417 of IPC cannot be sustained. Even in the complaint, it is not stated about the promise made by the accused to marry the complainant before the sexual act committed by him. The learned Sessions Judge having considered the oral and documentary evidence and having come to the conclusion that there was consensual sex between the accused and the complainant for a period of more than eight months, ought not to have convicted the accused under Section 417 of IPC in the peculiar facts and circumstances of the present case.

38. Thus, a careful reading of the evidence on record clearly depicts that there is no evidence against the accused from which it can be conclusively inferred that there was any fraudulent or dishonest inducement of the prosecutrix by the accused to constitute an offence under Section 415 of IPC. Therefore, the accused cannot be convicted for the offence of cheating punishable under Section 417 of IPC as the prosecution has failed to prove all ingredients of the said offence beyond reasonable doubt.

VIII. JUDGEMENTS RELIED UPON

39. Our view is fortified by the judgment of the Hon'ble Supreme Court in the case of Deepak Gulati -vs- State of Haryana reported in AIR 2013 SC 2071, wherein the Hon'ble Supreme Court held at paragraphs 15, 22, 23 and 24 as under:

> 15. Section 114-A of the Evidence Act, 1872 (hereinafter referred to as "the 1872 Act") provides, that if the prosecutrix deposes that she did not give her consent, then the court shall presume that she did not in fact, give such consent. The facts of the instant case do not warrant that the provisions of Section 114-A of the 1872 Act be pressed into service. Hence, the sole question involved herein is whether her consent had been obtained on the false promise of marriage. Thus, the provisions of Sections 417, 375 and 376 IPC have to be taken into consideration, along with the provisions of Section 90 IPC. Section 90 IPC provides that any consent given under a misconception of fact, would not be considered as valid consent, so far as the provisions of Section 375 IPC are concerned, and thus, such a physical relationship would tantamount to committing rape.
>
> 22. The instant case is factually very similar to Uday [Uday v. State of Karnataka, (2003) 4 SCC 46 : 2003 SCC (Cri) 775 : AIR 2003 SC 1639] , wherein the following facts were found to exist:
>
> I. The prosecutrix was 19 years of age and had adequate intelligence and maturity to understand the significance and morality associated with the act she was consenting to.

II. She was conscious of the fact that her marriage may not take place owing to various considerations, including the caste factor.

III. It was difficult to impute to the accused, 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.

IV. There was no evidence to prove conclusively, that the appellant had never intended to marry the prosecutrix.

23. To conclude, the prosecutrix had left her home voluntarily, of her own free will to get married to the appellant. She was 19 years of age at the relevant time and was, hence, capable of understanding the complications and issues surrounding her marriage to the appellant. According to the version of events provided by her, the prosecutrix had called the appellant on a number given to her by him, to ask him why he had not met her at the place that had been pre-decided by them. She also waited for him for a long time, and when he finally arrived she went with him to Karna Lake where they indulged in sexual intercourse. She did not raise any objection at this stage and made no complaints to anyone. Thereafter, she also went to Kurukshetra with the appellant, where she lived with his relatives. Here too, the prosecutrix voluntarily became intimate with the appellant. She then, for some reason, went to live in the hostel at Kurukshetra University illegally, and once again came into contact with the appellant at Birla Mandir. Thereafter, she even proceeded with the appellant to the old bus-stand in Kurukshetra, to leave for Ambala so that the two of them could get married in the court at Ambala. However, here they were apprehended by the police.

24. If the prosecutrix was in fact going to Ambala to marry the appellant, as stands fully established from the evidence on record, we fail to understand on what basis the allegation of "false promise of marriage" has been raised by the prosecutrix. We also fail to comprehend the circumstances in which a charge of deceit/rape can be levelled against the appellant, in light of the afore-mentioned fact situation.

40. Our view is also fortified by the judgment of the Hon'ble Supreme Court in the case of Rajesh Patel -vs- State of Jharkhand reported in 2013 Crl.LJ 2062, wherein the Hon'ble Supreme Court at paragraphs 9,10, 11, 12, 14 and 16 held as under:

> 9. Further, there is an inordinate delay of nearly 11 days in lodging the FIR with the jurisdictional police.

The explanation given by the prosecutrix in not lodging the complaint within the reasonable period after the alleged offence committed by the appellant is that she went to her house and narrated the offence committed by the appellant to her mother and on the assurance of Purnendu Babu, PW 3, the mother remained silent for two to four days on the assurance that he will take action in the matter. Further, the explanation given by the prosecutrix regarding the delay is that at the time of commission of offence the appellant had threatened her that in case she lodges any complaint against him, she would be killed. The said explanation is once again not a tenable explanation.

Further, in the reason assigned by the High Court regarding not lodging the complaint immediately or within a reasonable period, it has observed that in case of rape, the victim girl hardly dares to go to the police station and make the matter open to all out of fear of stigma which will be attached with the girls who are ravished. Also, the reason assigned by the trial court which justifies the explanation offered by the prosecution regarding the delay in lodging the complaint against the appellant has been erroneously accepted by the High Court in the impugned judgment [Criminal Appeal No. 58 of 1999, decided on 14-11-2006 (Jhar)] . In addition to that, further observation made by the High Court regarding the delay is that the prosecutrix as well as her mother tried to get justice by interference of PW 3, who is a common friend of both of them and PW 4, the doctor with whom the prosecutrix was working as a nurse. When the same did not materialise, after a lapse of 11 days, the FIR was lodged with the jurisdictional police for the offence said to have been committed by the appellant. Further, the High Court has also proceeded to record the reason that the prosecutrix had every opportunity to give different date of occurrence instead of 14-2-1993 but she did not do it which reason is not tenable in law. Further, the High Court accepted the observation made by the learned trial Judge wherein the explanation given by the prosecutrix in her evidence about being terrorised to be killed by the appellant in case of reporting the matter to the police, is wholly untenable in law. The same is not only unnatural but also improbable. Therefore, the inordinate delay of 11 days in lodging the FIR against the appellant is fatal to the prosecution case. This vital aspect regarding inordinate delay in lodging the FIR not only makes the prosecution case improbable to accept but the reasons and observations made by the trial court as well as the High Court in the impugned judgments are wholly untenable in law and the same cannot be accepted. Therefore, the findings and observations made by the courts below in accepting delay in lodging the FIR by assigning unsatisfactory reasons cannot be accepted by this Court as the findings and reasons are erroneous in law.

10. Further in the case in hand, PW 3, who is a common friend of the appellant and the prosecutrix, according to the prosecution case, has categorically stated that he does not know anything about the case for which he had received the notice from the court to depose in the case. PW 4 has stated in his evidence that the prosecutrix was getting nursing training privately in his chamber for the last three years as on the date of his examination, namely, on 16-11-1995. He has stated in his examination-in-chief that on 14-2-1993 when he opened his chamber the prosecutrix came to his chamber and further stated that her mother did not tell him anything. He has been treated as hostile by the prosecution, he was cross-examined by the prosecutor, in his cross-examination he has categorically stated that he has told the police that he does not know anything about the incident. He has further stated that neither the prosecutrix nor her mother told him about the incident and further stated that he does not know anything about the case.

11. Further, neither the doctor nor the IO has been examined before the trial court to prove the prosecution case. The appellant was right in bringing to the notice of the trial court as well as the High Court that the non-examination of the aforesaid two important witnesses in the case has prejudiced the case of the appellant for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any other part of her body and also the nature of hymen layer, etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on

her. The non- examination of the doctor who had examined her after 12 days of the occurrence has not prejudiced the case of the defence for the reason that the prosecutrix was examined after 12 days of the offence alleged to have been committed by the appellant because by that time the sign of rape must have disappeared. Even if it was presumed that the hymen of the victim was found ruptured and no injury was found on her private part or any other part of her body, finding of such rupture of hymen may be for several reasons in the present age when the prosecutrix was a working girl and that she was not leading an idle life inside the four walls of her home. The said reasoning assigned by the High Court is totally erroneous in law.

12. In view of the above statement of evidence of PW 3 and PW 4 whose evidence is important for the prosecution to prove the chain of events as per its case, the statement of evidence of the aforesaid witnesses has seriously affected the prosecution case. Therefore, the courts below could not have, by any stretch of imagination, on the basis of the evidence on record held that the appellant is guilty of committing the offence under Section 376 IPC. Further, according to the prosecutrix, PW 3 who is alleged to have rescued her from the place of occurrence of offence, has clearly stated in his evidence that he does not know anything about the incident in his statement thereby he does not support the version of the prosecution. The High Court has erroneously accepted the finding of the trial court that the appellant has not been prejudiced for non-examination of the doctor for the reason that she was working as a nurse in the private hospital of PW 4 and being a nurse she knew that the information on commission of rape is grave in nature and she would not have hesitated in giving the information to the police if the occurrence was true. Further, the finding of the courts below that non- examination of the IO by the prosecution who has conducted the investigation in this case has not caused prejudice to the case of the appellant, since the prosecution witnesses were unfavourable to the prosecution who were either examined or declared hostile by the prosecution, which reasoning is wholly untenable in law. Therefore, the finding and reasons recorded by both the trial court as well as the High Court regarding non-examination of the abovesaid two witnesses in the case has not prejudiced the case of the appellant is totally an erroneous approach of the courts below. For this reason also, we have to hold that the findings and reasons recorded in the impugned judgment [Criminal Appeal No. 58 of 1999, decided on 14-11-2006 (Jhar)] that the trial court was justified in holding that the prosecution has proved the charge against the appellant and that he has committed the offence on the prosecutrix, is totally erroneous and the same is wholly unsustainable in law.

14. Further, one more strong circumstance which has weighed in our mind is that they had good acquaintance with each other as they were classmates and they were in terms of meeting with each other. The defence counsel had alternatively argued that the appellant had sex with her consent. The High Court proceeded not to accept the said argument by giving reasons that the appellant failed to explain as to under what circumstance he had sex with the consent of the prosecutrix when she was confined in his house. The contention urged on behalf the appellant that it was consensual sex with the prosecutrix is to be believed for the reason that she herself had gone to the house of the appellant though her version is that she went there at the request of the appellant to take back her book which she had given to him. This is a strong circumstance to arrive at the conclusion that the defence case of the appellant is of consensual sex. Further, the prosecution case is that after the offence was committed by the appellant he had locked the room from outside and left. After half an

hour Purnendu Babu, PW 3 arrived and unlocked the room. This story is improbable to believe and the prosecutrix has not lodged the complaint either immediately or within reasonable period from the date of occurrence. The complaint was indisputably lodged after a lapse of 11 days by the prosecutrix. In this regard, it is pertinent to mention the judgment of this Court in Raju v. State of M.P. [(2008) 15 SCC 133 : (2009) 3 SCC (Cri) 751] , the relevant paragraph of which is extracted hereunder for better appreciation in support of our conclusion:

> "12. Reference has been made in Gurmit Singh case [State of Punjab v. Gurmit Singh, (1996) 2 SCC 384 : 1996 SCC (Cri) 316] to the amendments in 1983 to Sections 375 and 376 of the Penal Code making the penal provisions relating to rape more stringent, and also to Section 114-A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113-A and 113-B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualised as the presumption under Section 114-A is extremely restricted in its applicability. This clearly shows that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth.

Additionally, her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."

16. The trial court as well as the High Court should have appreciated the evidence on record with regard to delay and not giving proper explanation regarding delay of 11 days in filing FIR by the prosecutrix and non-examination of the complainant witnesses viz. the doctor and the IO which has not only caused prejudice to the case of the appellant but also the case of prosecution has created reasonable doubt in the mind of this Court. Therefore, the benefit of doubt must enure to the appellant. As we have stated above, the testimony of the prosecutrix is most unnatural and improbable to believe and therefore it does not inspire confidence for acceptance of the same for sustaining the conviction and sentence. Therefore, we are of the view that the impugned judgment [Criminal Appeal No. 58 of 1999, decided on 14-11-2006 (Jhar)] requires to be interfered with by this Court in exercise of its jurisdiction. Accordingly, we allow the appeal and set aside the impugned judgment [Criminal Appeal No. 58 of 1999, decided on 14-11-2006 (Jhar)] . If the appellant has executed bail bonds, the same may be discharged.

41. The Co-ordinate Bench of this Court while considering the provisions of Section 376 of IPC in the case of State of Karnataka -vs- Anthonidas reported in ILR 2000 KAR.266, held at paragraphs 3 and 4 as under:

> 3. The last submission canvassed was that there is very clear evidence of miscarriage and the submission was that this would be actionable under Sections 312 or 313 IPC. Even though there is no charge under this head, it is permissible in given cases for a Court to convict of a lesser offence if the facts so justify for which reason, we have examined the argument. First of all, the facts do not make out any case of inducing a miscarriage. This is the most important ingredient in so far as the Section virtually punishes the doctor who is responsible for it and even assuming the learned SPP has submitted that it was done at the instance of the accused, we find from the evidence that there has been no inducement of a miscarriage because the girl was bleeding heavily when she was brought to the doctor and the doctor has only thereafter done the "cleaning up operations" in medical terms, and has said so in the evidence that the miscarriage was not induced. How the bleeding commenced, is not clear from the evidence and one cannot rule out the possibility that the girl herself had made some attempts to get rid of the unwanted pregnancy.

There might have been other good reasons as to how it happened which could have even been in natural course and therefore, even as regards this lesser offence it would not be possible to interfere with the decision of the trial Court.

4. Having carefully applied our mind to the facts of the case and having heard the learned SPP on merits, we are of the view that no interference is called for. The appeal accordingly fails and stands dismissed.

IX. CONCLUSION

42. On re-appreciation of the entire oral and documentary evidence on record and in the light of the principles enunciated in the dictums of the Hon'ble Supreme Court and this Court stated supra, we answer the points raised in these criminal appeals as under:

> (i) The 1st point raised in these criminal appeals is answered in the negative holding that the prosecution has failed to make out any case to interfere with the impugned Judgment in so far as acquitting the accused for the offences punishable under Sections 376, 506 and 313 of IPC, in exercise of the powers under Sections 378(1) and (3) of the Code of Criminal Procedure.
>
> (ii) The 2nd point raised in these criminal appeals is answered in the affirmative holding that the accused in Criminal Appeal No.786/2013 has made out a case to interfere with the impugned Judgment in so far as convicting the accused for the offence punishable under Section 417 of IPC, as the same is without any basis. Accordingly, the accused is liable to be acquitted for the said offence.

X. R E S U L T

43. For the reasons stated above, we pass the following:

ORDER

1. The Criminal Appeal No.405/2014 filed by the State is dismissed as devoid of merits.

2. The Criminal Appeal No.786/2013 filed by the accused is allowed.

3. The impugned judgment of conviction and order of sentence convicting the accused for the offence punishable under Section 417 of IPC and sentencing him to undergo simple imprisonment for six months with fine and default sentence, is hereby set aside.

Accused is acquitted for the offence punishable under Section 417 of IPC.

4. The bail bonds, if any stand cancelled.

5. The fine amount paid, if any shall be refunded to the accused.

6. We hope and trust that the accused shall not involve in such activities in future.

Sd/-

JUDGE Sd/-

JUDGE Gss*