

GAHC010004082013



2024:GAU-AS:11416

**THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

Case No. : Crl.A./44/2013

KISHORE KR SHARMA
S/O SRI NARAYAN SHARMA, R/O BALISATRA UNDER KAYA POLICE
STATION IN THE DIST. OF KAMRUP, ASSAM.

VERSUS

THE STATE OF ASSAM
ASSAM

Advocate for the Petitioner : MR. K SAIKIA, MR.D TALUKDAR,MR.N P DAS,MR.P CHOWDHURY

Advocate for the Respondent : PP, ASSAM, „,MR. P CHOWDHURY

BEFORE

HON'BLE MR JUSTICE ARUN DEV CHOWDHURY

For the Petitioner : Mr. D Talukdar, Advocate.

For the Respondents : Mr. B Sarma, Advocate.

Date of Hearing : 22.11.2024

Date of Judgement : 22.11.2024

JUDGMENT & ORDER (ORAL)

1. Heard Mr. D Talukdar, learned counsel for the appellant. Also heard Mr. B Sarma, learned Additional Public Prosecutor, Assam.
2. The present appeal is filed under section 374 of the Cr.P.C. 1973 challenging the judgment and order dated 22.01.2013 passed by the learned Additional District & Session Judge, Kamrup, Rangia, in Sessions Case No. 165 (K)/2009, whereby the accused /appellant was convicted under Section 417 IPC and was sentenced him to undergo Simple Imprisonment for one year and also to pay fine of Rs 5000/- and in default to suffer Simple Imprisonment for one month.
3. The prosecution case, in nutshell, is that the complainant filed a complaint before the SDJM, Rangia on 12.12.2007. Being forwarded by the learned Magistrate, later on same was treated as FIR by the Rangia Police Station and was investigated. It is alleged in the said complaint, inter-alia, that the complainant who is an unmarried lady had love affair with the accused appellant for last two years. The accused appellant promised to marry her and had sexual relations with the complainant for several times. It is also alleged in the complaint that the appellant took an amount of Rs. 1,26,000/- in the month of November, 2005 from the elder brother of the complainant with a promise to return the same within one year. It is the further case of the complainant that the accused appellant again took an amount of Rs. 1,65,000/- from the complainant for investing in a business but thereafter he did not contact with the complainant for two months. Subsequently, the complainant came to know that the appellant planned to marry another girl and thereby the accused/ appellant cheated her by making false promise to marry.

4. After completion of the investigation, charge-sheet was filed. Charge was framed by the learned trial court. Charge was explained to the accused, which he pleaded not guilty and claimed to be tried. The prosecution in support, examined as many as 8 witnesses and the defence did not adduce any evidence.
5. Before having the determination, let this court first examine the depositions of the PWs.
6. **PW1, Takdira Yasmin Rahman** in her deposition deposed that she knew the accused/ appellant for last 15 years and they studied together and had love affairs with the accused/ appellant and he promised to marry her. She further deposed that the accused/ appellant raped upon her and he did the same thing for several times on the pretext of marrying her. She in her deposition deposed that though they were not married socially but the appellant used to treat her as his wife and promised to marry her on 10.12.2007 and he took an amount of Rs. 1,65,000/- in order to marry her out of which Rs. 1,00,000/- was taken for the purpose of business and Rs. 65,000/- as marriage expenses. She further stated that the appellant took Rs. 1,00,000/- from her brother as loan but till date he has not returned the same. She stated that the appellant though promised to marry her on 10.12.2007 but he did not marry her and married a girl namely Alpana. PW1 further deposed that in the year 2006, while she went to Apollo Hospital, the appellant also accompanied her where he identified himself as her husband. She identified Ext. 1 as FIR and Ext. 2 as her statement recorded under Section 164 Cr.P.C.

During cross-examination, PW1 denied the fact that she did not mention the fact of committing rape upon her in her complaint petition as well as

statement before the Magistrate. In her cross-examination, she admitted that she has not mentioned the date of commission of rape nor the place of occurrence. She also in her cross-examination, stated that no document was submitted as regards taking of money amounting to Rs. 1,65,000/- from her and an amount of Rs. 1,00,000/- from her brother. In her cross-examination, she admitted that as the appellant failed to marry her, she has filed the present case against the appellant and in October, 2008, she got married with another person.

7. **PW2, Md. Tarikul Islam** is the brother of the complainant, who deposed that the appellant and his sister studied together since childhood and the appellant used to visit their house to meet her sister and thereafter they started loving each other. PW2 further deposed that the appellant promised to marry his sister and thereafter he took loan of Rs. 1,26,000/- from him for some business purpose. He further deposed that his sister told him that the appellant took an amount of Rs. 1,65,000/- from her and she told him that they developed illicit relationship between them.

In cross-examination, PW2 deposed that his sister got married with one Inamul Hoque. PW2 in his cross-examination admitted that he has not deposed before the police wherefrom he got the money and denied the suggestion that he did not state before the police that the accused promised to marry his sister.

8. **PW3, Mainuddin Ahmed** deposed that he had seen the appellant with the complainant in motorcycle while loitering in Rangia town. PW3 further stated that when he asked the matter to the appellant, the appellant stated that he loved the complainant and would marry her and they went to Madras for treatment of the complainant, but he came to know that the

appellant did not marry the complainant.

In his cross-examination, he denied that he did not state regarding the fact that he had seen the appellant with the complainant in his motorcycle. PW3 further denied the fact that he did not tell the police that the appellant had told him that he would marry the complainant.

9. **PW4, Mabinur Ahmed** deposed that he knew both the parties and had seen the appellant visiting the house of the complainant. He further deposed that he was reported by the appellant that very soon he would marry the complainant and the complainant told that though their religion is different but she agreed to marry the appellant.

During cross-examination, PW4 denied the fact that he did not tell the police that the appellant used to visit his computer centre and also the fact that he did not tell the police that they stayed as husband and wife at Madras. PW4 also denied the fact that he did not tell the police about the appellant talking to him and friends that he had done everything as is done after marriage.

10. **PW5, Mukut Ali** deposed that though the accused and the complainant belong to two different religion but they decided to marry each other.
11. **PW6, Smt. Binita Kalita** deposed that she is a friend of the complainant and she came to know that the complainant loved the accused. PW6 further deposed that during their visit to Madras they stayed as husband and wife. She further deposed that she was reported that the appellant had taken some money for expenditure of the marriage.
12. **PW7, Smt. Dharitri Barman**, the learned Judicial Magistrate, who recorded the statement of the victim under Section 164 Cr.P.C. She proved

Ext 2 and Ext. 2(1) and Ext. 2(2) as her signature.

13. **PW8, Harish Ch. Sarma (I/O)** investigated the case and recorded the statement of the witnesses, arrested the accused and sent the complainant for medical examination. After completion of investigation, submitted charge-sheet under Section 420/376 IPC.
14. **PW9, Dr. Pradip Thakuria**, who examined the victim at GMCH deposed that he along with Dr. Partha Das examined the complainant. Ext. 5 is the medical examination and opinion.
15. The learned counsel for the appellant submits that the prosecution has failed to bring home the charge under Section 417 IPC as initial deception is missing in the instant case and the complainant being major had herself consented to their intimate and physical relationship out of her own sweet will as they were friends and knew each other for the last 15 years and not for the fact that the appellant lured her on the pretext of marrying her. Therefore, according to the learned counsel for the appellant the conviction under Section 417 IPC for cheating is not sustainable in law and the same is liable to be set aside.
16. The learned counsel for the appellant further submits that the prosecution has failed to prove miserably by way of cogent evidence that the consent given by the complainant to sexual intercourse was given under misconception of fact i.e. promise to marry but because for the fact that she also desired for it as they knew each other for pretty long time and it has come in evidence that both of them went to Madras and stayed together for treatment of the complainant. Therefore, the appellant ought not to have been convicted under Section 417 IPC for cheating and the

conviction is not tenable in law and the same is liable to be set aside.

17. The learned counsel for the appellant further submits that it is well settled that the consent given by the prosecutrix to sexual intercourse with a person with whom she is deeply in love on a promise that he would marry her on a later date cannot be said to be given under misconception of fact. The complainant and the appellant were deeply loved for several years and the consent for physical relationship was not obtained by way misconception of fact. Therefore, the accused/ appellant is entitled for acquittal for conviction under Section 417 IPC.
18. Per contra, Mr. B Sarma, learned Additional Public Prosecutor, Assam submits that the prosecution through the evidence of the victim and other witnesses has been able to prove that the promise to marry was false and the accused made such promise with an intention not to abide by it but to deceive the woman and to convince the victim to engage in sexual relation. The misconception of fact, which vitiated the consent of the victim has duly been proved beyond any reasonable doubt by the prosecution and therefore, this is not a fit case to reverse the impugned judgment and conviction.
19. I have given anxious consideration to the submissions made by the learned counsel for the parties.
20. The evidence of PW1 establishes that accused/ appellant was known to her for last 15 years and they studied together and had love affairs. The PW2 i.e. the brother of the prosecutrix also testified that the accused and his sister had been together since their childhood and accused used to visit their house and started loving each other and the accused/ appellant

promised to marry his sister. Similar is the revelation as regard PW3, PW4, PW5 and PW6. All of these witnesses, who know both the accused and the prosecutrix, during their testimonies, reveal that the accused and prosecutrix had long love relation and they were seen together in different places. However, the accused/ appellant did not marry the victim.

21. From the deposition of PW1 and PW2, it is further revealed that an amount of Rs. 1,65,000/- was given to the accused for the purpose of doing his business and for marriage expenses inasmuch as the accused had taken loan of Rs. 1,00,000/- from PW2 and did not return. It is further revealed from the testimony of the victim that earlier the accused appellant introduced him to be husband, when the accused visited a hospital. When the accused did not marry her and married another girl, namely, Alpana on 10.12.2007, the FIR was lodged.
22. From the cross-examination PW2, i.e. the brother of the PW1, it reveals that the PW1 in the meantime, got married with one Inamul Hoque. The prosecutrix further testified that though she and the accused were not married socially, but the accused/ appellant used her as wife and promised to marry her on 10.12.2007.
23. In the aforesaid backdrop of evidence, the fundamental issue that arises is whether treating the prosecutrix as his wife without marriage and thereafter refusing to marry her amounts to an offence of cheating.
24. In ***Pramond Suryabhan Pawar vs State of Maharashtra***, reported in ***(2019) 9 SCC 608***, the Hon'ble Apex Court held that when the promise to marry is false and the intention of the maker, at the time of making the promise itself was not to abide but to deceive the woman to convince her

to engage in sexual relation, there is a miss-concept of fact, which vitiate the women's consent. At the same time a breach of a promise cannot be said to be a false promise and to establish false promise, the maker of the promise should have had no intention of upholding his word at the time of giving it. It is further held that consent of a woman in reference to Section 375 must involve an active and reason deliberation towards to proposed act. It was also held that to establish that consent was vitiated by miss-concept of fact arising out of a promise to marry two propositions i.e. that the promise of marriage was a false promise, given in bad faith and with no intention of being adhere to at the time it was given and secondly, such false promise itself must be of immediate relevance or it must bear a direct nexus to the woman decision to engage in the sexual act.

25. In the case in hand, form the evidence of PW1, it is clear that there has been a long standing relation of 15 years and they used to stay during that period as husband and wife. The accused also introduced himself as husband of the prosecutrix socially, even without there being any marriage. The evidence of the PW1 nowhere even remotely suggest that they stayed as husband and wife under misconception of fact, with regard to the promise of marriage or that her consent was based on fraudulent representation of marriage. After meticulous examination of the prosecution evidence, this court does not find even remotely to indicate that there is material to suggest that at the inception the accused did not intend to marry the victim.
26. Therefore, in the considered opinion of this court, in absence of any evidence to prove that the PW1 had continued with the relationship with the accused as husband and wife on a miss-conception of a fact as

required under Section 90 IPC. It is by now well settled that mere refusal to marry would not constitute offence under Section 417 of the IPC. Therefore, in the considered opinion of this court, the impugned judgment is vitiated by perversity and cannot withstand the scrutiny of this court. Accordingly, the appeal stands allowed. The judgment and order dated 22.01.2013 passed by the learned Additional District & Session Judge, Kamrup, Rangia, in Sessions Case No. 165 (K)/2009, whereby the accused /appellant was convicted under Section 417 IPC and was sentenced him to undergo Simple Imprisonment for one year and also to pay fine of Rs 5000/- and in default to suffer Simple Imprisonment for one month stands set aside. The accused stands acquitted. Bail bond stands discharged. LCR be returned back.

27. Criminal appeal stands allowed.

JUDGE

Comparing Assistant