

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

Case No. : Crl.Rev.P./228/2018

SRI RAKTIM SAIKIA AND ANR.
S/O- SRI DIMBESWAR SAIKIA, VILL- BORKACHARI GAON, PO SALIKIHAT,
PS GOLAGHAT, DIST- GOLAGHAT (ASSAM), PIN- 785625

2: SRI BITU SAIKIA @ ASHIM
S/O- SRI JOGENDRA NATH SAIKIA
VILL- BORKACHARI GAON
PO SALIKIHAT
PS GOLAGHAT
DIST- GOLAGHAT (ASSAM)
PIN- 78562

VERSUS

THE STATE OF ASSAM AND ANR.
REP. BY P.P., ASSAM

2:SRI DIMBESWAR GOGOI
S/O- SRI BODON GOGOI
R/O- FREE SIMPLE GRANT
PO AND PS BORHOLLA
DIST- JORHAT (ASSAM)
PIN- 78563

Advocate for the Petitioner : MR. S K ROY

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

JUDGMENT

Date : 10-12-2021

Heard Md. K. Rahman, learned counsel appearing for the petitioners as well as Ms. M. B. Baruah, learned Legal Aid Counsel representing the respondents.

2. This is an application under Section 397 read with Section 401 of the CrPC whereby the Judgment and Order dated 18.12.2017 passed by the learned Sessions Judge, Jorhat in Criminal Appeal No. 34/2017 arising out of the Judgment and Order dated 09.12.2016 passed by the learned Assistant Sessions Judge, Jorhat in Sessions Case No. 89 (JT)/2016 are put to challenge.

3. One 20 years old girl was having a love affair with the present petitioner. Both eloped from their houses and co-habited. The father of the girl had lodged FIR before the Police that his 20 years old daughter was kidnapped by the present petitioner on a promise of marriage. Subsequently, the petitioner handed over the girl to his paternal uncle. Thereafter, the girl informed her parents over telephone and ultimately she was brought home.

4. After a routine investigation, Police filed the Charge Sheet against the present petitioner and his paternal uncle named Bitu Saikia under Sections 419/366 of the IPC. An additional Charge Sheet was also filed by putting Section 376 of the IPC against the present petitioner.

5. While testifying before the trial court, the victim girl admitted that she was in love with the present petitioner. She further stated that one day the present petitioner proposed to marry her. According to the victim girl, on 18.01.2016, she was called by the petitioner and by informing her parents that she would be going to her elder sister, she went with the petitioner. They went to the house of their paternal uncle Bitu

Saikia and she was told that this Bitu Saikia shall arrange the marriage. The victim girl has stated that she told the present petitioner that she was not interested in marriage. The victim girl has stated that when she refused to marry the present petitioner he beat her and his paternal uncle Bitu Saikia had forcibly put vermilion on her head. The victim girl has stated that neighbours were present at that time but she did not inform them that Bitu Saikia had forcibly put vermilion on her head.

6. The victim girl had disclosed after the said incident she stayed there for next four days and in those four days the present petitioner had forcible sexual intercourse with her against her will. The victim girl borrowed the mobile phone from the elder sister of Bitu Saikia and informed her parents.

7. At this stage, the law pertaining to the subject is relevant. The section 90 of the IPC has defined the word consent as under-

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

A consent is not such a consent as it 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 ; or

Consent of insane person

if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child

unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

8. In the case of [Uday v. State of Karnataka](#) (2003 CriLJ 1539) the Apex Court considered the

earlier decisions on the subject and held as follows:

It, therefore, appears that the consensus of judicial opinion is in favour of the view 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 a misconception of fact. A false promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no straitjacket formula for determining whether consent given by the prosecutrix to sexual intercourse is voluntary, or whether it is given under a misconception of fact. In the ultimate analysis, the tests laid down by the courts provide at best guidance to the judicial mind while considering a question of consent, but the court must, in each case, consider the evidence before it and the surrounding circumstances, before reaching a conclusion, because each case has its own peculiar facts which may have a bearing on the question whether the consent was voluntary, or was given under a misconception of fact. It must always weigh the evidence keeping in view the fact that the burden is on the prosecution to prove each and every ingredient of the offence, absence of consent being one of them.

There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90, IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of caste considerations. The proposal was bound to meet with stiff opposition from members of both families. There, therefore, a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The, question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary, the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They met often, and it does appear that the prosecutrix permitted him liberties which, if at all, are permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 o'clock in the night. It usually happens in such cases,

when two young person are madly in love, that they promise to each other several times that come what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment succumb to temptation of having sexual relationship. This is what appears to have happened in this case as well as, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute to the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

9. In the case of Dilip Singh Alias Dilip Kumar v. State of Bihar (AIR 2005 SC 203) the question before the Hon'ble Apex Court was as to whether consent given by a woman believing a man's promise to marry her is a 'consent', which excludes the offence of rape. The decision in Uday (supra) was further explained by the Apex Court, in Dilip Singh (supra), as follows:

The first two sentences in the above passage need some explanation. 'While we reiterate that a promise to marry without anything more will not give rise to "misconception of fact" within the meaning of Section 90, it needs to be clarified that a representation deliberately made with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of the promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause secondly. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Ram Panda, which was approvingly referred to in Uday case. The Calcutta High Court rightly qualified the proposition which it stated earlier by adding the qualification at the end (Cri LJ p. 1530, para 7) -"unless the court can be assured that from the very inception the accused never really intended to marry her", (emphasis supplied) In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an act of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case (vide passage quoted supra). By making the solitary observation that "a false promise is not a fact within the meaning of the Code", it cannot be said that this court has laid

down the laws differently. The observations following, the aforesaid sentence are also equally important. The court was cautious enough to add a qualification that no straitjacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday case as a whole, we do not understand the court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out.

10. In *Bipul Medhi v State of Assam*, reported in 2007 (2) GLR 200, this Court has, in a similar matter, held –

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 IPC, amount to consent in law and the sexual intercourse by such a promisor with a woman, so induced, would constitute offence of rape. 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 IPC 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. . . .

11. One year latter, after Bipul Medhi (supra), in Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Anr (AIR 2007 SC 3059), the Hon,ble Supreme Court has again dealt with the subject. The facts of the case before the Hon,ble Apex court are as under—

Respondent No.2 lodged the First Information Report (in short the 'FIR') alleging that with an assurance that the accused-appellant would marry her, he had sexual relationship with her. When this went on for some time, the informant had been taken to a temple where in the presence of deity he accepted her to be his wife and there was an agreement of marriage entered into. Alleging that the accused was likely to get married with some other lady, an FIR was lodged.

12. In Pradeep Kumar @ Pradeep Kumar Verma (supra), the Hon,ble Supreme Court has held and laid down the ratio as under—

A promise to marry without anything more will not give rise to “misconception of fact” within the meaning of Section 90, I.P.C., it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375, I.P.C. clause second.

13. **Deliberating upon the same subject in Deepak Gulati v. State of Haryana, reported in** (2013) 7 SCC 675 the Apex Court held that, *“consent may be express or implied, coerced or misguided, obtained willingly or through deceit held it Consent is an act of reason, accompanied by deliberation, the mind weighing, as in a balance, the good and evil on each side. There is a clear distinction between rape and consensual sex and in a case like this, the court must very carefully examine whether the accused had actually wanted to marry the victim, or had malafide motives, and had made a false promise to this effect only to satisfy his lust, as the latter falls within the ambit of cheating or deception. There is a distinction between the mere breach of a promise, and not fulfilling a false promise. Thus, the court must*

examine whether there was made, at any early stage, a false promise of marriage by the accused; and whether the consent involved was given after wholly, understanding the nature and consequences of sexual indulgence.

14. Thus the law is very clear that a simple promise to marry without anything more will not give rise to “misconception of fact” within the meaning of Section 90, I.P.C. In the instant case, the victim claimed that the present petitioner proposed to her to marry and she had accepted the proposal. That is why, she had gone with him. The victim girl had already attained sufficient maturity at the relevant time of occurrence. Now, this Court has reason to hold that the victim girl was a consenting party to the act of the present petitioner.

15. The evidence of the victim girl failed to inspire confidence to the effect that she was ever kidnapped and later on raped by the present petitioner. Both the Courts below has committed serious error while appreciating the evidence available in the record and arrived at erroneous findings. The judgments passed by the trial court as well as the appellate court are not sustainable in law.

16. The petition is allowed. The Judgment and Order dated 18.12.2017 passed by the learned Sessions Judge, Jorhat in Criminal Appeal No. 34/2017 and the Judgment and Order dated 09.12.2016 passed by the learned Assistant Sessions Judge, Jorhat in Sessions Case No. 89 (JT)/2016 are set aside and quashed. The present petitioner Sri Raktim Saikia is presently in judicial custody. So, he will be set at liberty forthwith.

17. Appreciating the assistance rendered by Ms. M.B. Baruah, learned Legal Aid Counsel, this Court hereby directs that she will be entitled to Rs.7000/- as professional fee, which shall be paid to her by the Gauhati High Court Legal Services Committee upon production of a copy of this judgment.

18. The LCR, if any, shall be returned.

JUDGE

Comparing Assistant