

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.308 of 2015

Arising Out of PS.Case No. -34 Year- 2007 Thana -AMDABAD District- KATIHAR

SK. BALTU SON OF SK. PULLU, RESIDENT OF VILLAGE - RAGHUNATH
PUR, POLICE STATION- AMDABAD, DISTRICT-KATIHAR.

.... APPELLANT/S

VERSUS

THE STATE OF BIHAR

.... RESPONDENT/S

Appearance:

For the Appellant/s : Mr. Bimal Kumar, Adv.
Mr. Birendra Kumar, Adv.
Ms. Maruti Kumari, Adv.
For the State : Mr. Z. Hoda, APP

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

ORAL JUDGMENT

Date: 16-03-2018

Appellant, Sk. Baltu has been found guilty for an offence punishable under Section 376 of the IPC and sentence to undergo R.I. for seven years as well as to pay fine appertaining to Rs.15,000/- and in default thereof, to undergo S.I. for six months, additionally vide judgment of conviction dated 15.05.2015 and order of sentence dated 18.05.2015 passed by Second Additional District & Sessions Judge, Katihar in Sessions Trial No.270 of 2007.

2. (Name withheld) PW.3 filed written report on 04.05.2007 before the Officer-in-charge, Amdabad Police Station disclosing therein that she happens to be aged about 16 years. On last Dashara at about 10 AM her neighbour Sk. Baltu came in her Aagan on the pretext of purchasing egg and then finding her alone, teased and then committed rape. When she disclosed that she will narrate the event to her parent, Sk. Baltu assured/promised that he will marry with her so, do not disclose the occurrence to anybody. Putting belief upon him she had not disclosed the same to anybody. On the other hand, Sk. Baltu whenever found an opportunity being her alone, under the garb of aforesaid promise indulged in physical



relationship as a result of which, she became pregnant. For the present, she is carrying 4-5 months pregnancy. When she disclosed the event to Sk. Baltu and further requested him to marry over which, Sk. Baltu threatened her of dire consequence and further, disclosed that he will not marry. Then thereafter, she disclosed the event to her parents with whom has come to police station where is filing written report. On the basis of the aforesaid written report Amdabad34/2007 has been recorded under Section 376 of the IPC followed with investigation as well as submission of charge sheet, facilitating the trial, meeting with ultimate result, subject matter of instant appeal.

3. Defence case as is evident from mode of cross-examination as well as statement recorded under Section 313 of the Cr.P.C is that of complete denial. However, no ocular evidence has been adduced on behalf of defence though Ext.A certified copy of the order dated 23.01.2014 passed in Complaint Case No.52/2008 has been filed, Ext.A.

4. In order to prove its case, prosecution had examined altogether five PWs out of whom PW.1 is Sk. Jalil, PW.2 is Bibi Shera, PW.3-victim, PW.4-Jagdish Pandey (Investigating Officer) and PW.5- Dr. Renu Kumari as well as had also exhibited, Ext.1-Signature of informant over written report, ext.1/2-Endorsement over written report, Ext.2-Chargesheet, Ext.3-Formal FIR, Ext.4-Medical Report.

5. Learned counsel for the appellant has submitted that in spite of having positive finding recorded by the learned lower court under para-16 of the judgment wherein it has been observed that from the testimony of the victim i.e. prosecutrix, it is found that she



happens to be consenting party that being so judgment of conviction and order of sentence would not have been passed. Furthermore, it has also been submitted that when the court once informed and recorded finding to the effect that indulgence under sexual activity happens to be promiscuous under the garb of assurance of marriage then, in that event, no offence under Section 376 of the IPC would be maintainable rather, in worst case it would be breach of promise and for that, section 417 of the IPC is applicable and for that the appellant remained sufficient time under judicial custody whereupon the sentence as already undergone should be recorded.

6. In an alternative, it has also been submitted that though evidence of victim happens to be at upper pedestal but in the given facts and circumstances of the case, her version could not be accepted as, it suffers from vengeance and that being so, independent corroboration was needed which is found absent and that being so, considering the age, status, conduct under guise of the evidence of PW.5, doctor, her evidence is fit to be discarded and so, the finding having been recorded by the learned lower court happens to be perverse and is fit to be set aside. Adding furthermore, it has been submitted that there happens to be inordinate delay in institution of the case without cogent explanation, whereupon, considering entirety of the prosecution version, whole allegation is fit to be found distrustful. In likewise manner, it has also been urged that happens to be reason behind persistence of vagueness in the prosecution case, as apart from non-substantiating the allegation, the prosecution also failed to identify proper place of occurrence.

7. On the other hand, learned Additional Public Prosecutor controverted the submission whatever been made on behalf of learned counsel for the appellant and has submitted that



the first occurrence of rape happens to be the crucial point for proper adjudication whether aforesaid activity was under the garb of promise or not. If it happens to be under the garb of promise to marry then, in that event, an offence under Section 376 would be but, in the facts and circumstances of the case, it is evident that the first attempt by which victim was confronted with sexual activity was against her will and that being so, the subsequent activity though being under the garb of consent would not exonerate the appellant consequent thereupon, appeal is fit to be dismissed.

8. So far status of victim on the date of institution of case is concerned, admittedly pregnant. With regard to her pregnancy the finding of PW.5 coupled with her evidence that she was carrying fetus of 27 weeks 2 days on the date of examination and i.e., ultimately resultant after indulgence in sexual activity. That being so, she had indulged in sexual activity goes out of controversy. The other circumstances which is visualizing from the evidence of PW.5 is, her age has been estimated in between 16-17 years. Accepting variance of $\pm$ two years her age varies in between 14 to 18 years. The age leaving upper side is to be accepted and so, victim as per medical evidence was major on the date of the occurrence. No other evidence is found at the end of the prosecution on that score. In the aforesaid background now the ocular evidences are to be seen. Admittedly, PW.1 and 2 (Parents) are not an eye witness but, whatever they deposed, that happens to be on the basis of the disclosure having made by the victim PW.3. The most interesting feature while cross-examining PW.1, father is manifest from para-5 of the cross-examination wherein he was suggested that "it is wrong to say that accused had not committed anything with his daughter rather one Nasim is responsible for the occurrence". In para-6 PW.1 had further



stated that if the accused wants to get victim and children examined medically as well as through DNA test, he is free to pray for the same which never been prayed for. PW.2 who happens to be mother of the victim was cross-examined on that very score wherein she had stated at para-8 that Nasim is not on visiting term. PW.3 is the victim herself who had deposed that on the alleged date and time of occurrence accused Sk. Baltu came inside her house on the pretext of making query regarding egg. At that very time she was alone and seeing her alone, committed rape. Accused then disclosed that he will marry whereupon should not disclose the event to her parents. He had not married with her. On account of commission of rape she became pregnant. She had disclosed to accused whereupon he threatened that in case of disclosure to anybody she will be murdered. She had further stated at para-6 that she begotten a son who is along with her. During cross-examination at para-7 she had stated that she had filed written report before the police in the month of Jeth. She was raped about 7-8 months prior to institution of case. She was raped before Durgapooja. She had not reported/informed regarding the same. In para-8 she had stated that accused on the pretext of married continued with sexual proximity with her consent. During said course, she had put belief over undertaking of the accused. Then happens to be the subsequent event. At para-10 she had denied the suggestion that she has got intimacy with other persons of the village and during course thereof, she might have sustained pregnancy and only to extract money, this case has been filed. Then at para-12, she had stated that she had not filed any case under Section 498A of the IPC but, she had filed case relating to dowry. Then had denied the suggestion that she happens to be more than 20 years. From perusal of her entire



evidence, it is apparent that no suggestion has been flashed to her with regard to Nasim.

9. Defence had exhibited order dated 23.01.2014 passed in Complaint Case No.52 of 2008 by the victim against the appellant and others wherein by the order impugned, accused were discharged. It happens to be a subsequent event which could not be taken into consideration for the present purpose.

10. From the evidence available on the record, it is apparent that incident is bifurcated in two parts. First part happens to be with regard to commission of rape that was before the last Dashara and the subsequent event happens to be at the later part. Right from initial version that means to say written report there is specific disclosure that firstly she was raped and when she disclosed to appellant that she was going to narrate the occurrence of her parents, accused had tendered promise to marry and as admitted by the victim herself, subsequent indulgence though consensual, was under guise of promise which was offered after the occurrence. So far first occurrence is concerned, the victim has not been tested by way of cross-examination. Now, the other aspect visualizing from the lower court record has also to be seen. From the charge, it is evident that that charge has been framed for the commission of rape before Dushara. When the aforesaid theme is taken together with the conduct of the accused, it is evident that during course of cross-examination of PW.1 he had admitted that she was raped but not by himself rather put by one Nasim. That means to say he was knowing since before that victim was raped, whoever be the rapist. Then in that circumstance, it was expected at his end to have in witness box to say on an oath that he was not rapist rather rapist was the Nasim. The aforesaid dubious conduct of the appellant is found duly



exposed when cross-examination of the victim PW.3 has been gone through whereunder he had not identified Nasim to be responsible for commission of the rape rather he had raised the issue suggesting that victim happens to be characterless lady having lecherous character associated with so many villagers and one of them might have in pregnant her. Though, in terms of Section 53A of the Evidence Act such assertion could not be accepted or recognizable in the eye of law. Furthermore, while cross-examining PW.1, he had offered the accused/appellant to get the DNA tested which never been suggested to victim nor any step was taken by the accused/appellant for DNA test.

11. After considering earlier pronouncement in ***Karthi v. State represented by Inspector of Police, Tamil Nadu*** reported in ***AIR 2013 SC 2645***, it has been held:

“14. The factual submission advanced at the hands of the learned counsel for the appellant was that the prosecutrix Poomari (PW 1) was a consenting party to the sexual relationship which the appellant-accused Karthick had with her. That may be so at a subsequent stage, yet it is not possible for us to accept the instant submission advanced at the hands of the learned counsel for the appellant for his exculpation. The facts as they unfold from the statement of the prosecutrix Poomari (PW 1) are, that even before the first act of sexual intercourse, the appellant-accused Karthick used to tease her. He also used to tell her that he wished to marry her. The fact that he had sexual intercourse with her, when the prosecutrix Poomari (PW 1) was all alone in her house, is not disputed. The prosecutrix Poomari (PW 1) has confirmed in her deposition, that at the time of the first sexual



intercourse with her at her house, the appellant-accused Karthick had gagged her mouth with his right hand. He had promised to marry her, by placing his hand on her head, after having ravaged her. The subsequent acts of sexual intercourse, were actions of actively cheating her, by giving her the impression that he would marry her. The occurrence at the Murugan temple, is of significant importance. At the temple, for the first time the appellant-accused Karthick told the prosecutrix Poomari (PW 1), that he would not marry her. The instant factual position has been confirmed by Chandran (PW 9) and Ilangovan (PW 10). Despite lengthy cross-examination, the appellant-accused has not been able to create any dent in the testimony of the prosecutrix Poomari (PW 1). In the aforesaid view of the matter, we confirm the concurrent determination of the courts below, that the appellant-accused Karthick committed deceit with the prosecutrix Poomari (PW 1) by promising to marry her. On the strength of the said deception, in the first instance persuaded her not to disclose the occurrence to anyone, and thereafter, repeatedly had sexual intercourse with her. Therefore, in the facts and circumstances of this case, it is not possible for us to accept the contention advanced on behalf of the appellant-accused Karthick, that sexual intercourse by the appellant-accused Karthick with the prosecutrix Poomari was consensual. Obtaining consent by exercising deceit, cannot be legitimate defence to exculpate an accused."

12. Consequent thereupon, instant appeal fails and is accordingly dismissed. Appellant is on bail, his bail bond is cancelled directing him to surrender before the learned lower court within



fortnight to serve out remaining part of sentence, failing which the learned lower court will be at liberty to proceed against the appellant in accordance with law.

(Aditya Kumar Trivedi, J.)

Prakash Narayan

AFR/ NAFR	A.F.R.
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