

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (SJ) No.204 of 2015**

Arising Out of PS.Case No. -20 Year- 2011 Thana -SATHI District-
WESTCHAMPARAN(BETTIAH)

=====

Sk. Mintu, son of Sk. Hasmullah, resident of Village: Brindaban, P.S.: Sathi,
District : West Champaran.

.... Appellant/s

Versus

The State of Bihar

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Ram Adya Singh-Advocate

For the Respondent/s : Mr. Sujit Kumar Singh-A.P.P.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 29-01-2018

Sole appellant Sheikh Mintu has been found guilty for an offence punishable under Section 376 of the I.P.C. and sentenced to undergo R.I. for seven years as well as to pay fine appertaining to Rs.5,000/- and in default thereof, to undergo S.I. for three months, additionally vide judgment of conviction dated 17.03.2015 and order of sentence dated 23.03.2015 passed by the 3rd Additional Sessions Judge, West Champaran at Bettiah in Sessions Trial No.302 of 2012.

2. Name withheld, informant (PW-2) gave her fard-bayan on 07.03.2011 disclosing therein that she happens to be aged about 16 years. For the last one year on the pretext of marriage, her co-villager Sheikh Mintu has indulged with her in sexual relationship as a result of which, she became pregnant. Whenever, she insisted upon for



marriage, he delayed the same on one pretext or the other and now, he has declined. Side by side, is also threatening. Villagers are well conversant with the aforesaid affair.

3. After registration of Sathi P.S. Case No.20 of 2011, investigation commenced and concluded in a manner, subject matter of instant appeal.

4. 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. It has also been pleaded that appellant got married with Aasma Khatoon daughter of Sheikh Mushar much prior to the alleged date and time of occurrence that means to say on 29.12.2009 and that being so, the assertion of the informant that on the pretext of marriage, she had been exploited at the end of appellant, did not justify. Furthermore, it has also been pleaded that the motive for false implication is at the instance of Kaisar as well as Sheikh Reyaz, under whom father of informant happens to be labourer, who were prosecuted for committing rape over sister of the appellant and the same has been confirmed up-till the High Court. In order to substantiate the same, apart from examination of DW-1, Nikahnama as well as judgment of the High Court passed in Cr. Appeal (S.J.) No.557 of 2009 dated 05.08.2013



have also been made an exhibit.

5. In order to substantiate its case, prosecution had examined altogether eight PWs, who are PW-1, Sobratan Khatoon, mother of the victim, PW-2, named withheld, victim herself, PW-3, Abdul Hasan, brother of the victim, PW-4, Kamal Kishore Singh, PW-5, Raja Hussain, PW-6, Nagendra Paswan, PW-7, Md. Raunak and PW-8, Dr. Rashmi Nandkeolyar while two witnesses have been examined as Court witness viz. CW-1, Ainul Haque, father of the victim and CW-2, Ibrar Hussain, an employee of Health Department, who had produced the relevant register of Chanpatia P.H.C. where victim was examined during course of delivery. Side by side, had also exhibited viz. Exhibit-1, F.I.R., Exhibit-1/1, endorsement over written report, Exhibit-2, medical report, Exhibit-3, patient admission register of Chanpatia P.H.C. In likewise manner, defence had also examined one DW, DW-1 Md. Kabir Ahmad as well as also exhibited Nikahnama as Exhibit-A, judgment dated 05.08.2013 passed in Cr. Appeal (S.J.) No.557 of 2009 as Exhibit-B.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of learned counsel for the appellant that from the deposition of DW-1 in consonance with Exhibit-A, it is evident that appellant got himself married in the Year



2009 and on account thereof, there happens to be no occasion for him nor to the prosecution party to negotiate and further, develop intimacy in the background which later on extended upto physical relationship as a result of which, victim became pregnant. That being so, the very foundation of the prosecution case is found completely shattered. In its continuity, it has also been submitted that, that happens to be reason behind that no effort was taken at the end of the prosecution to have the D.N.A. Test of the child matched with the D.N.A. of the appellant and so, the prosecution knowingly, intentionally withheld itself from adopting and exercising such scientific method, which could have pin-pointed involvement of the appellant as alleged by the prosecution. The aforesaid exercise was very much pertinent in the facts and circumstances of the case as the prosecution has not alleged that informant was raped by the appellant rather at a first instance, there was negotiation in between guardians and under garb of aforesaid eventuality, it has been alleged that appellant came on visiting term and during course thereof, he exploited the victim for months together as a result of which, she became pregnant and then, as his demand of motorcycle was not fulfilled, appellant declined to marry.

7. It has also been submitted that this case should not be viewed simply a case falling under the definition of Section 375 of the



I.P.C., because of the fact that being both the parties, belonging to Mahomedan sect wherein the girl is quite competent to enter into marriage as soon as she attains the age of puberty, which has been disclosed as 15 years and so, when the event is guided by Personnel Law, then in that event, it would not be a case of rape and so, appellant should not have been convicted and sentenced for Section 376 of the I.P.C., as for the aforesaid activities, there was consent at the end of victim.

8. It has also been submitted that there happens to be no disclosure at the end of the victim that at the first occasion, during conjugation, appellant had overpowered her and so, it was indulgence out of free-will and when taken under the guise of Personnel Law, would not attract the offence of rape. Furthermore, it has also been submitted that as per Mohamedon Law, marriage is a contract and even considering the prosecution case, there happens to be breach of contract, whereupon liable to be prosecuted for breach of condition of the contract and that being so, in worst case would be punishable under Section 417 of the I.P.C. and not under Section 376 of the I.P.C. It has also been submitted that from the medical report, it is evident that victim has been identified to be major and so, considering the conduct of the victim, she happens to be a consenting party and that being so, even no offence under Section 417 of the I.P.C. is made out.



So, submitted that the finding having recorded by the learned lower Court happens to be perverse, cryptic and the reason so assigned therein appears to be untenable in the eye of law and that being so, is fit to be set aside.

9. On the other hand, learned Additional Public Prosecutor refuted the submission and submitted that the Penal Provision could not be found eclipsed by the Personal law whenever there happens to be complained with regard to commission of an offence being punishable under penal law or any of the Special Law. Personal Law guides the inter se relationship which in the facts and circumstances of the case, was yet to be connected during midst thereof, victim being minor has been exploited in the background of prevailing atmosphere whereunder father of the victim had gone to the place of appellant and talked with his parents under congenial atmosphere. That being so, Section 376 of the I.P.C. has rightly been found to be attracted by the learned lower Court and considering the evidence available on the record, it is found fit for concurrence.

10. In the facts and circumstances of the case, first of all the evidence of the doctor (PW-8) is being discussed. She had examined the victim on 08.03.2011 and found following:-

i) Height 5'3", weight-50 k.g. No. of teeth-16/16=32,



average body built.

ii) Secondary sex characters-both breast developed auxiliary and pubic hair present.

iii) No injury found on her body and private parts.

iv) P/A- uterus-32 weeks, FHST, P.V., old torn hymen present. Vaginal orifice admits two fingers.

v) According to radiologist M.J.K. Hospital Bettiah dated 08.03.2011 plate no.2952, X-ray of penis both hips A/P view-Both the epiphysis crest of alliums fused. X-ray of Rt forearm + wrist A/P later view both the lower end of radius and ulna fused.

vi) According to pathologist M.J.K. Hospital, Bettiah spermatozoa not seen in vaginal swab. According to Janta Ultra Sound and X-ray dt. 08.03.2011, a live foetus of 34 weeks and three days is seen in uterus.

vii) In the opinion of doctor based upon above physical, pathologist and radiological finding, there was no recent sign of sexual assault.

viii) The age of the victim has been ascertained about 18 to 19 years and she was pregnant.

In the opinion of the doctor, she was found pregnant having a live fetus of 34 weeks that means approximately eight



months and 15 days. Furthermore, her age has been estimated to be 18-19 years.

11. At the relevant juncture, it looks pertinent to mention that in spite of direction having been given by the Apex Court that the ascertainment of age of the victim should be in the same process as prescribed under Rule-12 of the Juvenile Justice (Care & Protection of Children) Act, as has been held in *Jarnail Singh vs. State Haryana reported in 2013 CRI.L.J. 3976* and in *State of Madhya Pradesh vs. Anoop Singh reported in (2015) 7 SCC 773*, in spite of the same, out of ignorance or deliberately, the direction of the Hon'ble Apex Court is still being flouted. Be that as it may, from the evidence of the doctor, it has become crystal clear that victim was subjected to physical relationship as a result of which, she was carrying pregnancy of more than eight months.

12. In the aforesaid background, now the evidence of victim is to be taken note of. Victim is the PW-2, who had deposed that she happens to be informant of this case. Occurrence is about 1-1 ½ years ago from the date of institution of the case. Her marriage was fixed at an earlier occasion with Sheikh Mintu, in the aforesaid background, she was exploited at the end of Sheikh Mintu, who developed physical intimacy with her. Whenever there was talk of



Nikah, he deferred the same on the pretext of arrival of his elder brother, who was residing at Banguluroo. During midst thereof, Sheikh Mintu used to visit her place, enjoyed her company keeping promise that he will perform Nikah with her. Subsequently thereof, he insisted upon for procurement of a motorcycle and said that marriage will be performed only thereafter. As a result of physical relationship, she became pregnant. Even after her request to marry, he blatantly refused. Then had directed to abort and then, he will marry. She declined to abort. Because of the fact that Sheikh Mintu declined to marry her on account thereof, lastly she has instituted this case. Subsequently thereof, Sheikh Mintu got himself married with the daughter of Md. Mushar. She had further stated that her parents and others have got full knowledge with regard to the prevailing relationship. Her father had also made request, whereupon he declined to marry unless and until motorcycle is given. Sheikh Mintu is threatening that she will be murdered. She had gone to police station where she had made oral complaint, which was recorded in the written report at the police station itself and finding it correct, she put her thumb impression, identified the accused. During cross-examination at Para-19, 20, 21, 22, she had admitted marriage of Sheikh Mintu in the village itself having three children. The eldest aged about two years and the youngest aged about one and half months. In Para-23,



she had stated that negotiation was finalized in between her father as well as father of Sheikh Mintu about one and half years ago to the date of filing of the case. In Para-25, she had stated that at the time of finalization of negotiation, there was no demand of dowry. In Para-26, she had stated that after solemnization of marriage of Sheikh Mintu, physical relationship in between them cease to survive. In Para-27, she had stated that she was under physical relationship with Sheikh Mintu about one and half year prior to the marriage of Sheikh Mintu. In Para-28 and 29, she had stated that she continued the physical relationship with Sheikh Mintu even after six months of his marriage. In Paras-30, 31, 32, she had stated that she begotten a child at P.H.C. Chanpatia where hospital had furnished a document relating thereto. In Para-23, she had admitted that even during course of continuation of his physical relationship with Sheikh Mintu, she was well aware that marriage was yet to be solemnized. In Para-34, she had stated that family members of both the persons were well acquainted with their relationship. In Para-35, she had stated that there was no protest during course of visiting of Sheikh Mintu to her place. In Para-36, 37, 38, 39, 40, 41, there happens to be cross-examination with regard to institution of rape case by Munni Khatoon, sister of appellant, Sheikh Mintu against Kaisar Ali and Neyaz wherein they both have been convicted. In Para-43, she had admitted that she had incorporated in



the written report that her marriage was fixed with Sheikh Mintu. In Para-44, she had also disclosed that she had incorporated therein that Sheikh Mintu had suggested to abort and then, he will marry. She had also incorporated the fact that when her father had resisted whereupon he insisted that as motorcycle was not given, therefore, he would not marry. Then had denied the suggestion at Para-54, that there was no physical intimacy in between her and appellant. There was no marriage negotiation nor finalization. Because of the fact that her father happens to be labourer under the Fakar Ali whose son along with son of Nurulla are the convict, at their instance, got this case filed.

13. So far remaining witnesses that means to say, PW-1, who happens to be mother of the victim, had corroborated the aforesaid event along with status of the victim to be minor, but during course of cross-examination at Para-9, had admitted her husband to be employed under the Kaisar Ali and further, the rape case having instituted at the end of the sister of the appellant against Kaisar and Sheikh Neyaz and further, though marriage was fixed. Her daughter as well as appellant developed physical intimacy, but having not been tied under nuptial knot. PW-3, brother of the victim, remained outside, came to know with regard to aforesaid misfortune which his sister had faced at the end of the appellant on account of settlement of



marriage and further, non-acceding at the end of the appellant due to non-providing of a motorcycle, had admitted that two months prior to the institution of the case, appellant used to visit his house as well as marriage of appellant in the Year 2009. PW-5 was declared hostile and PW-7 happens to be a hearsay witness.

14. PW-4, on the alleged date and time of occurrence, was S.H.O., who after making endorsement over the written report made endorsement in favour of Nagendra Paswan to investigate the case while PW-6 is Nagendra Paswan, I.O., after entrustment of the investigation, gone to the P.O., recorded statement of witnesses including further statement of the informant, visited the P.O. which happens to be the house of the informant, also located the house of the appellant lying 300 yards south to the house of informant, sent the victim for medical examination, received the medical report, received supervision report and handed over charge on 31.07.2011, on account of retirement. During cross-examination at Para-20, he had stated that informant/ victim had disclosed before him on 30.03.2011 that she had begotten a son on 09.03.2011. Then had stated at Para-21 that he had not taken any step for ascertainment of fatherhood of the child. In Para-23, he had further stated that he had not taken statement of the neighbours of the informant. In Para-27, he had further stated that he had not got recorded statement of victim under Section 164 of the



Cr.P.C.

15. CW-1 is the father of the victim, who during course of his examination-in-chief had reiterated the version of the prosecution. During cross-examination at Para-20, he had stated that his one of the daughter had instituted a case against her husband before her marriage, then thereafter her Nikah was performed. In Paras-21, 22, 23, 24, 25, 26, 27, 28, 29, there happens to be cross-examination at the end of the appellant regarding talk of negotiation, demand of motorcycle and refusal on account of non-fulfilment of demand of dowry. In Para-30, he had stated that after marriage, Sheikh Mintu ceased to visit his place. In Para-31, he had stated that before breakage of negotiation, he had not seen Sheikh Mintu in the company of his daughter at his place. In Para-32, he had stated that he is not remembering the exact date when he came to know about pregnancy of his daughter, more particularly, how much days prior to the institution of this case. Then had denied the suggestion that he has falsely deposed in this case. He had denied the suggestion that he had not negotiated with Sheikh Mintu regarding marriage of his daughter. He had denied the suggestion that appellant never visited his place nor he had developed physical intimacy with his daughter nor he is responsible for pregnancy of his daughter rather being labourer of



Faruque Ali, got this case filed.

16. CW-2 Ibrar Hussain is the employee of Health Department, who had brought the relevant register to substantiate the plea of the victim regarding delivery of a child.

17. DW-1 is a Teacher at Madarsa, who had come to depose that on 29.12.2009, Mintu Alam married with Aasma Khatoon daughter of Sheikh Mushar and accordingly, exhibited Nikahnama.

18. Because of the fact that DW-1 has been examined to controvert the allegation of the prosecution on the pretext that appellant was married since before the date on which negotiation of marriage has been alleged and its finalization under pretext of which, both the parties developed physical intimacy. Nikahnama (Exhibit-A) contains signature of a Hindu as a witness Chandrika Sah. Whether presence of Hindu over Nikahnama is permissible or not. The same is found duly explained under Article 252 of the Principles of Mahomedan Law by Mulla wherein it has been incorporated “ Essentials of marriage-It is essential to the validity of a marriage that there should be a proposal made by or on behalf of one of the parties to the marriage, and an acceptance of the proposal by or on behalf of the other, in the presence and hearing of two male or one male and two female witnesses, who must be sane and adult Mahomedans.”



That being so, apart from validity of Nikahnama (Exhibit-A) shrouded under dowry, it speaks otherwise in the background of the fact that there happens to be absence of parents or either of the parties over the Nikahnama. In likewise manner, had there been any kind of confusion, would have been properly explained by a competent witness that marriage was solemnized in the Year 2009.

19. Now, coming to the prosecution evidence, it is evident that appellant had not denied the status of the informant/victim that he was not knowing her since before. He had not denied that he was not on visiting term. He had suggested that as sister of appellant had instituted a rape case against Kaisar and Sheikh Reyaz and as father of the victim happens to be engaged in menial work under Kaisar on account thereof, at his instance this false case has been instituted. Mere suggestion would not serve the purpose when the evidence of prosecutrix is taken up in its entirety. Furthermore, whether an unmarried girl will come forward to level such kind of allegation, which ultimately will cost her prestige, dignity, womanhood scar for whole life unless and until, she has been victimized. There happens to be no suggestion at the end of the appellant to the victim that she was possessing lecherous activity, immoral character, subject to free-access. That means to say, the appellant was very much conscious with regard to character of the



victim and that happens to be reason behind that she was not at all castigated at the end of the appellant. The Hon'ble Apex Court, times without number had confronted with the aforesaid situation whereunder physical relationship having been in between victim and the accused on the pretext of marriage has been subject to consideration and after detailed discussion, it has been held that the conduct of the accused is to be seen right from inception of inter se relationship whether it was deceptive or not. If it was not a deception then in that circumstance, the Court had ruled out applicability of Section 376 of the I.P.C., more particularly where victim happens to be major. In ***Uday vs. State of Karnataka reported in (2003) 4 SCC 46***, it has been held:-

“21. 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 strait jacket 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 also 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.

.....

23. Keeping in view the approach that the Court must adopt in such cases, we shall now proceed to consider the evidence on record. In the instant case, the prosecutrix was a grown up girl studying in a college. She was deeply in love with the appellant. She was however aware of the fact that since they belonged to different castes, marriage was not possible. In any event the proposal for their marriage was bound to be seriously opposed by their family members. She admits having told so to the appellant when he proposed to her the first time. She had sufficient intelligence to understand the significance and moral quality of the act she was consenting to. That is why she kept it a secret as long as she could. Despite this, she did



not resist the overtures of the appellant, and in fact succumbed to it. She thus freely exercised a choice between resistance and assent. She must have known the consequences of the act, particularly when she was conscious of the fact that their marriage may not take place at all on account of caste considerations. All these circumstances lead us to the conclusion that she freely, voluntarily, and consciously consented to having sexual intercourse with the appellant, and her consent was not in consequence of any misconception of fact.”

So far this particular case is concerned, although the medical report suggests age of the victim to be in between 18-19 years which in normal phenomenon had permissible limit plus-minus two years identifying the victim to be major could be seen in light of direction laid down by the Apex Court coupled with the fact that victim has not been suggested that she was major and the event of consensual on the other hand, victim was not at all challenged on that very score, even though she had disclosed her age to be 16 years on the date of filing of the case and so, at the time of occurrence, she was round about 15 years, minor on account thereof, her voluntarily acceptance of the appellant permitting physical relationship under the garb of settlement of marriage having fixed at the end of their guardians would not give any kind of privilege to the appellant.



20. That being so, appeal is found de void of merit and is accordingly, dismissed. Appellant is on bail, hence his bail bond is hereby cancelled with a direction to surrender before the learned lower Court to serve out the 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)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	01.02.2018
Transmission Date	01.02.2018

