

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.268 of 2003**

Arising Out of PS.Case No. -null Year- null Thana -null District- SARAN

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Anwar Hussain S/O Abdul Qadir R/O village Rasulpur, P.S. Khaira, Distt.- Saran at Chapra

.... .... Appellant

Versus

State of Bihar

.... .... Respondent

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**Appearance :**

For the Appellant : Mr. Ranbir Singh (Amicus Curiae)

For the Respondent : Mr. Bipin Kumar (A.P.P.)

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**CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**  
**ORAL JUDGMENT**

**Date: 05-03-2018**

The sole appellant stands convicted under Section 376 of the Indian Penal code and sentenced to undergo R.I. for ten years, fine of Rs.10,000/- payable to the victim girl and in default to undergo S.I. for one year.

2. The prosecution case as per the complaint petition lodged by P.W.4 Md. Taiyab in short is that in connection with his job, he was living at Delhi and his wife and daughter aged about 15 years were living at his house and he had engaged the appellant (Anwar Hussain) for tuition to his daughter, Shahnaz Khatoon (victim). The appellant is his nephew (*Bhanja*) and his daughter Shahnaz Khatoon started studying either in his house or in the house of the appellant. It is also alleged that in course of tuition, appellant used to talk about “प्यार मोहब्बत” and the mother, brother and father of



the appellant no.1 who are also accused in this case used to talk about the marriage of his daughter with appellant and assured also and on that assurance, the appellant had made physical relationship with his daughter. It is also alleged that the intercourse was seen by Haleem Khatoon (P.W.3) and that came to his knowledge also. Further prosecution story is that when he enquired about it the appellant and other accused persons assured to get the appellant married with his daughter and when he went to their house, they refused to get his son married with the victim girl and sent his son to Delhi.

3. The aforesaid complaint petition was sent to the police under Section 156 (iii) of the Cr.P.C. for lodging the FIR; on that basis Khaira P.S.Case No.193 of 1996 under Sections 406 and 376 of the IPC was registered against the appellant and others, police after investigation , submitted charge-sheet against the appellant and other accused persons and cognizance of the case was taken and ultimately the case was committed to the court of sessions, which traveled to the file of Sri Bipin Dutta Pathak, XIth Addl. Sessions Judge, Saran at Chapra for trial and disposal.

4. During trial, the charges were framed under Section 376 of the IPC against the appellant and under Section 406 of the IPC against the appellant and other accused persons.



5. In support of the prosecution case, eight witnesses have been examined, they are – P.W.1 Abdul Mannan, P.W.2 Md. Hasan, P.W.3 Haleema Khatoon, P.W.4 Md. Taiyab (informant and father of the victim girl) P.W.5 Shahnaz Khatoon (victim girl), P.W.6 Birendra Rai, Advocate Clerk, who proved Ext. 3 (Formal FIR), Ext. 4 to 4/4 (signature of Advocate on complaint), P.W. 7 Dr. Pratima Gupta, who examined the victim girl along with Dr. Anita Shrivastava and proved Ext.5 and 5/1 (medical report) and P.W.8 I.O. of the present case, proved Ext.6 (forwarding on complaint).

6. Besides that; following documents have been admitted into evidence: Ext.1 signature of Md. Tiayab on complaint No.628 of 1996, Ext. 2 signature of Shahnaz Khatoon in her statement under Section 164 Cr.P.C., Ext.3 formal FIR written by A.S.I Ram Sakal Das, Exts. 4 to 4/4 signature of Rajkishroe Ojha, Adv. on complaint petition, Ext. 5 medical report, Ext. 6 signature and writing of Braj Bhusan Singh on FIR and Ext.7 case diary.

7. On behalf of the defence, neither oral nor documentary evidence has been adduced. The leaned trial court on conclusion of the trial has convicted the appellant under Section 376 IPC and acquitted the appellant and other accused persons from the charges under Section 406 of the IPC and sentenced the appellant as stated above.



8. Being aggrieved by the impugned judgment of conviction, the present appeal has been filed.

9. Nobody appears on behalf of the appellant on repeated calls and as such, Sri Ranvir Singh, Advocate has been appointed as the Amicus Curiae to assist the Court.

10. Contention of the learned Amicus Curiae is that, the prosecution has failed to establish the fact that the girl was minor at the time of occurrence rather evidence of the Doctor shows that she was below 18 years of age whereas Section 375 Clause 6 of the IPC provides for consent when the girl is below 16 years of age (prior to 2013 amendment), however, the learned trial court has convicted the appellant considering the girl as minor on the basis of the evidence of P.W. 4 (informant) and P.W.5 (victim girl). Further submission of the learned counsel for the appellant is that the learned trial court has not considered this aspect of the matter that the Doctor has not found any sign of rape on the person of the victim girl and none of the witnesses has stated as to when actually rape was committed rather there is vague allegation that the occurrence is of between 1.1.1995 to 12.6.1996, even the victim girl has not stated any date as to when first time the rape was committed and Halima Khatoon who also claims herself to be eye witness and seen the intercourse has not stated as to when she had seen the occurrence of intercourse, in such



view of the matter there is no cogent material available on the record to show that she was subjected to rape or any physical intercourse was made with the girl. It has also been submitted that even it is presumed that the girl was subjected to rape but that was not without consent and the prosecution case is that on assurance of marriage, intercourse was made and there is nothing available on the record to show that she was physically committed to rape rather the evidence available on the record shows that she was consenting party and as such the prosecution has failed to establish commission of rape as it does not come under the purview of Section 375 of the IPC i.e. without her consent, however, the learned trial court has not considered the aforesaid aspect of the matter and convicted the appellant under Section 376 of the IPC, hence, the impugned judgment suffers from infirmities and is not sustainable in the eye of law.

11. On the other hand the learned counsel for the State has supported the judgment on the ground that all the witnesses have stated about the intercourse with the victim girl and she was subjected to intercourse on the assurance of marriage but appellant has refused to marry with her and the evidence shows that he fled away to Delhi and that clearly shows that from the beginning he was not interested in marry with her and made physical relationship with



the victim girl and fled away to Delhi and furthermore evidence available on the record shows that at that time the victim girl was aged about 13-14 years, in such view of the matter, she was minor and consent or no consent is not relevant, hence, the impugned judgment is just and proper and it does not require any interference by this Court.

12. On perusal of the evidence of complainant/informant, it appears that the occurrence is of between 1.1.1995 to 12.6.1996 and evidence of P.w.4 discloses that he had engaged the appellant for tuition of his daughter. His evidence further discloses that later on he came to know that the appellant used to talk about “प्यार मोहब्बत” and tried to seduce her . He has also stated that the girl was aged about 13-14 years at that time and she could not understand the meaning of “प्यार मोहब्बत”. His evidence also discloses that on that the appellants seduced her and committed intercourse with her and it was seen by Halima Khatoon and it was also disclosed by his daughter and his wife but first time it was disclosed by Halima. It is also alleged that rape was committed forcefully, on that he along with Abdul Mannan went to make complain about the same on which the accused persons given assurance that the appellant will marry with her and the date of *Nikah* was fixed on 12.6.1996 but when he along with Abdul Mannan went



to the house of Abdul Quadir (father of the appellant) he refused to marriage of his son with the victim girl.

13. In his cross examination, this witnesses has stated that the girl was aged about 13-14 years at that time but he has mistakenly mentioned as 15 years. He has again stated that on 1.1.1995 he first time came to know about the talk of love affairs by the appellant with his daughter and on 1.1.1995 his daughter was subjected to rape. He was also stated that he stopped her tuition. His evidence also shows that on 12.6.1996 the accused persons got the appellant fled away to Delhi. Even according to the evidence of this witness, it appears that in the complaint petition, he has given period of occurrence between 1.1.1995 to 12.6.1996 but in his cross examination, he has stated that he came to know about the intercourse on 1.1.1995 and it shows that even after knowing about the intercourse the girl was continued to have intercourse with the appellant. His evidence also shows that at the time of occurrence in his family, family of four brothers were living.

14. P.W.5 is the victim girl and she has also stated that the occurrence is between 1.1.1995 and 12.6.1996. She has also supported the prosecution story of occurrence of appellant being engaged in tuition and the appellant used to talk about the “प्यार मोहब्बत” with her and told that he will marry her. It is also stated that



she was subjected to intercourse 3 to 4 times. She has also stated that the intercourse means rape. It is also stated that Haleema Khatoon had seen when the appellant was committing intercourse with her and Haleema Khatoon informed about the same to his father and mother and thereafter his father, mother and Abdul Mannan went to the house of Anwar Qadir; on which they became ready to marry with her but later on refused to marry with her and got his son fled away to Delhi. She has also admitted in her cross examination that apart from his father's family, family of three uncles were living and whenever Anwar Hussain committed intercourse with her, male members were away and female members were in the house with their family and at the time of intercourse the door was closed. It is also stated that prior to occurrence being seen by Haleema Khatoon she was subjected to intercourse.

15. On perusal of her whole evidence it does not appear that she was forcibly committed to rape except in para 7 she has stated that she has been committed forcibly intercourse with her, however, this Court failed to understand that when this witness has admitted that the intercourse has been committed in her house and all the family members of the victim were living as to why she had not raised *hulla* about the intercourse.

16. This witness has also stated that after 1.1.1995 as to



how many days the intercourse was committed, she does not know and on 12.6.1996 the rape was committed with her. A suggestion has also been given to this witness that her father as alleged in this case lodged the present case to put pressure on appellant to marry her with the appellant, which she has denied.

17. P.W.7 is the Doctor, who has examined her and from her evidence, it appears that she has stated that Hymen- Old teared on right side upper part. Vagina admits one finger easily, vaginal swab sent for spermatozoa, report was received. No spermatozoa was found neither alive or dead. Ono X-ray report she was found below 18 years of age. It can not be said that rape has been done or not. She is not habitual to intercourse.

18. Apart from the above, P.W.1 has also been examined as the prosecution witness, who is not an eye witness of the occurrence. According to his evidence, he has supported the prosecution case that the appellant was engaged in tuition and he has also stated that the victim girl was aged about 14 years, however, so far intercourse is concerned, according to him wife of Abdul Mannan has informed about the same, on which the informant has made complaint about the same to the parents of the appellant. This witness has admitted in his evidence that he had got mortgaged 3 kathas of land on Rs.10,000/- on 22.6.1993 and that land was



purchased by Abdul Quadir (father of the appellant) in the name of his sons though he has stated that for that he has no enmity but the aforesaid cross examination shows that he has grudge against the family of the appellant and further he is not eye witness of the occurrence.

19. P.W.2 Md. Hasan is also not eye witness of the occurrence, however, he has stated that the girl is aged about 18-19 years at present and the appellant was engaged for tuition to the victim girl and he has also disclosed that his wife Haleema Khatoon (P.W.3) had disclosed about the rape committed by appellant and when he enquired about the same from the appellant, he admitted the same and their family members agreed for getting him married with victim. She has admitted that she had seen Anwar Hussain committing rape with the victim girl. This witness has stated that on 1.1.1995, Haleema Khatoon disclosed about the rape but P.W.5 who is victim has not stated about any intercourse on 1.1.1995. This witnesses has also admitted that between his father and father of the appellant Abdul Qadir there was some cases earlier. P.W.3 Haleema Khatoon claims herself to be eye witness of the commission of rape. She has also supported the prosecution case in her evidence and stated that she had seen committing rape and at that time the victim girl was 13-14 years and she informed about the same to her husband



and her husband enquired about the same from the appellant Anwar Hussain which was admitted by him and their family members and agreed for getting married with the victim and after 10 days they went to *Nikah* but the accused persons had fled away the appellant to some other place. Her cross examination further shows in para 4 that the day when her husband Abdul Mannan (P.W.2) and P.W. 4 Md. Taiyab went to the house of appellant on that day she disclosed about the intercourse being committed by the appellant with Shahnaz Khatoon (victim girl). This witness has stated that at about 1.30 on day time she had seen Anwar Hussain committing intercourse with Shahnaz Khatoon from her house. Her attention has been drawn towards statement made before the police and she has stated before the police that she had seen Anwar Hussain and Shahnaz Khatoon having intercourse and she had also stated that Shahnaz Khatoon was aged about 14 years. From the evidence of this witness, it appears that though she has stated that she had seen the victim and the appellant committing intercourse but she had not disclosed the date on which the victim was subjected to intercourse. Further she has stated that she had seen from house about the intercourse being committed to her, which does not look probable.

20. P.W.6 is the formal witness and he has proved the complaint petition and signature on the complaint petition.



21. P.W.8 is the I.O. and his evidence shows that he had not made any inspection of the room in which the rape is said to be committed. He has also stated that none of the witnesses has stated before him about the day time of the occurrence of rape and he has also stated that the victim has stated before him that occurrence took place after 4-5 months since January, 1995. His attention has also been drawn towards contradiction in the evidence of the witnesses from earlier statement before police.

22. What transpires on close scrutiny of the evidence that though all the witnesses have stated about the victim being subjected to intercourse by the appellant but none of the witnesses have mentioned any date or time of commission of rape, whereas P.W.4 who is the complainant-cum-informant in this case has stated that he came to know about the same on 1.1.1995 but the evidence of P.W.5 who is victim in this case has not given any date of intercourse, similarly, Haleema Khatoon (eye witness of the occurrence) has not given any specific date of the occurrence. Furthermore, as discussed above, even though as per the evidence of P.W.4 (informant) he came to know about the occurrence on 1.1.1995 that the girl was subjected to intercourse till 12.6.1996 as stated in the complaint petition. Moreover, the Doctor has not found any sign of rape and no spermatozoa was found and she was also not found habitual of rape



though it is alleged that in between 1.1.1995 and 12.6.1996 occurrence took place.

23. P.W.8 (I.O.) has also stated that the girl has stated before him that 4-5 months after 1.1.1995 occurrence was taken place.

24. All these aspects of the matter clearly create shade of doubt about the veracity of the evidence of the prosecution whiteness. Apart from that Section 375 of the IPC prior to 2013 amendment, provides as follows :-

***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:—***

***(First) — Against her will.***

***(Secondly) — Without her consent.***

***(Thirdly) — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.***

***(Fourthly) — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.***

***(Fifthly) — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.***

***(Sixthly) — With or without her consent, when she is under sixteen years of age.***



25. Later on 16 years of age has been substituted by 18 years of age vide, 2013 Criminal Law Amendment Act so age of the victim girl is much relevant in the present case. Evidence of P.W.5 shows that she was aged about 15 years, however, in the court the complainant had stated that she was aged about 13 years and P.W.4 (father of the victim ) has also stated that she was 13 to 14 years and by mistake he has mentioned 15 years in the complaint petition. Evidence of another witnesses has also disclosed that she was aged 13-14 years. The doctor who has examined the girl has found that the age of the girl to be 18 years. The victim girl in para 6 has also stated that she studied up to class 5 but no certificate has been brought by the prosecution on the record in support of her age.

26. It is well settled principle that the prosecution has to establish each ingredient of rape including the age of the girl, by cogent and reliable evidence, however, in the present case, the prosecution has not been able to establish the age of the girl.

27. So far question of consent is concerned Section 90 of the IPC defines consent as follows :-

***“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.”***



28. In the present facts and circumstances, the aforesaid question of consent or non-consent has been discussed in the case of *Jayanti Rani . V. Stat of West Bengal reported in 1984 Criminal Law Journal 1535* and considering the ratio of the same in case of *Uday. Vrs. State of Karnatka reported in AIR 2003 SC 1639*, the Hon'ble Apex Court in para 21 of the judgment 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 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.”*

29. As such it is settled by above pronouncement that so far consent and non-consent is concerned it varies according to the facts



and circumstances of each case.

30. The aforesaid question was reconsidered in a case of *Deelip Singh V. State of Bihar reported in (2005) 1 SCC 88* and it was held in para 35 of the judgment, as follows :-

*“35. The remaining question is whether on the basis of the evidence on record, is it reasonably possible to hold that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry? We have no doubt that the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. PW 12 was also too keen to marry him as she said so specifically. But we find no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. No circumstances emerging from the prosecution evidence establish this fact. On the other hand, the statement of PW 12 that 'later on', the accused became ready to marry her but his father and others took him away from the village would indicate that the accused might have been prompted by a genuine intention to marry which did not materialize on account of the pressure exerted by his family elders. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, the observations of this Court in Uday's case at paragraph 24 comes to the aid of the appellant.”*

31. In the present case also, the evidence available on the record shows that the appellant was intended to marry with victim girl and the evidence also shows that *Nikah* was also finalized but the family members of the appellant got the appellant fled away to Delhi



and as such facts of the present case are squarely covered by the facts of the case of *Deelip Singh V. State of Bihar (Supra)*. These aspects have not been taken into consideration by the learned trial court while convicting the appellant under Section 376 of the IPC though the learned trial court has acquitted the appellant and other accused persons from the charges under Section 406 of the IPC.

32. Considering the infirmities and inconsistencies as discussed above, in my opinion, the appellant is entitled for benefit of doubt in the facts and circumstances of the case.

33. Accordingly, this appeal is allowed and the impugned judgment and order is set aside. The appellant is in jail, he is discharged from the liability of his bail bonds.

(Vinod Kumar Sinha, J)

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