

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.480 of 2003

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

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Md. Ishrafil Ansari son of Moinuddin Mian, resident of village Khaparia, P.S. Sono, District Jamui.

.... Appellant

Versus

State of Bihar

.... Respondent

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Appearance :

For the Appellant : Mr. Amrit Anunay, Advocate (Amicus Curiae)

For the Respondent : Mr. Bipin Kumar, APP

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

ORAL JUDGMENT

Date: 10-08-2018

On repeated calls, no body appears on behalf of the appellant, as such Mr. Amrit Anunay, Advocate is appointed as the Amicus Curiae to assist this Court.

2. The sole appellant has been convicted under Section 376 of the Indian Penal Code and sentenced to undergo R.I. for seven years, vide judgment dated 5.8.2003 and order dated 6.8.2003 passed by Subhas Kumar Singh, Ist Addl. Sessions Judge, Jamui in Sessions Trial No.371 of 2002.

3. The prosecution report as per the complaint petition, which has been lodged on 8.10.2001 in short is that the appellant on allurements of marriage with her has established physical relationship as father and mother of the appellant is very poor and they were unable to marry her and as such on assurance of the appellant she had made physical relationship with the appellant and the complainant had



seven months pregnancy and thereafter appellant stopped talking to her. It is also stated that the father and mother of the appellant went for talking to some other place for marrying him, a Panchayat was also held and in the panchayati also *Panches* asked the appellant to marry with her but the appellant did not marry.

4. The aforesaid complaint petition was sent to the police for registration of a case. On the basis of which Sono P.S. Case No.120 of 2001 was registered against the appellant under Section 376 of the IPC, after the cognizance, the case has been committed to the court of sessions, which ultimately came to the file of Subhas Kumar Singh, Ist Addl. Sessions Judge, Jamui for trial and disposal.

5. The appellant stands charged under Section 376 of the IPC and the prosecution in order to prove its case has examined altogether 8 witnesses : - P.W.1 Chandrika Khatoon- mother of the victim, P.W.2 Md. Karoo Mian, P.W.3. Md. Ilyas Ansari, P.W.4 Hatima Khatoon (informant), P.W.5 Md. Sadique, P.W.6. Sardul Mian, P.W.7 Waris Mian and P.W.8 Md. Ataur Rahman.

6. On perusal of the evidence, it appears that P.Ws. 5 to 8 had been declared hostile by the prosecution and neither the I.O. nor the Doctor have been examined in this case.

7. P.W.4 is the prosecutrix in this case and she has supported the allegation made in the complaint petition and stated that two years prior appellant Md. Ishrafil Ansari used to come to her



house and told her that he will marry her but he did not marry her and told that first he will marry his sister and then he will earn and thereafter he will marry with her. Her statement further discloses that he married with another girl of village Ikwa. She has also a son with the appellant. Her statement further discloses that he had also not obeyed the decision of the panchayat and then she filed a case in the court. This witness has been cross examined at length and a suggestion has been given that she had illicit relation with the husband of Jamina i.e. Jamil Mian and that suggestion has been denied by the complainant. Her statement further discloses in para 7 that she was married with Nasiruddin and for ten days she had remained there and thereafter she was divorced. Her statement further discloses that the occurrence is of two years prior.

8. P.W.1 who is the mother of the prosecutrix discloses that the appellant used to visit the prosecutrix and he committed rape upon her and she became pregnant and after having 4-5 months of pregnancy, her daughter disclosed about it. Her evidence also discloses that on pretext of marriage, the appellant used to make physical relation with the prosecutrix and he married with another lady.

9. P.W.2 is a villager and he has also supported the prosecution case and stated that there was a panchayati and in Panchayat it was decided that the appellant will marry with her but he



did not marry with her. This witness has tried to show that the prosecutrix was married earlier with Nasruddin but the evidence of the prosecutrix and the mother of the prosecutrix shows that the prosecutrix was not married with Nasurddin, however, she has stated that there was also a panchayati and in the panchayat it was decided that the appellant will marry with her.

10. P.W.3 has also supported the prosecution case and stated that on the allurement of marriage the appellant has raped upon her and appellant has also stated that first he will earn money and then he will marry with her and he has also stated about the panchayat in his cross examination but he could not say the date of panchayati.

11. As discussed above P.Ws. 5 to 8 have been declared hostile and there is nothing in their evidence to corroborate the evidence of P.Ws. 1 to 4 and the I.O. has not been examined nor the Doctor has been examined in this case.

12. The defence of the appellant is of innocence and of false implication.

13. Learned trial court on conclusion of the trial has convicted has appellant under Section 376 of the IPC mainly on the ground relying on the decision of the Hon'ble Division Bench of this Court in the case of *Saleha Khatoon Vrs. State of Bihar* reported in *1989 Cr. L.J. 202* stating that consent was obtained on the basis of fraud and allurement and practicing deception on the lady.



14. Being aggrieved by the aforesaid judgment, the present appeal has been preferred by the appellant.

15. The learned *Amicus Curiae* has assailed the judgment mainly on the ground that even if the whole evidence is believed to be true, the prosecutrix is a consenting party in this case and it has wrongly been held by the learned trial court that the consent has been obtained on the misconception by allurement of marriage, in this connection, reliance has been placed on the decision of the Hon'ble Apex Court in the case of *Uday – Vrs. State of Karnataka* reported in **2003 (4) SCC 46**, in which the above judgment of *Saleha Khatoon's case (supra)* has also been considered and the Hon'ble Apex Court has held that the consent cannot be said to be consent under misconception and acquitted the appellant. Further submission of the *Amicus Curiae* is that even according to the complaint petition the occurrence is in between 1.9.2010 to 20.7.2001 but the complaint petition has been filed on 8.10.2001 i.e. after three months of the occurrence and it is further submitted that the learned trial court has not considered the aforesaid aspect of the matter, while convicting the appellant. Reliance has also been placed on the decision of the Hon'ble Apex Court in a case of *Kaini Rajan Vrs. State of Kerala* reported in **(2013) 9 SCC 113** and mainly on the aforesaid ground, the learned *Amicus Curiae* has assailed the judgment.

16. On the other hand, the learned counsel for the State has



defended the judgment of conviction on the ground that the evidence of P.W.4 clearly shows that on allurements of marriage the appellant has subjected her to intercourse and continued to have physical relation with her but when she became pregnant, he stopped talking with her and a panchayati was also held but he has not obeyed the decision of the Panchayati also and evidence of P.Ws.1 and 3 also supports the evidence of P.W.4 and P.W. 2 is witness of panchayati. In such a situation, conviction of the appellant is just and proper and it does not require any interference by this Court as the learned trial court has convicted the appellant mainly on the ground that consent is not consent and he has come to a conclusion that the consent was obtained on the basis of some fraud and allurements or practicing deception on the pretext that he will marry with her and made sexual intercourse with her and further convicted the appellant on the ground that he never pretended herself that he was husband of the lady or a married man.

17. The fact in the present case is that admittedly the appellant was never married and according to the evidence of P.W.4 the talk was going on at some other place and as such it can not be said that he was a married man at that time. On the other hand the prosecutrix was married to one Nasruddin. So far consent on misconception or fraud, as discussed above by the learned trial court is concerned, from perusal of the judgment in the case of *Uday- Vrs.-*



State of Karnataka (supra) it appears that the Hon'ble Apex Court has considered various judgments in the case and also considered the judgment passed in the case of *Saleha Khatoon Vrs. State of Bihar* (Supra) by the Division Bench of Patna High Court and para 21 of the judgment in the case of *Uday- Vrs. State of Karnataka (supra)* may be read as follows:

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 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 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."

18. In the present case the prosecutrix is a married lady which is admitted fact whereas the appellant was unmarried man. It appears from the evidence that nowhere in the evidence the



prosecutrix has stated about subjecting her physical intercourse though indirectly she has stated that she has become pregnant rather her evidence discloses that the appellant had also told her that he will first marry his sister and then he will marry with her. Her evidence also disclosed that the appellant had married with another girl and he had a son also. Her evidence also disclosed that there was physical relation was between the appellant and her. At the same time, her evidence clearly discloses that she was a consenting party in the physical relationship between them and the appellant has first in the very beginning disclosed that he will marry his sister first before marrying her and as such the appellant had disclosed her condition also and her evidence also does not disclose that she was subjected to sexual intercourse with appellant in sense of any misconception or foul playing upon her whereas Section 90 of the IPC provides that it must be shown that consent was given by misconception of fact and secondly it must be obtained individually or had reason to believe that the consent was given in consequence of misconception, materials available on the record do not disclose that promise to marry, allured the girl. It is admitted fact that the prosecutrix herself has stated that the appellant had shown his difficulty that he had to marry her sister first and it is not shown that the remarriage was solemnized then the prosecutrix has lodged the case rather the complaint petition shows about fixing his marriage at some other place after taking dowry and



that also disclose that it is beyond the control of the appellant and thereafter the case has been lodged and it appears that during the trial the appellant had married with another lady . The Hon'ble Apex Court in the above case *Uday Vrs. State of Karnataka (supra)* in para 24 has further held that :

“24. There is another difficulty in the way of the prosecution. There is no evidence to prove conclusively that the appellant never intended to marry her. Perhaps he wanted to, but was not able to gather enough courage to disclose his intention to his family members for fear of strong opposition from them. Even the prosecutrix stated that she had full faith in him. It appears that the matter got complicated on account of the prosecutrix becoming pregnant. Therefore, on account of the resultant pressure of the prosecutrix and her brother the appellant distanced himself from her.”

19. Another point of the matter is that there is delay in lodging the FIR as even according to the complaint petition the occurrence is in between 1.9.2001 to 20.10.2001 and the complaint petition has been filed on 24.9.2001 and the Hon'be Apex Court in a case of *Kaini Ranjan Vrs. State of Kerala* in para 17 has held as follows :-

“17. K.P. Thimmappa Gowda v. State of Karnataka was a case where the accused has assured the prosecutrix that he would marry her and had sexual affair, which was repeated on several occasions as well. But he did not marry and she became pregnant. That was a case where there was delay of eight months in filing the complaint. The accused was given the benefit of doubt holding that it would not be possible to conclude that the alleged sexual act



was committed without the consent of the prosecutrix.”

20. Considering the discussions as made above, it appears that the prosecution has not been able to establish a case under Section 376 of the IPC against the appellant beyond reasonable doubt and as such the appellant has been given at least benefit of doubt in the present case. Accordingly, this appeal is allowed.

21. The impugned judgment and order are set aside and as the appellant is on bail, he is discharge from liabilities of his bail bond.

22. Amicus Curiae is entitled for the amount admissible from the Patna High Court Legal Service Committee for the services rendered by him in this appeal.

(Vinod Kumar Sinha, J)

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