

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1448 of 2018

Arising Out of PS. Case No.-36 Year-2010 Thana- SANOKHAR District- Bhagalpur

Md. Javed @ Md. Javed Mian Son of Md. Mahfuz, Resident of Village-
Chotinaki, P.S.- Sanokhar, District- Bhagalpur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Pratik Mishra, Advocate.

For the Respondent/s : Mr. Binod Bihari Singh, APP.

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
C.A.V. JUDGMENT

Date : 12-03-2021

This is an appeal against the judgment of conviction dated 26.03.2018 and order of sentence dated 05.04.2018 passed in Sessions Trial No. 461 of 2011 arising out of Sanokhar P.S. Case No. 36 of 2010 whereby the learned Trial Judge (Additional Sessions Judge-VII, Bhagalpur) found the sole appellant Md. Javed @ Md. Javed Mian guilty for offence under Section 376 IPC and sentenced to undergo rigorous imprisonment for seven years. A fine of Rs.25000/- was imposed to be paid to the victim and in default of payment of fine, further one year and nine months simple imprisonment was awarded.

2. The prosecution case as disclosed in the written report (F.I.R.) lodged by the victim girl is that the appellant by inducing the informant, aged about 14-15 years, to marry was in



physical relation with her. The physical relation was continuing in the house of the appellant as well as in the house of the informant since last six months. Since the informant was carrying pregnancy from the appellant since last four months, she asked the appellant to marry with her, but the appellant refused and the family members of the appellant asked the informant to get aborted. Being frustrated, on 30.04.2010 she reported the matter to the police station, but the police did not take any action. Then a written report was submitted to the SP/Bhagalpur on 03.05.2010 and on direction of the S.P., Sanokhar P.S. Case No. 36 of 2010 was registered under Section 376 and 506/34 IPC.

3. During trial, the prosecution examined altogether ten witnesses. The defence also produced one witness Md. Hafiz.

4. Mr. Pratik Mishra, learned counsel for the appellant contends that a closure and careful scrutiny of the prosecution case and evidences would make it evident that the victim was in consensual physical relation with the appellant. The prosecution has failed to prove that on the alleged date of occurrence, the victim was below 16 years of age, as such her consent was immaterial. Learned counsel contends that it is not



the prosecution case that consent of the victim was obtained by fraud or by putting her or anyone in whom she was interested in fear of death or at the time of giving consent the victim was of unsound mind or under influence of intoxication, consequently unable to understand the nature and consequence of that for which she gave the consent. Learned counsel contends that the aforesaid serious infirmity has been ignored by the learned trial Judge while recording the judgment of conviction, hence the same is not sustainable in law.

5. Learned counsel for the State-respondent Mr. Binod Bihari Singh would submit that the victim has deposed that she was below 16 years of age on the date of alleged occurrence and she was not cross-examined at all on this point, therefore the defence tacitly accepted the prosecution case on the age of the victim. Hence, consent of the victim was immaterial. Moreover, the consent of the victim was obtained by alluring her for marriage, hence the consent was obtained by fraud.

6. PW-7 the victim girl deposed that initially the appellant established physical relationship with her by force, however the appellant pretended that he would marry with her and thereafter both continued in relationship. The victim was



carrying four months pregnancy from the appellant. Then she asked the appellant to marry. The appellant refused, hence the case was lodged. This witness admitted that the appellant was in physical relation with her consent. Both were enjoying the relationship. They used to eat together. The family members were aware of their relationship. The witness further admitted that she never made any protest of the act of the appellant in lifting her to his lap while watching television. The victim was in talking term with the appellant taking precaution of non-divulgence of their relationship. The family members never made any complaint against the act of the appellant.

PW-5 Julekha Khatoon is a relative of the victim girl. She has deposed that the victim fell in love with the appellant, however when the victim was pregnant from the appellant, appellant refused to marry with her.

PW-1 Bibi Jarina, the mother of the victim has admitted the relationship between the two and the case was lodged only when the appellant refused to marry with the victim who was pregnant from the appellant.

PW-2 Abdul Hamid, PW-3 Md. Abbas and PW-8 Md. Jichho have been declared hostile by the prosecution as they did not support the prosecution case. Though they were



confronted with their statement before the police, however attention of the investigating officer PW-10 Md. Wahid Nut was not drawn to the statement made before him by these hostile witnesses.

PW-4 Md. Israil is uncle of the victim and he has supported the allegation as hearsay evidence. PW-6 Md. Wajir is father of the victim girl. He has supported the allegation as hearsay witness. Since the victim has not stated that she had disclosed about the occurrence to the hearsay witnesses aforesaid nor the hearsay witnesses deposed that from whom they got about the occurrence, hence their deposition has got no evidentiary value.

PW-9 Dr. Shobha Raven had examined the victim. The Dr. did not found any sign of sexual assault rather noticed that the victim was pregnant. She assessed the age of the victim between 17-18 years.

DW-1 Md. Hafij has deposed that the marriage of the victim was performed on 23.02.2015 in his presence with Md. Atikur.

7. Thus, the testimony of the victim clearly depicts that she was voluntarily in physical relation with the appellant. The marriage between the two could not be solemnized for



whatever reason may be. At the time of hearing on sentence before the learned trial Judge, she filed a petition that lesser punishment should be awarded to the appellant as both have married with a different life partner. Since the relationship between the victim and the appellant was known to others also, they never made any protest prior to the institution of the case. The prosecution evidence itself depicts that the victim was in consensual physical relationship with the appellant.

8. The term “fraudulently” has been defined in Section 25 of the Indian Penal Code as “ a person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise”. There is no evidence that the appellant was in physical relation with the victim with intent to defraud her. The subsequent conduct of non solemnization of marriage, the reason whereof is not on the record, cannot be termed as a case of fraudulent act because the dishonest and fraudulent intention must be at the inception of entering into the relationship. Prosecution has failed to prove this requirement of law.

9. The prosecution has sought to prove the age of the victim on an approximation. In the case of **Sunil v. The State of Haryana** reported in **AIR 2010 SC 392**, the Hon’ble Supreme Court held that conviction cannot be based on an



approximate age of the victim. In the case of **Jarnail Singh v. State of Haryana** reported in **2013 CRI. L. J. 3976**, the Hon'ble Supreme Court said that the age of the victim of rape should be determined in the manner provided under Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007, there is no difference as regards minority between the child in conflict with law and the child who is victim of the crime. Under Rule 12, preference is to be given to the school documents in determination of the age of the victim. The prosecution has not produced any school document to prove the age of the victim. PW-1 Bibi Jarina, the mother of the victim deposed that she cannot say about the age of the victim. PW-2 to PW-6 including the father of the victim have not deposed at all on the age of the victim. The doctor who had conducted the ossification / radiological examination of the victim was not produced by the prosecution. Hence direct evidence for determination of age of the victim is not there on the record.

10. It is trite proposition that in criminal trial the prosecution is bound to prove the charges against the accused beyond reasonable doubts and not by preponderance of probability. Even where statutes provide for reverse burden of proof on the accused, the prosecution must discharge its initial



burden by producing trustworthy and acceptable evidence. Therefore, it cannot be argued by the State-respondent that non cross-examination of the prosecution witnesses on the point of age of the victim exonerates the prosecution from the burden of proving the age of the victim beyond all reasonable doubts.

11. In the case of **State of Madhya Pradesh V. Munna @ Shambhoo Nath** reported in **(2016) 1 SCC 696**, the consensual intercourse was proved and the prosecution failed to prove the age of the victim, below the statutory requirement, beyond reasonable doubts. Hence, the Hon'ble Supreme Court refused to interfere with the judgment of acquittal recorded by the High Court. The Hon'ble Supreme Court held that the evidence of approximate age of the victim would not be sufficient to any conclusion about the exact age of the victim.

12. In **Rajak Mohammad V. State of Himachal Pradesh** reported in **(2018) 9 SCC 248**, the case was of consensual intercourse, but the prosecution had failed to prove that the victim was a minor on the date of occurrence. Hence, the Hon'ble Supreme Court set aside the conviction recorded by the High Court.

13. Thus, the irresistible conclusion in this case would be that the victim was in consensual relationship with the



appellant and the prosecution failed to prove that she was below 16 years of age as prescribed under the law applicable on the date of occurrence. In the circumstance, she was competent to consent. Therefore, in my view, the prosecution has failed to prove the charge of rape against the appellant and the learned trial Judge has failed to appreciate the aforesaid infirmity in the prosecution case in correct perspective.

14. In the result, the impugned judgment and order are hereby set aside and this appeal is allowed.

15. Let the appellant be set free at once.

(Birendra Kumar, J)

mantreshwar/-

AFR/NAFR	A.F.R.
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