

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.1521 of 2017**

Arising Out of PS. Case No.-41 Year-2011 Thana- MADHEPUR District- Madhubani

Reyaz Ahmad @ Chunnu @ Md. Riyaz @ Munna, Son of Md. Doud,
Resident of Pachhi, P.S.- Madhepur, District- Madhubani.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Prince Kumar Mishra, Amicus Curiae
For the Respondent/s : None

**CORAM: HONOURABLE MR. JUSTICE A. M. BADAR
ORAL JUDGMENT**

Date : 08-08-2022

By this appeal, appellant/convicted accused, Reyaz Ahmad @ Chunnu @ Md. Riyaz @ Munna is challenging the Judgment and order dated 18.04.2017 and 21.04.2017 passed by the learned Presiding Officer, Fast Track Court -I, Madhubani, in Sessions Trial No. 540 of 2012 between the parties, thereby convicting him of the offence punishable under Section 376 of the Indian Penal Code and sentencing him to suffer rigorous imprisonment for four years apart from imposition of fine of Rs.10,000/- and in default to suffer further rigorous imprisonment for six months. For the sake of convenience, the appellant shall be referred to in his original capacity as “an accused”.

2. Facts leading to the prosecution of the accused
projected from the police report can be summarized thus:-



A. The prosecutrix, P.W. 5 Ms. K. (identify concealed) and the accused used to reside at village Pachhi falling under the jurisdiction of Police Station Madhepur, District Madhubani in the State of Bihar. It is case of the prosecution that by making false promise to marry the prosecutrix (P.W.5), the accused allured her and committed sexual intercourse with her few days after 15.02.2010 to 28.10.2010. Because of the act of sexual intercourse by the accused, in the meanwhile, the prosecutrix (P.W.5) become pregnant. Ultimately the prosecutrix was required to abort her foetus. On 28.12.2010, the accused approached the prosecutrix (P.W. 5) and again committed sexual intercourse with her with a promise to marry her. However subsequently, where the prosecutrix (P.W. 5) insisted to fix the date of marriage, the accused refused to marry her and had assaulted her.

B. The prosecutrix (P.W. 5), on 07.01.2011, approached the learned Additional Chief Judicial Magistrate by filing the complaint. The learned Magistrate was pleased to pass an order under Section 156(3) of the Cr.P.C. on the said complaint directing investigation vide order dated 07.01.2011. That is how on 08.04.2011, Crime No. 41 of 2011 came to be registered against the accused at Police Station Madhepur for



the offences punishable under Sections 376 and 323 of the Indian Penal Code.

C. Routine investigation followed. The prosecutrix was sent to the Sadar Hospital Madhubani for her medical examination. On conclusion of investigation, the accused came to be charge sheeted.

D. The learned trial court had framed and explained the charges for the offences punishable under Sections 376 and 323 of the Indian Penal Code to the accused. He pleaded not guilty and claimed trial.

E. In order to bring home the guilt to the accused, the prosecution has examined as many as eight witnesses. P.W. 1 Md. Hussain is a co-villager. P.W. 2 Maksud Alam is uncle of the prosecutrix. P.W. 3 Ms. S. (identify concealed) is her mother and P.W. 4 Nanhi Khatoon is her aunt. The prosecutrix Ms. K. (identify concealed) is examined as P.W. 5. P.W. 6 Dr. Gargee Sinha, is the Medical Officer of Sadar Hospital, Madhubani. P.W. 7 is Deo Narayan Choubey is the Investigating Officer. P.W. 8 Ram Ashish Kamti is another Investigating Officer, who had filed charge sheet against the accused.

F. The defence of the accused was that of total denial. He however did not enter in the defeance.



3. After hearing the parties, by the impugned Judgment and order, the learned trial court was pleased to convict the accused and to sentence him as indicted in the opening para of this Judgment.

4. I heard Mr. Prince Kumar Mishra, the learned Amicus Curiae appointed to represent the accused/appellant at the cost of the State. He vehemently argued that even according to the case of prosecution, the prosecutrix was major at the time of the alleged incident. The sexual relations in between the parties were consensual in nature and the provision of Section 90 of the Indian Penal Code is not applicable to the case in hand. The prosecutrix was indulging in the act with her free consent and free will. In support of these submissions, apart from relying on evidence of the prosecutrix, Mr. Prince Kumar Mishra, the learned Amicus Curiae relied on Judgment in the matter of **Dr. Dhruvaram Murlidhar Sonar V. State of Maharashtra and others** reported in **AIR 2019 (SC) 327**, **ANURAG SONI V. STATE OF CHHATTISGARH** reported in **(2019) 13 SCC 1** and **DEELIP SINGH @ DILIP KUMAR V. STATE OF BIHAR** reported in **(2005) 1 SCC 88**.

5. As usual none appeared for the State.

6. I have carefully considered the submissions so



advanced and also perused the record and proceedings including oral as well as documentary evidence adduced by the prosecution.

7. According to the prosecution case, by making a false promise to marry her, the accused had committed sexual intercourse with the prosecutrix and this act amounts to rape as the consent of the prosecutrix was an outcome of misconception of fact. Therefore, evidence of the prosecutrix is of prime importance in the case in hand. The case set out in the FIR which was registered in consequent to the order passed by the learned Magistrate under Section 156(3) of the Cr.P.C. is to the effect that on 15.02.2010, the accused met the prosecutrix and requested her to be with him and he will marry her. Initially the prosecutrix refused to accede to this request of the accused but after few days she succumbed to the tactics of the accused because of his false promise to marry her. On the backdrop of this case of the prosecution, it is in evidence of the prosecutrix that on the day of the incident she was sleeping at her house. In the midnight, the accused came and wake up the prosecutrix. The prosecutrix further deposed that then the accused allured her by promising to marry her and committed rape on her. She stated that thereafter such incidents of sexual intercourse



continued for the long and she become pregnant. Thereafter, as per her version, the accused gave some medicines to her and then her pregnancy came to be terminated. She testified that then the accused threatened her not to disclose this incident to anybody. As per evidence of the prosecutrix then there was meeting of the Panchayat in the village and in that meeting the accused refused to marry her.

8. The cross-examination of the prosecutrix is important. She has admitted in her cross-examination that even prior to the first incident of sexual intercourse stated by her which happened in her house at the midnight, she had sexual intercourse with the accused on earlier occasions also. This admission of the prosecutrix makes it clear that the sexual relations between the parties was not established as a consequence of promise by the accused to marry her. It seems to be a consensual act of two adult persons. This fact is clear from cross-examination of the prosecutrix. She has also stated that when the accused came to her house in the midnight, her parents as well as two sisters were sleeping near her. Evidence of Investigating Office P.W. 7, Deo Narayan Choubey shows that house of the prosecutrix was of a small house comprising of three rooms. The prosecutrix is very specific in stating that her



two sisters were sleeping with her at the time of the incident of the accused coming to her house in the midnight. Element of doubt as such creeps up in the version of the prosecutrix because of such fact situation prevalent on the spot of the incident at the time of alleged incidence of sexual intercourse at her house by the accused.

9. While in the witness box in February, 2013, the prosecutrix has stated in her age as 18 years. While lodging the complaint before the learned Magistrate 07.01.2011, she has stated her age as 17 years. As per her complaint, the first instance of sexual relations between her and the accused took place few days after 15.06.2010. This implies that at the time of this first act, the prosecutrix was more than 16 years of age. The incident took place lastly on 28.08.2010. In the year 2010, age of consent as per provisions of Section 375 of the Indian Penal Code was 16 years. Thus the prosecutrix was an adult lady having attained the age of consent at the time of alleged first sexual intercourse by the accused. Her evidence that the accused provided her medicines for termination of her pregnancy came on record by way of omission, no such facts have stated by her in her complaint. Therefore, this improvement needs to be discarded.



10. P.W. 6 Dr. Gargee Sinha was one of the member of the Medical Board which has examined the prosecutrix on 11.07.2011. As per her evidence, the prosecutrix was 16 to 17 years of age and the Medical Board has not found any evidence of commission of rape on her. Thus, medical evidence is also not corroborating the version of the prosecutrix. On the contrary, it is indicating that the prosecutrix was major at the time of the alleged incident.

11. Now let us examine whether the prosecution has proved that the consent of the prosecutrix was procured by the accused under misconception of the fact by giving false promise to marry her. At this juncture, it is apposite to quote in paragraph 20 of the Judgment in the matter of **Dr. Dhruvaram Murlidhar Sonar (supra)** reads thus:

“20. Thus, there is a clear distinction between rape and consensual sex. The court, in such cases, must very carefully examine whether the complainant had actually wanted to marry the victim or had mala fide motives and had made a false promise to this effect only to satisfy his lust, as the later falls within the ambit of cheating or deception. There is also a distinction between mere breach of a promise and



not fulfilling a false promise. If the accused has not made the promise with the sole intention to seduce the prosecutrix to indulge in sexual acts, such an act would not amount to rape. There may be a case where the prosecutrix agrees to have sexual intercourse on account of her love and passion for the accused and not solely on account of the misconception created by accused, or where an accused, on account of circumstances which he could not have foreseen or which were beyond his control, was unable to marry her despite having every intention to do. Such cases must be treated differently. If the complainant had any mala fide intention and if he had clandestine motives, it is a clear case of rape. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 of the IPC.”

Similarly in paragraph 12 of the Judgment in the matter of **Anurag Soni (supra)** following are the observations of the Hon’ble Supreme Court:

“12. The sum and substance of the aforesaid decisions would be that if it is established and



proved that from the inception the accused who gave the promise to the prosecutrix to marry, did not have any intention to marry and the prosecutrix gave the consent for sexual intercourse on such an assurance by the accused that he would marry her, such a consent can be said to be a consent obtained on a misconception of fact as per Section 90 IPC and, in such a case, such a consent would not excuse the offender and such an offender can be said to have committed the rape as defined under Section 375 IPC and can be convicted for the offence under Section 376 IPC.”

Similarly in the matter of **Deelip Singh @ Dilip Kumar (supra)**, following are the observations of the Hon’ble Supreme Court in paragraphs 16, 17, 18 and 19 reads thus:

“16. The concept and dimensions of “consent” in the context of Section 375 IPC have been viewed from different angles. The decided cases on the issue reveal different approaches which may not necessarily be dichotomous. Of course, the ultimate conclusion depends on the facts of each case.



17. The Indian Penal Code does not define “consent” in positive terms, but what cannot be regarded as “consent” under the Code is explained by Section 90. Section 90 reads as follows:

“90. Consent known to be given under fear or misconception. - A consent is not such a consent as is 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;.....”

18. Consent given firstly under fear of injury and secondly under a misconception of fact is not “consent” at all. That is what is enjoined by the first part of Section 90. These two grounds specified in Section 90 are analogous to coercion and mistake of fact which are the familiar grounds that can vitiate a transaction under the jurisprudence of our country as well as other



countries.

19. The factors set out in the first part of Section 90 are from the point of view of the victim. The second part of Section 90 enacts the corresponding provision from the point of view of the accused. It envisages that the accused too has knowledge or has reason to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact. Thus, the second part lays emphasis on the knowledge or reasonable belief of the person who obtains the tainted consent. The requirements of both the parts should be cumulatively satisfied. In other words, the court has to see whether the person giving the consent had given it under fear of injury or misconception of fact and the court should also be satisfied that the person doing the act i.e. the alleged offender, is conscious of the fact or should have reason to think that but for the fear or misconception, the consent would not have been given. This is the scheme of Section 90 which is couched in negative terminology.”



12. It is thus clear that the promise to marry is required to be proved to be false at the time when it is made. The prosecution is required to adduce evidence to the effect that consent of the prosecutrix was obtained under misconception of fact by making a promise which was false to the knowledge of the accused at the time when it was made. No such evidence is forthcoming in the instant case. On the contrary, the prosecutrix herself has stated that even before making such promise by the accused, she was keeping sexual relations with the accused.

13. Other witnesses examined by the prosecution which are near and dear ones of the prosecutrix such as co-villager PW 1 Md. Hussain, her uncle PW 2 Maksud Alam, her aunt P.W. 4 Nanhi Khatoon and her mother P.W. 3 Mrs. S. have deposed about sexual relations between the prosecutrix and the accused on the basis of information received by them and in unison they have stated that the accused refused to marry the prosecutrix in the meeting of the Panchayat. This evidence is of no assistance to the prosecution to establish the charge. The Investigating Officers have deposed about the line of the investigation conducted by them.

14. The net result of forgoing discussion requires to be hold that the prosecution has failed to prove that the



accused had committed sexual intercourse with the prosecutrix against her will and without her consent. Therefore, the charge for the offence punishable under Section 376 of the Indian Penal Code must fail. In the result, the following order:-

- a. The appeal is allowed.
- b. The impugned Judgment and order of the learned trial court is quashed and set aside. The accused is acquitted of the offence alleged against him. He be released forthwith if not required in any other case.

15. We put on record words of appreciation for the able assistance rendered by Mr. Prince Kumar Mishra, learned Amicus Curiae, to this Court in arriving at the proper conclusion for deciding in that appeal. We direct the High Court Legal Services Authority to pay an amount of Rs.5,000/- to Mr. Prince Kumar Mishra, learned Amicus Curiae, for service rendered by him.

(A. M. Badar, J)

Bhardwaj/-

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