

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No.227 of 2019

Arising Out of PS. Case No.-23 Year-2015 Thana- MAHILA P.S. District- Kaimur (Bhabua)

Amit Seth @ Bhola Seth @ Amit Kumar, Son of Anil Kumar Seth R/o
village- Kudra , P.S- Kudra, District- Kaimur (Bhabhua)

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Rajesh Kumar Singh, Sr. Advocate
Mr. Manish Kumar Singh, Advocate
Ms. Akrity Aishwarya, Advocate
For the Respondent/s : Mr. Kundan Kumar, Advocate
Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR

and

HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)

Date : 01-08-2023

Heard Mr. Rajesh Kumar Singh, learned Senior

Advocate for the appellant and Mr. Abhimanyu Sharma for
the State.

2. The appellant has been convicted under
Section 376 (2)(n) of the Indian Penal Code and Section 6
of the POCSO Act, 2012 *vide* judgment dated 22.01.2019,
passed in POCSO Trial No. 06 of 2015 and Reg. No.
Session 379 of 2015, arising out of Bhabhua Mahila P.S.
Case No. 23 of 2015 by the learned Additional Sessions
Judge - 1st -cum- Special Judge, Kaimur at Bhabhua and
by order dated 31.01.2019, he has been sentenced to



undergo R.I. for 15 years, to pay a fine of Rs. 50,000/- and in default of payment of fine to further undergo R.I. for six months under Section 376 (2)(n) of the IPC.

3. No separate sentence has been awarded under Section 6 of the POCSO Act, 2012.

4. The victim/P.W. 3 (hereinafter referred to as 'X') had fallen in love with the appellant. The appellant is stated to be related to the victim, though in a remote way. They met in a family function held at the neighbours. The relationship continued from there and existed for about a year when the promise of marriage was not fulfilled and the victim was finally made to understand that the appellant shall not marry her.

5. Hence the case.

6. The victim in her FIR has categorically stated that she was on visiting terms with the appellant since January, 2014. Her parents and the parents of the appellant were aware of the blossoming relationship between the parties. According to her accusation, both her and the appellant's parents had, after some time, become



agreeable that in future, the victim and the appellant shall get married with all social sanction. The victim had alleged that taking advantage of this acceptance of the relationship, he sexually exploited her. In the beginning, she protested and impleaded the appellant to wait till marriage ceremony is performed but ultimately capitulated to the desire of the appellant to have sexual intercourse. This continued for a very long time without inviting any chagrin from any quarter.

7. While narrating her woes in the FIR, she has expressed her age to be 16-17 years. She has repeatedly alleged that she was subjected to sexual intercourse only on the assurance that the appellant shall marry her in due course.

8. We have noted in the FIR that such postponement of marriage was not on the ground of age of the victim or else she would have stated that the marriage would be performed only when she comes of the age of marriage. However, after about a year of courtship, something happened and the appellant refused to go by his



promise of marrying her. This led the parents of the victim to approach the parents of the appellant, seeking their intercession but to no avail.

9. Ultimately, when the victim was made to understand that her marriage cannot be solemnized with the appellant, she filed this case leading to registration of Bhabhua Mahila P.S. Case No. 23 of 2015 dated 07.05.2015 for the offences under Sections 376, 120B, 34 and 420 of the IPC and Section 4 of the POCSO Act, 2012.

10. The police after investigation submitted charge-sheet against the appellant and his parents. All three of whom were put on trial but the Trial Court acquitted the parents of the appellant and convicted the appellant as aforesaid.

11. Mr. Rajesh Kumar Singh, learned Senior Advocate, in defence of his client has submitted that both the parties got infatuated to each other and even if a promise was made by the appellant that he shall marry the woman later and that promise was not fulfilled, he cannot



be prosecuted and sentenced for the offence under Section 376 of the IPC read with Section 6 of the POCSO Act, 2012.

12. The reason for saying so is that for some reason or the other, the appellant may not have found himself to be in a position to fulfill the promise that he had made but he definitely never had any idea that the victim was less than 18 years of age nor was it ever communicated to him by her.

13. There could be many reasons for a promise not being fulfilled but from the circumstances narrated through the mouth of the victim as also her family members, there does not appear to be any reason to believe or suspect that the appellant had, since the beginning, no intention to fulfill his promise and that the liaison was only to satisfy his carnal lust.

14. That being so, then even accepting that there were physical relationship between the parties a number of times, the offence under Section 376(2)(n) does not get attracted.



15. Secondly, it has been submitted that if at all the victim was a minor, the first step of the prosecution ought to have been to determine her age for the appellant to be subjected to prosecution under the POCSO Act, 2012 and for that, necessarily the Rules in that regard had to be followed.

16. Mr. Singh has argued that the procedure under which the test of juvenility is made is applicable under POCSO Act, 2012 also. A juvenile could either be the perpetrator of the crime or the victim of the crime.

17. No effort has been made by the prosecution at all to ascertain the real age of the victim.

18. The victim herself states that she is 16-17 years of age whereas her medical examination indicates that she could be between 15-17 years.

19. Since no procedure was followed as ordained under the *Juvenile Justice (Care and Protection of Children) Act, 2015* and the Rules appended thereto especially Rule 12, the medical opinion is not to be taken as the ultimate opinion regarding the age of the victim.



20. Thus, the sum and substance of the argument of Mr. Singh is that by no stretch of imagination can it be said that the victim consented under any misconception of fact and therefore, the physical relationship between the appellant and the victim was voluntary and with her consent without having any inkling that the victim is less than 18 years of age.

21. As opposed to the afore-noted contentions, Mr. Abhimanyu Sharma, learned APP has submitted that decidedly the victim had not come of age to enter into any sexual relationship with any person and therefore there is a pre-supposition that she agreed for sex with the appellant only on the misconception that the appellant shall later marry her, notwithstanding the fact that this may have had the sanction of the parents of both the parties.

22. There could be no more gross case of a misconception of fact. And therefore, every sexual encounter of the victim with the appellant constituted a series of action inviting the mischief of Section 376(2)(n) of the Indian Penal Code.



23. Under the aforesaid circumstances, Mr. Sharma contends that the conviction and the sentence imposed upon the appellant is justified and is not required to be interfered with.

24. Before we analyse the evidence and come to any definitive finding, we would consider it apposite to examine the very concept of consent in such cases.

25. Section 90 of the Indian Penal Code provides 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; or

Consent of insane person. - if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child. - unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

26. The Indian Penal Code, as we have seen, does not define consent in any positive terms.



27. Section 90 only provides what is not a consent. If a consent is given under fear of injury or under a misconception of fact, that is no consent at all. In ***Deelip Singh alias Dilip Kumar v. State of Bihar (2005) 1 SCC 88***, the Supreme Court very eruditely analyzed that the first part of Section 90 is from the point of view of the victim and, the second part deals with corresponding provision from the point of view of the accused.

28. A bare reading of Section 90 would envisage that the accused too should have the knowledge or should have reasons to believe that the consent was given by the victim in consequence of fear of injury or misconception of fact.

29. We may, for the moment, focus on the second part of the Section which lays emphasis on the knowledge or the reasonable belief of the person, who obtains the so called "*tainted*" consent. The requirement of both the parts of Section 90 has perforce to be cumulatively satisfied.



30. What does this mean?

31. The Court is thus, required to see whether the person giving the consent has given it under fear of injury or misconception of fact, but simultaneously the Court should also be satisfied that the person doing the act in the capacity of an offender is conscious of the fact or should have the reasons to think that but for the fear or misconception the consent, consent would not have been given. It is only then that the negative covenant of Section 90 IPC operates with its full swing. This perhaps is the scheme of Section 90 which starts with a negative covenant.

32. The Supreme Court was conscious of the fact that Section 90 cannot be construed as an exhaustive definition of consent for the purposes of Indian Penal Code. The normal connotation and concept of consent is not intended to be excluded. It is precisely for this reason that Courts of all hierarchy in different cases have come out with different hypotheses with respect to consent or lack of consent or tainted consent.



33. The etymology of the word "consent" needs be further analyzed.

34. Strout's Judicial Dictionary defines consent as an act of reason accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. Some other Jurists have defined it as containing three different facets *viz.* a physical power, a mental power and a free and serious use of them.

35. To clarify, if a consent is obtained by intimidation, force, circumvention, surprise or undue influence, such consent is synonymous with delusion and cannot be said to be the outcome of weighing the pros and cons in a balanced manner.

36. So far as consent for sexual act is concerned, especially on the part of a female, (for the purpose we are presuming that the victim is an adult) the question is whether she is understanding the nature and consequence of sexual act and whether such understanding is an intelligent understanding. Then only, it can qualify to be called her consent.



37. The most rudimentary and yet most conclusive way to test whether there was a consent which was untainted is to discover whether it was voluntary or vitiated by the grounds that we have noted above.

38. In one of the celebrated cases of the Supreme Court of 1950s, ***Rao Harnarain Singh Sheoji Singh vs The State, AIR 1958 Punjab 123***, the Supreme Court engaged itself in spelling out a difference between consent and submission and ultimately came up with the proposition that every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent.

39. It would be the guiding principle for us now to determine whether the victim had consented for sex or had submitted to sex only on being satisfied that she had a future with the appellant and that the appellant would not leave her high and dry. This test however would be subsequent to our finding that the victim was of the age of giving such consent.



40. Thus, the first exercise of ours in a case of this kind is to see whether the victim was of 18 years of age to have taken an intelligent decision of submitting herself to sexual desires of the appellant. This only would satisfy the test that she was not under any misconception of fact so that her decision comes out of the mischief of Section 90 and be treated as consent for all practical purposes.

41. So far as the age of the victim is concerned, though after the relationship had soured, she had stated in her fardbeyan statement that she is 16-17 years of age but the records are completely silent about her educational qualification which would have been the primary test for deciding whether she is a major or a minor.

42. While going through the evidence, we found that Dimple Seth (P.W. 2), her aunt, forbade her for sometime from engaging with the appellant as she was not of age but that may not be taken as a definite evidence of the victim not being of age. It would have been for all we know the ministrations of an aunt in order to protect her



niece and such advise cannot be taken to mean positively that the victim was not a major.

43. This has to be seen in the context of practicality that there is no magical change in a person's mind on completing 18 years of age. Can the mind of a person be said to be deficient in any respect if he or she has not attained the age of 18 years and is only short by a month or two.

44. Thus, a practical view of the whole aspect has to be taken before coming to any definite conclusion especially when somebody is being charged for raping a minor girl successively for him to be prosecuted under Section 376(2)(n) of the Indian Penal Code. This being the state of records as far as the age of the victim is concerned, we would not be far off the mark in holding that the victim was of age to take a conscious decision.

45. We may also refer to the deposition of the Doctor, who examined her and found that she could be between the age group of 15-17 years.



46. The other factor which plods us to think in that direction is the complete approval of the parents of both sides for the parties to continue with their relationship. When the parents of the victim were once made to understand that the victim had been subjected to sexual intercourse, the issue was taken very lightly and the victim was made to understand that it does not matter as she is ultimately going to marry the appellant. These set of facts in the evidence further lend assurance to us that the victim was not a minor and was absolutely capable of taking her own decisions regarding her life.

47. The purpose of any act *viz.* the provisions of the Indian Penal Code and the POCSO Act, 2012 is to protect the children who are below 18 years of age. It is only for this that the POCSO Act, 2012 provides strict punishment against an act of sexual indulgence with a girl below 18 years of age. The rigors of POCSO Act, 2012 operates *proprio vigore* under the Indian Penal Code also in its Section 376 IPC where consent of a girl below the age of 16 years is immaterial.



48. The POCSO Act, 2012 and the Indian Penal Code target sexual exploitation of children, male or female, but undoubtedly it has also resulted in, at times, criminalizing consensual adolescence/teenage relationship and while deciding a case, we do reckon that we have to be very very conscious about not exceeding the line provided under the Statutes and also not to come to any conclusion which would adversely impact the actual functioning of the legislation. We need not delve into the sexual anatomy of male and female at a particular age and its development and the so called infatuation of the opposite sexes which is at its peak at teenage/adolescence but we need to keep ourselves abreast of the different behavioral experimentation by an adolescent, male or female.

49. Coming back to the narrative about the age of the victim, there being complete absence of any record of her being a minor, especially the non-examination of the parents of the victim who could have been the best persons in the absence of any other documentary evidence



to tell us as to when was the victim born, we feel justified in holding that the victim was a major and had been taking conscious decision, of course with the aid and advise of her parents and others.

50. The discussion now ought to be made on the more metier aspect of the consent; whether she submitted herself to sexual desire and consented to pre-marietal sex on the promise of the appellant to marry her in future or her own vision of future with the appellant or under a misconception that the promise was genuine.

51. This inquiry can begin from the circumstances disclosed during the trial. Whether the appellant was serious in promising a marietal life to the victim from the beginning or was he only adroitly creating a situation whereby a teenager infatuated with him, would submit to his sexual desires.

52. The evidence in this regard is very specific.

53. There was a marriage function in the house of one Kanhaiya Seth, a neighbour of the victim. In the family of Kanhaiya Seth, the cousin of the appellant was



married. The victim and the appellant met at Kanhaiya Seth's house. According to the deposition of witnesses, it was a love at the first sight. The parties continued to meet each other. The parents of both the parties were happy to note that the relationship between them was very very compatible, otherwise they would have forbade either of the parties to continue with that relationship. The victim is said to have visited the appellant alone in the house of the appellant whenever the appellant so desired.

54. During the entire period of courtship, there was no apprehension in the mind of parents of the either side that the appellant was only posing as a lover. All of them saw him as a prospective groom. The parents of the appellant liked and appreciated the ways of the victim. She was also told by the parents of the appellant that she would be brought in their house as their daughter-in-law.

55. Was this all a sham and pretence? Had it been only at the behest of the appellant, we could have agreed for such proposition but not when the parents are also involved.



56. Though the victim in her deposition has said that when the relationship soured and the parents of the victim went to the parents of the appellant for an intervention in the matter, the appellant and the parents made an about-turn and said that the marriage cannot be performed, but this appears to be a statement in disgust and in anger. There was no evidence as against the parents of the appellant and precisely for this reason they have been acquitted of all the charges.

57. This, therefore, gives us an idea that something must have gone wrong between the relationship of the appellant and the victim and the appellant broke his promise. Did he develop a cold feet in entering the family life? We have no evidence that the appellant got employment or was offered a better bargain in the marriage market. That could have been one reason for castigating such breach of promise. But no, there is nothing on record to indicate that the appellant got into any lucrative job and therefore was placed high in the



marriage market and therefore chose to forget the old relationship with the victim.

58. What happens between a man and a woman in their private lives is not easy to fathom. Had it been so easy to guess, there would have been lesser cases of break-down of marriages. What repels two persons and what brings them close is very subjective.

59. Under the aforesaid circumstances, would it not be too much for a Court of law to necessarily dub this about-turn and somersault of the appellant to be a deliberate breach of promise with the mischievous intention of having satisfied his carnal lust and then abandoning the victim.

60. The answer to this poser is in the negative.

61. On the specific question whether the consent obtained on the basis of promise to marry which was not acted upon, could not be regarded as consent for the purposes of Section 375 IPC, we have taken guidance from a decision of the Division Bench of Calcutta High



Court in ***Jayanti Rani Panda vs State of West Bengal***
And Anr., 1984 CriLJ 1535.

62. In the afore-noted case, a person had promised the victim girl to marry and had thereafter raped her which made her pregnant. She was dragged out of the house and because of that, she suffered miscarriage. A complaint was filed under Section 156(3) Cr.P.C., whereupon a regular case was instituted for investigation for various offences including Sections 376, 313 and 419 of the Indian Penal Code.

63. The Court, on finding that no School Leaving Certificate or Birth Certificate or Ossification Test was brought on record to demonstrate that the victim was a minor, concluded that she was a major and that she was a consenting party. While coming to that conclusion, the Court took into account the knowledge of the father of the victim about the love affairs between the parties.

64. It was in this context that the case was decided. The failure to keep the promise at a future uncertain date due to reasons not very clear on the



evidence, the Bench held that it did not always amount to a misconception of fact at the inception of the act itself.

65. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. The matter would have been different, the Court observed, if the consent were obtained by creating a belief that they were already married. In such a case, the consent could be said to be the result from a misconception of fact but there the facts alleged was a promise to marry, but when, was not known to the parties.

66. The Court must be assured that from the very inception, the accused never really intended to marry her. This and the other cases of the same ilk were earlier discussed in ***Uday v. State of Karnataka, (2003) 4 SCC 46***, where it was observed that "*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.*"



67. The Bench, however, agreed that there can be no straight-jacket formulae 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 test laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent. But the Courts 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.

68. From the records of this case, we do not find it to be a case of passive submission of the victim in face of any psychological pressure or allurement made by the appellant. She was fully conscious and knew the nature



and consequences of the act that she was asked to indulge in.

69. We do not find that the tacit consent given by her was the result of misconception created in her mind as to the intention of the appellant in marrying her.

70. We have given our anxious consideration to the issue whether the appellant, right from the beginning was cheating on the victim. We can only come to that conclusion if we have some materials in the shape of evidence to infer that the appellant had made a promise which was false and it was never intended to be acted upon by him.

71. The continuance of the relationship with the consent of the parents of both sides lends assurance to us that the appellant was not cheating from the beginning. The relationship was not continuing under cloak and dagger; the families knew about it. Would it then be appropriate for us to infer that the parents of the appellant were abetting their son to sexually exploit a woman without harbouring any intention of marrying her?



72. In the absence of any evidence regarding such proposition, we cannot but reject the hypothesis suggested by the prosecution that the appellant had been cheating on the victim right from the beginning.

73. A brief reference of Section 114A of the Evidence Act would be necessary to complete the discussion. Section 114A which has been inserted in the Indian Evidence Act, 1872 in the year 1963 puts reverse burden with respect to presumption of absence of consent in certain prosecutions for rape. In a prosecution for rape under Clauses A, B, C, D, E, G of Sub-Section 2 of Section 376 of the Indian Penal Code where sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent.

74. In the present set of facts, we have seen that there is no denial of consent by the victim. She only



asserts that she agreed to the overtures of the appellant in the hope that she one day would marry him.

75. The reverse presumption can be triggered only when the prosecution proves its case, which in the present case does not appear to have been done.

76. These reasons, therefore, compel us to reject the hypothesis of the Trial Court.

77. We set aside the judgment and order of conviction and sentence and acquit the appellant.

78. The appellant is stated to be on bail. His liabilities under the bail bonds stands discharged.

79. The appeal stands allowed.

(Ashutosh Kumar, J)

(Vipul M. Pancholi, J)

krishna/sanjay

AFR/NAFR	AFR
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