

IN THE HIGH COURT OF JHARKHAND AT RANCHI
Criminal Appeal (S.J.) No. 705 of 2012

[Against the judgment of conviction dated 13.06.2012 and order of sentence dated 14.06.2012 passed by learned Principal Sessions Judge, Pakur in Sessions Case No.06 of 2008]

Mohidul Sk Appellant

--Versus--

The State of Jharkhand Respondent

For the Appellant : Ms. Jasvinder Mazumdar, Advocate

For the State : Mr. Pankaj Kumar Mishra, A.P.P.

PRESENT : **HON'BLE MR. JUSTICE GAUTAM KUMAR CHOUDHARY**

By Court 1. Judgment of conviction and order of sentence under Section 376 of the Indian Penal Code is under challenge in the instant criminal appeal

2. On the statement of the victim recorded as fardbeyan on 22.10.2007, Pakur (Mahila) P.S. Case No.2/2007 was registered under Sections 493, 376, 323/34 of the Indian Penal Code.

3. As per the fardbeyan, six months ago, the appellant Mohidul Sk committed rape with her by muffling her mouth near her house in a bush. After the incidence, she returned to her home and narrated it to her parents. At this, her parents and the villagers confronted the appellant, on which he admitted his guilt and promised to marry her. After the promise of marriage, she started frequently coming in the house of the appellant and developed intimate love relationship with him. In the meantime, she became pregnant. A Panchayati was held, but the marriage could not be solemnized as uncle and father of the appellant refused to it. The appellant went along with prosecutrix and the villagers for registration of the marriage to Pakur Court, but due to dispute raised by the other party, the marriage could not be contracted. Against this background, FIR was registered against Mohidul Sk, Miraj Sk and Akhtar Sk.

4. Police, on investigation, submitted charge sheet under Sections 376, 493 and 323 of the Indian Penal Code against the appellant, whereas Miraj Sk and Akhtar Sk were not sent up for trial.

5. Altogether 13 witnesses were examined and the medico legal examination has been proved as Exhibit 1. The statement of the accused was recorded under Section 313 of the Cr.P.C. The defence is of innocence, but no specific defence has been pleaded.

6. The learned trial Court acquitted the appellant for the offence under Sections 493 and 323 of the IPC and convicted him under Section 376 of the IPC and sentenced to undergo R.I. for seven years and fine of Rs.1000/-.

7. It is submitted by learned counsel on behalf of appellant that P.W. 4, P.W. 5 and P.Ws.7-10 have all turned hostile and not supported the prosecution case. The prosecution story rests on the testimony of prosecutrix P.W. 3 and her family members P.W. 1, P.W. 2 and P.W. 6. P.W. 1 is brother, P.W. 2 is father and P.W. 6 is mother. All the independent witnesses have not at all supported the prosecution case.

8. While recording the deposition of the prosecutrix has been assessed by the Court to be 17 years, but she deposed it to be 15 years. Doctor (P.W. 11) who examined the victim has assessed her age as 17-18 years. Age of the consent before 2013 amendment in Section 375 of the Indian Penal Code, was 16 years and the incidence took place before 2013 therefore, the prosecutrix was major at the time of the said incidence.

9. It is argued that it was altogether consensual physical relationship, as it continued for more than six months as per the FIR as well as the statement of the prosecutrix (P.W. 3) and also her family members. During this period of six months, no protest was made, no complain was given to anyone and only in advance stage of pregnancy, she informed about the incidence to her family members. To obtain carnal pleasure under force or coercion, is the essence of offence under Section 376 of the IPC. In absence of any evidence to that effect, offence will not be made out. Investigating Officer has not been examined in this case.

10. Learned A.P.P. has defended the judgment of conviction and sentence. The Doctor, who has been examined as P.W. 11, has deposed that at the time of examination, she was having pregnancy of five months. P.W. 2 has stated that he had promised to marry, but subsequently, he refused to marry her. This is consistent evidence that first come in the testimony of P.W. 6. A Panchayati was also held in this regard and deposed too by P.W. 12, but the accused refused to attend the Panchayati. It is further argued that P.W. 3 has deposed the first occurrence took place under force and duress when the rape was committed and thereafter on false promise of marriage, the appellant continued sexually exploiting her.

11. Sexual intercourse with a woman, "against her will" or "without her consent" is the essence of offence of rape. Mere act of submission does not

amount to consent. It depends upon the circumstances of each case, whether the earliest consent by the victim was mere passive submission or willing consent. Consent obtained by misrepresentation of fact, is also no consent within the meaning of Section 90 of the IPC. In the case *Dhruvaram Murlidhar Sonar v. State of Maharashtra*, (2019) 18 SCC 191 it has been held that there is a clear distinction between rape and consensual sex. The acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC.

12. In the present case, as discussed above, there is an inordinate delay of six months in registration of the case. Physical relationship continued for about six months and when the victim became pregnant only then the matter was reported. It has been deposed by the prosecutrix that the accused had promised to marry her. It has also come in evidence that the Appellant had gone to the Court for registration of marriage, but was prevented by other persons there. On these evidence, the allegation of rape having been committed on a false promise of marriage is not proved. What can be gathered from the combined reading of the testimony of witnesses is that on panchayat, the Appellant was asked to marry the victim girl, but this did not materialise on account of the objection from others. Proposal to marry was a subsequent development and not one which was given to obtain the consent of the victim girl. The evidence unerringly point to a consensual relationship, resulting in pregnancy after which the case was registered. The consent of the victim was not obtained under force or fraud.

Under the circumstance, this Court is of the view that prosecution has failed to prove the charge of rape against the Appellant.

Judgment of conviction and sentence, passed by the learned trial Court is set aside.

Appeal is allowed.

(Gautam Kumar Choudhary, J.)

Jharkhand High Court, Ranchi

Dated, 22nd February, 2024

NAFR/Anit