

Binod Pradhan Vs. State of Sikkim

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Court : Sikkim

Decided On : Mar-24-2014

Judge : S.P. Wangdi

Appeal No. : S.B. Crl. A. No. 17 of 2013

Appellant : Binod Pradhan

Respondent : State of Sikkim

Judgement :

Wangdi, J.

1. The Appellant in this Appeal seeks to assail the judgment dated 31-08-2013 passed by the Learned Fast Track Court, South Sikkim at Namchi in Sessions Trial (Fast Track) Case No.27 of 2013 (hereinafter referred to as the impugned judgment) by which he was convicted under Section 376 of the Indian Penal Code, 1860 and sentenced to undergo imprisonment for 7 years and to pay a fine of Rs.2,000/- (Rupees two thousand) in default of payment of which he was directed to undergo further imprisonment of 2 month by duly remitting the period of imprisonment already undergone by him against the sentence.

2(i). The facts of the case to state briefly is that on 01-04-2012 at about 1100 hours one Sarmila Chhettri, the Complainant, had appeared at the Melli Police Station, South Sikkim accompanied by her grandmother, Smt. Dil Maya Chhetri, P.W.1, and reported verbally that in August, 2011, she, accompanied by Tika

Chettri, P.W.2, had gone to Turuk Public Health Sub-Centre (in short œPHSC?) to get her ailing child checked up but as the PHSC was found closed they had to return home. On the way back they were invited by the Appellant-Accused Binod Pradhan to his house for tea. When they entered the house, they found the Accused Sabita Rai, the wife of the Appellant-Accused, also present there. While at the house, the Accused Sabita Rai claiming herself to be a Maata (pythoness) who had solved many marital discord by use of her supernatural power, invited the Complainant to the house the next morning for her jokhana, i.e., to read her fortune assuring her of her reunion with her estranged husband. Accordingly, the following day after getting her child checked up at the Turuk PHSC medically, she went to the house of the accused persons carrying some puja samagri (items for offering puja). That the Accused Smt. Sabita Rai (Maata) while performing the puja told the Complainant that the only way to get her estranged husband to return was to sleep with her husband, the Appellant-Accused, for a week continuously. It is then stated that she was not convinced initially but upon persuasion of the Accused Sabita Rai (Maata) and after drinking a glass of beer offered by her that made her drowsy, she relented and had sexual intercourse with the Appellant-Accused in the sitting room in the presence of the Accused Sabita Rai. She had not disclosed of this incident to anyone but revealed it only on 27-03-2012, when her pregnancy was detected at the Turuk PHSC where she had been taken by her grandmother, Smt. Dil Maya Chhetri, P.W.1, when she had complained of irregular menstruation. On being asked as to how this had come about she narrated the entire episode involving the Accused Sabita Rai and her husband, the Appellant. When the Appellant and his wife were confronted, they completely denied the allegations resulting in the lodging of FIR.

(ii). During the course of investigation, the Investigating Officer having found sufficient material against the Appellant-Accused and his wife Sabita Rai for having committed the offences under Sections 376/420/120B IPC, charge-sheet was filed against them for trial.

3. The Learned Fast Track Court upon consideration of the materials found prima facie case to frame charges against the Appellant-Accused No.1 under Section 376 IPC and his wife Sabita Rai under Sections 419/109 IPC to which they

pleaded not guilty and claimed trial.

4(i). During the trial the prosecution examined as many as 13 witnesses and exhibited 36 documents and upon consideration of the evidence, the Learned Fast Track Court found the Appellant-Accused guilty of the offence under Section 376 IPC and accordingly convicted as already stated earlier.

(ii). The Accused No.2, Sabita Rai, however, was acquitted by giving her the benefit of doubt for want of sufficient evidence to establish the charge against her that she had assisted the Appellant-Accused No.1 in the commission of the offence of cheating the Complainant/victim by pretending to be a Maata. It is against the conviction and sentence of the Appellant that the present Appeal has been preferred.

5(i). Mr. B. K. Gupta, Learned Advocate, appearing on behalf of the Appellant, submitted that the Learned Fast Track Court has fallen in grave error in passing the impugned judgment holding the Appellant-Accused guilty of the offence under Section 376 IPC in as much as none of the ingredients necessary to fulfil the requirement of Section 375 IPC has been fulfilled. It is submitted that the prosecution had failed to establish the Appellant having had sexual intercourse with the prosecutrix and, even if that fact is assumed to have been proved, it has not been established that any force had been applied or that the prosecutrix had been lured in doing so as alleged on behalf of the prosecution but, the act was rather consensual.

(ii). Next, it is contended that the fact that the prosecutrix remained silent for 8 long months and that, even during the trial she refused to appear to give evidence in spite of the fact that she was contacted at least once would give one to reasonably presume that the allegations against the Appellant-Accused is false and fabricated.

(iii). It is contended that the FIR, Exhibit 11, has not been proved in accordance with law. Besides, the fact that the prosecutrix evaded entering the witness box to prove the FIR said to have been lodged by her, the only witness in connection with the FIR Exhibit 11 being P.W.9, Garja Man Rai, was also vague in his deposition

and had stated nothing to establish that the FIR was indeed lodged by her.

(iv). Mr. Gupta strongly argued that the finding of the Learned Fast Track Court at paragraph 40 of the impugned judgment to the effect that the birth of child within a period of nine months from the date of incident and having confirmed accused as father of the child by DNA report of expert corroborated by exhibit-2, document marked X and the stand taken by his counsel before the court of law at the time of bail hearing proved that fact beyond reasonable doubt that accused became father of child of victim after commission of rape on the victim. is obviously without any foundation, unsustainable and, therefore, liable to be set aside.

6(i). Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, would submit that the evidence placed on behalf of the prosecution was sufficient to establish the guilt of the Appellant-Accused and that interference by this Court was not called for, there being no error in the impugned judgment. It is submitted that FIR, Exhibit 11, stood proved by P.W.9, Garja Man Rai, and by the evidence of P.W.1, Dil Maya Chhetri, who had accompanied the prosecutrix to the Police Station while lodging the FIR.

(ii) Relying upon *Krishna Mochi and Others vs. State of Bihar* : (2002) 6 SCC 81, it was submitted that even if the FIR is not proved it would not be a ground for acquittal of the Appellant as the entire evidence of the prosecution has to be considered and that the nonexamination of the informant would not affect the prosecution case. That the contents of the FIR itself is a proof of fact that the prosecutrix had visited the house of the Appellant-Accused and his wife, Accused Sabita Rai, the previous day of the offence. That she had been informed by the Accused Sabita Rai, of the possibility of her estranged husband returning if certain sexual rituals were performed with her husband, the Appellant, and that it was only on account of this allurements that she visited their house the next day when she was made to undergo the sexual act. The contents of this FIR, as per the Learned Additional Public Prosecutor, thus stand established by the evidence of P.W.9 and P.W.1.

7. These are the only substantive submissions made on behalf of the parties and, in my view, we need not delay ourselves with the rest being redundant and

immaterial for the disposal of this Appeal for the reasons that shall follow hereafter.

8. I have heard the Learned Counsel for the parties and examined the evidence available on the records.

From the FIR and the charge-sheet, the foundation of the prosecution case squarely rests on the allegations that the Accused Sabita Rai who claimed herself to be a Maata (pythoness) had lured the prosecutrix in believing that if she underwent a ritual of sexual intercourse with her husband, the Appellant-Accused, her estranged husband would return. It is on this belief that the prosecutrix went through the ordeal of sexual intercourse with the Appellant-Accused resulting her being impregnated. This also appears to be the fact disclosed by her in her statement recorded under Section 164 of the Code of Criminal Procedure, 1908.

9. On a careful perusal of the impugned judgment, I find that the very foundation upon which the prosecution rests appears to have been completely demolished by the finding in the impugned judgment at paragraphs 41 and 42 which we may reproduce as under:-

œ41. It is the case of the prosecution that accused no.2 impersonated herself as pythoness maata to victim and gave assurance to victim to wriggle out her personal family problems and with fraudulent inducement and abetted accused No.1 to commit sexual intercourse with victim but besides hearsay strata of these statements, there is no legal evidence to establish the fact that accused no.2 is a pythoness maata and abated or deceived the victim to commit sexual intercourse that too with her own husband i.e accused no.1 on the relevant day. Section 154 and 164 Cr.P.C statement of the victim as already observed in the preceding paragraphs are not substantive piece of evidence.

42. On the basis of the above observation and discussion it is established that accused no.1 is biological father of child born from victim on 4.5.2012 at Namchi District Hospital after commission of rape by accused no.1 without having any consent and legal marriage with her and thereby committed an offence falls under section 375 IPC . I accordingly convicted him under section 376 IPC, 1860. This

court does not find any cogent evidence to establish beyond reasonable doubt that accused no.2 assisted the accused no.1 and cheated victim pretending herself as maata and participated in the commission of offence with accused no.1. Accordingly, accused no.2 is acquitted by giving benefits of doubt in the interest of justice.?

[underlining mine]

10. In the above circumstances, the consequence on the prosecution case, bereft of allurements as alluded to above, would be that the sexual intercourse entered into between the Appellant-Accused and the prosecutrix, was consensual, free from any of the descriptions contained in Section 375 IPC. This conclusion stands further fortified by the fact that the prosecutrix had remained silent for almost 8 months about the incident and had disclosed only when her grandmother P.W.1 got the wind of it. The other aspect that lends support to this conclusion is the prosecutrix having left her home to an unknown destination and remained elusive as can be gathered from the evidence of P.W.8, Durga Chettri. The relevant portion of her evidence reads as under:-

œ.. After initiation of the present case, my above named mother had come to my place at Tadong for medical check up. I do not remember the exact date as to when she had come to my home. My abovenamed mother became sick after hearing news to the effect that her granddaughter Sharmila took to heels. Thereafter, my mother received call from Sharmila on mobile phone but she could (sic) talk due to network problem and directed me to talk. I accordingly talked with her and received the information to the effect that she is fine but not disclosed her location.

XXX-by Ld. Counsel Shri B. K. Gupta for accused persons.

It is true that after receiving information from her that she is fine, she disconnected the mobile phone. Thereafter, I again tried to contact her but found switch off. It is not a fact that I am deposing falsely.? [underlining mine]

11. It may also be noted that prosecutrix neither chose to enter the witness box nor did the prosecution make any effort to produce her. I agree with the contention placed by Mr. B. K. Gupta, Learned Advocate for the Appellant, that the conduct of the prosecutrix which is clearly revealed by the entire prosecution evidence, would be a very strong circumstance that would go against the prosecution story. The other aspect of the matter which severely erodes the credibility of the prosecution story is the evidence of P.W.3, Shanti Rai, who in her evidence has stated that the prosecutrix had told her that her husband used to visit her occasionally even during the period of their estrangement of 11 months which resulted in her being pregnant. This has been reiterated by her as would appear from her crossexamination which reads as follows:-

œIt is true that when I enquired as to how (sic) from Sharmila as to how she conceived, then she told me to the effect that Sharmila told me that she has left her husband for past 11 months but she conceived the said foetus during the occasional visit of her husband. It is true that I know the accused persons as they are my covillagers. It is true that the said Sharmila did not disclose the accused persons were responsible for her pregnancy. It is not a fact that I am deposing falsely.?

P.W.3 who gave the above evidence was the ANM, Turuk PHSC who examined the prosecutrix on 27-03-2012 when she appeared there for medical examination with her grandmother, P.W.1. Her evidence has remained firm and undemolished.

12. In view of the conflicting evidence, particularly the fact that the very foundation of the prosecution case was not believed by the Learned Fast Track Court and had acquitted the wife of the Appellant-Accused Sabita Rai, it cannot be said that the prosecution has been able to prove the charges against the Appellant-Accused beyond any reasonable doubt. It is of significance to note that the State has neither preferred an Appeal nor a Cross Appeal against the finding in respect of the accused Sabita Rai, thereby attaining its finality.

13. For these reasons, I am of the view that the Learned Fast Track Court has committed an error in holding the Appellant-Accused guilty of offence under Section 376 IPC.

14. In the result, the Appeal is allowed. Consequently, the impugned judgment is set aside and the Appellant-Accused acquitted of the charge under Section 376 IPC.

15. No order as to costs.

16. Let a copy of this judgment along with the original records of the case be transmitted to the Learned Fast Track Court, South Sikkim at Namchi forthwith by a Special Messenger for its due compliance.

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