

Mainul Haque Vs. State of Assam

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Court : Guwahati

Decided On : Feb-19-2008

Judge : H. Barua, J.

Appellant : Mainul Haque

Respondent : State of Assam

Disposition : Appeal allowed

Judgement :

H. Barua, J.

1. This is an appeal against the Judgment and Order of conviction dated 15.07.2005 passed by the learned Assistant Sessions Judge Nalbari in Sessions Case No. 26/04 by which the learned trial Court convicted and sentenced the appellant to undergo imprisonment for 8 years under Section 376 IPC together with a fine of Rs. 2,000/- in default to suffer another 6 months RI.

2. The appellant being aggrieved by and dissatisfied with the Judgment and Order of conviction as aforesaid this instant appeal seeking setting aside and quashing of the Judgment so rendered by the learned trial Court has been filed.

3. Criminal law was set in motion by the victim with the lodgment of an FIR (exhibit 1) before the Station House Officer of Mukalmua Police Station on 23.09.2003

contending inter alia that she was in love with the appellant and the appellant used to visit their residence regularly for the last four years and in one day the appellant forcibly raped her. As a result she became pregnant. While she was carrying four months pregnancy she informed the appellant that she was carrying and requested him to marry her. Accordingly on 14.09.2003 accused took her to their residence and kept her in the courtyard and fled away therefrom. The family members of the appellant did not allow her ingress rather forcibly driven her out from their campus. The matter was brought to the notice of village elders. A village 'mel' was accordingly convened but the appellant did not make his presence available rather kept himself in concealment.

4. The FIR (exhibit 1) being thus lodged, the Station House Officer registered a case and commenced investigation. The victim informant was examined by the Investigating Officer and got her examined medically. The informant victim was also produced before a Magistrate for the purpose of recording her statement under Section 164 Cr.P.C. During investigation the appellant could not be apprehended by the Police. However, he surrendered before the Court and got himself enlarged on bail. The Investigating Officer after completion of the investigation laid the charge sheet against the appellant under Sections 493/376 IPC. The case was subsequently committed to the Court of Sessions for trial of the appellant. The learned Assistant Sessions Judge framed charge against this appellant under Section 376 IPC. The appellant pleaded not guilty and claimed to be tried. Altogether 6 witnesses were examined by the prosecution. Appellant was examined under Section 313 Cr.P.C. He pleaded his innocence. No defence evidence in any form was adduced. At the conclusion of the trial, the learned trial Court convicted the appellant and sentenced him as herein before stated. Hence this appeal.

5. Heard Sri B.C. Das, learned Senior Counsel for the appellant. Also heard learned , additional PP for the respondent, The State of Assam. This Court has carefully gone through the facts and circumstances of the case, evidence on record and other materials available in the case record including the impugned judgment. It is found from the perusal of the Judgment that the learned trial Court had carefully gone through all the facts and circumstances of the case, the

evidence on record and also the law relevant therefor.

6. Sri B.C. Das, learned Senior Counsel while arguing this appeal submitted that this appeal could be disposed of on the decision of a solitary issue of consent of the victim. Sri B. C. Das raised this issue in the following manner:

(1) Whether the victim had given her consent under misconception of facts.

Sri B.C. Das, while arguing submitted that there is no dispute in relation to visit of the appellant to the residence of the victim, since both the victim and the appellant were in love at that time. It was argued by Sri Das that the medical testimony of PW-5 goes to show that victim at the relevant point of time was above 18 years of age as per radiological report and also was carrying 16 to 17 weeks pregnancy as per ultra sonography report. Further the victim herself in her evidence as well as her statement recorded under Section 164 of the Cr.P.C had given her age as above 18 years. Apparently the victim was a major and was competent to give her consent. It was further argued by Sri B.C. Das that since the victim was in love with the appellant cohabitation resulted as per consent of the victim. Therefore, there cannot be any issue that consent was given by the victim for such cohabitation due to inducement etc., by the appellant.

7. Contrary to the argument so advanced by Sri B.C. Das, learned Senior Counsel for the appellant, the learned Additional PP, Assam appearing for and on behalf of the State respondent, submitted that on the basis of facts and circumstances and the evidence on record it can be inferred that the consent was given by the victim for such cohabitation due to misconception of facts. The learned Additional PP, referring to the evidence of the victim as well as the mother and the contents of the FIR submitted that the appellant had his carnal desire fulfilled, saying that he would marry the victim in near future. But the evidence categorically speaks about the conduct of the appellant. It is in the evidence that the appellant had taken the victim when she divulged about her pregnancy due to cohabitation between them. On 14.09.2004 appellant had taken her (victim) to his residence and keeping her in the courtyard fled away there from. The family members of the appellant did not accept her as the wife of the appellant rather drove her out forcibly there from. According to learned Additional PP, the appellant's conduct of leaving the victim at

their courtyard makes it palpably clear that the appellant had no intention to marry the victim. The appellant by inducing the victim that he would marry her in near future obtained her consent for such cohabitation. The victim, therefore, misconceived the fact and agreed to have a sexual intercourse in between them. The learned Additional PP, therefore, prayed this Court to maintain the conviction and sentence so rendered by the learned trial Court.

8. Sri B.C. Das, learned Senior Counsel Submitted that on facts prosecutrix had taken a conscious decision to participate in the sexual act with the appellant on being impressed by the appellant's promise to marry her. The appellant's promise was not false. He had an intention to marry since inception. It was further argued by Sri B.C. Das, that the appellant's intention to marry the victim could be inferred from his conduct. When the , victim became pregnant and when she divulged the fact of carrying pregnancy to the appellant, appellant in order to keep his promise had taken the victim as his wife to his residence. But the acts and omission on the part of his parents cannot however be combined with the appellant's conduct and intention. Appellant had sexual intercourse with the victim with a promise to marry her and on the face of the facts and circumstances and evidence on record it cannot be said that the appellant obtained the consent of the victim by playing fraud on her.

9. The word 'consent' in the Indian Penal Code is nowhere defined comprehensively but what cannot be recorded as consent under the Code is unambiguously explained in Section 90 of the Code, which provides as under:

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

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.

10. Therefore, under the provisions of Section 90 of the Indian Penal Code, two conditions must be fulfilled. Firstly, it must be shown that the consent was given under fear of injury or under the misconception of fact. Secondly, it must be proved that the person, who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception.

11. In our present case, of course we are not concerned about the consent under fear of injury. We are, however, concerned about the next phrase 'misconception of fact' appearing in the section for arriving at a decision whether the prosecutrix had given her consent under misconception of fact.

In the First Information Report that lodged by the prosecutrix herself it was contended that the appellant used to visit their home for last 4(four) years and they fell in love with each other but on a certain day the appellant forcibly raped her as a result of which she became pregnant. When she was carrying pregnancy of 4(four) months, the matter had been divulged to the appellant and requested him to marry her. So, apparently, from the text of the First Information Report that lodged it appears that the appellant forcibly had sexual intercourse with her resulting pregnancy of four months. This first informant while in the witness box has, to some extent, deviated from her earlier stand and in her deposition it is found that as a result of visit of the appellant to their residence, a friendship developed in between the first informant and the appellant and they fell in love for last four years and one day the appellant offered a proposal to marry her. With the assurance of marrying her, he tried to have sexual intercourse but she initially resisted. Thereafter, the appellant promised to marry her and had sexual intercourse with her as a result she discovered that she was pregnant. So, from the reading of the evidence of the prosecutrix, there appears no iota of evidence that the appellant had used force as has been contended in the first information report, to have sexual intercourse. But it is in evidence, when the appellant gave an assurance or in other words promised to marry the prosecutrix, the prosecutrix allowed the appellant to have sex with her. Further, when the prosecutrix divulged

the factum of pregnancy of four months to the appellant, the appellant had taken her unto his residence accepting her as his wife but left her at their courtyard and fled away. She was subsequently driven out by the parents of the appellant.

12. Mr. B.C. Das, learned senior counsel, in the face of the facts submitted that there was no misconception of fact on the part of the appellant as contended by the State respondent. It is evident on record that the appellant honestly obtained the consent of the prosecutrix in having sex with her. The subsequent conduct of the appellant, according to Shri B.C. Das, learned senior counsel, gives a go by to the second requirement of Section 90 of the Indian Penal Code. There is no evidence in the record to show that the appellant induced the prosecutrix to obtain her consent to have sexual intercourse with him. The prosecutrix being a major lady and in belief of the promise, gave consent for sexual intercourse. Divulgence of the factum of pregnancy by the prosecutrix to the appellant and her taking by the appellant subsequent thereto treating her as his wife unto their residence cumulatively make the position of the case clear and crystal that there was no misconception of fact as urged by the respondent.

13. Learned Additional Public Prosecutor, Shri D. Das, while arguing the appeal gave much stress in respect of subsequent conduct of the appellant. According to the learned Additional Public Prosecutor, appellant's promise was not sane in the true sense of the term; rather he made the promise that he would marry the prosecutrix in near future in order to have sexual intercourse with her. Learned Additional Public Prosecutor, there fore, submitted that no error or illegality had been committed by the learned trial Court in convicting the appellant and sentencing him as above.

14. Mr. B.C. Das, learned senior counsel in support of his argument relied on the decision in the case of Uday v. State of Karnataka reported in : 2003 CriLJ1539 . In Paragraphs 11 and 25 of the judgment, his Lordship, Hon'ble Mr. Justice B.P. Singh held as under:

21. 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. A promise is not a fact within the meaning of the Code. We are inclined to agree with this view, but we must add that there is no strait jacket formula 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 tests laid down by the Courts provide at best guidance to the judicial mind while considering a question of consent, but the Court 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.

25. There is yet another difficulty which faces the prosecution in this case. In a case of this nature two conditions must be fulfilled for the application of Section 90 IPC. Firstly, it must be shown that the consent was given under a misconception of fact. Secondly, it must be proved that the person who obtained the consent knew, or had reason to believe that the consent was given in consequence of such misconception. We have serious doubts that the promise to marry induced the prosecutrix to consent to having sexual intercourse with the appellant. She knew, as we have observed earlier, that her marriage with the appellant was difficult on account of cast considerations. The proposal was bound to meet with stiff opposition from members of both families. There was therefore a distinct possibility, of which she was clearly conscious, that the marriage may not take place at all despite the promise of the appellant. The question still remains whether even if it were so, the appellant knew, or had reason to believe, that the prosecutrix had consented to having sexual intercourse with him only as a consequence of her belief, based on his promise, that they will get married in due course. There is hardly any evidence to prove this fact. On the contrary the circumstances of the case tend to support the conclusion that the appellant had reason to believe that the consent given by the prosecutrix was the result of their deep love for each other. It is not disputed that they were deeply in love. They meet often, and it does appear that the prosecutrix permitted him liberties, which, if

at all, is permitted only to a person with whom one is in deep love. It is also not without significance that the prosecutrix stealthily went out with the appellant to a lonely place at 12 O'clock in the night. It usually happens in such cases, when two young persons are madly in love, that they promise to each other several times that comes what may, they will get married. As stated by the prosecutrix the appellant also made such a promise on more than one occasion. In such circumstances the promise loses all significance, particularly when they are overcome with emotions and passion and find themselves in situations and circumstances where they, in a weak moment, succumb to the temptation of having sexual relationship. This is what appears to have happened in this case as well, and the prosecutrix willingly consented to having sexual intercourse with the appellant with whom she was deeply in love, not because he promised to marry her, but because she also desired it. In these circumstances it would be very difficult to impute the appellant knowledge that the prosecutrix had consented in consequence of a misconception of fact arising from his promise. In any event, it was not possible for the appellant to know what was in the mind of the prosecutrix when she consented, because there were more reasons than one for her to consent.

15. Shri B.C. Das also relied on the decision in the case between Deelip Singh @ Dilip Kumar v. State of Bihar reported in : AIR 2005 SC203 wherein the provisions of Section 375 and Section 90 of the Indian Penal Code have been dealt with and explained.

On a close scrutiny of the facts and evidence on record, and the law laid down by the Hon'ble Supreme Court, this Court is of the opinion that the prosecutrix gave consent to sexual intercourse to the appellant without any stress of misconception of fact. Her evidence makes it palpably clear that she gave consent to such sexual intercourse believing the promise of the appellant that she would be married soon. There is no evidence on record to show that the appellant obtained consent or had reason to believe that the prosecutrix gave the consent in consequence of false promise or misconception.

16. Having considered the facts and circumstances of the case and the evidence on record, this Court is of humble view that the judgment and order of conviction so rendered by the learned trial Court cannot sustain. Conviction and sentence so awarded are set aside and quashed.

17. In the result, this appeal stands allowed.

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