

Abdul Salam Vs. State of M.P.

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Court : Madhya Pradesh

Decided On : May-20-2006

Reported in : 2007CriLJ4734

Judge : S.K. Pande, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376; Code of Criminal Procedure (CrPC) - Sections 374(2)

Appeal No. : Criminal Appeal No. 703/1991

Appellant : Abdul Salam

Respondent : State of M.P.

Advocate for Def. : Aseem Dixit, Govt. Adv.

Advocate for Pet/Ap. : S.C. Datt, Sr. Adv. and ;Manish Datt, Adv.

Disposition : Appeal allowed

Judgement :

S.K. Pande, J.

1. Sessions Judge, Rewa in S.T. No. 185/89 vide impugned judgment dated 17-7-91 recording conviction of appellant under Section 376 of the IPC sentenced him to undergo R.I. for a period of 5 years. Being aggrieved, appellant has preferred

this appeal under Section 374(2), Cr.PC.

2. Prosecutrix (P.W. 2) per post sent a letter dated 14-4-89 (Ex. P-1) to the Police stating inter alia that while she was working at the residence of Abdullah (P.W. 3) she came in contact with the appellant and remained indulged in sexual intercourse since February, 1988. As a result in the month of November-December she conceived a pregnancy. Appellant developed intimacy on assurance of marriage, however, the pregnancy being disclosed appellant suggested for an abortion. Prosecutrix (P.W. 2) declined to abort and a week before 20-5-89 delivered a female child. On the basis of letter (Ex. P-1) the police on its own recorded FIR (Ex. P-5) on 19-5-89 and sent the prosecutrix (P.W. 2) for medical examination. Dr. Smt. S.B. Nema (P.W. 9) on examination found the prosecutrix (P.W. 2) being habitual of sexual intercourse. Accordingly report (Ex. P-4) was recorded and the prosecutrix (P.W. 2) was referred to ossification test for confirmation of age. Dr. S.K. Pathak (P.W. 7) on the basis of X-ray examination recorded report (Ex. P-3) to the effect that prosecutrix was aged about 18 years. Completing the investigation appellant was charge-sheeted.

Appellant abjured the guilt and contended that Abdullah (P.W. 3) himself is a man of doubtful character. On account of enmity Abdullah (P.W. 3) had instigated the prosecutrix (P.W. 2) to falsely allege that she was conceived as a result of sexual intercourse by the appellant.

The Court below relying upon the statement of prosecutrix (P.W. 2) held that appellant allured her with a promise to marry as such she submitted herself to the act of sexual intercourse. As a result she conceived the pregnancy and on being asked to marry appellant resiled from the promise. On facts and in the circumstance the Court below in S.T. No. 185/89 vide impugned judgment recording conviction of appellant under Section 376 of the IPC sentenced him to undergo RI for the period said above.

3. Prosecutrix P.W. 2 states that she was aged about 15 years at the time when she indulged into sexual relationship with the appellant. Her father Rajjab Khan P.W. 4 has stated herself to be aged about 14 years. However, there is nothing in the statement of (P.W. 1) Kuttan, the mother to state the age of her daughter the

prosecutrix (P.W. 2). Abdullah P.W. 2, Rajjab Khan P.W. 3 in their statements (Exs. D-1 and D-2) before the police have stated that the prosecutrix (P.W. 2) on the date of incident was aged about 17 years.

P.W. 9 Dr. Smt. S.B. Nema has stated that as per physical appearance the age of the prosecutrix (P.W. 2) was 17 years. However, for confirmation of age she was referred to ossification test. P.W. 7 Dr. S.K. Pathak has stated that X-rays of forearm-wrist and iliac crest of the prosecutrix (P.W. 2) have been taken. On the basis of examination of X-rays aforesaid she was found to be aged about 18 years. P.W. 7 Dr. S.K. Pathak has categorically stated that there may be further difference of two years on either side. Taking evidence on record it has been proved that in the month of February, 1988 the prosecutrix was in fact aged about 18 years.

4. Prosecutrix P.W. 2 has stated that while she was working at the residence of Abdullah (P.W. 3) she came in contact with the appellant and developed intimacy. On being assured of marriage she indulged into sexual relationship with the appellant. After about 10 months time as a result of sexual intercourse she conceived the pregnancy. Appellant resiled from the promise to marry her instead suggested to go for an abortion. She declined to do so and sent the letter (Ex. P-1) per post to the police. After some time she delivered a female child. However, she died.

P.W. 1 Kuttan, P.W. 3 Abdullah, P.W. 4 Rajjab Khan have stated that they were apprised by the prosecutrix (P.W. 2) that as a result of continuous sexual intercourse by the appellant she conceived the pregnancy.

P.W. 6 Yusuf Khan has stated that a caste Panchayat was convened where the prosecutrix (P.W. 2) alleged that as a result of sexual intercourse by the appellant she had conceived the pregnancy. P.W. 6 Yusuf Khan has further stated that in the said Panchayat appellant denied the allegation of sexual indulgence with the prosecutrix (P.W. 2). P.W. 9 Dr. S.B. Nema has stated that on examination she found the prosecutrix (P.W. 2) being habitual of sexual intercourse. Report (Ex. P-4) accordingly was recorded.

5. Prosecutrix (P.W. 2) is the only witness to state that as a result of sexual intercourse by the appellant she conceived the pregnancy. The report (Ex. P-1) accordingly was sent by her to the police. Examining the statement of prosecutrix (P.W. 2) vis-a-vis the report (Ex. P-1) it is clear that the prosecutrix (P.W. 2) was aged about 18 years and came in contact with the appellant. She remained indulged in sexual intercourse with the appellant since February, 1988 and conceived pregnancy sometime in the month of November-December, 1998. Prior to 14-4-89 the act of indulgence into sexual intercourse was never disclosed by the prosecutrix (P.W. 2) even to her mother (P.W. 1) Kuttan and father (P.W. 4) Rajjab Khan. She was working at the residence of Abdullah (P.W. 3) as his wife was suffering from high blood pressure. The prosecutrix (P.W. 2) prior to the full term delivery did not disclose the fact of indulgence in sexual intercourse with the appellant to (P.W. 3) Abdullah also. This is suggestive of consent on the part of the prosecutrix (P.W. 2) for the alleged act of sexual intercourse with the appellant.

6. In *Uday v. State of Karnataka* : 2003 CriLJ1539 , it has been held:

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 false promise is not a fact within the meaning of the Code. 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. 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.

7. The Apex Court in *Deelip Singh alias Dilip Kumar v. State of Bihar* : AIR 2005 SC203 , examining the case on 'Consent' of the prosecutrix held as under:

In the instant case, not at the first instance but afterwards the accused obtained consent of victim girl to sexual intercourse on the basis of promise to marry which

was not acted upon. But at the first instance also, she was not subjected to rape against her will. The predominant reason which weighed with her in agreeing for sexual intimacy with the accused was the hope generated in her about the prospect of marriage with the accused. That she came to the decision to have a sexual affair only after being convinced that the accused would marry her, is quite clear from her evidence which is in tune with her earliest version in the First Information Report. There is nothing in her evidence to demonstrate that without any scope for deliberation, she succumbed to the psychological pressure exerted or allurements made by the accused in a week moment. Nor does her evidence indicate that she was incapable of understanding the nature and implications of the act which she consented to. Another statement of significance is that she tried to resist the talk of marriage by telling the accused that marriage was not possible because they belonged to different castes. However, she agreed to marry him after she was raped and under the impression that he would marry, she did not complain to anybody. These statements do indicate that she was fully aware of the moral quality of the act and the inherent risk involved and that she considered the pros and cons of the act. The prospect of the marriage proposal not materializing had also entered her mind. Thus, her own evidence reveals that she took a conscious decision after active application of mind to the things that were happening. Incidentally, the awareness of the prosecutrix that the marriage may not take place at all in view of the caste barrier was an important factor for holding that her participation in the sexual act was voluntary and deliberate. In the aforesaid circumstances, it cannot be said that the accused with the fraudulent intention of inducing her to sexual intercourse, made a false promise to marry. No doubt the accused did hold out the promise to marry her and that was the predominant reason for the victim girl to agree to the sexual intimacy with him. But there is no evidence which gives rise to an inference beyond reasonable doubt that the accused had no intention to marry her at all from the inception and that the promise he made was false to his knowledge. It seems to be a case of breach of promise to marry rather than a case of false promise to marry. On this aspect also, accused cannot be convicted.

8. On facts and in the circumstances it has been proved that the prosecutrix (P.W. 2) aged about 18 years was a consenting party to the alleged act of sexual

intercourse by the appellant. It cannot be said that her consent was obtained by putting in fear of death or of hurt. A consent given by the prosecutrix on a false promise of marriage is not a fact within the meaning of Penal Code, for determining whether the consent given by the prosecutrix was voluntary or under a misconception of fact. Therefore, the Court below erred in recording conviction of appellant under Section 376 of the IPC.

9. Consequently, the appeal is allowed. Setting aside the conviction-sentence passed by the Court below vide impugned judgment in S.T. No. 185/89, the appellant stands acquitted of the charge under Section 376 of the IPC. His bail bonds shall stand cancelled.

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