
(2011) 11 MP CK 0072
In the Madhya Pradesh High Court
Case No : Criminal A. No. 1287 of 2006

Shafat

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 10-11-2011

Acts Referred:

Penal Code, 1860 (IPC) — Section 376, 506B, 90

Citation : (2012) ILR (MP) 201

Hon'ble Judges : Tarun Kumar Kaushal, J

Bench : Single Bench

Judgement

T.K. Kaushal, J.—This appeal has been preferred against judgment dated 03.07.2006 passed by 5th Additional Sessions Judge (FTC) Chhatarpur in S.T. No. 49/2004 convicting the appellant u/s 376 of IPC for committing rape on prosecutrix aged 28 years (PW-6) and sentenced to 7 years R.I. and with fine of Rs. 1,000/- Facts of the case, in short, are that on 23.04.2003 at about 10:00 p.m. that appellant called the prosecutrix in his house for searching showing a match for her Nikah. While appellant was going on motorcycle to leave the prosecutrix at her house back, diverting the route, took her in forest and committed rape on her. The appellant was a Police Constable and posted at Police Station Gulganj District Chhatarpur. The prosecutrix was divorced by her husband 4 years back, after 10 years of marriage.

2. On 24.04.2003 the prosecutrix (PW-6) approached the police next day of the incident along with report in writing. Later on submitted some more such reports. A case was registered on 27.05.2003 against appellant and his brother u/s 376 and 506-B of IPC at Crime No. 01/2003 vide FIR Ex.P-6.

3. On 28.05.2003 vide Ex.P-4 case was registered at Crime No. 0/03 at Police Station Gulganj. On 28.05.2003 prosecutrix was sent for her medical examination. Lady doctor prepared slides her vaginal swab Vide Ex. P-7 is her MLC report and was also sent for recording her statement by Sub Divisional Magistrate Bijawar. Slides of vaginal swab of prosecutrix was sent for FSL Sagar

for chemical examination, Ex.P-13 is FSL report. Appellant was arrested on 11.06.2003 and was sent for his medical examination Ex. P-14 is his MLC report.

4. Completing the investigation, citing 16 witnesses, police Gulganj submitted a charge-sheet against appellant and his brother Illayas u/s 376 and 506-B of IPC in the Court of Judicial Magistrate First Class Bejawar. Case was committed to the Court of Sessions for trial. Trial Court framed charges u/s 376 and 506-B of IPC and on his brother Illayas. Appellant along with his brother Illayas abjured guilt. Defence of the accused persons in the trial was that of false implication.

5. To substantiate the case of prosecution statements of Hardayal Chourasia (PW-1), Bhagwati Yadav (PW-2), Tulsi (PW-3), Raghuveer Prasad (PW-4), Lakhani Lal Yadav, Sainik (PW-5), Prosecutrix (PW-6), Ramesh Kumar, A.S.I. (PW-7), Najim Khan (PW-8), Dr. Nidhi Khare (PW-9), R.D. Singh Kushwaha (PW-10) and Tehjeeb Kazi (PW-11) were recorded. To substantiate the defence of appellant statement of Selagram, Aarakshak (DW-1), Purushotam Das Tiwari, Constable (DW-2) and Anil Tiwari, Head Constable (DW-3) were recorded.

6. Appreciating the aforesaid evidence Trial Court acquitted the appellant and his brother of the charges u/s 506-B of IPC, however, convicted the appellant u/s 376 of IPC and sentenced as above.

7. Challenging the aforesaid findings of conviction and sentence this appeal has been preferred on the grounds that appreciation of evidence is not proper. The FIR has been lodged with a delay of a month without any reasonable explanation. Evidence of prosecutrix is self contradictory and is not corroborated by either medical evidence or by any independent evidence. On the other hand, it is submitted by Government Advocate that evidence of prosecutrix is worthy of credence and has been rightly believed by the Trial Court.

8. According to prosecutrix (PW-6) rape was committed on 23.04.2003 in respect of the incident her previous statements are available on record as follows:-

Sr. No

Date

Ex.

Description

(i)

24.04.03

P-10A

Written typed report addressed to Superintendent of Police Chhatarpur received by police on 02.05.2003. It was not produced along with charge-sheet. In pursuance of order dated 04.02.2005 passed on application of prosecutrix u/s 91 of the Code of Criminal Procedure, it was brought on record in Trial Court.

(ii)

12.05.03

D-3

Affidavit brought on record by appellant during cross examination of the prosecutrix .

(iii)

On or before 26.05.03

D-4

Statement recorded by police during enquiry in respect of affidavit Ex. D-3.

(iv)

27.05.03

P-5

Written report addressed to Superintendent of Police on the basis of which Ex. P-6 FIR was recorded.

(v)

28.05.03

P-4

FIR registered at Police Station Gulganj.

(vi)

28.05.03

D-1

Statement of prosecutrix recorded by SDM Bijawar during investigation.

(vii)

29.05.03

D-2

Police statement of prosecutrix recorded by u/s 146 of the Code of Criminal Procedure .

9. On careful perusal of statements of prosecutrix recorded on 21.06.2004 in Trial Court along with the aforesaid 7 documents of the prosecutrix it has been revealed that the prosecutrix was a divorcee aged 28 years was left by her husband 4 years prior to the incidence. She used to live alone in her house at Gulganj. Appellant was interested in her. Nikah to be settled with some one. They

developed acquaintance for last about a period of one year. Appellant had a background of physical relations with the prosecutrix frequently for last one year. According to the prosecutrix appellant had assured her to have Nikah with her. Rape was committed by the appellant stating that she had become his wife. Since appellant was a Police Constable, the prosecutrix found it difficult to convince the police to take any action against him.

10. In trial the prosecutrix was subjected to a very lengthy cross examination. She had changed many houses to live in Gulganj within a period of 2 years for some or other reasons. Prosecutrix has disowned her previous statement recorded by SDM, Ex. D-1, saying that she had never been a consenting party to physical relationship with the appellant. Initially appellant was helping for her Nikah with some other person. They had been in physical relationship for last about more than one year on regular basis. Later on prosecutrix herself showed undue keen-ness in Nikah with the appellant.

11. Since the case was registered after a period of more than a month hence there remains no significance of medical report and FSL report. These reports do not support the prosecutrix at all. On careful perusal of the whole statement of prosecutrix. It is not clear whether offer of Nikah was made by the appellant first and then committed intercourse or intercourse committed by first and then as a consolation offer of Nikah was made. Considering these facts either way, it is precipitated from the statement that condition of Nikah was introduced later on by the prosecutrix in the relationship. In aforesaid background on the basis of statement of prosecutrix it is difficult to understand that intercourse has been committed under promise of the Nikah by the appellant.

12. Learned counsel for the appellant placed reliance on Pradeep Kumar @ Pradeep Kumar Verma Vs. State of Bihar and Another, r and another and submitted that perception of the prosecutrix that she might have a Nikah with appellant at the time of intercourse will not amount to rape committed by the appellant under promise of the marriage. It has been observed in para 20 and 21:-

20. The first two sentences in the above passage need some explanation. While we reiterate that a promise to marry without anything more will not give rise to misconception of fact within the meaning of Section 90, it needs to be clarified that a representation deliberately made by the accused with a view to elicit the assent of the victim without having the intention or inclination to marry her, will vitiate the consent. If on the facts it is established that at the very inception of the making of promise, the accused did not really entertain the intention of marrying her and the promise to marry held out by him was a mere hoax, the consent ostensibly given by the victim will be of no avail to the accused to exculpate him from the ambit of Section 375 clause second. This is what in fact was stressed by the Division Bench of the Calcutta High Court in the case of Jayanti Rani Panda's case (supra) which was approvingly referred to in Uday's case (supra). The Calcutta High Court rightly qualified the proposition which it

stated earlier by adding the qualification at the end - unless the court can be assured that from the very inception the accused never really intended to marry her. (emphasis supplied). In the next para, the High Court referred to the vintage decision of the Chancery Court which laid down that a misstatement of the intention of the defendant in doing a particular act would tantamount to a misstatement of fact and an action of deceit can be founded on it. This is also the view taken by the Division Bench of the Madras High Court in Jaladu case (vide passage "ed supra). By making the solitary observation that a false promise is not a fact within the meaning of the Code, it cannot be said that this Court has laid down the law differently. The observations following the aforesaid sentence are also equally important. The Court was cautious enough to add a qualification that no strait-jacket formula could be evolved for determining whether the consent was given under a misconception of fact. Reading the judgment in Uday's case as a whole, we do not understand the Court laying down a broad proposition that a promise to marry could never amount to a misconception of fact. That is not, in our understanding, the ratio of the decision. In fact, there was a specific finding in that case that initially the accused's intention to marry cannot be ruled out.

21. These aspects have been elaborately dealt with in Deelip Singh's case (supra). The stage of analyzing the factual materials was yet to be undertaken. But as rightly contended by the appellant if on a bare reading of the FIR, it shows that no offence had been made out for proceeding situation would be different. It would have been proper for the High Court as noted above to deal with the matter elaborately. That apparently has not been done.

13. In view of the totality of facts and circumstances of the case, incident of 23.04.2003 appears not to be an act of rape committed by the appellant on the prosecutrix. Statement of the prosecutrix in this regard does not inspire the confidence. Her previous seven statements at different point of time make the story of prosecution less reliable. Prosecutrix, in present case, is not a witness worthy of credence. No conviction can be based on her such testimony. Conviction of appellant u/s 376 of IPC deserves to be and is hereby set aside.