

HEADING OF JUDGMENT IN SESSION CASE

IN THE COURT OF ADDITIONAL SESSION JUDGE BILASIPARA

Present:- Smti S. Bhuyan, AJS

Additional Session Judge, Bilasipara

Session Case No- 28 of 11

u/s 379/323/34/376 of IPC

STATE

Versus

1. Mozibor Rohman
2. Nuruddin
3. Nur Hassan
4. Ms. Ras Nesha Bibi
5. Mofida Bibi
6. Rasidul Islam

Accused persons.

(Committed by Sri N.S. Deori, then learned SDJM (M), Bilasipara in GR (BLP) case No- 326/08 u/s 376/379/325/34 IPC)

Advocate appeared:-

For the state:-Mr. T. Kr. Bhattacharya, Addl. PP

For the accused:- Mr. J. A. Pradhani

Mr. S. Saha, advocate.

Date of institution of the case :- 12-12-08

Date of commitment :- 30-12-10

Date of Framing charge :- 21-02-2011

Date of prosecution evidence :- 02-08-11,21-12-11,16-08-12,12-09-12,
17-05-13,11-02-15.

Statement of accused recorded on :- 19-06-17.

Date of Argument :- 17-08-17, 21-08-17.

Judgment delivered :- 04-09-17

JUDGMENT

Prosecution Case

1. Prosecution case in brief is that informant of this case had love affair with accused Rasidul Islam for one year and accused with promise to marry her, had sexual intercourse with her and on 06-12-08 at about 05.30 pm accused Rasidul take her to his house to marry her. At that time she taken Rs. 10000/- from her house and when she and accused entered into the house of accused Rasidul Islam, Mozibor Rahman wanted to assault Rasidul seeing this Rasidul run away and other accused Mozibor, Nuruddin, Nur Hussain, Mofida Bibi and Alesa Bibi assaulted her driver out her from there house and taken away her one gold ear ring and chain and cash amount. On bichar was called in the village but other accused did not produce Rasidul in the said bichar.

Investigation

2. Officer-in-charge of Bilasipara police station on receiving the ejahar from informant Tongita Begum registered a police case vide No Bilasipara police case No. 326/08 under Section 376/379/325/34 IPC and ASI Juran Ali was entrusted to conduct the investigation of the case. In course of investigation I/O visited place of occurrence, prepared the sketch map, examined the witnesses, sent the victim

for recording her statement u/s 164 Cr.P.C by magistrate and also sent victim for medical examination and collected medical report and on being transferred he handed over the C.D. to the then OC Bilasipara and later part of the investigation was completed by another I.O. After completion of investigation another IO submitted charge sheet against the accused persons named herein above u/s 376/379/325/34 IPC.

Committal

3. On receipt of the charge sheet, Learned SDJM (M) Bilasipara, took cognizance and after furnishing necessary copies to accused persons committed the case before the Learned. Sessions Judge, Dhubri for trial. This case was initially handed over to Ld. Asst. Sessions Judge, Dhubri and finally this case is made over to this court for trial by Ld. Session Judge Dhubri.

Charge

4. Then Ld. Asst. Session Judge Dhubri after hearing for both sides and perusal of material on record framed charge u/s 379/323/34 IPC against the accused persons Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi and charge u/s 376 against the accused Rasidul Islam and when charges read over and explained to the accused persons they pleaded not guilty and claimed to be tried.

Trial

5. In order to prove the prosecution charges against the accused person, prosecution adduce evidence of all together 7 number of witnesses and exhibited 4 no of documents. PW-1 Tongita Begum, PW-2 Fatema Bibi , PW-3 Md. Tazarat Ali, PW-4 Firoja Bibi, PW-5 Rabiya Bibi, PW-6 Md. Juran Ali, PW-7 Dr. Sashidhar Deka . Ext.1 Ejahar, Ext.2 Statement of victim u/s 164 Cr.P.C,Ext. 3 Sketch map and Ext.4 Medical report . After closure of the prosecution evidence, statement of the accused persons recorded u/s 313 Cr.P.C. Accused plea is denial, however declined to adduced evidence in support of the plea of denial.

6.

POINTS FOR DETERMINATION:-

- i) Whether accused persons Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi on 06-12-08 at about 05-30 pm at Beltary under Bilasipara PS committed theft of Rs. 10,000/- from informant Tongita Begum?
- ii) Whether accused persons Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi in furtherance of common intention on 06-12-08 at about 05.30 pm at Beltary under Bilasipara PS voluntarily caused hurt to Ms. Tongita Begum?
- iii) Whether accused person Rasidul Islam prior to fling of the ejahar at Beltary under Bilasipara PS committed rape on the victim Tongita Begum?

ARGUMENT

7. It has been argued by the Ld. Addl P.P the accused Rasidul Islam with false promise to marriage with victim have sexual intercourse with her which amounted to commission of rape and therefore he is punishable u/s 376 I.P.C. He further submitted that when accused Rasidul take victim to his house other accused persons beating her causing hurt on her body and snatched away gold chain and cash amount of Rs. 10000/- and though two prosecution witness turned hostile but rest of the PW's corroborated the prosecution case and victim was below 18 years at the time of incident is fairly proved and prosecution beyond all reasonable doubt fairly able to prove its charge against the accused persons.

8. Ld. defence counsel made submission that victim is not a minor because in her 164 Cr.P.C statement victim stated her age as 19 years, in FIR form victim age mentioned as 20 years at the time of incident and medical report stated she is below 18 years which means there is two years error in either side and if two years is added then victim is above 18 years and accused entitled benefit of error. He again contented ejahar and evidence of the victim not shown any clause of section 375 I.P.C and victim was willing and consenting party to the sexual act and there

is no recent sign of sexual intercourse as per medical report ext-4 therefore accused Rasidul is not guilty under the penal provision of section 376 I.P.C. He submitted the statement of the victim that she had accompanied accused Rasidul to his house to get marriage with Rs. 10000/- along with ornament not all believable and acceptable piece of evidence. And this is totally false allegation against all the accused. He submitted that victim got married with another person name Kalam after lodging this case against the present accused person, against the consent of her parent which shown that victim was in love with said Kalam and not with accused Rasidul and though accused Rasidul wanted to marry victim and his parents express the same to the victim's father but it is the victim father who refused to give his daughter in marriage with Rasidul. Therefore, ingredient of section 417 I.P.C is also not attracted that accused with false promise to marry victim had sexual intercourse with her. He submitted that there is long delay in filing the ejahar and delay being not explained prosecution case is fatal under the fact and circumstances and quality of the evidence led by the prosecution. He further submitted that one of the IO is not examined, VDP secretary who is material witness was also not examined in whose house victim was stayed and therefore under what circumstances and for what reason she was put in the house of VDP secretary was unfurled. Therefore, prosecution case levelled against the accused person is un-believable and not established beyond all reasonable doubt.

DISCUSSION, DECISION & REASON THEREOFF:-

9. Prosecution charge against the accused Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi u/s 379/323/34 I.P.C and prosecution charge against accused Rasidul Islam is u/s 376 I.P.C. Therefore, let's find out first whether prosecution charge u/s 379/323/34 I.P.C has been established against the other accused persons Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi.

10. PW-1 is the victim informant. Her allegation against aforesaid accused persons is that on 06-12-08 at about 05.30 accused Rasidul Islam taken her to his house to marry her and at that time she taken Rs. 10,000/- from her house. When she entered into the house of Rasidul aforesaid accused Mozibor Rohman,

Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi beaten her and snatched away her gold chain and cash amount of Rs. 10,000/-. She deposed accused Rasidul took her to his house to marry her and when she came to his house Rasidul's mother, father, sister assaulted her and took away ₹s 10000 and one gold chain and thrown her from there house.

11. Victim in her evidence did not utter what injury sustained by her on her body. According to victim villager kept her in some person house and one bichar was held but accused persons did not turn up. With regard to sustaining of injury she is totally silent.

12. PW-2 stated she is the mother of the victim and people told her that accused Rasidul had taken her daughter at his house and Rasidul parents were beating her daughter and her daughter had taken gold ornament and cash amount of ₹ 10000 with her. She deposed for 5-6 days her daughter was in the house of VDP secretary. PW-1 informant did not state that she narrated incident to her mother or father. PW-2 mother of the victim, did not heard any incident from her daughter. She heard incident from other people of the village. From her evidence it is reveal that she did not expressed from whom she heard about the incident. Her evidence pointed she has no first hand and direct personal knowledge about the incident. Her evidence further pointed that she does not have any concrete knowledge when her daughter left the house and what goods she had taken with her. According to her evidence she came to know about accused Rasidul taking her daughter to his house and her daughter carrying cash amount only from other. Therefore, her evidence is purely hearsay evidence. Further her evidence does not bring on record that accused has snatched away or taken away any ornaments or cash amount from her daughter. She only stated in her statement that her daughter only taken ornaments and cash along with her when she went to the house of accused Rasidul with accused Rasidul.

13. PW-3 is the father of victim. His evidence is that on the day of incident he was in the house of Anar and at that time he heard hullah in the house of Rasidul and hear that Rasidul had taken victim (his daughter) to his house. PW-3 was declared hostile by the prosecution. On careful scrutiny of the evidence of PW-3 it is transpired that PW-3 did not uttered a single words against the aforesaid accused persons that they have voluntarily cause any injury on the person of victim

or taken away any gold ornaments or cash amount from the possession of victim. And therefore evidence of PW-3 has no relevancy.

14. PW-4 is also declared hostile by the prosecution. He stated he was not present at his house at the time of incident and he was at Karimganj and later on heard that informant entered into someone house. Thus evidence of PW-4 has no force as his evidence does not bring any material in favour of the prosecution case and against the accused person. **In cross** by prosecution he stated that he did not made any statement before the police. In cross by defence stated accused person not known to her and they are not her relatives.

15. PW-5 is also declared hostile. Evidence of PW5 is that at the time of incident she was present at Fakiragram and after long time she return back to her husband's house and from Firuja she heard that in the house of Tonjita, accused Rasidul used to visit. She also did not stated that aforesaid accused persons assaulted victim or snatched away her ornaments and cash amount.

16. PW-6 is the I/O. His evidence is that he had investigated the case, prepared sketch map, examined the witnesses, sent victim woman to court for recorded her statement u/s 164 Cr.P.C and also sent her for medical examination. Ext- 3 is sketch map. Ext 3(1) his signature. In cross he sated he did not examine the VDP secretary. PW-7 is the doctor. According to him he examined Tongita Begum on 15-02-08 on police requisition and no mark of violence found in her body.

17. As per medical report there was no injury sustained by the victim. Victim in her statement u/s 164 Cr.P.C did not disclose what injury she had sustained on which part of the body. Though she stated that accused person beaten her but she is silent about the type of bodily injury on her body. On scanning of the evidence on record I find that statement of the victim that accused person beaten her and voluntarily caused hurt on her body and taken away cash amount of ₹10000 and her gold chain does not corroborated by other PW's. Even her parents did not corroborate her statement therefore, I find that her evidence does not derive confidence and same is not reliable and acceptable piece of evidence and I am constrained to hold that prosecution miserably failed to bring home charge u/s 323/34 I.P.C. against accused persons Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi.

18. Charge against accused Rasidul Islam that he had commit rape on the victim of this case who is examined as PW1. Section 375 I.P.C define what is rape and section 376 I.P.C is the penal provision of rape.” To fulfill the condition of rape it must be against the will of the victim and without her consent. A person is said to commit rape u/s 375 IPC if the woman is under 18 years of age even if there is consent and when consent obtained under fear of death of her or of hurt is no consent and consent is also no consent when it is given by reason of unsoundness of mind or intoxication and when man knows that woman is not his wife ”

19. Prosecution to establish the charge of section 376 I.P.C against the accused must show that accused had sexual intercourse with the victim and said sexual intercourse is against the will, consent of the victim and she is below 18 years of age. It is settled principle of law that consent obtain by fraud, misrepresentation of fact is not amounted to consent. To find out the consent whether it is free consent and whether obtain under misrepresent of fact is to be seen from the scrutiny of the statement of the victim with other piece of evidence. Further it is the settled principle of law that an accused can be held guilty and convicted based on the sole evidence of victim. But at the same time it is to be seen whether said sole evidence derived confidence and is free from doubt and is sufficient enough to hold the accused guilty. Now let me see whether prosecution able to bring home all the ingredients to constitute an offence of rape against the accused Rasidul fulfill or not and whether evidence of victim is sufficient and derived confidence.

20. Ext1 is the ejahar and Ext 1 is filed by the victim herself. She stated she had love affairs with accused Rasidul for last one year and accused with promise to marry her had sexual intercourse with her on several occasion and on 06-12-08 at about 5.30 pm accused take her to his house to marry her. And when she and accused Rasidul reached the house of accused Rasidul, father of the accused Rasidul i.e accused Mozibor Rahman came to assault Rasidul. To that accused Rasidul run away from there. In the ejahar victim not stated that accused Rasidul had sexual intercourse with her against her will and consent.

21. In her evidence she stated that she had love affair with accused Rasidul and he promise to marry her and had sexual intercourse with her on several times. She stated she objected but he promise to marry her so she did not made any hullah. In cross she stated that she had consented to sexual intercourse with

Rasidul as he promised to marry her. According to the statement of the victim made in the ejahar, accused Rasidul taken her to his house to marry her. Her further cross is that she married to another person and said marriage was perform at Sapatgram at her pehis house and her husband name is Kalam and Kalam stays near the house of her father. Her cross further reveal that her husband had a first wife whose name is Firoza who has no children and at the time of her marriage with Kalam, Firoza was stayed in the house of Kalam but now, Firoza staying at her parent's house. She stated her husband Kalam pronounced *talaq* to Firoza. Her mother PW-2 did not enlighten any fact of commission of rape on her daughter by accused Rasidul. Her father also did not state any fact regarding commission of rape on his daughter by accused Rasidul. PW-2 stated she heard that Rasidul took her daughter to his house and his parents were beating her daughter. Except this fact she did not stated anything against the accused Rasidul. PW-3 who is the father of victim deposed that accused Rasidul used to visit his house and he told Rasidul that he has growing daughter and he should not come to his house and after two month of this father of Rasidul with one Atowar come to his house and told him that Rasidul and victim are in love but he refused to give in marriage. PW-3 did not stated that accused Rasidul committed rape on his daughter.

22. PW-1 in her evidence did not state that she had divulged the incident of rape to her parents. On careful analysis and scanning of the evidence of victim as well as other PWs evidence, it is revealed that she did not whisper any incident of rape on her by the accused on the date of incident or prior to the incident. She even did not state other witnesses that accused with false promise to marry have sexual intercourse with her. Her cross examination reflected when accused had sexual intercourse with her she did not raised any hue and cry and she participated and consented same. She took plea that she participated and consented sexual act with the accused as accused promised to marry her. But same does not shows that said act was against her free consent or against her will. Against will and free consent means forceful sex and consent on misrepresentation of facts. Her ejahar shown that on 06-12-08 accused took her to his house to marry her and when both of them reached accused Rasidul's house the father of the accused Rasidul come forward to beat Rasidul to which he run away. Evidence of her father shown that when father of the accused came to his house and asked his daughter for

Rasidul he refused to give his daughter in marriage with Rasidul. Thus, conjoint reading of statement of PW-1 in her ejahar, in her evidence along with the evidence of her parents PW-2 and PW-3, it is revealed that consent of the victim was not obtained by the accused on misrepresentation of the facts. Her statement made in ejahar and statement of her father pointed accused Rasidul wanted to marry victim but both sides parents did not allowed to solemnize the marriage. PW-1 (victim) evidence shows she raised hue and cry when parents of accused Rasidul thrown away her from their house. Cross examination of victim also revealed that she did not raised any objection on sexual intercourse and she also participated the same voluntarily with free consent and wanted to marry accused Rasidul.

23. Form the careful reading of the evidence of PW-1, victim of the case ingredient to constitute the rape that is against the will and against the consent not coming in favour of the prosecution side fairly. I have also perused her statement recorded u/s 164 Cr.P.C and in her statement u/s 164 Cr.P.C she did not state that accused committed rape on her against her will and consent. She stated accused had sexual intercourse with her and he promised to marry her. Her evidence shown that she did not disclosed the incident of rape even to her mother and her evidence does not derive confidence and her evidence alone is not sufficient and adequate to book accused guilty of commission of rape on her.

24. In the medical report her age is shown age below 18 years. Victim in her statement u/s 164 Cr.P.C stated she was 19 years at the time of incident. Her evidence is that for one year she and accused Rasidul are in love. This again shown she was 18 years at the time of incident. Ejahar was lodged by victim herself. When she lodged ejahar she state her age 20 years before the police. Accordingly in the FIR form police note down her age as 20 years. Victim's parents did not whispered that victim was minor at the time of incident. Medical age based on x-ray report is not conclusive proof of the age of a person and it has two years error in either side. Victim herself stated her age as 19 years on the day of recording her statement u/s 164 Cr.P.C by the Ld. Magistrate. That means she was 18 years of age one year ago. Victim was not below the age of 16 years. From her evidence alone show that at the time of incident victim was not below the age of 18 years. So her consent is a valid consent. Medical report does not shown any sign of recent sexual act. Victim not disclosed any person even to her parents that on 6-12-08 or

prior to it accused Rasidul had committed rape on her. Therefore, in view of the evidence on record in absence of any corroboration from any side, victim evidence alone is not sufficient to hold accused Rasidul guilty u/s 376 I.P.C and I am to hold that prosecution failed to bring home the charge u/s 376 I.P.C against the accused Rasidul beyond all reasonable doubt and he is entitled benefit of doubt.

25. In the result, I come to my judicious finding that prosecution miserably failed to establish the charge u/s 379 IPC and charge u/s 323/34 I.P.C against the accused person Mozibor Rohman, Nuruddin, Nur Hassan, Ms. Ras Nesha Bibi and Mofida Bibi and I hold them not guilty u/s 379 IPC and charge u/s 323/34 I.P.C and they were acquitted under charge of section 379 IPC and charge u/s 323/34 I.P.C and set at liberty. Prosecution failed to establish the charge u/s 376 I.P.C against the accused Rasidul beyond all reasonable doubt and I hold him not guilty u/s 376 I.P.C and he is acquitted from the charge of section 376 I.P.C and is set at liberty.

26. Bail bond of accused persons will remain stands for next six (6) months u/s 437(A) Cr.P.C.

27. Send back the GR case record with case diary to the learned committal Court with a copy of the judgment.

28. Given under hand and seal of this Court on this 4th day of September 2017 at Bilasipara.

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara

Dictated and Corrected by me,

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara

Typed by,

Swmkhwr Brahma, Stenographer.

APPENDIX

PROSECUTION WITNESS:-

PW-1 Victim/informant,

PW-2 Fatema Bibi,

PW-3 Md. Tazarat Ali,

PW-4 Firoja Bibi,

PW-5 Rabiya Bibi,

PW-6 Md. Juran Ali and

PW-7 Dr. Sashidhar Deka.

PROSECUTION EXHIBIT:-

Ext.1 Ejahar,

Ext.2 Statement of victim u/s 164 Cr.P.C,

Ext. 3 Sketch map and

Ext.4 Medical report

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITES :- NIL

COURT EXHIBITES :- NIL

COURT WITNESS :- NIL

(Smti S. Bhuyan)

Addl. Session Judge, Bilasipara