

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE No.2
SONITPUR :: TEZPUR

Sessions Case No. 16 of 2009

Under section 417/313 I.P.C

(Arising out of G.R. Case No. 503/05)

State of Assam

-Vs-

Sri Nimai Mandal

..... Accused.

PRESENT

MS. A. AJITSARIA, AJS,
Addl Sessions Judge No.2, Sonitpur, Tezpur

Date of Evidence : 16.5.2009, 20.10.2009, 20.11.2009,
4.1.2010, 5.1.2011, 23.4.2012
Date of Hearing : 28.4.2014, 19.5.2014
Date of Judgment : 19.5.2014

For the State : Sri Khemraj Adhikary, Addl Public Prosecutor.

For the accused : Sri Shrilal Gupta, Advocate.

J U D G M E N T

1. The prosecution case in brief is that on 10.1.2005, Smt Adari Sarkar, filed a complaint in the Court of the Learned Chief Judicial Magistrate, Sonitpur, Tezpur and the same being forwarded was treated as FIR, on the basis of which Rangapara P.S Case No. 75/05 under section 417/493/315/420 IPC was registered. It was alleged in the said complaint that on 10.3.2004, Nemai Mandal (the accused) made her to elope with him by enticing her in various ways. Thereafter in a meeting held in the village, the accused admitted to the same and it was decided that they would be given into marriage in the month of "Magh" next. After elopement, the accused kept the complainant in a rented house and when she became pregnant, the accused had the fetus aborted, under

threat. It was further stated in the complaint that one Smt Milani Ghose, wife of Sri Manoranjan Ghose helped the accused in carrying out the abortion. The complainant stated that after living with her for ten months, the accused suddenly went away. Since the accused did not return, the complainant went to the house of her in laws, but was not accommodated and having no alternative, she took shelter in her father's house. The complainant further stated that at the time of filing of the complaint, she was running three months pregnant and that she was facing immense difficulties.

After due investigation, charge-sheet was submitted against the accused Sri Nimai Mandal, Sri Khagen Mandal and Smt Puspa Rani Mandal under 493/420/34 IPC.

2. The accused entered appearance and after observing necessary formalities, the offence being u/s 313 IPC, the case was committed to the Court of Sessions for trial by the Ld Judicial Magistrate First Class, Sonitpur, Tezpur.

3. After hearing both sides, and on perusal of the police report furnished u/s 173 of the Cr.P.C., Sri Khagen Mandal and Smt Puspa Rani Mandal (parents of the accused) were discharged u/s 227 CrPC by order dated 13.3.2009. Formal charge u/s 417/313 IPC was framed, read over and explained to the accused, Sri Nimai Mandal to which he pleaded not guilty and claimed to be tried. Hence, this trial.

4. In support of its case, prosecution examined 7 (seven) witnesses and defence examined none. The plea of defence is of total denial.

5. After closure of the prosecution evidence, the accused was examined u/s 313 of the Cr.P.C. wherein he denied the accusation leveled against him. The accused stated that the complainant had voluntarily eloped with him and it was the

complainant who deserted the accused. The accused totally denied about having the foetus of the complainant aborted.

6. I have carefully examined the evidence on record and heard arguments of both sides.

POINTS FOR DETERMINATION

(i) Whether the accused intentionally deceived the complainant in believing that he would marry her and induced her to have sexual intercourse ?

(ii) Whether the accused, voluntarily caused miscarriage of the complainant, without her consent ?

DECISION AND REASONS THEREOF

7. PW 1/Smt Malati Devi deposed that the accused and the complainant (Adari Sarkar) lived as tenants in her house in the year 2000. She stated that the accused was a carpenter and the complainant had one day, readied the clothes and bag of the accused, after which he left to work in Arunachal Pradesh. Thereafter the complainant left for her mother's house. PW 1 further stated that as her rent was due, she did not allow the complainant to take the utensils with her while she was leaving.

In his cross examination, PW 1 stated that both the accused and the complainant had lived peacefully and that she had not seen any quarrel between them.

8. PW 2/Smt Adari Mandal is the complainant. PW 2 deposed that the accused was her husband. She stated that the incident took place about 5 years back when she eloped with the accused, as she had an affair with him. She stated since the past five years the accused had not even enquired about her and was staying in

the house of her parents and that she was surviving by working as a daily wage earner. PW 2 stated that she begot a girl child (from the accused), who was more than 4 years of age. She further stated that before the birth of this child, the accused had made her abort a foetus and she filed the complaint after miscarriage of her first child vide Ext 1. PW 2 proved her statement u/s 164 IPC as Exbt 2.

In cross-examination, PW 2 stated that after marriage, she lived with the accused as husband and wife. She stated that her abortion was carried out at Jilmil near Kanaklata Civil Hospital and that she did not remember the date or year in which her abortion was carried out. She admitted that in her complaint petition Ext 1, she had not mentioned that her abortion was carried out at Jilmil. She stated that a maternal aunt of the accused had accompanied her for the abortion and that she did not know her name. However she admitted that the said aunt was still alive. She admitted that the maintenance case filed by her was dismissed as she had not appeared for adducing her evidence and that in her maintenance petition, she had not written about the alleged abortion. In the cross examination, she admitted that in her statement u/s 164 CrPC, Ext 3, she had not stated that her abortion was carried out at Jilmil. She admitted that, in her statement before police, she had stated that she would not be able to locate the hospital where her abortion was carried out. PW 2 stated that the mid-wife who had given her medicine for abortion was known as Kajali and that she was still alive.

9. PW 3 / Sri Raj Kumar Sarkar, father of Adari Sarkar deposed that her daughter had eloped with the accused about 5 years back, after which both of them lived together as husband and wife in a rented house. PW 3 further stated that when her daughter was 3 ½ months into pregnancy, the accused got aborted the foetus and even after that both continued to live as husband and

wife. Later, her daughter gave birth to a girl child who was 4 years 3 months of age and that presently (at the time of his deposition), Adari and the girl child were staying in PW 3's house.

In cross examination, PW 3 stated that her daughter was made to consume medicine given by an old lady of Kachubeel, which resulted in her daughter's abortion. PW 3 stated that he came to know about the abortion from the maternal aunt of the accused. He denied the suggestion put forward by the defence to the effect that they had lodged a false complaint since the accused was not maintaining his daughter.

10. PW 4, Pranjit Mandal deposed that the accused, along with Adari had lived for about one year in the rented house of KPR at Dighaligaon. Later, leaving Adari in the house, the accused went somewhere in connection with work and that Adari now lived with her parents and had a 3 year old daughter.

In his cross examination he stated that during their stay in the house of KPR, both, the accused and Adari lived as husband and wife.

11. PW 5, Prafulla Das deposed that one day she came to know that Adari had eloped with the accused, with whom she was having an affair. In cross examination she declined having any knowledge as to whether after eloping, the accused and Adari lived together as husband and wife.

12. PW 6, Smt F Sultana, JMFC, Sonitpur , Tezpur proved the statement recorded by her on 19.9.08 u/s 164 CrPC.

13. PW 7, Sri Mahendra Nath Borah, S.I. of Police at the relevant time, stated that on 23.7.2008 while he was working an attached officer at Rangapara PS he was entrusted with the investigation of the case. PW 7 stated that he did not get the

complainant/victim medically examined, however she was produced for recording of statement by the Ld Magistrate. He visited the place of occurrence, recorded the statement of witnesses, drew the sketch map. After completion of investigation, he finally, submitted the charge-sheet vide Ext.4. In his cross examination he admitted that before him, many other police personnel had been endorsed with the investigation but no progress was made. He stated that the incident was of 10.3.2004, Rangapara PS had received the FIR on 27.3.05 and on the same day the case was registered.

14. Ingredients for conviction under section 417 IPC, has been elaborately dealt with by the Hon'ble Gauhati High Court in **Bipul Medhi vs State of Assam reported in 2006 (3) GLT 585**, wherein the Hon'ble Division Bench has observed that *"...when a woman is induced to part with her chastity or virginity, which is the most valued possession of hers, the person, who so induces the woman by making false representation, would be liable for punishment under Section 417 IPC, if the victim's having sexual intercourse, with such a person, causes or is likely to cause harm to her body, mind or reputation, for, in such a case, unless so deceived, the victim would not have permitted sexual act by the accused. To put it differently had such a victim not been deceived, she would not have permitted sexual act or would have refrained from allowing such sexual act and, clearly in such a case, but for her permitting such sexual act, she would not have suffered harm to her body, mind or reputation.*

15. In the instant case, PW 1, PW 3 and PW 5, have in unison stated that PW 2 eloped with the accused. PW 2 herself has deposed that she since she was having an affair with the accused, she eloped with the accused and they lived together as husband as wife. None of the prosecution witnesses have stated that PW 2 eloped because the accused had made a false promise of marrying her and induced her into elopement. Under such circumstances, it cannot be said that the accused committed fraud on the PW 2 or

that he deceived her. Again, none of the witnesses, not even the complainant/victim/PW 2 has stated that the accused forced her to indulge in sexual intercourse without her consent. On the contrary, PW 2 stated that both of them lived as husband and wife and later, the accused deserted her. Thus in the absence of the basic elements of the offence u/s 415 IPC and as laid down by the Hon'ble Gauhati High Court in Bipul Medhi (Supra), this Court is of the considered opinion that the prosecution has failed to prove that the accused committed an offence u/s 417 IPC.

16. Coming to the offence u/s 313 IPC, the complainant (PW 2) and her father (PW 5) have deposed in this regard. While PW2 deposed that the accused had her aborted in Jilmil near K.C.Hospital, Tezpur, PW 5 stated that PW 2 was made to consume medicine given by one old lady from Kachubeel, which had resulted in her abortion. In cross examination, PW 2 admitted that in the petition for maintenance she had not mentioned about any such abortion. Moreover, a perusal of her statement u/s 164 (Ext 2) shows that she had stated thus before the Ld Magistrate *"..meanwhile because of copulations with husband, I became pregnant, then my husband stressed me to go for abortion. When I refused to go for abortion, he beat me up and committed excesses on me and taking recourse to .., had my feotus aborted with the help of villager."* In her cross examination, she admitted that she did not state before the Ld Magistrate that she had undergone abortion at Jilmil. Though PW 2 stated that she had informed the landlady about her abortion, PW 1 however deposed that the relation between the accused and PW 2 was good . PW 1 has said nothing about PW 2's abortion. Moreover, there is no medical report of the victim to show that she, in fact, had undergone abortion. None, who has allegedly caused her abortion, have been examined. The I/O specifically stated that no arrangement was made to get PW 2 medically examined. Hence, there is no proof on record to establish that PW 2 actually underwent abortion. Moreover, from the evidence of PW 1, it is apparent that she

allowed the accused to have sexual intercourse with her even after the alleged abortion.

17. In order to attract Section 313 IPC, it is to be established that the pregnancy was terminated without the consent of the prosecutrix. In the instant case, though PW 2 has stated that her abortion was carried out against her will, but in absence of any proof of the factum of abortion itself, mere statement of PW 2 cannot serve the cause of the prosecution. No doubt in appropriate cases where the version of the prosecutrix is believable and the Court finds her to be trustworthy, conviction can be based on such version. In the instant case however, as discussed herein before, with material contradictions like the place and mode of abortion which strikes at the root of the issue, the prosecutrix/PW 2 cannot be held to be trustworthy. The prosecution having failed to prove the factum of termination of pregnancy per se, the question of delving upon the issue of consent or no consent would be of no consequence.

18. In view of the discussion herein before, it can be safely concluded that the prosecution has failed to bring home the charges against the accused.

19. In the result, I hold that accused, Nimai Mandal is not guilty of the offences charged with or any other minor offence and, as such, he is acquitted of the charges u/s 417/313 IPC and set at liberty.

20. Bail bond executed by the accused and surety are extended for next six months as per the provision of section 437A Cr.P.C.

21. Considering the facts of the instant case, this matter is not referred to District Legal Services Authority for granting compensation u/s 357A Cr.P.C.

22. Send a copy of the order to Learned District Magistrate, Sonitpur u/s 365 Cr.P.C.

The judgment is signed, sealed and pronounced in open court, in the presence of both sides, on this the 19th day of May, 2014.

Additional Sessions Judge No. 2,
Sonitpur, Tezpur.

A N N E X U R E

1. Prosecution Witnesses:-

P.W. 1:- Smt Malati Devi

P.W. 2:- Smt Adari Mandal

P.W. 3:- Sri Raj Kumar Sarkar

P.W. 4:- Sri Pranjit Mandal

P.W. 5:- Sri Prafulla Das

P.W. 6 :- Smt F Sultana

P.W. 7:- Sri Mahendra Nath Bora

2. Defence Witnesses:- None

3. Court Witnesses:- None

4. Prosecution Exhibits:-

Exbt. 1:- Complaint petition /FIR

Exbt. 2:- Statement of the complainant u/s 164 CrPC

Exbt. 3 :- Sketch Map

Exbt. 4:- Chargesheet

5. Defence Exhibits:- Nil

Additional Sessions Judge No. 2,
Sonitpur, Tezpur.