

In The Supreme Court of Bangladesh
High Court Division
(Criminal Appellate Jurisdiction)

PRESENT:

MR. JUSTICE MD. SHOHROWARDI

Criminal Appeal No. 2340 of 1998

Abdul Mannan @Md. Abdul Mannan
..... Convict Appellant.

-Versus-

The State

..... Respondent.

Mr. Md. Subrata Shaha, Advocate

.....For the appellant.

Mr. S.M.Golam Mostofa Tara, D.A.G with

Mr. Md. A. Mannan, AAG

... For the State

Heard on 25.07.2023, 26.07.2023 and 03.08.2023

Judgment delivered on 09.08.2023

Md. Shohrowardi, J.

This appeal under section 408(b) of the Code of Criminal Procedure, 1898 is directed against the judgment and order dated 24.09.1998 passed by Assistant Sessions Judge, Second Court, Tangail in Sessions Case No. 64 of 1997 convicting the appellant under section 493 of the Penal Code, 1860 and sentencing him thereunder to suffer rigorous imprisonment for 7(seven) years and to pay a fine of Tk. 5,000, in default, to suffer imprisonment for 6(six) months.

The prosecution case, in short, is that informant Nazma Begum is an unmarried girl aged about 18 years. She used to live in the house of her father situated adjacent to the house of accused Abdul Mannan and her brother was a day labour of the accused

Abdul Mannan. The accused used to visit the house of Nazma Begum and gifted some cosmetics. He also used to give her illegal proposal. After that, Nazma Begum requested him to marry her. In reply, he said that he would marry her at a suitable time. The accused Abdul Mannan put his hand over the hand of Nazma and assured her that he would marry her. Thereafter, they used to live together. As a result, victim Nazma conceived. Consequently, she put pressure upon the accused to marry her. On 29.05.1997 Abdul Mannan took her to Bhuiyapur to marry her. But he took her to the Hospital and under coercion pushed her an injection which resulted her miscarriage and she stayed in the house of Nurse Nurunnahar for one day. After that, a salish took place and in that salish accused Abdul Mannan denied to marry the victim and hence the case.

After the alleged occurrence, the victim Nazma Begum filed Petition Case No. 892 of 1997 on 25.06.1997 in the Cognizance Court, Ga Area, Tangail and the learned Magistrate by order dated 25.06.1997 directed the Officer-in-Charge, Bhuapur Thana to treat the complain petition as FIR, if after investigation, the allegation made in the complaint petition is found true and vide memo dated 25.06.1997 sent the complaint petition to Thana. After that, the officer-in-charge by order dated 04.07.1997 directed the S.I. Monirul Islam to take necessary steps for investigation. During investigation, the investigating officer found prima facie truth of the allegation under sections 493/313 of the Penal Code, 1860 against the accused Abdul Mannan and submitted final report dated

28.8.1997 under sections 393/313 of the Penal Code, 1860 in favour of accused Hamidur Rahaman, Akbari, Nurun Nahar and Shahid Ali and submitted non-FIR prosecution report against the accused Abdul Mannan.

Thereafter, the case was sent to the Sessions Judge, Tangail which was registered as Sessions Case No. 64 of 1997 and the case was transferred to the Assistant Sessions Judge, Second Court, Tangail for trial. During the trial, the charge was framed against the accused under sections 493/313 of the Penal Code, 1860 which was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried in accordance with law. The prosecution examined 6 witnesses to prove the charge against the accused. After examination of the prosecution witnesses, the accused was examined under section 342 of the Code of Criminal Procedure, 1898 and he again pleaded not guilty and declined to adduce any DW.

P.W. 1 Most. Nazma Begum is the victim. She stated that the occurrence took place on 29.05.1997 at about 3 pm. Her younger brother Abbas is a day labour of accused Abdul Mannan and he used to come to the house of the victim. Taking that advantage accused used to give bad proposal but she did not agree. At that time, he said that they are husband and wife and touching the holy Quran in his hand told that from now they would be husband and wife. After that, the accused used to live together with the victim. Consequently, she became pregnant for 03 months. At that time, she had given the

proposal to marry her. On the plea of registration of the Kabinnama, the accused took her to Bhuapur Hospital. At that time, she told him that this is not the office of the Nikah register. In reply, he said that this is the office of Kazi. Subsequently, she was taken to the house of Nurse Nurunnahar and on coercion pushed injection. Thereafter, she becomes senseless. While she regained her sense, she could understand that her miscarriage took place and stitch was given. She and accused Abdul Mannan again stayed in the house of Nurun Nahar at night. Subsequently, the victim was taken to her house and she disclosed the occurrence of miscarriage to her mother. After that, a shalish took place and Abdul Mannan again admitted that he would marry her but he fled away. Subsequently, she went to the Thana. She proved the complaint petition as exhibit-1 and her signature as exhibit-1/ka. During cross-examination, she stated that illegal act was done but she could not say the date of occurrence. She affirmed that Nuru Member, Shafiq, Doraz Master, Basir Munshi, Abul Fakir, Azgar and Shamsher are her neighbours. Mannan and many other people were also present at the Hospital. While she was in Bhuapur Hospital witness Dulal, Khoka, Tota and 4/5 other persons also went there. She disclosed that Doctor Rezaul Karim treated her, but she did not open her clothes and lady Doctor examined her. No shalishnama was written. She also disclosed that before miscarriage she did not go to the doctor.

P.W. 2 Fatema Begum is the mother of the victim. She stated that her daughter stated that her miscarriage took place. There was

illicit relations between Mannan and her daughter. After miscarriage, she went to the doctor who issued the certificate. During cross-examination, she stated that she, Tuta and her younger son went to the doctor.

P.W. 3 Doctor Md. Rezaul Karim stated that on 31.05.1997 at 10 he examined Nazma Begum aged about 19 years in his house in the presence of her brother Anowar and a female attendant. He found the evidence of miscarriage pushing an injection. He proved the certificate as exhibit-2 and his signature as exhibit-2/ka. During cross-examination, he stated that while he was a student, he also studied gynaecology. The patient informed him that about 48 hours ago the injection was pushed in. He denied the suggestion that the victim was not pregnant.

P.W. 4 Khoka Mia stated that the occurrence took place on 15th Jaistha, last year. He heard that accused Mannan had taken the victim Nazma to the Hospital and her miscarriage took place. A shalish was held but no decision was taken in the shalish. During cross-examination, he stated that he heard that Nazma was admitted to Bhuapur Hospital. She was also admitted to Tangail Hospital. He could not say whether his father lodged a case against the accused Abdul Mannan.

P.W. 5 Amjat Ali@ Azahar was tendered.

P.W. 6 S.I. Md. Mominul Islam is the investigating officer. He stated that on 04.07.1997, he was posted at Bhuapur Thana. He took up the investigation of the complaint petition following the

instruction of the O.C. During the investigation, he found the truth of the allegation under sections 493/313 of the Penal Code, 1860 against the accused and submitted non FIR prosecution No. 65 of 1997 dated 28.08.1997 against the accused. During cross-examination, he stated that on 04.07.1997 he took up investigation. He affirmed that Azahar, Fatema and Abul were cited as witnesses in the report but they were not named in the complaint petition. In the complaint petition, it has been stated that the occurrence took place at the house of Nurun Nahar. In the complaint petition names of Tota, Anowar, Nowab Ali, Sahadat and Mokaddes have been mentioned as witnesses but in the prosecution report those persons were not cited as witnesses. In the complaint petition, it has been mentioned that the miscarriage took place at Bhuapur Hospital but no report was found from Bhuapur Hospital. He affirmed that no report from any Hospital was found. He did not record the statement of Doctor Rezaul Karim although along with the complainant petition, a certificate was annexed.

The learned Advocate Mr. Md. Subrata Shaha appearing on behalf of the accused Abdul Mannan submits that the trial court found that the prosecution could not prove the miscarriage of the victim and in the Medical Certificate (exhibit-2) it has been mentioned that there was an incised wound on the leg but the victim P.W. 1 did not say anything as regards the incised wound caused at the time of alleged miscarries. At the time of treatment after miscarriage, the brother of the victim, Anowar was present but the prosecution did not

examine him. He also submits that the alleged occurrence took place on 29.05.1997 and the complaint petition was filed on 25.06.1997 about 28 days after the alleged occurrence without giving any explanation as regards the delay in filing the complaint petition. The prosecution failed to prove the charge against the accused beyond all reasonable doubt.

The learned Assistant Attorney General Mr. Md. A. Mannan appearing on behalf of the state submits that P.W.1 Nazma Begum is the victim and her statement made as regards cohabitation on coercion by the accused and subsequent miscarriage was corroborated by P.W. 3 Dr. Md. Rezaul Karim and the prosecution proved the charge against the accused beyond all reasonable doubt. He prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Md. Subrata Shaha who appeared on behalf of the accused and the learned Assistant Attorney General Mr. Md. A. Mannan who appeared on behalf of the respondent, perused the evidence, impugned judgment and order passed by the trial court and the records.

On perusal of the evidence, it appears that the victim P.W. 1 Nazma Begum stated that she along with her brother Anowar went to the doctor. During cross-examination, she affirmed that the lady doctor examined her for about one hour. P.W. 3 Doctor Rezaul Karim stated that on 31.05.1997 at 10 am, he examined the victim Nazma aged about 19 years in the presence of the female attendant but the prosecution did not examine the lady doctor and female attendant who examined the victim for one hour. P.W. 3 affirmed that he examined the victim in the presence of

her brother Anowar Hossain but said Anowar Hossain was also not examined in the case.

During cross-examination, P.W. 1 stated that Nuru members, Shafiq, Doraz Master, Bashir Munshi, Abul Fakir and Ali Azgor are her neighbours. In the complaint petition, it has been alleged that after the occurrence a shalish took place but no date of the shalish has been mentioned in the complaint petition. The prosecution also did not examine any witness who was present at the shalish and the neighboring people.

In the medical certificate (exhibit-2) it has been mentioned that there is an incised wound about 2"x½" on the right leg at its lower part caused by a simple sharp cutting weapon and the age of injury was about 48 hours but the complainant P.W. 1 did not mention that she sustained any incised wound on her leg. Furthermore, P.W. 1 stated that the lady doctor examined her but the certificate was issued by P.W. 3 Dr. Md. Rezaul Karim. Therefore, there is a doubt as regards the genuinity of the medical, certificate (exhibit-2) issued by P.W. 3 Dr. Md. Rezaul Karim. The prosecution failed to prove the medical certificate of the victim issued from Bhupur Hospital.

The trial Court found that no miscarriage of the victim was proved and the trial court disbelieved the medical certificate (exhibit-2) issued by P.W.3 Dr. Md. Razaul Karim. No other medical certificate of the victim was proved by the prosecution. To prove sexual intercourse or cohabitation, a medical certificate issued by a competent doctor is indispensable. In the absence of any medical certificate from any reliable and competent doctor, it cannot be held that the miscarriage of victim P.W.1 Nazma Begum took place. No explanation has been given by the

prosecution as regards the delay of twenty-five days in filing the complaint case.

In view of the above evidence, observation, findings and proposition, I am of the view that the prosecution failed to prove the charge to the hilt against the accused beyond all reasonable doubt.

I find merit in the appeal.

Accordingly, the appeal is allowed.

The impugned judgment and order passed by the trial court is hereby set aside. The accused is acquitted from the charge levelled against him.

Send down the L.C.R. at once.

(MD. SHOHWARDI, J.)