

CASE NO.:
Appeal (crl.) 293 of 2007

PETITIONER:
Omkar Prasad Verma

RESPONDENT:
State of Madhya Pradesh

DATE OF JUDGMENT: 08/03/2007

BENCH:
S.B. SINHA & MARKANDEY KATJU

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Crl.) No. 5775 of 2006)

S.B. SINHA, J.

Leave granted.

Appellant is a teacher in a government school. Vimala was a student reading in the said school. She alleged that the appellant had sexual intercourse with her on putting her to fear that she would be failed in her classes. In fact, she was studying in class VII for three years. A First Information Report was lodged. She became pregnant. Appellant took her to a hospital at Satna where an abortion took place. In the meantime a missing diary was recorded on 1.02.1997. On 11.02.1997, the prosecutrix herself came back and gave a statement before the Investigating Officer. She alleged that at the relevant time she was only 13= years old.

The said allegations were not found to be correct in the trial. A finding of fact was arrived at by the learned Trial Judge that she was a consenting party. She was found to be more than 18 years of age. On the basis of the said findings, it was categorically held that the accused was not guilty of the offence of commission of rape. The learned Trial Judge, however, was of the opinion that as the school, in question, was a government school, the appellant was a public servant. The prosecutrix was a student, and thus, in that capacity, was in his custody and in that view of the matter he was guilty of commission of an offence under Section 376B of the Indian Penal Code and sentenced him to undergo 2 years R.I. and a fine of Rs. 1000/- in default thereof to undergo sentence of 6 months R.I. An appeal preferred by the appellant herein has been dismissed by reason of the impugned Judgment by the High Court.

The short question which arises for consideration is as to whether in a case of this nature, Section 376B of the Indian Penal Code is attracted or not.

Section 375 of the Indian Penal Code defines rape to mean:-
"Rape. \026 A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:-

First. \026 Against her will.
Secondly. \026 Without her consent

Thirdly. \026 With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly. \026 With her consent, when the man knows

that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly. \026 With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly. \026 With or without her consent, when she is under sixteen years of age."

Section 376 (2) of the Indian Penal Code provides for sentences for different nature of the offences falling in the said category. Section 376(2)(b) provides for sentences against public servant who takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him. Section 376 (2)(b) reads as under:-

"(2) Whoever \026

(a) ***

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) ***

(d) ***

(e) ***

(f) ***

(g) ***

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine"

The ingredients of the said provision are :

- (i) the accused must be a public servant;
- (ii) he must take advantage of his official position;
- (iii) he must induce or seduce any woman;
- (iv) such woman must be in his custody in such capacity or she is in the custody of public servant subordinate to him; and
- (v) he must have sexual intercourse with her which does not amount to the offence of rape.

The Indian Penal Code was amended by Act 43 of 1983 in terms whereof apart from amending Section 376 itself, various sub-sections were inserted, viz., Sections 376A to 376D. All the aforementioned newly inserted provisions were sought to deal with such cases which are not covered by Section 376. They have thus, been inserted to meet a situation which was otherwise not provided for under Section 376. A new offence against the public servant is created under Sections 376(2)(b), 376B and 376C of the Indian Penal Code. Intercourse by a man with his wife during separation and by any member of the management or staff of a hospital with any woman in that hospital would be the offences falling under Sections 376A and 376D of the Code.

A distinction must also be made out between an offence of rape as contained in Section 375 of the Indian Penal Code which is punishable under Section 376 and an offence of sexual intercourse with a woman in the situations specified in the aforementioned provisions. The distinction is that whereas under Section 376 (2), there is no consent at all, under Sections 376B, 376C and 376D, there would be consent on the part of the prosecutrix but such consent has been obtained by taking undue advantage of the position as public servant, Superintendent or Member of the Management. Sections 376A to 376D, *stricto sensu* therefore, do not deal with rape as is understood in its ordinary parlance.

While construing a penal provision, the rule of strict interpretation shall be adhered to.

Consent of a girl, therefore, although would not take the offence outside the purview of Section 376(2), but therefor other ingredients thereof must be found to be existing.

We will assume that the appellant being a teacher of the government school was a public servant. But all the students of the school, only thereby, were not in the custody of the appellant. The expression "custody" implies guardianship. A custody must be a lawful custody. The same may arise within the provisions of the statute or actual custody conferred by reason of an order of a court of law or otherwise.

In P. Ramanatha Aiyar's Advanced Law Lexicon, page 1170, "custody" has been defined to mean:

"Care keeping; charge (as parent or guardian having custody of children and minors); imprisonment; judicial or penal safe keeping (as custody of prisoner); defence from an enemy; preservation (as a fleet stationed for the custody of the narrow seas)."

When these two ingredients are satisfied, the third ingredient, therefore, would be as to whether the public servant has taken advantage of his official position. If a student and a teacher fall in love with each other, the same would not mean that the teacher has taken undue advantage of his official position. Even then, there must be an inducement or seduction by a public servant so far as the woman in his custody is concerned.

Sexual intercourse, therefore, for the purpose of attracting Section 376B of the Indian Penal Code must take place at a place where the woman was in custody. In this case, the prosecutrix categorically admitted that the same did not take place within the precincts of the school but outside the school.

We, therefore, are clearly of the opinion that the ingredients of the offence under Sec. 376B of the Indian Penal Code are not satisfied in the instant case.

For the reasons aforementioned, the appeal is allowed. Appellant is on bail. He is discharged from the bail bond.