

(2022) 11 GAU CK 0039

Gauhati High Court

Case No: Criminal Revision Petition No. 111 OF 2020

Birendra Nath

APPELLANT

Vs

State Of Assam And  
Anr

RESPONDENT

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Date of Decision: Nov. 24, 2022

Acts Referred:

- Indian Penal Code, 1860 - Section 376
- Code Of Criminal Procedure, 1973 - Section 232, 233, 313, 397

Hon'ble Judges: Parthivjyoti Saikia, J

Bench: Single Bench

Advocate: A Chaudhury, N. Mahajan, R.J. Baruah

Final Decision: Disposed Of

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### Judgement

1. Heard Mr. N. Mahajan, learned counsel appearing for the petitioner. Also heard Mr. R.J. Baruah, the learned Addl. Public Prosecutor appearing

for the State respondent(s).

2. This is an application under Section 397 of the Code of Criminal Procedure whereby the impugned judgment and order dated 24.01.2020 passed by

the learned Sessions Judge, Golaghat in Criminal Appeal No.9/2019 is under challenge.

3. The petitioner was convicted under Section 376 of the Indian Penal Code by the learned Assistant Sessions Judge, Golaghat in Sessions Case

No.188/2013. On appeal, the learned Sessions Court upheld the conviction passed by the trial court.

4. The prosecution case in a nutshell is that" the prosecutrix lives in a quarters with her husband who is a policeman. The said quarters consists of

two parts. One part is occupied by the prosecutrix and her husband and the other part is occupied by Bhupendra Chutia who resides with his family.

5. The petitioner is a brother-in-law of the prosecutrix and also is a policeman who resides in a different quarters.

6. On the day of occurrence i.e. on 28.04.2012, the petitioner had dinner in the house of the prosecutrix along with her husband. After dinner, the husband of the prosecutrix went out for night duty. The petitioner also left the house.

7. It was raining at that time. At about 10.30 at night, the petitioner came to the house of the prosecutrix. He forcibly committed rape upon her. She raised hue and cry but none heard her voice. The father-in-law of the prosecutrix also resides with her in a separate room. He also never heard the cries of the prosecutrix. The neighbour Bhupendra Chutia also did not hear any voice of the prosecutrix.

8. The prosecutrix immediately informed her husband and other relatives over mobile phone. Her husband arrived there immediately but by that time, the petitioner had left the house.

9. Next morning, the prosecutrix lodged the FIR before police. On 30.04.2012, prosecutrix was medically examined. The doctor did not find any signs of forcible sexual intercourse upon the person of the prosecutrix.

10. During the trial of the case, the prosecutrix, her husband, Bhupendra Chutia, Rima Bordoloi were examined along with the doctor who examined the prosecutrix and the police investigating were also examined. On the basis of the evidence on record, the trial court convicted the petitioner.

11. I have given my anxious considerations to the submissions made by the learned counsel of both sides.

12. In this case, two specific provisions of the CrPC namely, Section 232 and Section 233 are relevant.

13. The petitioner was examined under Section 313 of the CrPC on 02.11.2015. On that day, the petitioner declined to adduce defence evidence.

14. At this stage, a brief visit to Sections 232 and 233 of the CrPC would be fruitful. These Sections read as under:

Sections 232 -

If, after taking the evidence for the prosecution, examining the accused and hearing the prosecution and the defence on the point, the Judge considers

that there is no evidence that the accused committed the offence, the judge shall record an order of acquittal.

Section 233 of the CrPC

Entering upon defence.

(1) Where the accused is not acquitted under section 232, he shall be called upon to enter on his defence and adduce any evidence he may have in support thereof.

(2) If the accused puts in any written statement, the Judge shall file it with the record.

(3) If the accused applies for the issue of any process for compelling the attendance of any witness or the production of any document or thing, the Judge shall issue such process unless he considers, for reasons to be recorded, that such application should be refused on the ground that it is made for the purpose of vexation or delay or for defeating the ends of justice.

15. Unlike the case triable by a Magistrate, in a sessions triable case, if after recording evidence and after hearing the accused under Section 313 of the CrPC if the trial court finds that the accused is not guilty,

he shall be immediately acquitted. But if the accused is found guilty, then it is mandatory on the part of the trial court to ask the accused to enter

defence. At least, one opportunity to the accused must be afforded to adduce defence evidence even if he declines to adduce defence evidence at the

time of recording his statement under Section 313 CrPC. Whenever an accused is to be convicted by the trial court, the Judge must follow the

provision under Section 233 of the CrPC. That is the reason why in a sessions triable case, the accused should not be asked as to whether he intends

to adduce defence evidence. Because in a sessions triable case, the accused cannot exercise his discretion at the time of recording his statement

under Section 313 CrPC as to whether he would examine defence witness or not. In such a case, it is the duty of the court to ask the accused to

examine defence witnesses as per the mandate of Section 233 of the CrPC.

16. In the case in hand, when the petitioner/accused while being examined under Section 313 CrPC on 2nd November, 2015, he declined to adduce his defence evidence. Therefore, the trial court straightway proceeded to hear the arguments. This is the wrong committed by the trial court. Under the provisions of Sections 233 of the CrPC, it was a mandatory duty of the trial court to afford one opportunity to the petitioner to adduce defence evidence. If on such a fixed date given for adducing defence evidence, the accused does not adduce defence evidence, then the court has the liberty to proceed further to hear the argument and to pass the judgment.

17. This Court is of the opinion that the trial court committed error while convicting the petitioner without giving him an opportunity to adduce defence evidence under Section 233 of the CrPC. Therefore, the impugned judgment is set aside and the trial court judgment passed by the Assistant Sessions Judge, Golaghat in Sessions Case No.188/2013 is also set aside.

18. The case is remanded back to the trial court of the Assistant Sessions Judge, Golaghat to dispose of the case in the light of the aforesaid observations of this Court.

19. The petition allowed. The impugned judgment and order dated 24.01.2020 passed by the learned Sessions Judge, Golaghat in Criminal Appeal No.9/2019 is set aside.

20. The criminal revision petition stands disposed of accordingly.