

(2008) 04 GAU CK 0020

Gauhati High Court

Case No: None

Ajahar Ali

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: April 29, 2008

Acts Referred:

- Penal Code, 1860 (IPC) - Section 341, 354, 376, 447, 448

Citation: (2008) 3 GLT 55

Hon'ble Judges: P.K. Musahary, J

Bench: Single Bench

Final Decision: Allowed

Judgement

P.K. Musahary, J.

This appeal is directed against the judgment and order dated 10.3.2005 passed by the learned Additional Sessions Judge (Ad hoc) Barpeta in Sessions Case No. 50/2004 convicting the accused appellant under Sections 376/448 IPC and sentencing him R.I. for 5 (five) years and a fine of Rs. 1,000/- and in default R.I. for 3 (three) months u/s 376 IPC and R.I. for one month u/s 448 IPC.

2. The prosecution case may be stated in brief thus--

3. One Md. Anowar Hussain filed a complaint case on 20.3.2003 before the learned Chief Judicial Magistrate, Barpeta, alleging that on 16.3.2003 at about 9.00 a.m. accused Md. Ajahar AH @ Ashraf Ali trespassed into his house and committed rape on his wife Musstt. Abeda Khatun. Hearing her cries his sister Johela Khatun came and saw the incident and informed the same to the neighbours. By then, the accused fled the scene and took shelter in the house of one Akash Ali, a co-villager. The father of the accused assured to settle the matter with the help of village headman and due to steps taken towards that end there was a delay in filing the complaint petition. The said complaint petition filed by the victim's husband was forwarded to the O.C., Barpeta Police Station and accordingly a case being Barpeta

P.S. Case No. 137/06 was registered under Sections 447/341/354/376/506 IPC and on completion of investigation the Investigating Officer filed charge-sheet against the accused person under Sections 448/376 IPC. The offence u/s 376 IPC being exclusively triable by the Court of Sessions the same was committed to the Court of learned Sessions Judge, Barpeta by the learned Chief Judicial Magistrate, Barpeta. Accordingly on appearance of the accused before the trial Court charges were framed against him and the same was read over and explained to him to which he pleaded not guilty and claimed to be tried.

4. The prosecution examined in all 8 witnesses including the prosecutrix and the medical officer. The defence examined three witnesses in his defence.

5. Heard Mr. B.C. Das, learned Senior Counsel assisted by Mr. B. Barman for the accused appellant and also heard Mr. B.B. Gogoi, learned Additional Public Prosecutor, Assam.

6. Mr. Das, learned Senior Counsel taking me through the evidence adduced by the prosecution, particularly the evidence of the victim PW 2, Anowar Hussain, PW 1, husband of the prosecutrix and Johela Khatun, PW 3, victim's husband's sister along with the evidence of the Medical Officer, PW 6, submits that the prosecution has miserably failed to establish the case of rape against the accused person beyond reasonable doubt. It has also been submitted by Mr. Das that the evidence of the prosecutrix is not cogent and reliable inasmuch as she has not stated in her evidence that she was raped forcefully against her will. The medical report Ext.-3 does not support the evidence of the prosecutrix. The medical report says that there is no injury mark in her person and the doctor's opinion is very much specific which is quoted below:

In my opinion there is no sign of recent sexual intercourse. Her age is above 16 (sixteen) years and below 18 (eighteen) years.

7. Mr. Das further submits that the trial Court emphasized on the evidence of PW. 3 who claimed herself to be an eye-witness of the occurrence, but her presence at the time of occurrence has been belied by the evidence of PW 1, who categorically stated that Johela Khatun (PW-3) did not see the occurrence.

8. Mr. Gogoi, learned Additional Public Prosecutor supporting the impugned judgment submits that the prosecution has been able to prove the case beyond reasonable doubt as the prosecutrix herself stated in her evidence that she was subjected to "bad act" by the accused person and the learned trial Court rightly relied upon the evidence of the victim.

9. I have given due consideration to the rival submissions of the learned Counsel appearing for the accused appellant and the respondent State. In a case of rape the Court has to give prime importance to the statement of the prosecutrix and the Court has to consider whether the evidence of the prosecutrix is cogent, reliable,

trustworthy and inspiring confidence of the Court.

10. Let us examine now whether the evidence of the prosecutrix is cogent, reliable and trustworthy and confidence inspiring to convict the accused/appellant. The prosecutrix, PW 2, deposed in her evidence that she was alone when the accused person came to her house and caught hold her. Her clear statement is that the accused appellant committed "bad act" on her and she sustained injury on her chest. The accused appellant after commission of the offence left the place and she told her husband and the villagers about the occurrence. In the cross-examination she stated that she raised hue and cry and Johela Khatun, sister of her husband came to her room from the other room and she saw the occurrence. The prosecutrix at no point of time during her examination-in-chief and cross-examination said that she was raped or ravished sexually by the accused appellant. She did not make any categorical statement how the accused appellant committed the rape or ravished on her. There is no statement on her part that when the accused person caught hold her she resisted him. It is not acceptable that when a women is caught hold or attempted to be raped she would not resist such advancement and therefore I find that the evidence of the prosecutrix is far from being trusted and believed and inspiring confidence of the Court.

11. The evidence of PW-3, Johela Khatun, has been based and relied upon for conviction of the accused appellant. It needs a scanning. At the time of deposition this witness was aged about 15 years and 10 years at the time of occurrence. The minor girl of 10 years of age may have hardly any idea about the sexual acts, unless tutored, what is called ravishment on the women. She claimed to have seen the occurrence and saw. the accused removing the cloth of her sister-in-law (Prosecutrix). She deposed that she raised hue and cry to attract the neighbours. In her cross-examination she stated that the accused mounted on her sister-in-law but there is no statement on her part that her sister-in-law (Prosecutrix) resisted the offensive act of the accused person. Further, it is to be noted that the father of this witness (PW-1), clearly stated in his deposition that Johela, (PW3), did not see the occurrence. So, the very presence of this witness has become doubtful and no reliance can be put on her evidence.

12. One of the main ingredients of offence of rape is the penetration of the man genital in vagina of the women. It is the settled law that penetration is sine qua non in the case of rape. Full or even a slightest penetration of the penis in the vagina is a must. The victim herself did not say anything about the penetration. There is no medical evidence in this regard. The medical report rather says that there was no injury mark on her person. According to medical report the age of the prosecutrix is above 16 years and below 18 years. Question of consent would not arise in the case where the prosecutrix is below 16 years of age. Here in this case prosecutrix is above 16 years and she was able to give her consent for sexual act.

13. That apart the delay of 14 days in filing the complaint after the alleged occurrence cast a doubt on the veracity of the allegation made against the accused appellant. The explanation offered by the complainant is not satisfactory in as much as it has been stated that negotiation was initiated to settle the matter at the village level. There is no indication as to what sort of settlement was sought to be made in regard to the aforesaid alleged serious offence. It was required that the matter should have been reported to the Police immediately after the incident looking at the seriousness of the offence but that was not done by the husband of the prosecutrix rather they waited for some settlement.

14. There are catena of judgments rendered by the Apex Court that the accused may be convicted of the offence of commission of rape on the sole evidence of the prosecutrix provided the same is supported by medical evidence. As discussed above, we have already found that the evidence of the prosecutrix has not been found categorical, cogent and reliable besides being supported by the medical evidence. There is a scope for taking other view, on the basis of the evidence on record, that the prosecutrix consented in the sexual act with the accused appellant and it would not attract Section 376 IPC. This being the position the charge of offence u/s 448 IPC would not also attract.

15. Accordingly, I hold that the prosecution did not succeed in proving its case beyond reasonable doubt. Consequently, the impugned judgment and order dated 10.3.2005 convicting the accused and sentencing him is liable to be set aside and accordingly the same is set aside. The accused appellant is entitled to be acquitted on benefit of doubt.

16. It has been stated at the bar that the accused has been in jail from 10.3.2005 and he has been behind the bar for more than 3 (three) years. It is ordered that the accused appellant maybe set at liberty forthwith.

17. The appeal is allowed. L.C.R. may be sent down.