(2008) 02 GAU CK 0072

Gauhati High Court

Case No: None

Ainul Hoque @ Inul Hoque		APPELLANT
	Vs	
State of Assam		RESPONDENT

Date of Decision: Feb. 28, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Penal Code, 1860 (IPC) - Section 354, 375, 376, 511

Citation: (2008) 2 GLT 235

Hon'ble Judges: H.N. Sharma, J

Bench: Single Bench

Judgement

H.N. Sarma, J.
This Criminal Appeal is directed challenging the judgment and order dated 25.1.2002 passed by the Additional Sessions Judge (Ad hoc), Darrang, in Sessions Case No. 48 (D) 2001, convicting and sentencing the accused appellant u/s 376, IPC, to undergo RI for eight years and to pay a fine of Rs. 3,000.00 in default further RI for six months.

I have heard Mr. A.M. Mazumdar, learned senior counsel and Mr. B.S. Singh, learned P.P., Assam.

2. The prosecution case as unfolded, inter alia, is that three and half year old minor daughter of the informant A. Rahman, while was playing outside the compound of his house, she was allured by the accused appellant to his room and committed rape on her and at that stage, the wife of the informant and the mother of the victim girl PW-1, entered the room of the accused in search of her daughter and saw the occurrence and rescued victim girl from the clutches of the accused. The PW-1 informed about the incident to her husband and heir husband PW-2 lodged an FIR before the Burah Out Post on 21.04.97. No action having been taken by the police thereon, he lodged another information to the

Superintendent of Police, Darrang, on 29.4.97. On the basis of the instruction given on the body of the said information by the Superintendent of Police, Darrang to the Officer In-Charge, Sipajhar Police Station to register a case, the Sipajhar PS. Case No. 53/97 u/s 376, IPC, was registered against the accused treating the said information as an FIR.

3 After the investigation, the police submitted a Final Report against the accused on the basis of the medical evidence. But the learned Chief Judicial Magistrate, Mangoldoi, not accepting the same took cognizance of the offence u/s 376, IPC and the case being triable by a Court of Sessions, the learned CJM committed the case to the Sessions Court, Darrang and accordingly, Sessions Case No. 10(D)98 was registered. The learned Sessions Judge, Darrang, upon hearing the learned Counsel for the parties and having found prima facie materials, vide order dated 6.3.98 framed charge u/s 376, IPC against the accused, which was explained to him to which he denied and claimed to be tried.

4. During the course of trial prosecution examined as many as three witnesses including the doctor who caused medical examination of the victim. The Investigating Officer could not be produced before the Court as he was killed by the extremist and vide the order dated 6.10.2001, the learned Sessions Judge, Darrang, after hearing the learned Counsel for the parties recorded exemption of the Investigating Officer, in such situation. After closer of the examination of PWs, the accused was examined u/s 313 Cr.P.C., pointing out the circumstances that appeared against him during the deposition of PWs. The defence adduced no evidence in his support. The learned Sessions Judge upon perusal of the materials available on records and after appreciation of the statements of the witnesses vide the impugned judgment and order dated 25.1.2002, convicted the accused as aforesaid.

5. Mr. Mazumdar, learned senior counsel, submits that on perusal of the statements of witnesses and on proper appreciation thereof, more particularly, statement of PW-3, the doctor, it cannot be said that any case u/s 376, IPC, has been made out or proved against the accused and he has been wrongly convicted by the learned trial Judge. learned Counsel further submits that the prosecution has not been able to prove the basic ingredients of Section 376, IPC in the instant case and the statements of witnesses which are fully contradictory are not safe to be relied on to secure the conviction and accordingly, the impugned conviction and sentences be set aside and quashed.

6. The learned P.P. submits that it is a very rare case of subjecting a minor girl of 3 1/2 years old to such heinous crime of rape by the accused and the statements of the witnesses, particularly, the mother of the victim girl, PW-1, are sufficiently clear to convict the accused appellant. He further submits that the evidence of the doctor, PW-3, is demonstrative of the fact that the overt act committed by the accused appellant justifies his conviction and accordingly, the impugned conviction and sentences requires no interference.

7. I have considered the rival submissions made by the learned Counsel for the parties. The submissions made by the learned Counsel for the parties led me to appreciate/scrutinize the evidence and materials on records in the light of the allegations and the charges framed against the accused.

8. PW-1 is mother of the victim girl who deposed, inter alia, that the victim Nurjahan Begum @ Jimli is her daughter who was about 4 and half years old on the date of deposition. She knows the accused appellant whose house is just in front of her house. On 17.4.97 when she was working in her house at about 12.30 P.M., the accused called her daughter to his house. As her daughter was not returning, she enquired about her and searching for her. When she heard her cry inside the house of the accused, she went inside the house of the accused by opening the door and found that her daughter Nurjahan was lying on the bed undressed and the accused was mounting on her committing bad acts. Her daughter was crying.

9. At that time there was no other person in the house. She released the girl from the clutches of the accused. Her private part (Vagina) was swelling and reddened. She could not urinate. Next day she was taken to the hospital. The father of the accused appellant called a public meeting wherein the accused was fixed with Rs. 1,000.00 for the expenses of the treatment of the victim girl. On being refused by the father of the accused, the girl was provided with the treatment at Mangoldoi Civil Hospital at the expenses of her father. The doctor of the Mangoldoi Civil Hospital injected T.T. injection.

10. In her cross-examination, she stated that at the time of occurrence the victim girl was about three and half years old. PW-1 was extensively cross-examined by the defence but her statement in-chief could not be demolished. A suggestion was given to PW-1 during cross to the effect that the case was filed against accused appellant due to failure to pay the amount of Rs. 1,000.00, which was fixed by the villager for the treatment of the minor victim girl. In a question by the Court, PW-1 stated, inter alia, that the accused was about 17 years old and unmarried. He was reading at school at the time of the occurrence and there was good relationship between them before the incident.

11. PW-2 is Abdul Rahman, the father of the victim girl. In his deposition he stated, inter alia, that sometime. On 17.4.97, the incident took place relating to his daughter and on that day he went to the market place and returned at about 3.00 P.M. in the evening. His wife, P.W. 1, informed him that the accused appellant called her daughter to his house on the pretext of giving tamarind and raped her. Her mother put her back to their house and she stated that illicit act has been done by the accused upon their daughter. The incident took place inside the house of the accused appellant. He further stated that the rape was committed by mounting over the minor girl and the girl was unable to urinate. She was taken to the hospital and she cried. As the hospital was closed on that day, she was taken to the hospital on the next date.

12 On 19.4.97 she was given treatment at Kenduguri State Dispensary and the doctor gave her prescription and medicines and he bought those medicines. A village meeting was convened and the accused was imposed with a fine of Rs. 1,000.00 and he was directed to pay the same and the accused also agreed to pay the fine but on the next day he refused. He lodged the FIR vide Ext. 1 and Ext. (1) is his signature. The police came to their place and took the girl to Bhagalpara Hospital and from there the girl was taken to Patharighat and she was given treatment at Mangoldoi. She was about three and half years old at the time of incident.

13 In cross, this witness stated that Burah Police Out Post is about 6/7 miles away from his house and therefore, he did not go there after the occurrence on the next date also did not informed anybody. On 22.4.97 when he went to Burah Police Out Post for lodging the FIR, police asked about the incident and asked to show the house of the accuse. The village meeting was held on 22.4.97 and a fine was imposed upon the accused appellant by the village.

The vital part of the deposition of PW-2 as given in chief could not be demolished by the defense.

14. PW-3, the doctor, J atindra Bhagawati at the relevant time was serving as SD & HO at Mangoldoi Civil Hospital on 25.4.97. He examined the victim girl and found the following injuries on her person:

1. No sign of recent rape detected.

2. Her age is below 5 years.

3. Her vulva is reddened, swollen and no other mark of violence on her private parts.

He proved the Ext. 2 as his report and Ext. 2(1) is his signature. In cross-examination, PW-3, explained that "recent" means within 24 hours and if the vulva is gripped or any other injuries or dash (dashed) against any substance, (it) may be reddened and swollen.

15. After closer of the prosecution witnesses while the accused was examined u/s 313 CrPC, the defence apart from taking defence of total denial, the accused also stated that there were some dispute regarding the boundary of the land between the families of the complainant and the accused and hence the case was filed against him.

16. From the evidence of the prosecution witnesses as scanned above, it is to be found that the PW-1 is the eye witness to the occurrence. She is very specific about the part played by the accused in commission of the offence. PW-1 is the husband of PW-2 and the father of the minor victim girl who got the information from PW-1 who narrated the story to him. Evidence of PW-1 whose allegation vitally pointed towards the accused could not be demolished by defence. There might be minor contradiction here and there but the same strengthens the, prosecution case and makes it more material.

17 One of the mist (most) vital circumstances that has been proved by the prosecution in the instant case is that the fine imposed upon the accused by the villagers for the commission of the offence. In the statement of PW-1 in cross-examination and the statement of PW-2 it is found that the villagers imposed fine of Rs. 1000.00 upon the accused which related to the act committed by him. The medical evidence of the doctor, P.W.-3, who examined the victim girl did not find any sign of recent rape and he explained that "recent" means within 24 hours. The incident took place on 17.4.97 and the victim was examined on 25.4.97. Due to passage of time, i.e., 8 days, after the occurrence, it may not be possible for the doctor to found (find) out any sign of rape. The evidence of the doctor is very specific to the effect that there was injury upon the vulva of the victim girl. The evidence of PW-1 who is the mother of the minor victim girl and an eye witness is a natural witness to the occurrence and the learned trial Court believed and accepted her statements.

18. Turning to the definition of Section 376, IPC, it is found that in order to succeed in prosecuting an accused u/s 376, IPC, the prosecution must prove that -- (1) the accused had sexual intercourse with the victim girl and that the act was done under the circumstances falling under any of the five descriptions specifically mentioned in Section 375, IPC and (2) that there was penetration going by the aforesaid definitions.

19. On discussion of prosecution witnesses, if (I) find that the prosecution could not prove all the five necessary ingredients of Section 376, IPC. PW-1 is silent regarding penetration and actual act although it is proved beyond all reasonable doubt that the accused undressed the minor girl and mounted over her. Now, let us see as to whether in such a situation it can be said to be an attempt to commit rape attracting Section 511, IPC, which involves the question as to whether it was an attempt to commit rape or criminal assault. The distinction between attempt to commit rape and the criminal assault has been discussed in the case of Rex v. James Lloyd reported in (1836) 7C and P 817 : 173 ER 141, while summing up the charge to the jury, Justice Patterson observed as follows:

In order to find the prisoner guilty of an assault with intent to commit a rape, you must he satisfied that the prisoner, when he laid hold the prosecutrix not only desired to gratify his passions upon her person but that he intended to do so at all events and notwithstanding any resistance on her part.

20. Again in the case of Empress v. Shankar reported in ILR (1881) 5 Bom. 403, the accused was charged for an attempt to commit rape and Justice M. Malyill, J., speaking for the Court observed as follows:

We believe that in this country indecent assaults are often magnified into attempts at rape and even more often into rape itself; and we think that conviction of an attempt at rape ought not to be arrived at unless the Court be satisfied that the conduct of the accused indicated a determination to gratify his passions at all events and in spite of all resistance.

21. Whether a certain act amounts to attempt to commit a particular offence is a question of fact dependent on the nature of the offence and the steps necessary to take in order to commit it. No exhaustive precise definition of what would amount to an attempt to commit an offence is possible. A person commits the offence of attempt to commit a particular offence when (i) he intends to commit that particular offence and (ii) he having made preparations and with the intention to commit the offence, does an act towards its commission of that offence but must be an act during the course of committing that offence. (Ref. Abhayanand Mishra Vs. The State of Bihar,

22. In commission of crime there is first an intention to commit it. Secondly, preparation to commit and thirdly, attempt to commit it. If the third stage, that is, attempt, is successful, then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the person attempting the act.

23. An "attempt" is made punishable, because every "attempt", although it fails of success, must create alarm, which of itself is an injury, and the moral guilt of the offender is the same as if he had succeeded (Ref.: Livingstone"s System of Penalty). The term "attempt" has not been defined in the IPC. An attempt to constitute a crime is an act done with an intent to commit that crime and forming part of a series of acts which would constitute its actual commission if it were not interrupted. An attempt is an act done in part execution of a criminal design, amounting to more than mere preparation, but failing short of actual commission and possessing, except for failure to consummate, all the elements of the substantive crime, combined with the doing of some act adapted to, but filing short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the at accepted (Ref.: R. v. Collins (1964) 9 Gox 497).

24. Tested with the aforesaid principles, the evidence of PWs scanned above, more particularly, PW-1 who is an eye witness to the occurrence, I find it difficult to hold that the evidence available on record justifies for holding the accused guilty for attempting to commit the offence of rape u/s 511, IPC, by taking note of basic ingredients of Section 376, IPC. Situated thus, it is again to be seen whether the proved facts constitute an offence u/s 354, IPC. In dealing with such cases, the Apex Court in the case of State of Punjab Vs. Major Singh, , wherein Justice Mudholkar, J., speaking for the majority of the Court at paragraphs-4 and 13, held that when any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that act will fall within the mischief of Section 354, IPC. Justice Bachawat, J., in his concurrent judgment at paragraph-17 held as follows:

A female of tender age stands on a somewhat different footing, Her body is immature and her sexual powers are dormant. In this case, the victim is a baby seven and half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless, from her very birth she possesses the modesty which is the attribute of her sex. But cases must be rare indeed where the offender can be shown to have acted with

the intention of outraging her modesty. Rarely does a normal man use criminal force to an infant girl for satisfying his lust. I regret to say that we have before us one of such rare cases.

In the instant case, the victim was a minor of three and half years old. The evidence of PW-1 corroborated by PW-2 and the evidence of PW-3 clearly proved that due to act committed by the accused, as disclose by Ext.-2, private part vulva of the minor girl was injured. By taking into consideration all the evidence and materials available on records including the circumstances under which the accused was punished by the villagers imposing fine of Rs. 1,000.00 for commission of the offence, his conviction u/s 376, IPC, is altered as one u/s 354, DPC, the accused is sentenced to undergo RI for 2 years with a fine of Rs. 10,000.00. On realization of fine, the same shall be paid to be victim girl. Accordingly, the appeal stands partly allowed.

The accused appellant is directed to surrender before the learned Sessions Judge, Mangoldoi, to serve out the sentences.

Return the LCRs forthwith.