

Chandan Das Vs. The State of Assam

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Court : Guwahati

Decided On : Mar-04-2014

Judge : C.R. Sarma

Appeal No. : Crl. Appeal No. 134 of 2013

Appellant : Chandan Das

Respondent : The State of Assam

Judgement :

1. This appeal is directed against the judgment and order, dated 30.04.2013, passed by the learned Additional Sessions Judge No. IV, FTC, Kamrup, Guwahati, in Sessions Case No. 114(K)/2012.

2. By the impugned judgment and order aforesaid, the learned Sessions Judge convicted the appellant for the offence under Section 376(1) IPC and sentenced him to suffer RI for eight years and also to pay fine of Rs.5,000/-, in default, suffer RI for three months. Aggrieved by the said conviction and sentence, the convicted person, as appellant, has come up with this appeal.

3. The prosecution case, in brief, as may be required for disposal of this appeal is as follows:

On 01.12.2011, at about 8 A.M., when the victim girl, who was staying in the house of the informant, had gone towards the nearby Panchayat Office for

disposing garbage into a ditch, the appellant, finding her alone, grabbed her and committed rape.

4. The informant, coming to know about the incident from the victim girl, lodged an FIR with the Police. On receipt of the FIR, Police registered a case under Section 376 IPC and launched investigation into the matter.

5. During the course of the investigation, Police visited the place of occurrence, examined the witnesses, arrested the accused person and got the victim examined by a Medical Officer. The victim was also forwarded to the Court for recording her statement under Section 164 Cr.P.C. At the close of the investigation, Police submitted charge-sheet under Section 376 IPC. The case being committed to the Court of Sessions, in due course, the learned Sessions Judge framed charge under Section 376 IPC. The charge was read over and explained to the accused to which he pleaded not guilty.

6. The prosecution examined as many as six witnesses including the Investigating Officer (PW-4) and the Medical Officer (PW-5). At the conclusion of the evidence for the prosecution, the accused person was examined under Section 313 Cr.P.C. He denied the allegations, brought against him.

7. His plea was that there was an outstanding amount of Rs. 6,000/- to be paid to him by the informant, in connection with the work done as mason, in the house of the informant and that, on being asked for payment of the said amount, the informant called him to the Panchayat Office and assaulted him, therein, by falsely alleging that he had committed rape on his said maid servant i.e. the victim girl. However, the accused declined to adduce defence evidence, to substantiate his said plea.

8. Considering the evidence on-record and after hearing both the parties, learned Sessions Judge held the appellant/accused person guilty of the offence under Section 376 (I) IPC and accordingly, convicted and sentenced him, as indicated above. Hence, this appeal.

9. Mr. M A Sheikh, learned Counsel, appearing for the appellant, referring to the evidence given by prosecution witnesses, has submitted that there are major contradictions and discrepancies in the evidence, given by the prosecutrix and the informant. It is also submitted that the evidence, given by the informant, is not consistent with the statement, made in the FIR. It is submitted, on behalf of the appellant, that the informant, due to enmity in connection with the payment of money towards the work done, as a mason, by the appellant, has falsely implicated the applicant with a view to teach him a lesson for asking the payment.

10. The learned Counsel, appearing for the appellant, has submitted that, in the FIR, the informant i.e. PW-1, clearly stated that when he went out from his house in search of the victim girl, who was late in returning home after throwing the garbage, found the victim and the appellant in unusual condition and that, alarm being raised by him, the villagers had apprehended the appellant, but the informant, in his evidence, given as PW-1 stated that he and his wife found the victim coming from the low lying area after throwing garbage and on being asked by his wife, the victim had narrated that she was raped by the appellant. In view of the above, it is submitted by the learned Counsel, appearing for the appellant, that there is major contradiction in the FIR as well as the oral evidence, given by the PW-1 regarding the circumstances in which the victim girl was found. Therefore, it is submitted that, in view of the said contradiction, the prosecution version regarding rape is not believable.

11. It is also submitted that, the victim being a minor girl, absence of any injury in her private parts does not suggest that she was subjected to forceful sexual intercourse.

12. The learned Counsel, appearing for the appellant, has submitted that none of the villagers, who assembled immediately after the occurrence and apprehended the appellant, has been examined to substantiate the prosecution version and that, withholding of such vital witnesses is fatal for the prosecution. In view of the above, the learned Counsel, appearing for the appellant, has submitted that the informant, with a view to teach the appellant a lesson for demanding payment, had falsely concocted the story of rape.

13. The learned Counsel, appearing for the appellant, has submitted that considering entire facts and circumstances of this case, the story of rape, as put forwarded by the prosecution, is not at all believable and as such, the impugned conviction and sentence are liable to be set aside. In support of his contention, the learned Counsel for the appellant has relied on the following decisions:

(1) Huidrom Birjit Singh Vs.- State of Manipur, reported in [1996] 3 GLR 125.

(2) State of Assam Vs.- Kailash Talukdar and Ors., reported in 2012(4) GLT 80.

(3) Rofiqul Islam Vs.- State of Assam, reported in 2011(3) GLT 841.

(4) Anath Giri Vs.- State of Tripura, reported in 2011(3) GLT 589.

14. Refuting the said argument, advanced by the learned Counsel, appearing for the appellant, Mr. B J Dutta, learned Additional Public Prosecutor, Assam, has submitted that, in a rape case, the testimony given by the prosecutrix, if found to be trustworthy and reliable, can be the sole basis for conviction and that, quantity of evidence in such cases is not the determining factor.

15. The learned Additional Public Prosecutor, referring to the evidence, on-record, has submitted that there is sufficient corroboration, in the evidence of the prosecutrix and the PW Nos.-1, 2 and 3, on material point i.e. regarding the rape. It is also submitted that the contradictions or inconsistencies with regard to the averments, made in the FIR, as pointed out by the learned Counsel for the appellant, are not on material points and that, the maker of the FIR i.e. PW-1, not being confronted with the said inconsistency, no adverse inference can be drawn. It is also submitted that, though the victim girl and the PW Nos.-1,2 and 3, were cross-examined, no contradiction, with regard to their evidence regarding rape, could be elicited to negate the prosecution version.

16. In view of the above, the learned Additional Public Prosecutor has submitted that the prosecution could successfully prove, beyond all reasonable doubt, that the victim was raped by the appellant and as such, the learned Sessions Judge committed no error by recording the conviction and the sentence aforesaid.

17. In order to appreciate the argument, advanced by the learned Counsel, appearing for both the parties, I feel it necessary and appropriate to examine the evidence, on-record. In the present case, the FIR has been lodged by the informant, in whose house the victim was living. In the FIR, it has been clearly stated that the victim went out to throw garbage and the appellant committed ill act on her. The informant, who deposed as PW-1, has exhibited the FIR as Exhibit-1. In the FIR, it has been stated that he found the victim and the appellant in unusual condition and that, alarm being raised by him, villagers had assembled there and apprehended the accused person.

18. The informant, in his evidence, given as PW-1, stated that he and his wife (PW-2) found the victim weeping and the victim, on being asked by PW-2 i.e. wife of the informant, had informed that she was gagged and raped by the appellant. This witness further stated that they had apprehended the appellant. Supporting the said evidence of PW-1, his wife Smti Ranu Kumar, (PW-2), stated that she and her husband went out in search of the victim and they found the victim trembling and on being asked, she told that she was raped by the appellant. This witness further stated that the appellant was also found there and that he was apprehended, on being identified by the victim. Though PW Nos.-1 and 2 were cross examined, no contradiction on material point could be elicited to negate their said evidence regarding rape of victim girl.

19. PW-1, who lodged the FIR has not been confronted with the alleged inconsistencies appearing in the said FIR. Law is well settled that the FIR is not a substantive piece of evidence and the same can be used only to confront its maker with the inconsistency. Unless the informant is confronted with the inconsistency, noticed in the FIR, no adverse inference can be drawn in respect of oral evidence given by the informant and other witnesses. Therefore, I find no sufficient material to disbelieve the oral evidence given by PW-1.

20. From the evidence of PW-2, it appears that only half of a minute was required to walk to the place, where the victim was found. This indicates that the place of occurrence was adjacent to the house of the informant. However, none of the said two witnesses including PW-3 saw the alleged incident. They came to know about

the incident from the victim, on being disclosed by her. But from their evidence, it has been established that they found the victim in unusual condition in the place of occurrence. Therefore, from the evidence of PW-1 and PW-2, the circumstances that the victim had gone towards the Panchayat Office for disposing garbage, that she was late in returning home, that she and the accused were found in unusual condition and that the victim had disclosed that she was raped, have been established.

21. The victim girl, deposing as CW-1, stated that when she had gone to the place of occurrence for disposing garbage, the appellant had grabbed and laid her on the ground. She clearly stated that the appellant, after removing her pant, also put off his own pant and committed bad work in her vagina. In her cross examination, she stated that when the accused had committed bad work, she did not feel pain and that there was no bleeding. Except using the term bad work, the victim did not state that the accused had inserted anything or his penis into her vagina. The term bad work is a vague one. The said bald statement does not indicate sexual intercourse i.e. penetration by the penis into the vagina. Considering the age of the victim, absence of any marks of violence also raises doubt about the probability of penetration by the penis of a full grown person.

22. As the occurrence took place on 01.12.2011 i.e. prior to the amendment of Section 375 IPC (amendment w.e.f. 03.02.2013), in the present, the definition provided by Section 375 IPC, prior to the said amendment, will be applicable. As provided by Section 375 IPC (as it then was), in order to constitute an offence under Section 375 IPC, sexual intercourse must take place, under the circumstances falling under any of the following six descriptions:-

First. - Against her will.

Secondly.- Without her consent.

Thirdly.- 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.- 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.- 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.- With or without her consent, when she is under sixteen years of age. The explanation to the said provision indicates that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. The sine quo non of the offence of rape is penetration. The penetration must be into the private parts of the victim. Carefully perusing the evidence of the victim girl (CW-1), I find that she did not state that there was penetration into her private parts i.e. vagina. Except using the term bad work she did not state as to what bad act was done in respect of her private parts. The term bad work does not conclusively lead to hold that sexual intercourse had taken place. Therefore, the evidence, given by the victim (CW-1) does not inspire confidence to believe that the appellant had committed offence of rape.

23. As held in the case of Huidrom Birjit Singh (supra), graver the crime, greater should be the standard of proof. The quality of evidence, in the case at hand, does not exclusively lead to the conclusion that the appellant had committed rape on the said minor. It is doubtful if the appellant had committed rape. Law is well settled that if two views are possible, on the evidence adduced in a case, the view, which is favourable to the accused should be accepted. That apart, she being a minor, as revealed from the medical evidence, given by PW No. 5, absence of any mark of violence either on her body or in her private parts raises doubt regarding forceful sexual assault. The facts and circumstances of this case and the evidence, given by the victim (CW-1) do not inspire confidence to believe that the appellant had committed the offence of rape.

24. Though the learned Counsel for the appellant has relied on the decisions held in the cases of Rofiquil Islam (supra) and Anath Giri (supra), I am of the considered

opinion that the facts and circumstances of the said cases and the present case being different, the principles laid down in the said cases will not be applicable to this case. In the case of Anath Giri (supra), the victim herself lodged the FIR and contradicted her own statement, made in the FIR. In the FIR, she stated that at the time of occurrence she was studying, while in her evidence, she stated that she was sleeping. In view of the said major contradiction, Court refused to believe her version. But in the present case, the FIR was lodged by the PW-2. That apart, there is no major contradiction creating doubt about her evidence regarding disrobing and doing bad work. In the case of Rafiqul Islam (supra), the question involved were recording of confessional statement and examination of the accused under Section 313 Cr.P.C. The decision given in the said case is not relevant for decision in the present case.

25. The victim (CW-1), in her evidence, has clearly stated that the appellant laid her on the ground, removed her pant and his own pant also. This evidence, given by CW-1 remained undemolished. No contradiction in respect of her said evidence could be proved. Rather, her said evidence stood corroborated by the evidence given by PW Nos. 1 and 2, who stated that they found the victim returning from the place of disposing the garbage and they were reported by her that she was raped by the accused.

26. The learned Counsel, appearing for the appellant, has submitted that the victim, in her cross-examination, stated that she had narrated about the occurrence to PW-2 at her house, but from the evidence of PW Nos.-1 and 2, it appears that the victim had disclosed about the incident at the place, where she was found by the said two witnesses.

27. From the evidence of PW-2, it appears that the place of occurrence was adjacent to the house of the PW Nos. -1 and 2. As revealed from the evidence of PW-2, it appears that they were required to walk half of a minute, from their house, to the place of occurrence. Therefore, considering the proximity of the place of occurrence from the house of the informant, in my considered opinion, the said statement made by the victim girl can not be treated as a major contradiction so as to discredit her evidence. That apart, considering the nature of the alleged offence

and the age of the victim girl, such minor contradiction can not be treated as sufficient ground to disbelieve her forceful evidence.

28. Supporting the evidence of CW-1 and PW Nos.-1 and 2, Sri Hemanta Kumar, an independent witness, deposed as PW-3, stated that the victim, in his presence, told PW-2 that she was raped by the appellant. He also stated that the victim was weeping at that time and that the appellant was apprehended and handed over to the Police. This witness was also cross-examined by the defence and no contradiction could be brought out to render his evidence disbelievable.

29. The Investigating Officer has been examined as PW-4. Not a single contradiction in respect of the evidence given by the prosecution witnesses has been proved through the I.O. In view of absence of any contradiction or inconsistency in the evidence, given by the said witnesses, I find no reason to disbelieve their forceful evidence, regarding the said incident.

30. The defence took the plea that the appellant was falsely implicated for asking payment in connection with the work done by him. According to the appellant, he worked as an assistant of Sri Basanta Das, who was engaged as a mason for constructing a toilet in the house of the informant and that the informant was required to pay Rs.6,000/- to the appellant.

The suggestions, put to the PW Nos.-1 and 2, with regard to the said plea has been denied by the said witnesses. The defence has not adduced any evidence to substantiate the plea that there was any outstanding amount. The accused, who took the said plea of working as an assistant to Sri Basanta Das, could have examined Sri Basanta Das to establish his claim. A mere plea taken by the accused person, during his examination under Section 313 Cr.P.C., can not be treated as evidence, unless the same is substantiated by legal evidence. Therefore, for want of any evidence, the said defence version can not be accepted to negate the prosecution story.

31. From the above discussed evidence, it is found that the prosecution failed to prove that the accused committed sexual intercourse, as defined by Section 375 IPC. Therefore, the conviction and sentence under Section 376(1) IPC are not

maintainable. It has been sufficiently established that the appellant had removed the pant of the victim and laid her on the ground by applying force with criminal intent. The above act, done by the appellant constituted the offence under Section 354 IPC (as it was then). Therefore, it is found to be proved, beyond all reasonable doubt, that the appellant committed the offence under Section 354 IPC. Accordingly, the conviction under Section 376(I) IPC is modified to one under Section 354 IPC. The act of disrobing a woman, that too forcefully removing the pant (underwear), by applying force, amounts to severe form of outraging the modesty of woman. Therefore, the accused is liable to suffer the penalty of imprisonment, as provided by Section 354 IPC. Accordingly, while modifying the impugned sentence under Section 376 (I) IPC, the appellant/accused is sentenced to suffer rigorous imprisonment for one year and pay fine of Rs.5,000/- (Rupees five thousand) , in default, suffer imprisonment for another period of 3 (three) months. The period of detention, already undergone by the accused, shall be treated as set off. The fine amount, if realised, shall be paid to the victim as compensation. No interference is made in respect of the compensation under Section 357(A) Cr.P.C.

32. As the appellant is on bail, he shall surrender before the learned Additional Sessions Judge No. IV, Kamrup, Guwahati within one month from this date for serving out the remaining part of the sentence. His bail bond shall stand discharged immediately after expiry of one month from this date.

33. Return the LCR.

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