

AllaudIn Vs. State of Assam

AllaudIn Vs. State of Assam

SooperKanoon Citation : sooperkanoon.com/122177

Court : Guwahati

Decided On : Feb-05-2003

Judge : I.A. Ansari, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 164; Indian Penal Code (IPC) - Sections 376

Appeal No. : Criminal Revision No. 119/1993

Appellant : Allaudin

Respondent : State of Assam

Advocate for Def. : None

Advocate for Pet/Ap. : A.B. Choudhury and M. Hazarika, Advs.

Prior history : I.A. Ansari, J. 1. 1. This revision is directed against the judgment and order, dated 14.12.1992, passed by the learned Sessions Judge, Barpeta, in Criminal Appeal No. 4(B-2)/1992, upholding the judgment and order, dated 1.3.1992, passed by the learned Assistant Sessions Judge, Barpeta, in Sessions Case No. 74(B)/1990, convicting the accused/petitioner under Section 376 IPC and sentencing him to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs. 1000 and in default, to s

Judgement :

I.A. Ansari, J.

1. 1. This revision is directed against the judgment and order, dated 14.12.1992, passed by the learned Sessions Judge, Barpeta, in Criminal Appeal No. 4(B-2)/1992, upholding the judgment and order, dated 1.3.1992, passed by the learned Assistant Sessions Judge, Barpeta, in Sessions Case No. 74(B)/1990, convicting the accused/petitioner under Section 376 IPC and sentencing him to undergo Rigorous Imprisonment for one year and also to pay a fine of Rs. 1000 and in default, to suffer further Rigorous Imprisonment for 3 months.

2. The case against the accused/petitioner, as unfolded in the trial, may, in brief, be stated as follows :

On 23.9.1989 at about 9.00 p.m., when the complainant, Ali Akbar, was away from his house, the accused/petitioner, namely, Allauddin, with his three brothers, namely, Jallaluddin, Antu Mia and Rahamat Ali entered into the house of the complainant and forcibly took away complainant's daughter, Sakurjan Nessa, despite resistance offered by her mother, Hasna Khatun. The accused/petitioner also took away with him some clothes and ornaments from the house of the complainant. When the complainant returned home, his wife reported the occurrence, whereupon the, complainant searched for his daughter in the village, but, on failing to trace her whereabouts, lodged a complaint in the Court, on 25.9.1989, against all four accused aforementioned. After holding an enquiry under Section 202 Cr.PC, the learned Magistrate, who was in seisin of the case, issued a search warrant and in execution thereof, the victim girl, namely, Sukurjan, was recovered by the police and, upon her production before the Magistrate, her statement under Section 104 Cr.PC was recorded. The victim girl was, thereafter, medically examined. After appearance of the accused before the learned Magistrate the case was committed to the Court of Sessions for trial.

3. During the course of trial, charge under Section 376 IPC was framed against the accused/petitioner, but the petitioner pleaded not guilty thereto. The remaining 3 accused persons were discharged and the, trial proceeded against the present petitioner.

4. In all, the prosecution examined 4 witnesses in support of their case. The accused was, then, examined under Section 313 Cr.PC. In his examination aforementioned, the accused denied that he had committed rape on the victim.

5. On conclusion of the trial, the learned trial court by its judgment and order, dated 11.3.1992, aforementioned held the accused guilty, of the charge framed against him and convicted him accordingly and passed the sentence against him as hereinabove indicated. The accused/ petitioner preferred an appeal, but by Judgment and order, dated 14.12.1992, aforementioned, the appeal was also turned down. The accused-petitioner has, now, come before this Court with the present revision petition,

6. I have perused the available material on record including the , impugned judgments. I have heard Mr. A. B. Choudhury, learned counsel, appearing for the accused/petitioner. None has appeared for the opposite party.

7. Upon perusal of the impugned judgments and the evidence on record, what attracts my eyes is that the victim girl, namely, Sukurjan (PW-3), admittedly, could not give her precise age and deposed that it was her father, who could say as to what her actual age was. As far as the victim girl's parents, namely, Ali Akbar (PW-1) and Hasua (PW⁻2) are concerned, they were unable to give, on account of their illiteracy, the correct age of the victim girl. This aspect of the matter was taken note of by the learned trial Court as well as the appellate Court. However, it was the evidence of the Doctor (PW-4) that the X-ray of the victim girl revealed that ossification of lower end of right radius and ulna bone was incomplete. The Doctor, therefore, concluded that the victim was below the age of 18 years. Though the opinion with regard to age given medically may suffer from marginal error of 2 years, as has been pointed out by the Apex Court in 1982 (2) SCC 538 and 2001 (5) SCC 714, the opinion of the Doctor was not challenged by the defence nor has the same been challenged before me. The learned trial Court, therefore, concluded that the victim was below the age of 18 years and this view appears to have been upheld by the learned appellate Court in its impugned judgment.

8. What is, now, of immense importance to, note is that the learned trial Court has noted in its judgment that on account of the fact that the victim was below the age of 18 years at the time, when she allegedly had sexual intercourse with the accused, it was immaterial whether the intercourse, which the accused had with her, was with or without her consent. This view appears to have been adopted by the learned, appellate Court too, I am constrained to point out that the view so adopted by the learned Courts below is completely incorrect inasmuch Section 375 IPC, which defines rape, lays down that a man is said to commit 'rape' when he has, inter alia, sexual intercourse with a woman, with or without her consent, when she is under 16 years of age. This means that if a man has sexual intercourse with a female person, who is below the age of 16 years, her consent is immaterial, but if he has sexual intercourse with a woman, who is above the age of 16 years, and if the intercourse is with her consent, such intercourse would not amount to rape.

9. In view of the fact that the victim was, according to the findings of the learned Court below, above the age of 16 years, though may be below 18 years, it was imperative on the part of the learned Courts below, which scrutinised the evidence on record, to ascertain for themselves if the evidence on record was cogent and clear to show that the sexual intercourse, if any, which the accused had with the victim was with her consent or not. In this regard, it is apposite to take note of the evidence of the victim on which both the learned Courts below have relied upon. According to the evidence of the victim (PW-3), 1 1/2 years back at night, while she was reading, all the accused entered into her room, she shouted for help and when her mother came there, accused Antu Mia threatened her with a dagger and, then, she was forcibly taken away by the accused to Bilashipara and, then, to Meshmara and from there, she was taken to the house of Sorhab Ali at Norvita, where she was kept confined for 5 days, the accused had sexual intercourse with her and at Chapatuli, accused Allaluddin forcibly raped her until police recovered and produced her in the Court.

10. Believing the above evidence of the victim, the learned trial Court took the view that the accused had sexual intercourse with the victim without her consent,

11. During the trial, it appears to have been pointed out before the learned trial Court that in her statement recorded under Section 164 Cr.PC, the victim, while mentioning that she had sexual intercourse with the accused, did not assert that the intercourse, which the accused allegedly had with her, was forcible in nature, but when she gave evidence before the learned that Court, she asserted, for the first time, that the accused forcibly had sexual intercourse with her. The relevant portions of the victim's statement made under Section 164 Cr.PC were duly drawn attention to by the defence during her cross-examination and when so confronted with her previous statement, the victim merely asserted that she had not made any such statement. The learned trial Court ignored this glaring improvement, which the alleged victim had made on her previous statement, by merely observing that the statement recorded under Section 164 Cr.PC, in the committing court, cannot be treated as contradiction. This view adopted by the learned trial Court is wholly incorrect inasmuch as Section 145. Evidence Act permits cross-examination of a witness as to the previous statement made by him, in writing, or reduced into writing and relevant to matters in question.

12. Coupled with the above, a careful examination of the impugned judgment of the learned appellate Court shows that the learned appellate Court too has failed to take into consideration victim's previous statement made under Section 164 Cr.PC, wherein she had given no indication at all that the sexual intercourse, which she had with the accused, was without her consent or forcible. Thus, the improvement made by PW 3 in the evidence given by her in the learned trial Court that the sexual intercourse, which she had with the accused, was forcible is too glaring for the eyes to miss and for a Court, sitting even as a revisional Court, to ignore.

13. Ordinarily, while exercising revisional jurisdiction, the High Court will not substitute its views in place of the views of the trial Court or the appellate Court, if the views adopted by the Courts below can be held to be reasonable, but if the finding of the Courts below suffers from perversity in the sense that the same is not supported by evidence on record or reached by ignoring the evidence on record, the revisional Court has no option but to interfere with such a finding. It is also trite that in a criminal trial, if the evidence on record gives rise to two equally

possible views, the view, which favours the case of the defence, shall be adopted by the Court. This golden principle of criminal jurisprudence appears to have been blushed aside by both the learned Courts below.

14. The statement of the victim girl recorded under Section 164 Cr.PC clearly indicates, if I may reiterate, that she had, contrary to what she asserted before the learned trial Court, been in love with the accused for three years and left the house of her parents with her free will. Her previous statement also shows that she remained with the accused until the time she was recovered by the police and she had sexual intercourse with the accused on as many as four days, but she did not claim, as already indicated above, that the sexual intercourse, which she had with the accused, was either forcible or without her consent.

15. A statement recorded under Section 164 Cr.PC by a committal court is a previous statement and can be made use of by the defence for the purpose of contradiction and for the purpose of impeaching the credibility of the evidence given by the witness.

16. Considering, therefore, the matter in its entirety, I am firmly of the view that in the absence of any explanation appealing from the evidence on record, which could reconcile the improvements that the alleged victim had made in her evidence given before, the Court with regard to the nature of sexual intercourse, which she had with the accused, the learned Courts below could not have legally come to the lone and only conclusion that the accused-petitioner had sexual intercourse with PW 3 forcibly and was, therefore, guilty of the offence charged with. Viewed from this angle, the finding of the learned Courts below that the evidence on record proved that the accused had sexual intercourse forcibly with the victim is wholly perverse and cannot be allowed to stand good on record.

17. In the result, and for the reasons discussed above, this revision succeeds and the impugned judgments and orders aforementioned are hereby set aside. The conviction of the accused-petitioner and the sentence passed against him shall, accordingly, stand set aside. Bail bond of the accused shall also stand discharged.

18. Send back the LCRs with a copy of this judgment and order.

