

Jintu Das Vs. State of Assam

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Court : Guwahati

Decided On : Sep-04-2002

Judge : P.C. Phukan, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 376

Appeal No. : Criminal Appeal No. 234 of 2000

Appellant : Jintu Das

Respondent : State of Assam

Advocate for Def. : P. Bora, PP

Advocate for Pet/Ap. : B. Baruah, Adv.

Disposition : Appeal allowed

Judgement :

P.C. Phukan, J.

1. This is an appeal directed against the judgment and order dated 2.8.2000 passed by the learned Additional Sessions Judge, Dibrugarh convicting the accused-appellant under Section 376 IPC and sentencing him thereunder to 7 years' rigorous imprisonment and also to pay a fine of Rs. 2,000, in default, to further 6 months' rigorous imprisonment in Session Case No. 9 of 2000.

2. I have heard Mr. B. Baruah, learned counsel appearing for the accused-appellant and Mr. P. Bora, learned public Prosecutor, Assam. I have also considered the records of the case.

3. On 20.5.1998 the Prosecutrix Smt. Kalpana Das, PW 2, lodged an FIR to the effect that on 1.2.1998 at about 7 P.M. on the day of Saraswati Puja the accused Jintu Das asked her to accompany him to the embankment of the river Brahmaputra telling that he had some urgent talk with her and had sexual intercourse with her promising to marry her. When she became pregnant, she disclosed the matter to her mother and lodged the FIR Ext. 2. On completion of investigation, the police charge-sheeted the accused-appellant Under Section 376 IPC. The learned Magistrate committed the case to the Court of Session under the said Section of law. In the Court of Session, a charge Under Section 376 IPC was framed, read over and explained to the accused-appellant to which he pleaded not guilty and claimed to be tried.

4. In the trial prosecution examined 5 witnesses. In his examination under Section 313, the accused-appellant pleaded innocence and declined to adduce any evidence. The learned Sessions Judge on consideration of the evidence on record and after hearing the prosecution and the defence convicted and sentenced the accused-appellant as stated above hence this appeal.

5. Mr. Baruah, learned counsel for the accused-appellant has led me through the evidence which I have also scrutinised. PW 1, is Dr. M.N. Gogol, Prof. & Head of the Department of Forensic Medicine of Assam Medical College, Dibrugarh. He examined the prosecutrix, PW 2 on 20.5.1998 more than three months after the alleged occurrence. He found no evidence of sexual intercourse, no marks of injuries in her private parts. From physical, dental and radiological examination he opined that the age of the prosecutrix, PW 2 was between 16 and 18 years.

6. PW 2 is the allegedly victim girl. She knew the accused-appellant, a co-villager, since her childhood. According to her evidence, on the Saraswati Puja day, she came to the house of her maternal uncle (not examined) situated near the embankment of the river Brahmaputra after attending Saraswati Puja in the School. It was dark when she came out from her maternal uncle's house and met

the accused who took her to the side of the river telling her that he had some urgent talk with her. While they were sitting on the duke, the accused started taking in an obscene manner and forcibly committed sexual intercourse with her giving the assurance to marry her. But he did not marry her. She became pregnant and gave birth to a male child. In cross-examination, she admitted that she had been in love with the accused-appellant and she exchanged love letters with him. She, however, denied the defence suggestion that the accused-appellant had sexual intercourse with her, with her consent. She also admitted to have made a statement Ext-Ka before a Magistrate, Ext Ka (1) and Ka (2) being her signatures.

7. PW 3 Smt. Sarbeswari Das, mother of the prosecutrix, PW 2. She deposed that presently her daughter was aged about 18 years. That her daughter did not have her monthly periods for last 3 months. On being asked she told that the accused had forcibly sexual intercourse with her about 3 months back. She then went to the house of the accused to discuss the matter with his mother, but she insulted her and drove her out. PW 3 thus asked her daughter PW 2 to lodge an FIR.

8. PW 4 Shri Arun Das is brother-in-law to the prosecutrix PW 2. He came to know about her pregnancy from his mother-in-law, PW 3 and wrote the First Information Report, Ext. 2.

9. PW 5 the Investigating Police Officer deposed that the accused surrendered in the Court. His very brief evidence is formed in nature.

10. Mr. Baruah, learned counsel for the appellant submits that the learned Court below convicted the accused-appellant solely on the uncorroborated testimony of the alleged victim girl, in spite of her long silence after the alleged occurrence. That the FIR, Ext. 2 lodged by the alleged victim girl belies her own case of rape as made out in her deposition. Ext. 2 shows that she was a consenting party. That the learned trial court committed grave error of law and fact in holding that the victim girl, PW 2 was 16 years of age at the time of alleged occurrence relying solely on the statement of PW 2 without any documentary evidence. But according to the medical report her age was between 16 to 18 years. In her deposition the prosecutrix stated that she gave birth to the child on the day of Chat Puja, but the medical report is silent about the pregnancy of prosecutrix.

11. The point for determination is whether the accused-appellant had sexual intercourse with the prosecutrix, PW2. If so, whether the accused had such intercourse with or without her consent. If the accused had sexual intercourse with her consent, whether she had attained the age of consent, i.e., above 16 years of age at the relevant time.

12. The prosecution relies solely on the evidence of the prosecutrix as regards the commission of sexual intercourse on her. She did not inform anybody about any rape committed on her by the accused-appellant. Only when her monthly course stopped for 3 months and the sign of pregnancy became apparent, she disclosed it to her mother and the FIR was lodged after 3 months of the alleged occurrence. In her evidence she deposed that the accused impregnated her. On this point also there is no evidence save and except her own uncorroborated testimony. The doctor, PW 4 examined her after 3 months. His evidence is silent about her pregnancy. Her statement that she became pregnant does not find corroboration from medical evidence. It cannot be said that the prosecution has succeeded in proving that the accused had sexual intercourse with her as a result of which she became pregnant. Even assuming that the accused had sexual intercourse with her, it has not been proved that he did so without her consent. In cross-examination, she categorically stated that she had been in love with

the accused-appellant. They exchanged love letters. In view of the evidence as discussed above and in the facts and circumstances, the irresistible conclusion is that if the accused had sexual intercourse with her, it was with her consent. This has been corroborated by circumstances that she did not tell anybody about the sexual intercourse with the accused-appellant till she became pregnant. If a full grown woman consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact.

In this regard Mr. Baruah, learned counsel for the appellant has referred to a decision in *Jayanti Rani Panda v. State of West Bengal*, 1984 Cri. L.J. 1535 wherein it has been stated.

'The failure to keep the promise at a future uncertain date due to, reasons not very clear on the evidence does not always amount to a misconception of fact at the inception of the act itself. In order to come within the meaning of misconception of fact, the fact must have an immediate relevance. If a full grown girl consents to the act of sexual intercourse on a promise of marriage and continues to indulge in such activity until she becomes pregnant it is an act of promiscuity on her part and not an act induced by misconception of fact. Section 90, IPC cannot be called in aid in such a case to pardon the act of the girl and fasten criminal liability...'

Mr. Baruah, learned counsel submits that the learned Sessions Judge convicted the accused-appellant Under Section 376 IPC on the basis of the defence suggestion put to the prosecutrix, PW 2 that the accused had sexual intercourse with her consent. Mr. Baruah has strenuously argued that the learned trial Court was not justified in taking the aid of such suggestion in course of cross-examination. In support of his contention, he referred to a decision in *Sakariya v. State of M.P.*, 1991, Cri. L.J. 1925 wherein it has been held -

'Where in case of a charge of rape under Section 376 Penal Code, the statement of accused contained plain denial and a plea of false implication, subsequent suggestion by the defence lawyer to the prosecutrix about consent on her part would not amount to admission of guilt on behalf of the accused. A suggestion thrown by the defence counsel to a prosecution witness does not amount to an admission on the part of the accused. It is a common practice to suggest to a witness while he or she is under cross-examination, the case of the defence when such evidence or suggestion is denied, it does not constitute any evidence. Suggestions put are no evidence at all against the accused and on the basis of such suggestion no inference can be drawn against the accused that he admitted the fact suggested in the cross-examination. The proof of guilty required of the prosecution does not depend on the suggestion thrown to a witness.'

13. This brings me to the point as to whether at the relevant time the prosecutrix, PW 2 attained the age of consent, i.e., 16 years within the meaning of Clause (6) of Section 375. On 30th May, 2000 the prosecutrix, PW 2 gave her age as 18 years. Her mother, PW 3 also deposed that she was aged about 18 years and the

doctor also says that from physical, dental and radiological examination, her age was between 16 to 18 years. Mr. Baruah, learned counsel for the appellant submits that from the evidence on record, it cannot be held that at the time of occurrence she was 16 years of age or below 16 years of age. Mr. Baruah, learned counsel for the appellant has relied upon a decision in *Jaya Mala v. Home Secretary, Govt. of Jammu & Kashmir*, AIR 1982 SC 1297, wherein it had been held - 'in the opinion of doctor as to age of a person - Radiological test - Margin of error in age ascertained by radiological examination is two years on either side.' He has also referred to another decision in *Sudhamay Nath alias Bachhu v. State of West Bengal*, 1999 Cril. L.J. 4482. In this case the accused alleged to have allured prosecutrix that he would marry her and had sexual intercourse with her. Medical evidence showed that prosecutrix was above 16 years of age at time of incident. In such a case Prosecutrix consenting to act of sexual intercourse fully knowing nature and implication of such act, conviction of accused for offence of rape is not proper.

14. In view of what has been stated above, it cannot be said that the prosecution has succeeded in proving that the accused-appellant raped the prosecutrix, PW 2 beyond reasonable doubt. I have found that the accused is not guilty Under Section 376 IPC or any other sections of law. He is acquitted of such offence.

15. The appeal is allowed. The impugned judgment and order dated 2.8.2000 passed by the Addl. Sessions Judge, Dibrugarh in Sessions Case No. 9/2000 convicting the accused-appellant Under Section 376 IPC and sentencing him thereunder, 7 years rigorous imprisonment and to pay a fine of Rs. 2000 in default, 6 months further rigorous imprisonment are set-aside.

The accused is in Jail. He shall be set at liberty forthwith if not required in any other case.

Send down immediately the lower court records.

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