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Court : Guwahati

Decided On : Jul-26-2002

Judge : I.A. Ansari, J.

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

Appeal No. : Criminal Appeal No. 52 of 2002

Appellant : Mridul Saikia @ Babu

Respondent : State of Assam

Advocate for Def. : N. Mahammad, PP

Advocate for Pet/Ap. : H.R. Khan, J.A. Talukdar and B. Nath, Advs.

Judgement :

I.A. Ansari, J.

1. This appeal has been preferred against the judgment and order, dated 31.12.2001, passed by the learned Additional Sessions Judge, Jorhat, in Sessions Case No. 36 (J.J.) of 2000, convicting the accused-appellant under Section 376 I.P.C. and sentencing him to undergo rigorous imprisonment for a period of four years and to pay fine of Rs. 500 and in default, to suffer rigorous imprisonment for a further period of three months.

2. Prosecution's case against the accused-appellant, as unfolded at the trial, may, in brief, be stated as follows. The accused appellant is a neighbour of Smt. Mainu Bora @ Munu, a student of class VIII of Mahabandha Tea Garden High School, Jorhat, who is aged about 15 years. The appellant used to teach Munu at her house, On

18.6.1999, at noon, while Munu was in her home, the appellant came there and, on finding her alone, had sexual intercourse with her against her will. As a result of sexual intercourse, which the appellant had with Munu, she became pregnant. When Munu informed the appellant about her pregnancy, the appellant initially assured her that he would marry her, but on 8.11.1999, the appellant advised her to terminate her pregnancy, which she did not agree to. When Munu was so carrying pregnancy, her mother, Smt. Samnai Bora, on noticing Munu's condition, became suspicious and upon query made by her, Munu told her that she had conceived as a result of sexual intercourse that the appellant had with her and that the appellant had promised her that she would marry her. When Munu's father, Prafulla Bora, came home, Munu's mother informed her father about Munu's pregnancy. Prafulla Bora became furious and turned Munu out of his house, where upon she took shelter at the house of her brother-in-law and, in course of time, she filed a written complaint (Ext. 1) in the Court of Chief Judicial Magistrate, Jorhat. The said complaint was sent to police for investigation. Treating the said complaint as F.I.R., Pulibor P. S. Case No. 139/99 under Section 376/506 I.P.C. was registered against the appellant. Smt. Munu was medically examined and, on completion of investigation, police laid charge-sheet against the appellant under Section 376/506 I.P.C.

3. During trial, a charge under Section 376 I.P.C. was framed against the appellant, but when the said charge was explained to the appellant, he pleaded not guilty thereto.

4. In all, prosecution examined 9 (nine) witnesses. The appellant was, then, examined under Section 313 Cr.PC. In his examination aforementioned, the appellant denied that he ever had sexual intercourse with the prosecutrix. The defence, however, adduced no evidence.

5. At the conclusion of the trial, learned Add. Sessions Judge, Jorhat, found the appellant guilty of the charge framed against him. The appellant was accordingly convicted and sentenced as hereinabove mentioned. Hence, this appeal.

6. I have perused the relevant records including the impugned judgment and order. I have heard Mr. H.R. Khan, learned counsel for the appellant, and Mr. K. Monir, learned Additional Public Prosecutor.

7. Assailing the impugned judgment, Mr. Khan has submitted, inter alia that, the learned trial Court found that though the appellant had sexual intercourse with Munu, the intercourse was with her

consent. In such a situation, points out Mr. Khan, determination of correct age of the prosecutrix was essential. However, while so determining the age, learned trial Court relied on the vague as well as unsubstantiated evidence given by Manu's parents PWs 3 and 6 to the effect that she was, at the relevant time, aged about 15 years. As against such evidence of Munu's parent, submits Mr. Khan, the evidence given by the doctor (PW 5) shows that her age, barely after about 6 month of the alleged occurrence, was found to be above 18 years. The learned trial Judge, contends Mr. Khan, completely ignored the medical evidence on record without assigning any justifiable reason or reasons. Since the evidence on record adduced by prosecution, submits Mr. Khan, shows that the prosecutrix could have been above 18 years of age at the time of alleged occurrence, learned trial Judge could not have legally based his finding that the prosecutrix was less than 16 years of age, at the time of the alleged occurrence, on the oral assertions of prosecutrix's parents, particularly, when no birth certificate of Munu was produced and her correct date of birth was not revealed before the learned trial Court. The learned trial Court drew, points out Mr. Khan, support for the evidence of the prosecutrix's parents, with regard to her age, from prosecutrix's School Certificate, which too, according to Mr. Khan, was not reliable at all inasmuch as entry of her date of birth in the School register was made on the basis of information furnished by prosecutrix's mother that the prosecutrix was, on the date of her admission in the school, aged about 6 years.

8. Controverting the above submissions made on behalf of the appellant, learned Additional Public Prosecutor has submitted that the learned trial court was wholly justified in relying upon the evidence of Prosecutrix's parents, which was corroborated by the records of school, where the prosecutrix was studying at the time of the alleged occurrence. The finding of the learned trial court regarding the age of the prosecutrix, points out the learned prosecutor, cannot be justifiably assailed and in the face of the evidence on record that the accused had sexual intercourse with the prosecutrix, learned trial Court was within the ambit of law in convicting appellant.

9. Having heard both sides and upon perusal of record, what attracts my eyes, most prominently, is that the doctor (PW 5), who had examined the prosecutrix, gave two opinions, namely, that the prosecutrix was carrying foetus of 22 weeks and the other one was that as per the radiologist's report, her age was about 18 years. The evidence given by PW 5 with regard, to prosecutrix's age was discarded by the learned trial Court on the ground that the radiologist had not been examined and the X-Ray plate had not been proved/

introduced into the evidence on record, though, according to X-Ray report, X-Ray of left elbow and left wrist joint showed ossification completed in the bones around the left elbow joint and left wrist joint.

10. Thus, what is of utmost importance to note in that the radiologist's report was prima facie in favour of the defence. Since there was a piece of material in existence, on record, showing that the prosecutrix could have been above 18 years of age, it was the duty of the learned trial Court to examine the radiologist even if the prosecution was not inclined to do so, because it was the duty of the learned trial Court to reach a just decision in the case. It is precisely for thin reason that Section 311 Cr.PC exists, which clearly lays down that the Court may, at any stage of trial, (i.e., before pronouncement of the judgment) summon any person as a witness, Whose evidence appears to be essential for just decision of the case.

11. I must, however, hasten to point out that even after examining the radiologist, the learned trial Court was completely free to reach its own findings and/or opinion, but the fact that the radiologist was not examined was a serious omission

on the part of the learned trial Court, which, if not undone will cause, in my firm view, serious miscarriage of justice.

12. Since this Court, sitting, now, as an appellate Court is of the view that the examination of the radiologist concerned was essential for a just decision of the case, I am not Inclined to enter into the merit of the evidence on record nor am I inclined to make any endeavour to appreciate the evidence on record to ascertain if the evidence given by the parents of the prosecutrix coupled with the relevant school records of the prosecutrix's evidence prove convincingly that the prosecutrix's age, at the relevant time, was below 16 years.

13. Situated thus, I find myself left with no option, but to remand this case to the learned trial Court for examining the radiologist concerned and if the radiologist is not alive and/or his presence cannot be procured, then, the learned trial Court will be at liberty to bring into the evidence on record the findings of the radiologist along with relevant X-ray plate, if available, by examining any such witness/ witnesses as may be required under the law.

14. In the result, and for the reasons discussed above, this appeal partly succeeds. The impugned judgment and order are set aside. The appeal is remanded to the learned trial Court with direction to examine the radiologist and if the radiologist is not available and/or for any reasons whatsoever, his presence cannot be procured, the learned trial Court shall examine any other witness/witnesses, as it

may deem necessary, and bring into the evidence on record the relevant X-ray plate, if available, and also findings as well as opinion of the radiologist and after bringing the evidence on record, so directed, learned trial court shall dispose of the case in accordance with law.

15. The conviction of the accused-appellant and the sentence passed against him shall accordingly stand set aside. The appellant shall be set at liberty forthwith unless he is required to be detained in connection with any other case.

16. It is further directed that the appellant shall appear in the trial Court on 12.8.2002 and upon his appearance, if the appellant applies for bail, he shall be allowed to go on bail of Rs. 10,000 with one surety of the like amount subjects to the satisfaction of the learned trial Court.

17. Send back the L. C. R. forthwith alongwith copy of this judgment and order.

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