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Court : Guwahati

Decided On : Aug-27-2007

Judge : H. Baruah, J.

Appellant : AinuddIn Ali

Respondent : State of Assam

Judgement :

H. Baruah, J.

1. This appeal has been preferred against the Judgment and Order of conviction dated 14.06.2004 passed by Shri B.J. Mahanta, Adhoc Additional Sessions Judge, Kamrup (FTC) in Sessions Case No. 277 (K)/2001 by which the learned Adhoc Additional Sessions Judge convicted the appellant Md. Ainuddin Ali alias Md.Ainuddin under Section 376 of the Indian Penal Code to undergo imprisonment for 7(seven) years RI and a fine of Rs. 5000/- (Rupees five thousand) only in default to undergo additional 1 (one) year SI. The learned Adhoc Additional Sessions Judge also convicted the appellant under Section 448 IPC sentencing him to undergo SI for one year.

2. Being highly aggrieved by and dissatisfied with the Judgment and Order of conviction, this present appeal has been filed on various grounds amongst others the following:

(1) That the learned Trial Court committed error in law and in fact as well in convicting the appellant on the basis of evidence on record for which the conviction so rendered by the learned Trial Court cannot be sustained;

(2) That the learned Trial Court also committed wrong by not marshalling the evidence on record in its proper perspective and thus arrived at an erroneous finding which cannot at all be sustained in the eye of law;

(3) That the learned Trial Court also refused to accept the contradiction appearing in the face of the record which materially affects the case of the prosecution.

(4) That there is no eye witness to the occurrence and in the face of the same, the reliance on the evidence of the victim will be erroneous and unsafe. The learned Trial Court without going into the evidence both oral and documentary with utmost care and caution delivered the Judgment which cannot be sustained in the eye of law.

3.Appellant, therefore, in view of the above, approached this Court to allow the appeal and set aside the Judgment and Order of conviction passed by the learned Trial Court and acquit the appellant from both the charges.

4. The prosecution case, as it appears from the record is that the victim girl Fazila Begum (PW 4) on the day of occurrence i.e. on 29.01.98 while drying cloth in the courtyard of her aunt's house, the accused appellant Md. Ainuddin Ali came and gagged her mouth and had forcibly taken her inside the house where he committed rape on her. At that time, there was none inside the house who could perhaps witness the occurrence. Her aunt Msst. Rabia Begum (PW 2) while informed by her neighbour, returned home and informed about the incident to the father Md. Fazar Ali (PW 1) of the victim girl (PW 4). The father of the victim lodged FIR with the Rangia Police Station and a case was registered. Police took up the investigation and after completion of the investigation, charge sheet under Sections 448/342/376 IPC was submitted against the accused Md. Ainuddin Ali. The accused having been appeared before the committing Court, the same was committed to the Court of Sessions, Kamrup, Guwahati for trial. The learned Adhoc Addl. Sessions Judge after perusal of all the documents, evidences

recorded under Section 161 Cr PC framed charge against the accused appellant under Sections 448/376 IPC which were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

5. The learned Trial Court examined nine (9) witnesses including the Doctor and the Investigating Officer and the prosecutrix. Defence adduced no evidence. During trial, the accused was examined under Section 313 Cr PC to explain the circumstances which appeared in the evidence against him.

6. The learned Adhoc Addl. Sessions Judge, after perusal of the evidences, both oral and documentary and other documents recorded finding of conviction and convicted the appellant under Sections 448/376 IPC. Hence this present appeal.

7. I have heard the learned Counsel Mr. Hamidur Rahman for the appellant and also Ms. B. Saikia, learned Public Prosecutor, Assam.

8. It is argued by the learned Counsel for the appellant that the evidence which are available on record both oral and documentary are not at all sufficient to record a finding of conviction under any of the charges so framed by the learned Trial Court. It is also submitted by him that there is no eye witness to the occurrence. The learned Trial Court basing on the evidence of the prosecutrix recorded the conviction under both the charges. It is also submitted by him that the evidence of PW 3 Tarabanu Khatoon though seems to give some boost to the prosecution case, is not believable since this witness did not make any attempt to enter into the residence of the victim's aunt having seen the appellant coming to the house and embarrassing of the victim and dragging her inside the house. The evidence which has been given by her is not at all convincing in the face of the record that she had witnessed this part of the occurrence before commission of the rape on the victim.

9. The learned Counsel for the appellant has pointed out to the evidence of the doctor who has been examined as PW 9 in this case. It is argued by him that the doctor who has examined the victim on 06.02.98 was not examined by the prosecution rather the demonstrator who is not at all concerned about the examination of the victim girl was examined as witness. By examining this

demonstrator who is a foreigner to the examination cannot be believed since defence was not given any opportunity to cross-examine the doctor who examined the victim in support of the contention which led him to accept the evidence of the demonstrator. It is apparent from the case record that this victim was not examined by Dr. Amar Jyoti Patowary, Demonstrator, Forensic Medicine, G.M.C.H. but the prosecution has not offered any explanation why Dr. H.K. Mahanta, Associate Professor, G.M.C.H. who was involved in examining the victim girl has been left out. Apparently, the defence was not given any chance to cross-examine this particular witness who examined the victim. So, in a way it can be said that the defence is highly prejudiced for non-examination of Dr. H.K. Mahanta. From the evidence of PW 9 it is found that he has also deposed that the victim was examined by Dr. H.K. Mahanta. Dr. Mahanta recorded the observations which are incorporated in Ext. 4.

10. The learned PP., Assam while arguing this particular point i.e. in regard to the failure of Dr. Mahanta to give evidence, failed to place any satisfactory explanation why Dr. Mahanta had been left out. Prosecution ought to have examined Dr. H.K. Mahanta instead of Dr. Amarjyoti Patowary, a Demonstrator, Forensic Medicine, GMCH.

11. The next argument that has been projected by the learned Counsel for the appellant is in regard to the delay in filing the FIR. According to him delay in filing the FIR gives an ample opportunity to the informant to concoct and manufacture the case. Unless there is sufficient explanation to the effect, the delay cannot be accepted and it will rather cast a very serious effect to the case of the prosecution. The learned P.P. argued that delay had been caused due to convention of 'Village Mel' that took place twice where the appellant did not make his presence available to answer the charges. But no where it is found in the case record or in the judgment that the prosecution ever made any attempt to examine the village head men who were allegedly present in the said 'Village Mel'. Therefore, claim of the learned P.P. that delay had been caused due to convention of the 'Village Mel' is not acceptable.

12. Section 134 of the Evidence Act provides that on the basis of the testimony of the solitary witness, conviction can be warranted. In a catena of decisions it is observed by the Supreme Court that in a case under 376 IPC corroboration is not at all necessary even without the evidence of doctor. If the evidence of victim girl is found reliable and acceptable in all material particulars or in other words wholly reliable than the offender can be convicted under this section. We may refer to the evidence of PW 4 the victim girl, in particular. Her categorical statement is that the occurrence had taken place about 5 years back at about 7-00 to 8-00 A.M. At that time, she was living with her aunt but her aunt had taken her cattle to the field at that particular time and in the meantime, the appellant came from back side of the house, gagged her mouth, took her inside the house and raped her. It is also in her evidence that the appellant removed her panty, laid her on the bed and inserted his penis inside her genital. Hulla being raised by her, one Ispatannessa did not come inside the residence though she was at that time in the same courtyard and called her aunt Rabia Begum (PW 2). After committing rape, the appellant left the place of occurrence. Now from this fact situation it is to be seen whether the evidence of the prosecutrix is acceptable and can be relied upon with reference to the oral evidence available on record in one particular evidence of Tarabanu Khatun. It is found from the evidence of PW 3 that when appellant came to the house of the victim she was in the courtyard of her house. She had seen the appellant embracing and dragging the victim inside the house but she remained a silent spectator and did not make any attempt to enter the house and save the girl. It is also in the evidence of PW 2 Rabina Begum that when she arrived at the place of occurrence i.e. her house she saw Fazila Begum, the victim standing inside her house with Ainuddin, the appellant and on being asked Ainuddin did not tell her anything while Fazila was found crying and told that she was dragged inside the house by Ainuddin and was raped.

13. There was none inside the residence at the time of occurrence which has been revealed from the evidence of PW 2 and PW 3.

14. The victim herself has stated categorically that after committing rape on her, the accused left the place of occurrence. If this is so, the evidence of PW 2 Msstt. Rabia Begum cannot be believed at all that she had found the appellant inside the

house. If one is believed, the other should be disbelieved. Thus there appears no consistency between the two.

15. From the perusal of the impugned judgment on record it is found that the learned Trial Court accepted the evidence of Doctor without making any reference to non examination of Dr. H.K. Mahanta who performed the medical examination on victim. That apart, the learned Trial Court also did not see the importance of non-explanation of delay in making the FIR. The learned Trial Court, after discussion of the evidence as usual came to a finding that the appellant by trespassing in to the house which belonged to her aunt committed rape on PW 4. No explanation is also offered by the learned Trial Court in respect of the acceptance of the evidence of the doctor (PW 9). So, this prosecution case is found to have stranded with full of errors which are to be removed for arriving at a right decision.

16. After hearing the submissions of the learned Counsel of either parties, facts appearing in the face of the record and the evidences both oral and documentary, this Court finds that this is a case fit to be remanded back to the learned Trial Court for giving a fresh decision in respect of the commission of the alleged offence of the appellant. In the result, the Judgment and Order of conviction is hereby set aside and the case is remanded back to the learned Trial Court with the following direction:

(1) that the learned Trial Court shall examine Dr. H.K. Mahanta giving opportunity to the defence to cross-examine him,

(2) that the learned Trial Court shall afford opportunity to the prosecution to examine any other left over witness if desires with liberty to re-examine the witness already examined with opportunity to cross-examine by defence.

The appellant shall appear before the learned Trial Court within a month from the date of receipt of this order. Send down all lower Court records. Registry is to take steps accordingly.

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