

GAHC010219952023



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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./372/2023

MD. FARID ALI
S/O MD.KASIM ALI,
VILL.- JAGIROAD RAM MANDIR, NAKHOLA, P.S.- JAGIROAD, DIST.-
MORIGAON, ASSAM.

VERSUS

THE STATE OF ASSAM AND ANR.
THROUGH THE P.P., ASSAM.

2:NARENDRA BEY
S/O LATE DIGHOLA BEY

VILL.- RONGMIRDAN
P.O. AND P.S.- DIPHU
DIST.- KARBI ANGLONG
ASSAM
PIN- 782460

Advocate for the Petitioner : MR A N AHMED,

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGMENT & ORDER (CAV)

27-09-2024

Heard Mr. A.N. Ahmed, learned counsel for the appellant. Also heard Mr. B.

Sharma, learned Additional P.P. representing the State.

2. This appeal is directed against the Judgment and order dated 10/08/2023, passed by the learned Assistant Sessions Judge, Karbi Anglong, Diphu in Sessions case no. 68/2015, whereby the accused/ appellant was convicted u/s 376 IPC and sentenced to undergo rigorous imprisonment for Seven years and to pay a fine of Rs. 5000/- in default RI for one month.
3. The brief facts of the case is that an FIR has been lodged by the informant before the OC, Diphu Police Station stating *inter alia* that on 02/08/2014, his daughter went missing from Diphu Bazar. Later on, they came to know that the appellant kidnapped his daughter. Thereafter, the victim was recovered from the house of the accused/ appellant located at Silbhanga village under Jagiroad police station.
4. On receipt of the FIR, a case was registered vide Diphu PS case no. 217 of 2014 u/s 366/ 342/ 376/ 34 IPC and investigation was initiated. After completion of investigation, charge sheet was submitted against the appellant u/s 366/ 342/ 376 IPC, before the court of magistrate. As the offence u/s 366/376 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.
5. During trial, charge was framed u/s 366/ 343/ 376 IPC, which was read over and explained to the accused/ appellant to which he pleaded not guilty and claimed to be tried. To substantiate the case of the prosecution, seven witnesses were examined. After closure of the evidence, the statement of the accused/ appellant was recorded u/s 313 Cr.PC, wherein the incriminating material found in the evidence of the witnesses were put to him to which he

denied the same. After hearing the learned counsel for both the parties, the trial court convicted the accused/ appellant as aforesaid.

6. It was urged by the learned counsel for the appellant that the learned trial court has misread and misconstrued the evidence on record while convicting the accused/ appellant u/s 376 IPC. The witnesses examined by the prosecution are all relatives of the victim except the IO and the medical officer and are, therefore, interested witnesses. No independent witnesses were examined by the prosecution. As such, the conviction and sentence passed by the learned trial court is liable to be set aside.

7. It is also the submission of the learned counsel for the appellant that the victim is a major girl and the appellant had love affairs with the victim. On the date of incident, on receipt of a phone call from the appellant, the victim voluntarily left her house and eloped with the accused and reached at Jagiroad in the evening on the same day. During the said six hours of journey, the victim did not make any hue and cry or protest or informed the matter to her parents or any relatives about the incident. Thereafter, the victim got married with the appellant as per Muslim custom and stayed with the accused/ appellant for one and half months as husband and wife till recovery by the police.

8. It is also contended by the learned counsel for the appellant that during her stay in the house of the accused/appellant, the victim never informed her parents or other relatives about her place of residence and even about her marriage. In her statement also, the victim clearly stated that the appellant never used force towards her. She had eloped with the accused/ appellant on her own volition. According to the learned counsel for the petitioner, as it is crystal clear that the victim being a major girl, voluntarily left her house, got

married with the appellant and stayed with the accused as husband and wife, hence, the appellant cannot be convicted u/s 376 IPC. Therefore, the appellant deserves to be acquitted on benefit of doubt.

9. *Per contra*, learned Additional P.P. has argued that as per evidence of the victim, the accused/ appellant forcefully had physical relation with her although she had no intention to do so. The defence side did not cross examine the victim on her stand that the accused/ appellant established physical relationship with the victim forcefully, in spite of her reluctance. Learned Additional P.P., therefore submits that the Judgment of the trial court needs no interference by this court.

10. Having heard the learned counsel for the parties and on perusal of the trial court record including the impugned judgment, the only point to be discussed here in this appeal is that whether the victim is the consenting party or not to have sexual intercourse with the appellant and the conviction u/s 376 IPC is maintained or liable to be set aside.

11. To answer the question on the point, the evidence of the victim has to be gone through. The victim was examined in the case as PW-2. She deposed in her evidence that she got to know the accused accidentally on receipt of a phone call from the accused. The accused told that by mistake he called wrong number. Subsequently, he again called her in her mobile phone several times and they used to talk with each other. Thus, a friendship between them developed.

12. Further evidence of PW2 is that one day the accused called her over phone and told that he wanted to meet her, thus they met on the road at

Rongkhelan. Thereafter, he asked to accompany her to seventh mile which is near Manja. Both of them boarded in a bus but the accused did not get down at Seventh mile and instead he took her to Jagiroad. After getting down from the bus at Jagiraod, he took her to a house in a village. He told that the house belongs to his sister. He also introduced her to his sister and brother-in-law.

13. The victim also contended that on the first night, she and the accused occupied the same room. She slept on the bed and the accused on the floor. At around midnight, the accused came to her bed and started touching her inappropriately all over her body and also kissed her forcefully on her lips. She resisted his moves and told him angrily not to touch her or kiss her. After about two weeks, she was forcefully married to him by the relatives of the accused as per their Muslim custom and tradition. She stayed with the accused for about one and half months at different places. Finally, the accused took her to his own house and had sexual intercourse with her forcefully. She stayed about two weeks in the house of the accused. Subsequently, one day police came to the house of the accused and took her back home.

14. In her cross examination, PW-2 replied that she had a talking terms with the accused over phone. She did not tell her parents that she had a talking terms with the accused over phone. The accused never threatened her. She agreed to meet the accused person at Rongkhelan, Diphu. She did not inform her parents that she would meet the accused at Rongkhelan. This witness also stated she did not raise hue and cry while she was taken away by the accused. She did not tell any of her friends that she was taken away by the accused forcefully.

15. The other witnesses examined by the prosecution were not present when

the victim was taken away by the accused. Admittedly, the victim was recovered along with the accused from Jagiroad as stated by PW-3 and parents of the victim.

16. For the offence under section 376 I.P.C., the word 'rape' has been defined under section 375 I.P.C. wherein a man is said to commit rape on a female if the act is done against her will, without her consent; if it is with her consent it has been obtained by putting her or any person in whom she is interested in fear of death or of hurt with or without her consent when she is under 18 years of age or if she is unable to communicate her consent. Here it is not the case that the girl was unable to communicate her consent.

17. Hon'ble Apex Court in the case of ***Wahid Khan vs. State of Madhya Pradesh***, reported in 2010 (68) ACC 266 held that rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one. So the physical assault on the victim was a rape or not is to be decided by the court on the basis of evidence on record. Whether the said victim was abducted or kidnapped with the intent of compelling her to marry any person against her will or that she may be forced or seduced to illicit intercourse and whether the physical assault on the victim comes under section 375 of I.P.C. is to be looked into and the evidence is to be scrutinized to come to a definite conclusion.

18. As per the First Information Report, the victim was found missing from her house and when the girl was recovered by the police, the victim was found in the company of the present accused/appellant. When her statement was

recorded u/s 161 Cr.PC, she stated that on the missed call of the accused/appellant, they started conversation with each other and at last on the call of the appellant, she left her home. They boarded in a bus from Diphu and reached at Jagiroad and stayed in the house of the sister of the accused wherein their marriage was solemnized and started living like husband and wife.

19. In her statement recorded by the magistrate u/s 164 Cr.PC, the victim stated that she was studying at Province College, Guwahati in BA 1st semester. On 2nd August 2014, one Farid Ali came to Diphu (Rongkhelan) and she fled away with the boy. She knew him before one month. He proposed her over phone. They lived together at Jagiroad. From 2nd August to 17th September, she had been staying with him. He forced her to go with him and promised her that he loved her very much. He married her on the basis of their religious custom. They lived at his house like husband and wife.

20. From the statement of the victim, it is apparent that she was a major girl, when she left the house of her parents. There was no allegation against the appellant that the appellant applied force when the victim accompanied the accused to Jagiroad. It also appears that their marriage was held and they lived together as husband and wife. However, the victim nowhere stated that she was kept confined in the house of the accused, for which she was unable to communicate with any person. The victim also carried a mobile phone along with her but she did not inform her parents that the accused/ appellant had confined her in his house, got her married and committed rape on her against her will.

21. PW-3, who is the informant, i.e. the father of the victim, stated in his deposition that his daughter called him over phone once but she could not talk

to him properly and told him that she got stuck somewhere.

22. PW-4, who is the mother of the victim, also stated that her daughter did not tell her that she had a relationship with the accused.

23. PW-5, who is the relative of the victim, stated in her deposition that the victim passed BA and she was about 30 years of age at the relevant time. The victim did not tell her that she had love affair with the accused.

24. From the evidence of the victim girl, it reveals that the appellant got married to the victim by following Muslim customs. It is not reflected from the evidence of the victim how the marriage took place i.e., in presence of Kazi or by following any other rituals. Admittedly, the victim left her house along with the accused/ appellant without informing her parents or any of her relatives. The age of the victim was around thirty years at the relevant time. After their marriage, they lived together as husband and wife in the house of the appellant for one and half months. The victim did not raise any hue and cry at the time of solemnization of her marriage with the appellant. Though the victim got the opportunity to inform the matter to her parents or any other family members but she did not do so. Hence, the appellant and the victim being legally married husband and wife, the victim being major, the sexual intercourse between the two, if forcible, cannot be considered as rape.

25. *Exception 2* to Section 375 of **IPC** states "non-consensual sexual intercourse by a man with his wife, if she is over 15 years, does not amount to rape". Thus, coercive and non-consensual intercourse by a husband with his wife (above 15 years of age) is outside the ambit of rape.

26. In view of the above discussion and considering the facts and circumstances of the case, this court is of the view that the prosecution has

failed to prove the case against the accused/ appellant beyond all reasonable doubt.

27. In the result, the appeal is allowed. The Judgment and order dated 10/08/2023, passed by the trial court is hereby set aside. The accused/ appellant is acquitted on benefit of doubt. The appellant, who is in jail, be released forthwith, if not wanted in any other case.

28. The criminal appeal is disposed of accordingly.

29. Send back the trial court record.

JUDGE

Comparing Assistant