
(2017) 09 GAU CK 0012
In the Gauhati High Court
Case No : 140 of 2008

Abdus Samad Sheikh, Son of Md. Monsur Ali Sheikh

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 14-09-2017

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 313](#), [Section 374\(2\)](#), [Section 354\(a\)\(b\)](#) - Power to examine the accused - Appeals from convictions - Language and contents of Judgm

Citation : (2017) 09 GAU CK 0012

Hon'ble Judges : Hitesh Kumar Sarma

Bench : SINGLE BENCH

Advocate : MA Sheikh, KU Ahmed, MH Choudhury, M Hussain, NJ Dutta

Final Decision : Allowed

Judgement

1. This appeal, under Section 374(2) of the Cr.P.C., is preferred against the judgment and order, dated 06-08-2008, passed by learned Sessions Judge, Dhubri, in Sessions Case No. 21 of 2006, convicting the accused-appellant, under Sections 313 and 498(A) of the IPC and sentencing him, to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.10,000/-, in default, to suffer simple imprisonment for 1 year under Section 313 IPC and also sentencing him to rigorous imprisonment for 2 years under Section 498(A) IPC.

2. I have heard Mr. MA Sheikh, learned counsel appearing on behalf of accused-appellant. I have also heard Mr. NJ Dutta, learned Additional Public Prosecutor, for the state respondent.

3. The fact of the case is that, the informant Rashida Begum, got married with the accused-appellant Abdus Samad on 11.10.2001, and started conjugal life with accused-appellant in his house. After some days of their marriage, her accused-appellant husband, on being instigated by co-accused Mansur Ali and Manjira Khatun, demanded an amount of Rs. 10,000/- from her to be brought

from her elder brother for the purpose of repairing of his shop-house. Due to her failure to meet such demand, the accused persons tortured her physically, and also terminated the child in her womb at Dhubri Civil Hospital without her consent, and threatening her further that she would not be allowed to give birth to a child, until the demand is met. They also continued to demand an amount of Rs. 10,000/-, and simultaneously subjected her to physical torture. The informant conceived for the second time. The accused appellant threatened her that they would cause miscarriage of the child in her womb. Then, she somehow managed to collect Rs. 2,500/- from her elder brother and gave it to the accused-appellant husband, but they kept on insisting for the remaining amount of Rs. 7,500/-. She was also told that she would not be allowed to stay in his house unless she could bring the amount. The accused appellant administered some tablets to her, following which, she miscarried. She also sustained injuries due to the assault on her person by the accused appellant. It is further alleged that she was administered the tablet to get relief from the injuries she sustained, but she developed pain after taking the tablet and then she suffered the miscarriage. On 25.5.2003, she was driven out from the house of the accused-appellant following her failure to meet the demand for remaining amount of Rs. 7,500/-. She took refuge in the night at the house of her brother at Gauripur, and on the next day, she went to her parental home. She was waiting for the accused to come to take her back which the accused-appellant did not do. The informant issued legal notice to her accused-appellant husband to take her back which was not responded to by the accused appellant.

4. With the above facts, the informant lodged a complaint before the learned Sub-Divisional Judicial Magistrate, Dhubri, who in turn, forwarded the same to the concerned police station, which registered a case, being No. 138/2003 under Section 498(A) IPC, investigated into it, and finally, submitted charge-sheet against the accused-appellant under Section 498(A) IPC.

5. The learned Sub-Divisional Judicial Magistrate, Dhubri, tried the case, and at the stage of judgment, as he found materials against the accused-appellant under Section 313 IPC also, he committed the case to the learned court of Sessions Judge, Dhubri.

6. On receipt of the case by the learned Sessions Judge, Dhubri, and on appearance of the accused-appellant, learned Sessions Judge, framed a formal charge against him under Sections 313/498(A) IPC, to which he pleaded innocence.

7. In this case, to bring home the charge against the accused appellant, the prosecution examined as many as 9 (nine) witnesses including the Investigating Police Officer. The defence cross-examined the prosecution witness.

8. In his statement, recorded under Section 313 Cr.PC also, the accused appellant denied the allegations made against him and also declined to adduce evidence.

9. In this case, the informant/victim is, examined as PW1. In her evidence, she stated that after the marriage, the accused appellant demanded money from her and also tortured her. She also warned that if she could not bring money, her pregnancy would be terminated. Due to her failure to meet the demand, her abortion was caused in the Civil Hospital at Dhubri without her consent. She was taken to the Dhubri Civil Hospital forcibly and compelled for termination of her pregnancy. But, even thereafter, the accused continued to subject her to physical torture. He also caused miscarriage of her second child in her womb by administering a tablet which she believed to be a medicine for fever as she was suffering from fever at that point of time. This time also, the abortion was done without consent. She proved the FIR, vide Ext.1. In her cross-examination, as in the FIR, she admitted that she issued a legal notice to the accused appellant, marked, Ext.A in this case, wherein, as elicited by the defence through her cross-examination, she did not state anything about the abortion or her pregnancy and she only alleged assault on her person by the accused appellant and demanded to take her back. She is also admitted in her cross-examination that there is a suit, instituted by the accused appellant, for restitution of conjugal right, vide TS(R) No. 242/2003, and that she lodged the FIR, after institution of this suit. She also found to have stated that she did not know the name of the doctor who performed the abortion in the Dhubri Civil Hospital. She is further found to have admitted that she did not produce any documents regarding her pregnancy to the police. She also did not remember the date when she was taken to Dhubri Civil Hospital, where a lady doctor caused abortion without her consent. She also found to have admitted that while adducing evidence, in another case, against the accused appellant, she did not speak about the assault on her person by the accused appellant due to her failure to meet the demand for money. She also deposed that she was driven out of the house of the accused appellant for her failure to meet the demand for the remaining amount of Rs.7,500/-. She is also heard saying in her evidence that the accused-appellant refused to agree to the effort of one Jamshed, a village elder, and her other relatives, to resume their conjugal life.

10. PW2 is the mother of the victim/PW1, who is found to have stated in her examination-in-chief that, one day, the accused-appellant and his father came to her house and asked for Rs.20,000/-/25,000/- from her. She also found to have stated in her evidence that after the marriage, both the accused appellant and the informant used to quarrel. PW1 got pregnant and the accused appellant told that he did not want any child, and demanded Rs. 10,000/-, for opening a shop by the accused appellant, but she gave Rs.2,500/-. She is also found to have deposed that once the abortion of the child carried by her daughter/PW1, was caused, and thereafter, miscarriage was caused for the second time while she again became pregnant. The accused appellant used to scold PW1/victim. Then, she came back to her parental home and stayed there. The accused appellant did not take her back. She is also heard saying in her cross-examination that she did not know as to after how many months of their marriage, the PW1 got pregnant.

She also expressed her ignorance about the second pregnancy of the PW1 in her cross-examination. According to her, miscarriage of her child was done at the house of the accused appellant although she was not aware when it happened. She is also found to have admitted that the accused appellant issued notice for restitution of conjugal rights. She also admitted that she never saw the accused appellant assaulting the PW1/victim, with a further admission that the instant case was filed against the accused appellant after receipt of the notice from him for restitution of conjugal right.

11. PW3 is the brother-in-law of PW1/victim. According to him, due to failure to meet the demand for money, the accused appellant assaulted the PW1, and on 25.5.2003, she was driven out from the house of the accused appellant. In his cross-examination, he has admitted that he never saw the accused appellant assaulting the PW1/victim. He has also admitted that he was not aware of the date and time of demanding money and also about giving of Rs.2,500/- to the accused appellant.

12. PW4 is the elder brother of the victim/PW1. He claims in his evidence that on a certain day, PW1 went to their house all of a sudden and wanted Rs. 10,000/- to meet the demand of the accused appellant to which he expressed his inability, but his mother gave Rs. 2,500/- to his sister/PW1. The fact that she would be driven out from the house of the accused appellant, if the demand is not met, was informed to this witness by PW1/victim. In his cross-examination, he is found to have admitted that in another case, he deposed that the PW1/his sister, came back to their house and did not return to the house of her husband/accused appellant, and thereafter, litigations started between them. He also admitted that he did not state before the police, during investigation, that the accused appellant demanded Rs. 10,000/- . He further admitted that he has no personal knowledge about the details of the case filed by PW1/victim.

13. PW5 is also another elder brother of the victim/PW1. He claimed that as demanded by the accused appellant, they paid him an amount of Rs. 1,30,000/- after registration of marriage of the accused appellant and the PW1/victim. The accused appellant further demanded Rs.10,000/- for his business, but Rs. 2,500/- was given to him. The accused appellant assaulted the PW1 for not paying the full amount of Rs. 10,000/- and the accused appellant forcibly caused her abortion, but, even thereafter, they continued their conjugal life. Second time also, miscarriage of the child in womb of the victim/PW1 was caused by the accused appellant. He expressed his ignorance about the termination of the pregnancy of PW1 at Dhubri as well as the date on which demand for money was made. He also admitted that the accused appellant did not demand the money directly from him. On 25.5.2003, the victim/PW1 went to his house.

14. PW6 is the cousin brother of the victim/PW1. According to him, the PW1/victim has been staying in the house of her parents since last 4 years. The accused-appellant demanded some money out of which, Rs. 2,500/- was paid. He also deposed that the accused appellant had driven her out from his house for

not meeting his demand of money in full. He also heard about the abortion of the child of the victim/PW1. In his cross-examination, he is found to have stated that the PW1/victim came to her brother's house on 10.2.2003, but did not return, and thereafter, the cases started between the parties.

15. PW7 is the Senior Medical & Health Officer, Golakganj PHC, is found to have stated that on 7.7.2003, he examined the victim/PW1, aged 25 years, with reference to Golakganj PS Case No. 138/2003 under Section 498(A) IPC, and found no sign of any injury on her person. Ext.2 is the medical report.

16. PW8 is found to have stated in his evidence that after 4/5 months of conjugal life with the accused appellant, the victim/PW1 left to her parental house. The accused appellant sent some persons to take her back although she did not come back. Thereafter, the case was filed by the accused appellant for restitution of conjugal rights and the victim/PW1 also filed another case. In his cross-examination, he is found to have stated that the accused appellant neither tortured the victim/PW1 nor demanded money from her. Their life was normal.

17. PW9 is the Investigating Police Officer and he is found to have stated in his evidence that during investigation, he found nothing regarding the alleged abortion, and record of such abortion also could not be traced in the hospital.

18. Substantiating the suggestions of the defence put to the PW2, this witness (PW9) deposed that PW2 did not state before him that the accused appellant demanded money. PW5 also did not state before him as regards the abortion as well as pregnancy of the victim/PW1 to the police during investigation as well as about the demand of money. It has come out from the evidence of the Investigating Officer that none of the witnesses stated before him, during investigation, about the demand of money, payment of Rs.2,500/- out of the demanded amount of Rs. 10,000/- , and also about the payment of Rs. 1,30,000/-.

19. It also appears from the evidence on record that PW2 i.e. the mother of the victim/PW1, herself deposed that the victim/PW1 came to their house and did not return inspite of receipt of legal notice for restitution of conjugal rights. PW8 categorically stated that after 4/5 months of the marriage, the victim/PW1 went to her parental house and did not come back inspite of the fact that the accused appellant sent some persons to bring her back. There is no evidence at all to show that the PW1 was driven out by the accused appellant from his house after assaulting her for her failure to meet the demand for money as none of the witnesses are heard saying that they were informed about the fact of driving her out by the accused appellant from his house. Unless and until the other witnesses are told about the assault or other happenings in the house of the accused appellant by the PW1/victim herself, there was no scope for any of the witnesses to know about that. None of the witnesses, stated above, is also found to have stated that they were ever reported by the victim/PW1 about such facts. On the other hand, they paid Rs. 1,30,000/- to the accused appellant

immediately after registration of the marriage between them. But the victim, as PW1, herself deposed that the articles valued about Rs. 1,30,000/-, which she only gave and not cash amount, thus, belying the evidence of the PW5 on this count. On the other hand, PW2, i.e. the mother of the victim/PW1, is heard saying that the accused appellant and his father went to her house and asked for Rs. 20,000/-/25,000/- which is heard for the first time in this case as this is not the allegation of the informant/victim PW1 herself. Such allegation is neither found in the complaint/FIR nor in the evidence of any of the witnesses except for the first time in the evidence of PW2, even not corroborated by the victim/PW1, and her sons, PW4 & PW5, is found to be an attempt to stage a make-belief story by PW2 making herself untrustworthy. It appears from the evidence of all the witnesses, referred to above, that none of the witnesses have personal knowledge about the assault on the person of the victim/PW1, and there is also no evidence, as stated above, that the victim /PW1 told any of the witnesses that she was assaulted. That apart, the evidence of PW2 and PW8, taken together, makes it clearly appear that the victim/PW1 went to her parental house and stayed there on her own. The evidence of PW1/victim that the accused appellant did not take her back to his house is belied by the evidence of PW8, who is an independent witness, that the PW1 refused to go back to the company of the accused appellant inspite of the fact that some persons were sent to bring her back to his company.

20. That being so, in view of the discussions of evidence of the prosecution above, and the findings noted therein, it appears that the prosecution witnesses belied each other on the demand for property and as such the ingredients required to establish an offence under Section 498(A)(b) is found missing in this case. Evidently, there is no allegation of Section 498(A)(b) IPC in the instant case. That apart, the fact as well as the reason of leaving the house of the accused appellant by the PW1/victim could be established by the prosecution, and, as such, the prosecution has not been able to prove the charge against the accused appellant under Section 498(A) IPC beyond all reasonable doubt.

21. Now, coming to the charge under Section 313 IPC, let us scan the evidence on record.

22. PW1/victim, stated in her evidence that first abortion was done in the Dhubri Civil Hospital by a lady doctor, at the instance of the accused appellant without, her consent. PW2 is the mother of the victim and she is found to have stated in her evidence that she was not aware that after how many months of the marriage the PW1/victim became pregnant and when her pregnancy was terminated at the Dhubri Civil Hospital. PW1 has admitted in her evidence that no documents regarding her termination of the pregnancy could be produced before the court. The investigating officer is also found to have stated in his evidence that no record of abortion of the pregnancy of the victim/PW1 at the Dhubri Civil Hospital could be found. The lady doctor, who allegedly terminated the pregnancy of the victim/PW1, without her consent, is not made an accused in

the case. She also deposed that the accused appellant did not allow her to give birth to her child until the demand is met. But, even then, their sexual intercourse continued as she claimed that she became pregnant for the second time, which was also miscarried, as some tablet was administered to her by her husband/accused appellant. This fact is also not known to the mother of the victim/PW1. None of the other witnesses are found to have stated that they knew as to how and when both the alleged abortion and miscarriage were caused. There was no evidence on record to show that none of the witnesses were told by the victim/PW1 that her pregnancy was terminated twice by the accused appellant/doctor without her consent. On the other hand, there is absolutely no evidence that the accused appellant forcibly took her to the Dhubri Civil Hospital for abortion. It appears from the evidence, even if it is believed that she had been to Dhubri Civil Hospital, that the accused appellant only accompanied her to the hospital. There is no whisper in her evidence that the accused appellant insisted her to terminate her pregnancy or made any request to the doctor to cause abortion of the victim/PW1.

23. In the absence of any specific evidence, it cannot be taken to have been proved by the prosecution that the charge under Section 313 IPC is proved. That apart, in absence any specific evidence that the doctor at Dhubri Civil Hospital, aborted her without her consent, it cannot be said that she has proved the fact of consent or no consent merely because she made a statement in the evidence without any corroboration. She is even not found to have made a whisper about the abortion of her first pregnancy without her consent till after several months of her miscarriage of the second pregnancy allegedly caused by the accused appellant and till she filed the present case, after a inordinately long delay of several months. The conduct of the victim/PW1 rather makes it appear that even if there was miscarriage of her pregnancy at Dhubri Civil Hospital, yet it was with her consent. In the absence of implicating evidence, the accused appellant cannot be held guilty of the charge of causing miscarriage of her pregnancy without her consent.

24. In this respect, I would like to refer to a decision in *Moideenkutty Haji And Ors. vs Kunhikoya And Ors.* reported in AIR 1987 Ker 184 , which to my mind, applicable in the facts and circumstances of the case.

".....5) Section 313, I.P.C. penalises voluntary causing of miscarriage of a woman with child without her consent while miscarriage with consent is dealt with under Section 312. Under Section 313 the person procuring the abortion alone is liable to punishment whereas under Section 312 the woman is also liable for punishment. The only allegation in the complaint on that side is, on hearing that she is pregnant the petitioner took her to a Doctor who caused the abortion. There is no case that it was without her consent. On the other hand the averments show that she willingly submitted herself to abortion and even thereafter she had sexual intercourse with the petitioner. There is nothing to show that abortion was at his instance. Whether he was only accompanying the

lady at her request and whether he even made a request to the Doctor to have abortion, are not clear from the allegations. The Doctor who conducted the abortion is not made an accused which means she has no complaint against him. It is clear that an offence under Section 313 is also not made out from the allegations....."

25. The learned trial court is found to have based its judgment on the evidence in examination-in-chief of the victim/PW1 and her mother/PW2 in respect of the charge under Section 313 IPC although, as discussed above, the defence could demolish the prosecution case during the cross-examination of the witnesses. The decision of the learned trial court would have been otherwise had the cross-examination of the prosecution witnesses been not ignored. On the other hand, the learned trial court admonished the Investigating Police Officer for not collecting the evidence relevant for the alleged offence under Section 313 Cr.PC and even then found the accused appellant guilty of the charge under Section 313 IPC. On the other hand, as indicated above, there is no mention as well as discussion of the complete evidence on record and no mention at all of the evidence in cross-examination of the witnesses. The judgment of learned trial court is found not containing the reasons which formed the basis of the decisions as is required under Section 354(a)(b) of the Cr.PC.

26. In view of the above position of law, on the basis of the evidence on record and the facts narrated above, in the considered view of this court, the prosecution has failed to bring home the charge under Section 313 IPC.

27. In view of the discussions of the evidence on record, and the findings recorded during discussions, this court is of the view that the prosecution has failed to prove the charge against the accused appellant under Section 498(A) IPC beyond all reasonable doubt, and has failed to prove the charge under Section 313 IPC at all, and as such, he deserves to be acquitted.

28. Accordingly, the judgment of the learned trial court of Sessions Judge, Dhubri, is set aside.

29. The appeal is, accordingly, allowed.

30. Send back the LCR along with a copy of this judgment.