
(2018) 05 GAU CK 0201
In the Gauhati High Court
Case No : Criminal Appeal 348 of 2013

Akida Khatun

APPELLANT

Vs

State Of Assam

RESPONDENT

Date of Decision : 28-05-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 323, 354, 376, 506
Code Of Criminal Procedure, 1973 — Section 200, 313

Citation : (2018) 05 GAU CK 0201

Hon'ble Judges : HITESH KUMAR SARMA, J

Bench : Single Bench

Advocate : E. Hussain, B.J. Dutta, A.T. Sarkar

Final Decision : Dismissed

Judgement

1) None appears for the appellant on call. Learned counsel for the private respondent Nos. 2 to 6 are represented by learned counsel Mr. A.T.

Sarkar. State respondent No. 1 is represented by learned Additional Public Prosecutor, Mr. B.J. Dutta.

2) Since none appears for the appellant on call and this is an old pending case and the records are available, this court proposes to dispose of this

appeal, on hearing the learned counsel for the respondents, aforesaid, and on perusal of the records of the learned trial court as well as the evidence of the witnesses.

3) This appeal, is preferred against the judgment and order, dated 9.9.2013, passed by the learned Additional Sessions Judge (FTC), Dhubri, in

Sessions Case No. 244/2011, acquitting the accused-respondent No. 2 for offence under Section 376 of the IPC and remaining respondents of the charges under Sections 354/323/34 of the IPC.

4) The fact leading to the case is that, a complaint case, being CR Case No. 752/2011, was filed by the victim/present appellant against the accused-

respondents under Sections 376/354/323/34 of the IPC, alleging therein that the accused-respondent No. 2 committed rape on her, and thereafter, he

promised to marry her. He committed rape on her 17 times within a span of 5 months since 17.11.2010. She eloped with the accused-respondent No.

2 on 3.3.2010 in order to marry him socially and on her arriving in his house, the other accused-respondents assaulted her with blows, kicks and also

by pulling her hair. At the interference of the neighbouring witnesses, she was saved. Later on, the accused-respondent No. 2 refused to marry her

and instead he offered Rs. 10,000/- to settle the matter. The village elders assured to settle the matter on 4.3.2012, but the accused-respondents

avoided the process of settlement and rather she was threatened that she would be kidnapped and killed.

5) The learned Magistrate had taken cognizance of the complaint, after examination of the complainant under Section 200 of the Cr.PC, and after

making necessary enquiry, finding a prima-facie case, punishable under Sections 376/354/323/506/34 of the IPC, issued process against the accused

respondents. The learned Magistrate committed the case to the learned Sessions Judge.

6) Thereafter, exhausting all required legal formalities, a formal charge against the accused-respondent No. 2 was framed under Section 376 of the

IPC and against the remaining accused-respondents, charges under Sections 354/323/34 of the IPC was framed. The accused-respondents pleaded

not guilty to the charges. Therefore, the trial commenced.

10) During the trial, the prosecution examined as many as 6 (six) witnesses including the victim.

11) After closure of the prosecution evidence, statements of the accused-respondents under Section 313 of the Cr.PC were recorded. The accused-

respondents denied the allegations made against them. They also declined to adduce defence evidence.

12) After conclusion of trial, the accused-respondents were acquitted by the learned trial court, as aforesaid.

13) I have perused the evidence on record as well as the records of the learned trial court including the impugned judgment.

14) The prime witness in this case is the victim herself examined as PW4. In her evidence, she is heard saying that she was a minor of 17 years of

age at the time of occurrence. She read upto Class-III. On the date of recording her evidence, she stated that the occurrence took place 2 years

before on the day of Idd, while she came out of her house at about 10:30 pm to ease out, the accused-respondent No. 2, held her hand and took her to

the paddy field and committed rape there. After committing rape on her, the accused-respondent No. 2 also asked her not to disclose this to anybody

as he would marry her. Thereafter, she was left in her house. She was raped 17 times by the accused-respondent No. 2 and, on 3rd March, 2011, he

took her to his house with a view to marry her, which however, did not materialize.

In her cross-examination, she is heard saying that she did not file any FIR with the police station and that she was never examined by any doctor to

ascertain whether rape was committed on her or not. She has exhibited her statement recorded under Section 200 of the Cr.PC, as Ext. Ka. She

denied that she did not state in her such statement that in the night of Idd, while she was out of her house to ease out, the accused-respondent No. 2

held her hand, took her to the paddy field, and committed rape there. She further deposed that she was in love with accused-respondent No. 2. She

also denied that the accused-respondent No. 2 never committed rape on her. In her complaint petition, it has been alleged that, before 3.3.2011 also, 5

months back the accused-respondent No. 2 committed rape on her. Till the date of occurrence alleged in the complaint, out of which the aforesaid

Sessions case arose, rape was committed on her 17 times.

There is no whisper in the evidence on record that she ever resisted such commission of rape on her person although such rape was committed 17

times. What is most important in this case is that, on 3.3.2011, she was taken to the paddy field by the accused-respondent No. 2, committed rape on

her person, and brought her back to her residence. There is not a single whisper in the whole evidence on record that she ever said "no" to the

alleged rape on 3.3.2011, rather her evidence makes it appear that she was a consenting party, as, after rape, she was brought to her house back and

she did not take any exception on such alleged rape. That apart, her evidence is that, she was in love with accused-respondent No. 2 and he was

supposed to marry her, which did not materialise for very many reasons.

15) Now, the question is, if she is a minor, her consent is immaterial. She claimed in the complaint that, she is 17 years of age at the time of

occurrence. To establish her age at the time of occurrence, no evidence has been laid in the case before the learned Additional Sessions Judge.

Admittedly, she was not examined by the medical officer. So, this court does not have before it any evidence, oral or documentary, to substantiate the

claim of the victim that she was a minor at the relevant time of occurrence. That being so, it cannot be safely held that she was a minor on the date of

occurrence and the fact that the alleged rape was committed on her 17 times by the accused-respondent No. 2 means to suggest that she was used to

sex and was also a consenting party. Since she could not establish her age to be a minor, the benefit of this goes to the accused-respondent No. 2.

16) On the other hand, it appears that she lodged the complaint case before the learned trial court, 5 months after the first occurrence which has

strengthen the view of this court that she was a consenting party, as in between, admittedly she had sexual intercourse 17 times with the accused-

respondent No. 2. Therefore, in the considered view of this court, none of the witnesses are found supporting the prosecution version staged by the

victim in respect of commission of rape on her person. It is in the evidence that only on 3.3.2011, when the accused-respondent No. 2 did not marry

her, she disclosed the fact of commission of rape on her person to other witnesses. That being so, the evidence of the victim, examined as PW4, does

not inspire confidence of this court that rape was committed on her person rather she is found to be a consenting party. There is also no evidence that

with a promise to marry rape was committed on her person. None but except herself has stated this in evidence. Such evidence needs some

corroboration, otherwise, to rely on such solitary statement of the victim is full of risks in the background facts of this case. Therefore, the evidence

led by the victim/PW4 is not reliable and inspiring confidence of this court so far the alleged commission of rape on her person by the accused-

respondent No. 2 is concerned.

17) So far the alleged offences, under Section 354/323/34 of the IPC, committed by the other accused-respondents, there is no eyewitness. PW4

stated in her evidence that the village headman had seen the occurrence, whose

name is Ajijur Rahman. But, this Ajijur Rahman has not been examined by her as witness. She also deposed that PW1 had seen the occurrence but PW1 did not support her while adducing evidence, on oath.

Although PW5 and PW6 are found to have made statements in their evidence in respect of the village bichar, yet they are found silent about the allegation of assaults etc. That being so, this is a case of absence of evidence to substantiate the charges under Sections 354/323/34 of the IPC.

18) In view of the above, it appears that the judgment passed by the learned trial court of Additional Sessions Judge, Dhubri, is based on evidence on record, and is not at all found perverse to the evidence led by the prosecution for set aside the judgment of acquittal and convict the accused-respondents.

19) The settled position of law is that the finding of acquittal, recorded by the learned trial court, must be perverse to the evidence on record to set aside the same in appeal. But, in the instant case, this court does not find that the finding recorded by the learned trial court recording an order of acquittal, was perverse.

20) That being so, no interference is called by this court, and accordingly, this appeal is dismissed.

21) Send down the LCR with a copy of this judgment.