

(2018) 01 GAU CK 0038
In the Gauhati High Court
Case No : 269 of 2012

APARNA CHAKRABORTY

APPELLANT

Vs

STATE OF ASSAM and ANR

RESPONDENT

Date of Decision : 19-01-2018

Acts Referred:

[Code of Criminal Procedure, 1973](#), [Section 164](#) - Recording of confessions and statements
[Indian Penal Code, 1860](#), [Section 376](#),
[Section 90](#), [Section 17](#)

Citation : (2018) 01 GAU CK 0038

Hon'ble Judges : Mir Alfaz Ali

Bench : Single Bench

Advocate : I.H. LASKAR, H R A CHOUDHURY

Final Decision : Dismissed

Judgement

1. This revision is directed against the judgment and order dated 10.02.2012 passed by the learned Assistant Sessions Judge No. 2, Silchar in

Sessions Case No. 13/2011. By the said judgment, learned Trial Court acquitted the respondent No. 2 of the charges under Section 376 and 417

IPC.

2. As per prosecution case, the accused/respondent No. 2 was the neighbor of the victim and he used to visit the house of the victim very often

and developed a relationship with the victim. The respondent No. 2 was also engaged in physical relationship with the victim forcibly and

consequently the victim became pregnant. When the respondent No. 2 was informed about the pregnancy of the victim, the respondent No. 2

promised to marry her. But later on, he started avoiding the victim. The mother of the victim informed the father of the respondent No. 2, who

initially assured to settle the matter, but did not take any step. The informant along with the victim went to the house of the respondent No. 2 to

discuss the matter, but the respondent No. 2 and his father misbehaved them and had driven out them from the house. Finding no alternative, the

mother of the victim lodged the FIR (Ext.1), on the basis of which, police registered a case and after usual investigation, laid charge sheet against

the accused/respondent No. 2 under Section 376 and 417 IPC.

3. On receiving the charge sheet learned Judicial Magistrate took cognizance and having found the offence under Section 376 IPC exclusively

triable by the Court of Sessions, committed the case to the court Session and eventually, the respondent No. 2 stood trial in the Court of the

learned Assistant Sessions Judge, Silchar.

4. In course of trial, charges under Section 376/417 IPC were framed against the respondent No. 2, to which he pleaded not guilty. Prosecution

examined 8 witnesses to establish the charges and on appreciation of evidence, learned Trial Court acquitted the accused/ respondent No. 2 of

both the charges framed against him.

5. Being aggrieved by the judgment and order of acquittal, the victim preferred the instant appeal.

6. Learned counsel Mr. I.H. Laskar, for the revision petitioner, learned Sr. Counsel Mr. H.R.A. Choudhury for the respondent No. 2 and the

learned Additional P.P. Mr. D. Das, for the respondent No. 1, State were heard.

7. Learned counsel for the revision petitioner submitted that inspite of the clear evidence of the victim that the accused/respondent No. 2 initially

committed sexual intercourse with the victim forcibly and subsequently he committed sexual intercourse promising to marry her and consequently

she became pregnant, learned Trial Court acquitted the accused/ respondent No. 2 of both the charges illegally, without properly appreciating the

evidence brought on record.

8. Par contra, learned Sr. Counsel for the respondent No. 2 contended that the victim, a major girl, being in love with the respondent No. 2 was

engaged in sexual activity willingly and with consent and therefore, no offence was committed by the respondent No. 2.

9. From perusal of the record, it appears that out of 8 witnesses examined by the prosecution, PW-5 and PW-6 were declared hostile. PW-1,

PW-3 and PW-4 were reported witnesses. PW-7 & PW-8 were the doctor and Investigating Officer respectively and the entire prosecution case

hinges on the sole testimony of the victim, the PW-2.

10. PW-2, the victim stated in her evidence that she was in love with the accused/respondent No. 2 for last seven years and in the month of June,

2006, the accused/respondent No. 2 came to her house and asked for a glass of water. After taking the water, the respondent No. 2 caught hold

the victim by her hand and committed sexual intercourse with her, inspite of her objection. The accused/respondent No. 2 later on promised to

marry her. She also stated that after two days, the accused again visited her house and committed sexual intercourse with her and also put

vermillion on her forehead. She proposed for court marriage, but the accused was taking time on various pretexts and ultimately avoided her. When

she became pregnant, she informed her mother and her mother lodged the FIR in consultation with her. The statement of the victim recorded under

Section 164 CrPC has been proved as Ext. 2. In her statement recorded under Section 164 CrPC, she stated that in the month of June, 2006,

while she was alone in the house, the accuse came and committed sexual intercourse with her promising to marry and thereafter the accused

continued to have sexual intercourse with her for about 30 times. Consequently, she became pregnant.

11. The PW-1, mother of the victim, deposed that she came to know from the victim about her pregnancy through the accused. It was elicited

from her cross examination, that the accused/respondent No. 2 and the victim were cousin brother and sister and within the prohibited degree of

relationship. According to PW-4, he only heard about the victim being pregnant through the accused/respondent No. 2, and as such, the testimony

of the PW-4 appears to be hearsay. It was also elicited from the cross examination of PW-3 and PW-1 that the victim and her mother went to the

police station together for lodging the FIR and the FIR was lodged by PW-1 in consultation with the victim.

12. If the testimony of PW-2 before Court as well as her statement recorded under Section 164 CrPC as well as the statement made in the FIR

(Ext.1) are taken together, it would appear that before sexual intercourse, there was no promise. Although, the victim stated that in the month of

June, 2006, the accused committed sexual intercourse with her against her consent and inspite of her resistance, she had admitted that after two days also the accused again came to her house and committed sexual intercourse, but did not state anything regarding raising any objection. She further stated that nearly 30 times the accused committed sexual intercourse with her. It is also evident, that she was in deep love with the accused/respondent No. 2 for the last seven years. What is abundantly clear from the evidence of the victim in court and the allegation made in the FIR, that there was no promise on the part of the accused to marry her before committing sexual intercourse. Admittedly, after the sexual intercourse the accused told that he would marry the victim. The conduct of the victim and her evidence in totality was considered by the learned Trial Court and after appreciating the evidence, learned Trial Court came to the finding that the sexual intercourse by the accused/respondent No. 2 with the victim was with consent of the victim, who was a major girl of more than 20 years of age and therefore, the learned Trial Court held that no offence of rape was committed. With regard to the commission of offence under Section 417 IPC also, learned Trial Court came to the finding on the basis of the evidence that there was no misconception of fact or deception, while giving consent by the victim for sexual intercourse and therefore no offence under Section 417 IPC was also made out.

13. From the evidence of PW-2, the victim and her statement at different stages including the averments made in the FIR as well as the conduct of the victim and their deep love for 7 years makes it abundantly clear that sexual intercourse between the accused and the victim was with the consent of the victim and prosecution has not been able to establish such sexual intercourse to be non-consensual. It is also evident that the accused alleged to have promised to marry the victim after sexual intercourse for the first time and continued to have sexual intercourse with the victim. Evidently, both the accused and the victim were in deep love for 7 years. Admittedly, the accused and the victim were within the prohibited degree of relationship being cousin brother and sister. In the above facts and circumstances, even if it is assumed for the sake of argument, that the accused/respondent No. 2 made any promise of marriage and the victim consented for sex on such promise, question would again arise whether

such consent could be held to have been obtained by deception or misconception of facts to render the consent vitiated.

14. Section 90 IPC provides that a consent is not such a consent as it intended by any section of this Code, if the consent is given by a person

under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in

consequence of such fear or misconception. The provision of Section 90 makes it clear that in order to hold a consent to be vitiated under Section

90 IPC, twin ingredients are required to be proved. One from the point of view of the victim and the other from the point of view of the accused.

The victim must have given her consent either under fear or injury or on false representation of the accused, believing it to be true. In case of false

representation on misconception of fact, prosecution needs to prove, that had the victim not believed the promise or representation to be true, she

would not have given her consent. At the same time, the accused, who obtained the consent by alleged mis-representation of facts also must know,

that the victim had given her consent only as a consequence of misconception of fact believing the promise or representation made by the accused

to be true. In the instant case, there was no allegation of fear of injury and therefore, only question is whether there was misconception of fact.

Admittedly both the victim and the accused were within the degree of prohibited relationship and both were major and therefore, they were aware

of the fact that marriage between them was not possible as they were within the degree of prohibited relationship. When both the victim and the

accused were aware, that marriage between them was not possible or it was a rare probability, it is difficult to hold that the victim consented to

sexual intercourse believing the promise of marriage to be true, nor the accused/respondent No. 2 can be held to have reasons to believe, that

consent was given by the victim only in consequence of misconception of fact. When both the parties being adult, were fully aware, that marriage

between them was impossible and they were in deep love for 7 years and continued to have sex it can by no stretch of imagination be held, in the

facts and circumstances of the case, that the consent given by the victim was under any misconception of fact.

15. It is settled principle of law that revisional jurisdiction of High Court while examining an order of acquittal is extremely narrow and ought to be

exercised only in cases, where the Trial Court committed manifest error of law or procedure or ignored the relevant evidence and materials causing serious injustice or rendering the decision perverse. Re-appreciation of evidence is not permissible while exercising revisional jurisdiction (see AIR 2013 SC 3320). Therefore, unless there is violation of fundamental principle of law resulting in glaring injustice, revisional court is not supposed to interfere with the finding of acquittal recorded by the Trial Court. Even if it is found that a different view is possible, from the one, taken by the learned Trial Court, the revisional court is not supposed to replace the view of the Trial Court by its own view for interference of an order of acquittal.

16. The evidence and materials discussed hereinabove makes it clear that there was no convincing evidence to substantiate the charge against the accused/respondent No. 2 beyond reasonable doubt and the learned Trial Court after elaborate discussion of the evidence and the relevant law passed the order of acquittal and such order of acquittal passed by the learned Trial Court has not suffered from any glaring or manifest illegality or irregularity, warranting interference by this Court.

17. For the reason stated above, the present revision is found without any merit and accordingly dismissed.

18. Send down the LCR.