

(2019) 11 GAU CK 0067

In the Gauhati High Court

Case No : Criminal Revision Petition No. 307 Of 2009

Biren Handique

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 313, 397, 401
Indian Penal Code, 1860 — Section 442, 448, 497

Citation : (2019) 11 GAU CK 0067

Hon'ble Judges : Hitesh Kumar Sarma, J

Bench : Single Bench

Advocate : S Borpatragohain, Bb Gogoi, U Dutta

Final Decision : Dismissed

Judgement

1. This is a Criminal Revision Petition, filed under Sections 397/401 of the Cr.PC, challenging the legality, propriety and correctness of the judgment and order, dated 04.12.2008, passed in GR Case No. 665/2008 (GMK) under Sections 448/497 of the IPC by the learned Additional Chief Judicial Magistrate, Dhemaji. This revision petition has been preferred as per the law prevalent at that time.

2. The fact of the case is that the informant, Biren Handique/PW1 lodged an FIR with the Gogamukh Police Station alleging that the accused-respondent No. 2, Golap Gogoi, was maintaining illicit relationship with his wife, Puspanjali Handique/PW4. On 03.07.2008, at about 9:00 pm, the informant/PW1 saw the accused/respondent No. 2 coming to his house. When said Golap Gogoi/respondent No. 2 saw the informant/PW1, he came with a dao to assault him (informant). According to the informant, his wife/PW4 also admitted her illicit relationship with the accused/respondent No. 2.

3. On receipt of the FIR, the Gogamukh Police Station registered a case, investigated into it and on completion of investigation, charge-sheet against the accused/respondent No. 2 was laid under Sections 448/497 of the IPC.

4. After exhausting all required legal formalities, the learned court below framed a formal charge against the accused/respondent No. 2 under Sections 448/497 of the IPC to which he pleaded not guilty. Accordingly, the trial commenced.

5. In this case, the prosecution examined as many as 6 (six) witnesses and the defence examined none. The defence plea was of total denial.

6. After closure of the prosecution evidence, statement of the accused/respondent No. 2 was recorded under Section 313 of the Cr.PC. In his such statement, he is heard denying the accusations made against him.

7. The charge against the accused/respondent No. 2 was framed under Sections 448/497 of the IPC. Section 448 is a penal provision for committing house trespass as defined in Section 442 of the IPC. So far the offence under Section 497 of the IPC is concerned, it is adultery. The offence of adultery is that whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery.

8. I have meticulously perused the records of the learned court below, including the evidence recorded by the learned Magistrate.

9. I have also examined the judgments passed by the learned Additional Chief Judicial Magistrate, Dhemaji and impugned in this petition.

10. I have heard Mrs. S Borpatragohain, learned counsel for the revision petitioner. Also heard Mr. BB Gogoi, learned Additional Public Prosecutor, appearing for the State respondent No. 1 as well as Mr. U Dutta, learned counsel appearing for the respondent No. 2.

11. The first ingredient of an offence punishable under Section 448 of the IPC is house trespass with a view to commit an offence. The PW1/informant has stated in his evidence that on 03.07.2008, the accused/respondent No. 2 came to his house and when enquired about who he was, the accused/respondent No. 2 introduced himself with his name.

Thereafter, on enquiry as to what for he came there, he said that he used to come to his house earlier also to share bed with his wife and this time also, he has come for the same purpose. Thereafter, the accused/respondent No. 2 brought a dao from the courtyard of the house of the PW1/informant and attempted to assault him. But, the evidence of PW2 is to the effect that he had seen and heard the accused/respondent No. 2 having altercation with the informant/PW1 in front of the house, meaning thereby, that he was not inside his house at the relevant point of time. Such being the evidence, the very first element of an offence punishable under Section 448 of the IPC is found missing in the instant case. There is no other evidence supporting the evidence of the informant/PW1 in respect of trespassing of the accused/respondent No. 2 to his house with a view to commit an offence.

12. That being so, on the basis of the evidence on record, the charge under Section 448 of the IPC has not been established.

13. So far the offence under Section 497 of the IPC is concerned, the PW1 himself has not stated that he had seen the accused/respondent No. 2 indulging in sexual activities with his wife. He has referred to the statement made to him by the accused/respondent No. 2 to the effect that he used to come to his house to share bed with his wife and on that day also, he would do the same. Such statement of the informant/PW1, in his evidence, is clearly indicative of the fact that he did not witness or has personal knowledge of his wife compromising her chastity with the accused-respondent No. 2. Even, the wife of the informant/PW1 with whom the adultery is alleged has not implicated the accused/respondent No. 2 in any way and rather her evidence is to the effect that the informant (PW1) used to suspect her with one and all and he also suspected her to have illicit relationship with the accused-respondent No. 2. When the informant/PW1 did not witness the alleged offence of adultery and the same is denied by his wife, examined as PW4, it cannot be said that the prosecution has been able to establish the alleged offence of adultery under Section 497 of the IPC at all. The evidence of the other witnesses is not found implicating the accused/respondent No. 2 with the commission of the alleged offence of adultery.

14. Apart from that, the provision of Section 497 of the IPC has been struck down by a decision rendered by a five Judges Bench of the Supreme Court in the case of Joseph Shine -vs- Union of India, reported in (2019) 3 SCC 39 . On that count also, the judgment of acquittal of the accused/respondent No. 2 from the charge under Section 497 of the IPC cannot be converted to one under conviction under that provision.

15. That being so, this court is of the view that the judgment is based on evidence on record and there is no such perversity in the judgment of the learned court below requiring interference by this court in exercise of its revisional jurisdiction.

16. Accordingly, this revision petition is dismissed. However, as a parting remark, this court would like to mention that the learned court below in para 7 of the judgment has given the informant the liberty to file divorce suit in the proper court, if he is not satisfied or suspects his wife. This direction in the judgment was absolutely unnecessary and uncalled for and could have been avoided by the learned court below.

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