
(2009) 08 GAU CK 0006
In the Gauhati High Court
Case No : Criminal Appeal No. 28 of 2005

Kamal Saikia @ Kamal Sonowal

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 04-08-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 376, 376(1), 417, 493, 494

Citation : (2009) 5 GLT 344

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : J.M. Choudhury, B. Hussain and M. Hussain, for the Appellant; K.C. Mahanta, for the Respondent

Judgement

P.K. Musahary, J.—This appeal has been preferred against the judgment and order dated 11.01.2005 passed by learned Sessions Judge of Dhemaji in Sessions Case No. 61 (DH)/2004, convicting the accused-Appellant under Sections 376(1) and 417 IPC and sentencing him to undergo to R.I. for 7 years and to pay a fine of Rs. 10,000/- u/s 376(1) IPC, in default, to undergo further R.I. for 1 years; and further to undergo R.I. for 1 year and to pay of a fine of Rs. 5,000/- u/s 417 IPC, in default, to undergo R.I. for 3 months.

2. Briefly stated, the prosecution case is that the victim girl, Kalpana (real name withheld) and the accused-Appellant, Shri Kamal Saikia are neighbours of village Chinaichuk Garia Bari under P.S. Dhemaji in Dhemaji District. They were in love for a long period of time and the accused-Appellant promised the victim for a social marriage. Innocently the victim girl believed in the promise of the accused. With such promise, the accused came to the house of Kalpana in the month of August-September (Aghun), 2003. As he found her alone in her house, he committed rape on her. The physical and sexual relation between the victim and the accused-Appellant continued and as a result, she got pregnant. She approached the accused for marriage. The accused did not readily refuse to

marry her but asked her to await till the month of "Bohag" (April/May) so that he could collect some money. On being assured so, Kalpana remained silent expecting that the accused would marry her. With such expectation she did not disclose the incident to anybody, even to her mother. Ultimately, the accused did not turn up to marry her as promised by him. The victim girl ultimately had to disclose the matter to her mother who approached the accused. On being approached the accused admitted his guilt but assured the victim's mother that he would take Kalpana to his home and would accept her as his wife. But he did not keep his promise. The matter was then informed to the Mahila Samity but the accused denied the allegations and left the village.

3. Finding no other alternative, the victim's mother, Smti. Debenti Sonowal, lodged the written FIR with the Dhemaji Police Station on 30.04.2004. By that time the victim girl was at the advanced stage of 7 months. On the basis of the said Ejahar, a case being Dhemaji P.S. Case No. 107 of 2004 was registered under Sections 376 / 494 IPC. On completion of the investigation, the police laid the charge sheet against the accused-Appellant under Sections 376 and 493 IPC. The case was committed to the Court of Session, Dhemaji for trial. The learned Sessions Court framed charge against the accused-person under Sections 417 and 376(1) IPC. The charge being read over and explained to the accused-Appellant, he pleaded not guilty and claimed to stand trial. The prosecution examined as many as 6 witnesses including the I.O. while the defence examined none. On completion of the trial and after hearing the counsel for the parties, the learned trial Court convicted and sentenced the accused-person as stated earlier.

4. Mr. Choudhury, learned Senior Counsel, placing the evidence of the victim girl and also the evidence of her mother (PW. 2) and Medical Officer (PW. 5) submits that she was major at the time of alleged occurrence and she was a consenting party to the sexual intercourse that took place on several occasions and as such, the offence u/s 376(1) IPC would not be attracted. According to him, it is at best a case u/s 417 IPC for which the punishment prescribed is only one year. It is also submitted by him that the accused-Appellant has been in jail for more than 4 years 7 months and as such, he may be set at liberty forthwith.

5. Mr. K.C. Mahanta, learned Addl. Public Prosecutor submits that there is no conclusive proof that the victim girl was above 16 years of age and she was major at the time of occurrence. The victim girl, in her statement u/s 164 Code of Criminal Procedure stated that her age was 17 years. It has been proved that the accused-Appellant on false promise committed the offence u/s 376 IPC by committing rape without her consent and the charge against the accused-Appellant u/s 376(1) IPC has been established beyond all reasonable doubt and as such, no interference with the impugned judgment and order convicting and sentencing him, is warranted.

6. The victim girl was examined as PW. 1. Before she deposed in the trial Court, she was examined by judicial magistrate, Dhemaji u/s 164 Code of Criminal Procedure. Her statements before the Magistrate tally with the deposition she

made before the learned trial Court. It is maintained by her that the accused-Appellant by giving false promise for marriage and showing love with her committed the offence. She would not have indulged in any physical relation with the accused-Appellant had there been no promise for marriage from him.

7. Dr. P.K. Baruah of Dhemaji Civil Hospital was examined as PW. 5. He examined the victim medically. According to him, there was an ossification test of the girl and from the aforesaid test, she was found to be about 18 years. The defence declined to cross-examine him. No other documentary evidence, like school certificate or birth certificate of the victim girl was produced by the prosecution to prove its case that she was below 16 years of age at the time of occurrence. In absence of such documentary evidence or other evidence that may undo the evidence of medical officer, there is no scope for taking other view by this Court that the victim girl was below 16 years of age at the time of occurrence. The Doctor, as it appears from the evidence, gave his opinion on the basis of ossification test and such report cannot be ignored. As such, I find that the evidence of Doctor (PW. 5) is acceptable in evidence and thus, a conclusion may be arrived at that the victim was above 16 years of age i.e. between 16 and 18 years.

8. From the evidence of victim girl as well as her mother (PW. 2), it is found that the alleged occurrence i.e. forceful commission of rape on the victim girl was not reported to anybody. The victim girl remained silent till she was at the advanced stage of 7 months. It, thus, becomes crystal clear that she was a consenting party, be that due to the false promise from the accused-Appellant or she trusted him that he would marry her in due course of time. Once the age of the victim is proved that she was major at the time of occurrence, the accused-Appellant cannot be convicted u/s 376 IPC. The victim girl, being found between 16-18 years of age, she is found under the law, in a position to give consent. Such consent is found established in this case from her conduct inasmuch as she agreed to sexual intercourse on several occasions without divulging the same to anybody, even to her mother and she carried 7 months baby in her womb.

9. On the face of the evidence of the victim girl herself and the evidence of the doctor, I do not find that the prosecution has been able to bring home the charge of offence u/s 376(1) IPC. However, I find that the offence u/s 417 IPC has been well established inasmuch as it is proved in the evidence of the prosecutrix that she was given false promise by the accused-Appellant and due to such false promise she consented to sexual relation with him. In this regard, Mr. Choudhury, learned Sr. Counsel fairly submits that the offence u/s 417 IPC has been established against the accused-Appellant and he can be punished under the aforesaid section only. I appreciate the fair submission made by the learned Sr. Counsel at the Bar. However, it would be appropriate to refer the relevant section namely, Section 417 IPC, which is quoted below-

417. Punishment for cheating-whoever cheats shall be punished with imprisonment of either description for a term which may extend to one year, or

with fine, or with both.

10. In view of the aforesaid facts and circumstances and also the evidence on record, the conviction and sentence as recorded by the learned trial Court u/s 376(1) IPC is liable to be set aside and accordingly, the same is set aside hereby. Further in view of the submissions made by the learned Senior Counsel for the accused-Appellant and also the evidence on record in regard to offence u/s 417 IPC against the accused-Appellant, I find that no interference is called for and accordingly, the conviction and sentence as ordered by the learned trial Court against the accused-Appellant u/s 417 IPC is to be upheld, and accordingly, it is upheld.

11. The accused-Appellant stands acquitted u/s 376(1) IPC. However, the conviction and sentence u/s 417 IPC stands upheld. Since the accused-Appellant, as it appears from the record, has been in jail for 4 years 7 months, he may be set at liberty forthwith.

12. The present appeal is partly allowed with the aforesaid modification on conviction and sentence. Send down the LCR to the Court below forthwith.