
(1992) 01 GAU CK 0019
In the Gauhati High Court
Case No : Criminal Appeal No. 83 of 1985

Kandarpa Thakuria

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 30-01-1992

Acts Referred:

Penal Code, 1860 (IPC) — Section 345, 375, 376, 457, 511

Citation : (1992) CriLJ 3084

Hon'ble Judges : M. Sharma, J

Bench : Single Bench

Advocate : S. Medhi, for the Appellant; A. Ahmed and P.P. Assam, for the Respondent

Final Decision : Allowed

Judgement

M. Sharma, J.—This criminal appeal has arisen against the judgment dated 9-8-85 passed by the Sessions Judge, Cachar at Silchar in Sessions case No. 9/85 convicting the accused appellant u/s 376/511 of the I.P.C. sentencing him to suffer simple imprisonment for one year and to pay a fine of Rs. 1000/- in default further simple imprisonment for another 6 months. The prosecution case in brief is that one Md Kasem Ali, constable No. 885 was attached to Sonai Police Station. He was away from home on duty on the date of occurrence i.e. 24-9-83 leaving his wife Newaroon Nessa and his minor daughter in the barrack inside the police compound. The accused K. Thakuria is the Asstt. Sub-Inspector of Police attached to the said police station. He also got a quarter in the same police compound. On the date of occurrence at 11 p.m. while Newaroon Nessa (PW 4) was sleeping alone inside the room bolting the doors the accused somehow managed to open the door of the house and trespassing into the house tried to commit rape on Newaroon Nessa. She was woke up at the touch on her cheek by the accused. Finding the accused she persuaded him to leave her quarter but when she realised that the accused was bending upon criminally assaulting her she picked up a dao and gave 2/3 blows on the accused who ran away. Upon the

shoutings people nearby gathered and she narrated the story to them and an ejahar was lodged immediately after the occurrence and a case was registered Under Sections 457/ 345/376/511 of the I.P.C. The Sessions Judge in his judgment held that the appellant is guilty Under Sections 457/376 and 511 of the I.P.C. and no separate sentence was passed u/s 457 of the I.P.C.

2. Heard Mr. S. Medhi, learned counsel for the appellant and Mr. A. Ahmed, learned PP. The main point raised by the appellant was that in the evidence of PW. 4, (the complainant) or in the ejahar or in her statement before the Court there was no material for conviction of the accused u/s 376/511 of the I.P.C. and the conviction u/s 457 also cannot be established as there was no materials in the entire evidence on record. From the evidence on record of PW. 4 it is transpired that she woke up at the touch of the accused on her cheek and on her queries he said his name. She asked him how he could manage to enter the house as she bolted all the doors from inside. She also stated that he wanted to sleep with her on the bed but when she said that there is no space, he suggested to stretch the bedsheet on the floor. After that she told him that she would see whether the people in the neighbouring quarters are awake or asleep and she picked up the dao from under her bed and concealed it in the fold of her sari and proceeded to the adjacent room and looked out whether anybody was seen or not. The accused followed her and stood behind her. She categorically stated that till then the accused did not touch her but she realised that there was no escape from the accused and that she might be molested. Then she made use of the opportunity to her advantage and gave two dao blows on the neck of the accused. Then the accused ran away by opening the door through the veranda.

3. There was no eye-witnesses and this whole prosecution story was based on the testimony of the prosecutrix to bring home the conviction u/s 376/511. This section requires that to constitute rape under the law a single act of sexual intercourse must be committed under the circumstances -- falling under any of the five clauses in Section 375.

4. From the deposition of the PW. 4 it is clear that these ingredients were totally absent. Their conversation started normally though the accused expressed his intention. He did not go beyond touching her cheek.

5. The learned Sessions Judge to rope the accused with Section 376 took the help of Section 511 of the I.P.C. In her evidence the prosecutrix categorically stated that till the j entire period of his stay in her room the accused/appellant did not exhibit any indecent gesture or assault on her. There may be intention or expression but even an indecent assault upon a woman does not amount to attempt to rape unless it is established that there is a determination in the accused to fulfil his desire in spite of resistance. An assault with intention to commit a rape is very different from an intention to have an improper connection. The accused might have intended to assault the PW. 4 criminally, but there was no action or attempt on his part to complete the offence.

6. From the materials on record it was evident that there might be intention. But law does not take notice of an intention without an act. Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The evidence on record that the prosecutrix stated that when she was awakened by a touch on her cheek she asked the accused how he entered the room while it was bolted from inside and his reply that he knew magic shows that there was no attempt on the part of the accused to break the door and there was no evidence that the door was broken by him. Prosecutrix talked with him normally, he followed her from the bed room to veranda and till then he did not try to make any attempt to commit rape. There is no preparation consist in desiring the means necessary for commission of the act of rape. A conviction on an attempt of rape ought not to be arrived at unless, Court is satisfied that the conduct of the accused indicated a determination to gratify his passion at all events and in spite of all resistance. From the evidence on record I find it impossible to place entire reliance upon the prosecutrix's evidence as there is no evidence of attempt or preparation except her anxiety. Therefore I have hesitation in coming to conclusion that the appellant's conduct amount to an attempt to commit rape. No evidence showed marks of resistance or violence nor the clothings either of the prosecutrix or of the accused showed any strains which indicate that the appellant criminally proceeded.

7. Mr. A. Ahmed, learned PP fairly submitted that there was no material in the evidence on record to bring home the conviction u/s 376/511 but there is sufficient materials to establish the offence u/s 457 to convict the appellant under the said section and that the same section is sufficient to support the conviction. The trial Court did not sentence the appellant u/s 457 separately. But from the evidence on record and from the findings of the learned Sessions Court his argument does not hold good. In order to convict a person u/s 457, it is necessary to prove that the house trespass or breaking at night was committed with intention in order to committing of any offence punishable under this section. From the evidence it was clear that the door was bolted from inside but there was no breaking sign and from the evidence on record it is seen that the appellant had an easy entrance which has raised benefit of doubt from the evidence of PW. 4. The mere fact that house trespass was committed at night does not attract the offence of lurking house trespass within the meaning of this section.

8. In view of the above discussion I hold that there is no material on record to bring home the offence u/s 376/511 and/or 457 of the I.P.C.

9. The appellant is acquitted of the charges u/s 376/511/457 of the I.P.C. The appellant is released from the bail bond executed earlier.

In the result the appeal is allowed.