
(2014) 03 GAU CK 0002
In the Gauhati High Court
Case No : Crl. P. No. 10 of 2014

Moynul Hoque (Md.)

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 14-03-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, 482

Notaries Act, 1952 — Section 13

Penal Code, 1860 (IPC) — Section 109, 120B, 201, 34, 366(A)

Citation : (2014) 2 GLD 97 : (2014) 2 GLT 458

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : K.P. Sarma, Sr. Advocate, Mr. H. Das and Mr. H. Gogoi, Advocate for the Appellant; K. Munir, Addl. PP, Advocate for the Respondent

Final Decision : Allowed

Judgement

Arup Kumar Goswami, J.—By this application u/s 482 of the Code of Criminal Procedure 1973, for short, Cr.P.C., the petitioners seek to challenge the order dated 30.11.2013, passed by the learned Sessions Judge, Kokrajhar whereby charges under Sections 120B/109/34 I.P.C. was framed against the petitioners. The petitioner No. 1 is an advocate practising in Goalpara. The petitioner No. 2 is also an advocate practising in Goalpara and is also a Notary Public.

2. One Samit Ray lodged an ejahar on 07.05.2012 in the Kokrajhar Police Station alleging that on 04.05.2012 at about 8:30 a.m., his minor daughter, Ms. Purnima Ray, aged about 15 years, who was studying in Class-DC, when proceeding to her school, was kidnapped by one Sumer Seikh of village- Uttar Mokorapara. It was also stated that he had lodged an ejahar on 05.05.2012 in respect of the said kidnapping of his daughter and the subsequent ejahar was filed because he had come to learn about involvement of Md. Sumer Seikh.

3. On receipt of the said ejahar, Kokrajhar P.S. Case No. 112/2012 u/s 366(A) I.P.C. was registered and investigation was started.

4. Subsequently, on an application filed by the Investigating Officer, the learned Chief Judicial Magistrate, Kokrajhar by an order dated 16.05.2012, allowed Sections 376/417/494/120B/109/201/34 I.P.C to be added. However, by the said order, the learned Chief Judicial Magistrate, Kokrajhar had rejected the prayer of the Investigating Officer to arrest the petitioners.

5. On 01.07.2012, the petitioners were arrested in connection with the aforesaid case. Subsequently, they were granted bail by this Court on 23.07.2012. Charge-sheet was submitted on 13.09.2012 by the Investigating Officer under Sections 366(A)/376/417/494/120B/201/109/34 I.P.C. against the petitioners as well as Sumer Seikh.

6. The case being committed to the learned Court of Sessions Judge, Kokrajhar, Sessions Trial No. 93/2013 was registered. By an order dated 30.11.2013, after hearing the parties, the learned Sessions Judge framed charges under Sections 366(A)/376 I.P.C. against Sumer Seikh and charges under Sections 120B/109/34 I.P.C. was framed against the present petitioners.

7. Heard Mr. K.P. Sarma, learned Senior Counsel for the petitioners and Mr. K. Munir, learned Additional Public Prosecutor, Assam.

8. Mr. Sarma has drawn the attention of the Court to Section 164 Cr.P.C. statement of the victim girl, which was recorded on 14.05.2012 and submits that a mere perusal of the same goes to show that it was Sumer Seikh, who had kidnapped and had committed rape upon the victim. In the said Section 164 Cr.P.C. statement, it was stated that she was taken by said Sumer Seikh to two advocates, who asked her to put some signatures. Mr. Sarma submits that petitioners are sought to be implicated only on the ground that the petitioner No. 1 had drafted an Affidavit (Annexure - VII) and a Marriage Agreement (Annexure - VIII) and the petitioner No. 2 had notarized the documents on being identified by the petitioner No. 1. According to Mr. Sarma, admittedly the principal accused had kidnapped the girl in question 3 days prior to coming into contact with the present petitioners and there is no allegation whatsoever that the petitioners had played any role in the kidnapping of the girl in question and/or at the time of committing the offence of Section 376 I.P.C. Drawing up deeds/affidavits and notarizing the same are works done in the ordinary course of professional duties of a lawyer or a Notary, he submits. The petitioners did not have any reasons to harbor any misgiving and there was no statement in the Section 164 Cr.P.C. statement that she had apprised her predicament and woes to the petitioners that she was a victim of kidnapping at the instance of the person accompanying her or that she was subjected to any rape by him. An Age Certificate (Annexure - XI) was also produced to demonstrate that the girl was 18 years of age.

9. Learned Senior Counsel submits that when the principal accused is not charged u/s 120B I.P.C., the petitioners could not have been charged under Sections 120B/34 IPC. It is submitted by him that Section 13 of the Notary Act, 1952 provides that no Court shall take cognizance of any offence committed by a

Notary in the exercise of his functions except upon a complaint in writing made by an officer authorized by the Central Government or a State Government by general or special order in that behalf and admittedly there being no complaint of the specified authorities, the case against the petitioners is totally misconceived and without jurisdiction.

10. It is submitted by Mr. Sarma that in any view of the matter, there is a remote possibility of securing a conviction against the petitioners and allowing the case to proceed will result in miscarriage of justice.

11. In support of submission, Mr. Sarma has placed reliance on the following Judgments:

(i) Saju Vs. State of Kerala, .

(ii) Kulwant Singh @ Kulbansh Singh Vs. State of Bihar, .

12. Mr. K. Munir, learned Additional Public Prosecutor, Assam submits that a false affidavit was made by the petitioners whereby apart from manipulating her age to show her as major for the purpose of executing a marriage agreement, the minor girl's religion was also forcefully changed. Learned Additional Public Prosecutor submits that on the basis of the statements made by the victim in her Section 164 Cr.P.C. statement, complicity of the petitioners in the offences alleged is apparent and therefore, no interference is called for.

13. In Saju (supra), the Apex Court had laid down that to prove the charge of criminal conspiracy, the prosecution is required to establish that two or more persons had agreed to do or caused to be done, an illegal act or an act which is not legal, by illegal means. It is immaterial whether the illegal act is the ultimate object of such crime or is merely incidental to that object. To attract the applicability of Section 120B, it has to be proved that all the accused had the intention and they had agreed to commit the crime. There is no doubt that conspiracy is hatched in private and in secrecy for which direct evidence would rarely be available. It is also not necessary that each member to a conspiracy must know all the details of the conspiracy. It has thus to be established that the accused charged with criminal conspiracy had agreed to pursue a course of conduct which he knew was leading to the commission of a crime by one or more persons to the agreement, of that offence. Besides the fact of agreement, the necessary mens rea of the crime is also required to be established. It was further held that to prove charge of abetment, the prosecution is required to prove that the abettor had instigated for the doing of a particular thing or engaged with one or more other person or persons in any conspiracy for the doing of that thing or intentionally aided by an act of illegal omission, doing of that thing.

14. In Kulwant Singh Alias Kulbansh Singh (supra), it was laid down that where a person aids and abets the perpetrator of a crime at the very time the crime is committed, he is a principal of the second degree and Section 109 applies. But mere failure to prevent the commission of an offence is not by itself an abetment

of that offence. Considering the definition in Section 109 strictly, the instigation must have reference to the thing that was done and not to the thing that was likely to have been done by the person who is instigated. It is only if this condition is fulfilled that a person can be guilty of abetment by instigation. Section 109 is attracted even if the abettor is not present when the offence abetted is committed provided that he had instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to the conspiracy some act or illegal omission takes place or has intentionally induced the commission of an offence by an act or illegal omission. In the absence of direct involvement, conviction for abetment is not sustainable. Section 109 provides that if the act abetted is committed in consequence of abetment and there is no provision for the punishment of such abetment then the offender is to be punished with the punishment provided for the original offence. Active abetment at the time of committing the offence is covered by Section 109. Act abetted in Section 109 means the specific offence abetted. Mere help in the preparation for the commission of an offence which is not ultimately committed is not abetment within the meaning of Section 109. "Any offence" in Section 109 means offence punishable under I.P.C. or any special or local law. The abetment of an offence under the special or local law, therefore, is punishable u/s 109. For constituting offence of abetment, intentional and active participation by the abettor is necessary.

15. As the counsel for the parties have argued that Section 164 Cr.P.C. statement is the basis for framing charge against the petitioners, it is considered appropriate to reproduce the said statement of the victim girl in its entirety. It reads as under:

On oath:

I read in Class-IX at Kokrajhar Girls H.S. School. The resident of my parents is at Charikhola Bazar, but I live in the house of my maternal uncle Naresh Barman from where I read in the School. One Somen Seikh worked as a carpenter in my maternal uncle's house. One day he came to my school and offered me a mobile handset but I refused to accept the same. One day said Somen Seikh told me to go along with him and also threatened me that unless I go along with him then he will finish my life when I go to school alone. I afraid of him and one day went along with him. Somen Seikh further threatened me to kill me if I express anything about the said facts. At first said Somen Seikh took me to Goalpara thereafter to Lakhipur and I stayed here for four days. During these four days he physically intercourse with me against my will. Thereafter one day said Somen Seikh along with his uncle Ismail took me to court and met Advocates there. The said 2(two) advocates told me to put my signature on some papers. At first I did not want to put my signature in the said papers, but, as said Somen Sk. Threatened me sign there and thereafter I put my signatures.

Some days ago, some persons went here by car and thereafter took us to Kokrajhar and handed over to the Kokrajhar Police Station.

This is my humble submission.

I want to stay along with my parent.

16. A perusal of the statements made by the victim in her Section 164 Cr.P.C. statement would go to show that the petitioners are not in any manner implicated with allegations of kidnapping or rape. Only overt action attributed to the petitioners are in respect of asking her to put her signature in two documents. By these two documents, she was referring to the affidavit and the marriage agreement where she had put her signatures. Apparently, going by the statements of the victim, the petitioners were met in the Court premises. From such statements, it is clear that she had not disclosed to the petitioners that she was a victim of kidnapping or rape. There is no allegation also that the petitioners had forced her to put her signatures in the said two documents. It is also not indicated that Sumer Seikh had given any threatening to the victim girl in presence of the petitioners from where the petitioners could have gathered that something was amiss and all was not well.

17. It would appear that the petitioners did nothing beyond what a lawyer or a Notary is authorized to do in a Court of law. There is no material to suggest in the statements of the victim in her Section 164 Cr.P.C. statement that the petitioners had any previous knowledge about the factum of her being kidnapped and raped and she being put to fear. There is also no material to suggest that there is any concert between the petitioners and the other accused at the time of preparation and execution of the documents in question.

18. In *Hiralal Jain Vs. Delhi Administration*, the Apex Court had stated that it is well known that the main income of many lawyers in the District Courts is derived from the work of identifying persons and sureties in the Courts. It was also held that identification of a person before a Court or Authority is, per se, no incriminating evidence of conspiracy unless there is evidence of some antecedent behavior showing some concern or connection between the lawyer and the principal accused.

19. When the factual scenario in the instant case is tested on the background of principles of law set out hereinabove, it is clear that Section 109 I.P.C. has got no application.

20. The materials on record do not disclose any ingredients of Section 120B I.P.C. against the petitioners. The preparation of the affidavit and the marriage agreement cannot be termed as instigation or intentional aid to Sumer Seikh to commit the offences of Sections 366(A)/376 I.P.C., which events had occurred three days prior to Sumer Seikh and the victim coming into contact with the petitioners. It is also relevant to note Sumer Seikh had not been accused of any charge of conspiracy u/s 120B of the I.P.C., having any suggested connection with the petitioners.

21. Section 13 of the Notary Act 1952, as is submitted by Mr. Sarma, mandates

that no Courts shall take cognizance of any offence committed by a Notary in the exercise or purported exercise of his functions under the Act except on a complaint in writing made by an officer authorized by the Central Government or a State Government by general or special order in that behalf. Admittedly, the petitioner No. 2 had exercised his function as a Notary in the instant case and no complaint was made against him by the officers so authorised.

22. At the stage of framing of charge, it is to be seen as to whether there is a strong suspicion that the accused has committed an offence, which, if put to trial, could prove him guilty. The final test of guilt is not to be applied at that stage. However, where the Court finds that the basic ingredients of the offence are not satisfied or that there is any expressed legal bar, Court may quash the charge.

23. In view of the above discussions, I am of the considered opinion that the order dated 30.11.2013 passed by the learned Sessions Judge, Kokrajhar framing charge against the petitioners under Sections 120B/109/34 I.P.C. is not sustainable in law and as such, the same is set aside and quashed. The revision petition is, accordingly, allowed.