
(2013) 03 GAU CK 0010
In the Gauhati High Court
Case No : Criminal Appeal No. 05 (J) of 2008

Punaram Gohain	Vs	APPELLANT
State of Assam		RESPONDENT

Date of Decision : 13-03-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 375, 376

Citation : (2013) 3 GLT 540

Hon'ble Judges : C.R. Sharma, J

Bench : Single Bench

Advocate : M. Haloi, Amicus Curiae, for the Appellant; B.B. Gogoi, Addl.PP, for the Respondent

Judgement

C.R. Sarma, J.—Heard Mr. M. Haloi, learned Amicus Curiae appearing for the appellant and Mr. B.B. Gogoi, learned Addl. Public Prosecutor, Assam appearing for the State-respondent. This appeal, from the jail, is directed against the judgment and order, dated 29.09.2007, passed by the learned Additional Sessions Judge (FTC), Sivasagar, in Sessions Case No. 17(S-S)/2007, arising out of Simaluguri P.S. Case No. 82/2006 [G.R. Case No. 1123/2006], whereby and whereunder, the learned Addl. Sessions Judge (FTC), Sivasagar convicted Shri Punaram Gohain (hereinafter called the appellant) u/s 376 of the Indian Penal Code (in short, "IPC") and sentenced him to suffer rigorous imprisonment for 10 (ten) years and pay fine of Rs. 1,000/- (Rupees one thousand) only, in default suffer rigorous imprisonment for another period of 1 (one) month for his conviction u/s 376 IPC.

2. Aggrieved by the said conviction and sentence, the convicted person, as appellant, has come up with this appeal.

3. The prosecution case, in brief, is that the appellant committed rape on the victim, who was his own daughter from his first wife. The appellant has two wives, four daughters and three sons. The victim girl was the eldest amongst the

daughters and they used to live in the same room. On the fateful night, while the victim was sleeping with her sister, on the same bed, the appellant, being drunk, touched her body and committed ill act with her. She informed the incident to her aunt, Smti Rumi Borgohain, who had informed the villagers. On receipt of the said information, the Gaon Burah (PW 2) of the village as informant, lodged an FIR with the Police. On receipt of the FIR police registered a case u/s 376 IPC and launched investigation into the matter. During the course of investigation/ police examined, as many as, 8 (eight) witnesses, including the Medical Officer (M.O.), who examined the victim girl and the Investigating Officer (I.O.).

4. At the close of the investigation, police submitted charge sheet, u/s 376 IPC, against the appellant. The offence, being exclusively triable by the Court of sessions, the learned Judicial Magistrate, 1st Class, Sivsagar committed the case to the Court of Sessions. The learned Addl. Sessions Judge (FTC), Sivasagar by the impugned judgment and order aforesaid, convicted and sentenced the appellant, as indicated herein above.

5. Mr. M. Haloi, learned Amicus Curiae, appearing for the appellant, referring to the evidence on record, more particularly, the evidence of PW 1, i. e. victim girl and her mother, i.e. PW 6, has submitted that there is no evidence on record, constituting ingredients of rape, i.e. offence u/s 375 IPC. The learned Amicus Curiae has submitted that the victim girl and the other witnesses, except alleging commission of ill act by the appellant, had stated nothing regarding sexual intercourse. Therefore, it is submitted, by the leaned Amicus Curiae, that the prosecution failed to establish, beyond all reasonable doubt, that the appellant committed rape on the victim girl and as such the learned trail Judge committed error by recording the conviction and sentence, as indicated above.

6. Mr. B.B. Gogoi, learned Addl. Public Prosecutor, appearing for the State respondent, referring to the evidence of the victim girl and the statement made by her, u/s 164 Cr.P.C., has submitted that there are sufficient materials to draw inference that the appellant committed rape on the victim girl and as such, the learned Additional Sessions Judge (FTC), Sivasagar rightly convicted the appellant u/s 376 IPC.

7. In view of the above arguments, advanced by the leaned counsel, appearing for both the parties, I feel it appropriate to scrutinize the evidence, on record.

8. The victim girl, deposing as PW1, stated that when she was sleeping with her sister on the same bed her father, i.e. the appellant had touched her body and committed ill act with her. She also stated that, on being cried by her, her father assaulted her. She further stated that her mother, who came to know about the incident was also assaulted by her father. According to the said witness, her father repeated the said act for about four days and that she had informed the matter to her aunt, Smti Rumi Borgohain (not examined as witness).

9. In her cross-examination, she (PW 1) stated that she used to work in a Beauty Parlour, for which her father had scolded her as he did not like her to work in the

Beauty Parlour. She denied the suggestion that, as her father did not allow her to work in a Beauty Parlour, she had falsely brought the allegations against him.

10. Carefully perusing the evidence of the victim girl, I find that she, except stating that her father committed ill act with her, did not state any thing indicating sexual intercourse. Therefore, from her evidence, it is not possible to hold that sexual intercourse was committed by her said father.

11. PW 2 (Shri Deven Borgohain) i.e. Gaon Burah of the village, who lodged the FIR, has exhibited the same as Ext. 2. This witness stated that hearing nullah in the house of the appellant, he visited the latter's house and came to know from the villagers, who had assembled there, that the appellant had committed ill act with the victim girl. He further stated that on being asked by him, the appellant replied nothing. He did not state as to what was the alleged "ill act".

12. In his cross-examination, this witness (PW 2) stated that he did not ask any thing from the victim girl. He further stated that the FIR (Ext. 2) was written by one of the villagers and that he did not read the same.

13. From the above, it appears that this witness (PW 2) was not aware of the contents, made in the FIR aforesaid. It is also clear that he did not know any thing from the victim. Therefore, the evidence of this witness appears to be hearsay evidence.

14. Shri Ranjit Duara, one of the villagers, who also visited the house of the appellant, on the relevant day, deposing as PW 3, he stated that he came to know from the people, assembled in the house of the appellant, that the appellant had misbehaved with his daughter. He did not state anything regarding ill act or sexual inter course.

15. In his cross-examination, this witness (PW -3) has stated that he did not enquire, any thing from the victim girl, about the incident. Therefore, his evidence was also hearsay evidence, being derived from others.

16. Shri Bimal Borgohain, who also visited the house of the appellant alongwith others, deposing as PW 4, stated that the victim girl, in presence of the Gaon Burah (PW 2) and other villagers had disclosed that the appellant committed ill act with her. But neither PW 2, i.e. the Goan Burah, nor PW 3 i.e. a co-villager, stated that the victim girl had disclosed any thing before them. However, this witness contradicted his own evidence by saying, in his cross examination, that he came to know about the occurrence from the villagers and that he did not ask any thing from the victim girl. Therefore, he also did not hear anything from the victim girl.

17. Shri Raju Duara, one of the neighbours of the appellant, disposing as PW 5 stated that he came to know from the villagers, who had assembled in the house of the appellant, that the appellant had misbehaved with his daughter. He also did not ask any thing from the victim girl. Therefore, his evidence, being hearsay evidence has not substance.

18. Smti Sashi Prava Gohain i.e. mother of the victim girl, deposing as PW 6, stated that she came to know from Smti Rumi Borgohain i.e. the aunt of the victim girl, that the appellant had committed ill act with his own daughter i.e. victim girl. She further stated that, on being asked by her, the victim girl also told her that the appellant had committed ill act with her daughter. She further stated that out of fear, she did not ask her husband, any thing about the incident.

19. In her cross-examination, she (PW 6) stated that he used to live with her husband i.e. the appellant and that the appellant asked the victim girl not to work in the Beauty parlour. She also stated that she did not know if her daughter had falsely implicated the appellant. From her evidence, it is found that she along with her children used to sleep in the same room i.e. the room where the victim and her sister were sleeping. Therefore, it is surprising as to why the victim girl i.e. her said daughter did not tell her about the incident. According to PW 6 she first came to know from Smti Rumi Borgohain. This aspect of the matter raises doubt about the prosecution story. That apart, the prosecution failed to examine Smti Rumi Borgohain, who was a vital witness. Non-examination of such witness also raises doubt about the prosecution version.

Though, the victim girl in her evidence, given as PW1, has stated that, her mother came to know about the occurrence, that she and her mother were assaulted by her father after the incident, PW 6 i.e. her mother did not state that she came to know about the incident, on the fateful night itself; from the victim girl. She also did not state that she was assaulted by her husband; i.e. the appellant. In view of the above, I find no corroboration in the evidence of PW 1 aforesaid on the material point.

20. PW 7, Dr. Hemanta Kr. Baruah examined the victim girl. He stated that the victim girl was aged about 18 years and that there was no sign of inter course.

21. PW 8 was the Investigating Officer, who investigated into the case.

22. From the above discussed evidence, it is found that none of the witnesses, more particularly victim girl, did not state that the appellant had committed sexual intercourse with her. The Law is well settled that in order to constitute the offence u/s 375 IPC, it must be established that there was penetration of the penis into the private part of the victim.

23. In the present case, the prosecution has failed to establish the said basic ingredient of rape. Therefore, I am inclined to hold that the prosecution failed to establish, beyond all reasonable doubt, that the appellant committed rape on the victim girl. Therefore, the conviction and sentence, recorded u/s 376 IPC cannot be maintained.

24. In view of the above discussion, I find sufficient merit in this appeal. Accordingly, the appeal is allowed. The impugned conviction and sentence are set aside. The appellant be acquitted and set at liberty forthwith, if not required for any other case.

25. Return the LCR. Before parting with this judgment, I acknowledge, with appreciation, the assistance, rendered by Mr. M. Haloi, learned Amicus Curiae and direct that an amount of Rs. 5,000/- (Rupees five thousand) be paid to him as remuneration by the State.