

(2023) 06 GAU CK 0009

In the Gauhati High Court

Case No : Criminal Appeal No. 29 Of 2022

Raju Ahmed Laskar

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 09-06-2023

Acts Referred:

Indian Penal Code, 1860 — Section 341, 366, 366A, 375, 376, 506
Code Of Criminal Procedure, 1973 — Section 164, 313, 374

Citation : (2023) 06 GAU CK 0009

Hon'ble Judges : Malasri Nandi, J

Bench : Single Bench

Advocate : L R Mazumder, P S Lahkar

Final Decision : Disposed Of

Judgement

1. Heard Mr L R Mazumder, learned counsel for the petitioner and Mr P S Lahkar, learned Additional Public Prosecutor appearing on behalf of the State of Assam.

2. This appeal has been preferred by the accused appellant, Raju Ahmed Laskar, under Section 374 CrPC, challenging the Judgment and Order dated 05.01.2022, passed by the learned Assistant Sessions Judge No. 1, Cachar, Silchar, in Sessions Case No. 112/2018, whereby the accused appellant was convicted under Sections 376/366/341 IPC and sentenced to undergo Rigorous Imprisonment for a period of 7 (seven) years and to pay a fine of Rs. 5,000/- (Rupees Five Thousand) Only in default Simple Imprisonment for 3 (three) months for the offence under Section 376 IPC and also to undergo Simple Imprisonment for a period of one month for the offence under Section 341 IPC and further to undergo Rigorous Imprisonment for 4 years and to pay a fine of Rs. 5000/- (Rupees Five Thousand) only, in default, further Simple Imprisonment for 3 (three) months for the offence committed under Section 366 IPC. All the sentences were directed to run concurrently.

3. Prosecution case in brief is that the informant, Khudeja Begum Barbhuiya

lodged a written FIR before the Officer-In-Charge, Katigorah Police Station, on 19.11.2016, alleging inter alia that the accused person was in acquaintance of her husband, as such, he used to visit in the house of the informant. With assurance to provide loan to informant's daughter, accused/ appellant took her photograph, one blank paper with her signature, certificate etc. and thereafter, filed a case against her daughter in the Family Court, Silchar.

4. On 19.11.2016, at about 09:30 am, while the informant and her daughter were proceeding towards Silchar, the appellant stopped the minibus and forcefully picked up her daughter. On receipt of the complaint, a case was registered vide Katigorah PS Case No. 724/2016 under Sections 341/366-A/506 IPC.

5. During investigation, the Police visited the place of occurrence, recorded the statements of witnesses and the victim was also forwarded to the Learned Magistrate, for recording her statement under Section 164 CrPC. After completion of investigation, charge sheet was submitted under Sections 341/366/376/506 IPC. As the offences under Sections 366/376 IPC are exclusively triable by the Court of Sessions, the case was committed accordingly.

6. On appearance of the accused appellant before the Court of Sessions, the charge was framed under Sections 341/366/376/506 IPC which was read over and explained to the accused/ appellant, to which he pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused appellant, the prosecution examined 7 (seven) witnesses and some documents were exhibited in the learned trial Court. After completion of trial, the statement of the accused appellant was recorded under Section 313 CrPC and the incriminating evidence found in the evidence of the witnesses were put to him, to which he denied the same. The accused appellant also adduced himself as defence witness, DW-1. After hearing the arguments advanced by the learned counsel for the parties, the learned Court has convicted the accused appellant as aforesaid. Hence, this appeal.

8. It was urged by the learned counsel for the accused appellant that the learned trial Court failed to appreciate the evidence of the witnesses, which are inconsistent and contradictory to each other. As such, the Judgment and Order dated 05.01.2022, passed by the learned trial Court is liable to be set aside.

9. Learned counsel for the accused appellant also submitted that there was no bodily injury and no mark of recent sexual intercourse, found on the victim, on her examination by the Medical Officer, though the medical examination of the victim was done immediately after the occurrence. As such, the finding of the learned trial Court to the effect that the victim was subjected to sexual harassment is perverse.

10. According to learned counsel for the appellant, the victim is the legally married wife of the appellant. Their marriage was performed by the Kazi, as per

Muslim rites and rituals and Kabinnama was executed accordingly. The prosecution did not tender any evidence, which suggests that the marriage between the parties was dissolved by a competent civil Court. As the victim is the legally married wife of the petitioner, there is no question of kidnapping his wife, which falls under Section 366 IPC or committing rape on his wife, which attracts the provision under Section 376 IPC. As such, the accused appellant deserves to be acquitted.

11. On the other hand, learned Additional Public Prosecutor has argued that the marriage between the victim and the appellant has been denied by the informant and her daughter. No witness was examined to prove the marriage between the parties, as a result of which, at this stage, we cannot come to the conclusion that the victim is the legally married wife of the appellant. Hence, the offence under Sections 366/376 IPC are attracted in this case. The Judgment and Order dated 05.01.2022, delivered by the learned trial Court are well reasoned. Hence, it does not call for any interference by this Court.

12. PW-1 is the informant, Khudeja Begum Barbhuiya, who deposed in her evidence that her daughter Jannatara Begum was a student of Degree Course at Jatrapar College. At that time, the accused married her by swearing an affidavit, but her daughter was staying with them and they did not know anything about the marriage. Thereafter, the accused filed a case before Katigorah Police Station for getting custody of his wife, i.e. her daughter Jannatara Begum and also filed a case before the Family Court, Silchar for restitution of conjugal rights. On the date of the incident, when she and her daughter were going to attend the Family Court, the accused stopped them on the road and forcibly took her daughter. Then she filed the FIR, vide Exhibit-1. Later on, the accused and her daughter appeared before the Police and the Police handed over her daughter to her as per order of the Court. This witness also stated that at present her daughter is staying with her husband at Hyderabad after she was given in marriage.

13. In her cross-examination, PW-1 replied that she came to know about the marriage of her daughter with the accused appellant prior to three/four months of filing of the present case. She had never seen the affidavit, by which the marriage took place between the accused and her daughter. The accused had filed a case before the Family Court for getting custody of her daughter as his wife. Her daughter and the accused appeared before the Police after two days of filing of the case. There were 40/50 passengers in the bus, by which they were going to Silchar to attend the Family Court. She did not inform the Family Court about the said incident.

14. The victim was examined in the case as PW-4. From her deposition, it reveals that the incident occurred on 19.11.2016, at about 09:00 am. On that day, while she was going towards Family Court, Silchar in connection with a case lodged by the accused and when she reached in front of the house of the accused, he stopped the bus and pulled her out of the bus. The accused took her to his residence. At that time, her mother was with her. As her mother informed the

Police, the accused shifted her from his residence to Kadamtola and kept her in one of his relative's house for two days. In the said house at Kadamtola, one couple was there, but she did not know their names. The accused confined her in the said house. The accused pressurized her to solemnize marriage with him. The couple did not allow the accused to keep her there during night time. So, the accused picked her in the jungle behind the house. In the jungle, the accused forcefully had sexual intercourse with her. At that time, she was about 19 years old. Thereafter, the accused shifted her to some other person's residence and kept her there for two days. In the next morning, the accused brought Kazi and gave Rs. 6,000/- to him and forcefully took her signature in the Kabinnama. PW-4 also stated that the accused person agreed to accompany her to Police Station on condition that the case filed by her mother has to be withdrawn.

15. In her cross-examination, PW-4 replied that she did not lodge any case against the accused petitioner regarding obtaining her signature forcefully on the Kabinnama. Prior to the date of occurrence, she also came to the Family Court for 4/5 days in connection with restitution matters. At the relevant time, there were about 30/40 passengers in the bus. She did not know the said passengers, but there was one advocate, namely, Salim sitting in the bus. Near the place of occurrence, where the bus was stopped, there is a mosque and shops. Accused person dragged her to his house. Nobody came to rescue her.

16. PW-2 is the brother-in-law of the victim, who was not present, when the incident occurred. According to him, he came to know about the incident from his mother-in-law, i.e., the informant.

17. PW-3 is the bus conductor. He stated that he had no knowledge about the incident.

18. PW-5 is the Medical Officer, who examined the victim in connection with the incident. According to the Medical Officer, on the basis of physical examination, laboratory and radiological examination done on the victim, she found the following-

- 1) the age of the victim is above 18 years.
- 2) Evidence of recent sexual penetration not detected, as on 21.11.2016.
- 3) Injury marks not detected in her person and on genitals except old hymeneal tears.
- 4) The victim does not carry pregnancy as on the date of examination.

19. PW-6 is the Investigating Officer. He deposed that on 19.11.2016, he was posted at Katigorah Police Station. On that day, on receipt of ejahar from one Khudeja Begum Barhbuiya, the OC of concerned Police Station registered the case as Katigorah PS Case No. 724/2016 and entrusted him with the investigation. Accordingly, he visited the place of occurrence and recorded statements of witnesses, and prepared the sketch map of the place of

occurrence, vide Exhibit-4. During investigation, the victim was medically examined and they collected the medical report. Statement of the victim was also recorded under Section 164 CrPC, by the Magistrate. Then, due to his transfer, he handed over the Case Diary to the Officer-In-Charge, Katigorah Police Station. Thereafter, investigation was completed by another Investigating Officer, Mahitosh Nath.

20. In his cross-examination, PW-6 replied that he received information at about 01:00 pm, on 19.11.2016. He was endorsed by the OC to investigate the case and accordingly, without making any GD Entry he proceeded for investigation. On 21.11.2016, the victim appeared in the Police Station and on that day, she was sent for medical examination.

21. PW-7 is the another Investigating Officer, Mahitosh Nath Laskar, who submitted charge sheet against the accused appellant, under Sections 366/376/341/506 IPC.

22. The accused appellant was examined in the case as DW-1. According to the appellant, the victim is his legally married wife and the informant is his mother-in-law. The accused appellant further deposed that during their conjugal life, some discord arose and his wife had left his house and accordingly, he filed a case before the Family Court, Cachar, Silchar. The incident as alleged by the informant in the FIR never took place. He did not kidnap the victim ever nor committed rape upon her showing threat nor confined the victim.

23. After going through the evidence of aforesaid witnesses, it reveals that the accused appellant claimed that the victim is his legally married wife, which is not denied by the victim. According to the victim, on 19.11.2016, while she was travelling with her mother in a bus and when the bus reached in front of the house of the accused, the accused stopped the bus and pulled her out of the bus and took her to his residence. It is also alleged that as her mother informed Police about the incident, the accused/appellant shifted her to the residence of another person, wherein the inmates of the house did not allow her to stay at night. The accused took her to the jungle, wherein he committed sexual intercourse with her, but the victim admitted that on the next day, the accused brought one Kazi and took her signature in a Kabinnama and ultimately their marriage was held. Though it is alleged that the signature of the victim was taken in the kabinnama by using force, but ultimately the marriage between the appellant and the victim was held.

24. To prove the marriage, the accused appellant exhibited two documents, one is Muslim Marriage Register, vide Exhibit-A, which reveals that the marriage between the accused appellant and the victim was solemnized on 13.12.2015 and another is the kabinnama, vide Exhibit-B, which was issued on 31.12.2015. From the evidence of the informant, it also appears that her daughter, i.e. the victim married the accused appellant by swearing an affidavit, but they did not know anything regarding their marriage.

25. Now, the question comes whether a wife can initiate a prosecution against her husband under Section 366 or 376 IPC!

26. The law is based on the archaic patriarchal notion that a woman is the property of her husband, and through marriage, a woman gives irrevocable consent for life to have sex with her husband on demand. This puts women in a vulnerable position within a marriage, leaving scope for an abusive spouse to force sex on his wife through intimidation, threat, force, and other forms of abuse. In the absence of a law that protects women against marital rape, women who are forced into having non-consensual sex with their husbands are left with no means of legal remedy or relief. The term marital rape refers to non-consensual intercourse by a man with his wife, obtained by force, threat of force or abuse, physical and psychological violence, or when she is unable to give consent. It covers all forms of penetration perpetrated against a woman's will or without her consent.

27. Despite the situation, marital rape in India is still viewed as a domestic violence issue. Therefore, the remedies available to a survivor are civil in nature and are limited to "protection orders, judicial separation, and monetary compensation" under The Protection of Women from Domestic Violence Act, 2005.

28. Marital rape under the Indian Penal Code (IPC) only applies in the situation of "non-consensual intercourse with a wife who is aged between 12 and 15 years". Where the exception does not apply, the IPC (Section 375) states that "sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape."

29. However, the Hon'ble Supreme Court in *Independent Thought v. Union of India*; (2017) 10 SCC 800 and in *RIT Foundation v. Union of India*; 2022 SCC Online Del 1404) held that the part of Exception 2 to Section 375 which excused marital rape of minors between the ages of 15-18, was unconstitutional, which means that the term 15 years in the exception now needs to be read as 18 years. Currently, there are no criminal penalties for marital rape when a wife is over 18 years old.

30. In the case in hand, it appears that the victim was around 19 years of age when the incident took place. Though it is alleged by the victim and her mother that on the date of incident while they were travelling in a bus, when the bus reached in front of the house of the accused, the accused stopped the bus and pulled her out of the bus and dragged her towards his house. It appears from their evidence that about 30 to 40 passengers were also travelling in the said bus. It is not believable that when the bus reached in front of the house of the accused, why the bus stopped on the words of the accused appellant. It has not come to the evidence of witnesses that the accused had any relation with the bus driver and that on his request, the driver stopped the bus. It is also not acceptable that in front of 30/40 persons, the accused appellant pulled the victim out and dragged her towards his house. The bus conductor was examined in the

case as PW-3. According to him, he did not know the informant or the accused. He had no knowledge about the incident. It also appears that after the incident the victim got married to another person and is now living peacefully with her husband at Hyderabad

31. In view of the above discussion, in all its entirety, this Court is of the view that the prosecution has failed to prove the case against the accused/appellant beyond reasonable doubt.

32. In the result, the appeal is allowed. The Judgment and Order dated 05.01.2022, is set aside. The accused appellant is acquitted on benefit of doubt.

33. The appellant who is in jail, be released forthwith, if not wanted in any other case.

34. The Criminal Appeal accordingly, stands disposed of.

35. Send down the LCR.