
(2013) 05 GAU CK 0055
In the Gauhati High Court
Case No : Criminal Appeal No. 179 of 2009

Sri Milan Konwar @ Madhu

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 08-05-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Penal Code, 1860 (IPC) — Section 349, 350, 351, 354, 376

Citation : (2013) 05 GAU CK 0055

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : A.K. Bhuyan, Amicus Curiae, for the Appellant; B.J. Dutta, Addl. P.P., for the Respondent

Final Decision : Disposed Off

Judgement

Ujjal Bhuyan, J.—Heard Mr. A.K. Bhuyan, learned Amicus Curiae for the appellant and Mr. B.J. Dutta, learned Addl. Public Prosecutor, Assam. This appeal is directed against the judgment and order dated 31.08.2009 passed by the learned Sessions Judge, Dhemaji in Sessions Case No. 13 (DH)/2009 convicting the appellant u/s 448 /354 IPC and sentencing him to undergo simple imprisonment (SI) for 2 (two) months with fine of Rs. 500/-, in default, to undergo further SI for 8 (eight) days for the offence committed u/s 448 IPC and to undergo SI for 6 (six) months with fine of Rs. 1000/-, in default, to undergo further SI for another 15 (fifteen) days for the offence committed u/s 354 IPC, both the sentences to run concurrently.

2. Prosecution case in brief as can be seen from the first information is that on 19.12.2008 at about 7:00 p.m. while the informant was alone in her residence, the accused entered into her house and dragged her out to the courtyard, where he committed rape on her. When she raised hue and cry, her husband came and the accused fled from the place of occurrence. The first information was treated as FIR and on the basis of the same, Dhemaji PS Case No. 551/2008 u/s

448 /376 IPC was registered.

3. Police investigated the case and in the course of investigation sent the informant (prosecutrix) for medical examination on the next day i.e. on 20.12.2008. On completion of the investigation, police submitted charge-sheet against the accused u/s 448 /376 IPC. The offence u/s 376 IPC being exclusively triable by a Court of Sessions, the case was committed to the Court of Sessions Judge, Dhemaji by the Chief Judicial Magistrate vide order dated 10.02.2009.

4. After furnishing of relevant documents to the accused, charge was framed by the trial Court on 16.02.2009. The accused was charged with the commission of the two offences.

5. The first charge was that he on or about 19.12.2008 at about 7:00 p.m. in Subahi Bongalmari Gaon under Dhemaji Police Station committed house trespass by entering into the house of the prosecutrix in order to commit the offence of rape. Thus, he committed the offence punishable u/s 448 IPC. The accused was also charged that he or on about the same day, time and place, committed rape on the prosecutrix, thus committing an offence punishable u/s 376 IPC. When the charges were read over and explained to the accused, he pleaded not guilty and claimed to be tried.

6. Prosecution examined as many as 7 (seven) witnesses, including the Doctor and the Investigating Officer. The defence did not adduce any evidence. However, the accused was examined u/s 313 Cr.PC. The defence plea was of total denial. Further stand taken was that the accused had given money to the family of the prosecutrix and he had gone to her residence to get back his money. Since the money was not re-funded, he was falsely implicated.

7. Learned trial Court after considering the evidence adduced and the materials on record held that the evidence of the prosecutrix herself and the medical evidence negate the possibility of rape being committed on her by the accused. Though the charge u/s 376 IPC could not be proved, the learned trial Court came to the conclusion that the offence u/s 354 IPC and 448 IPC was committed by the accused and he was accordingly convicted. After hearing him on the point of sentence, learned trial Court sentenced the accused for the periods as indicated above.

8. Mr. Bhuyan, learned Amicus Curiae, submits that the allegation in the FIR was of commission of rape. When the informant adduced evidence as PW 1 the allegation was diluted from commission of rape to an attempt to commit rape. He further submits that the victim was medically examined on the very next day after the day of the occurrence, which was on or about 7:00 p.m. on 19.12.2008. In other words, the victim was medically examined within 24 hours of the alleged occurrence. Referring to the medical evidence, learned Amicus Curiae submits that the scratch mark on the bilateral thigh of the victim was more than 24 hours old and as per the medical opinion, there was no sign of forcible sexual intercourse except the presence of those scratch marks which according to the

medical evidence could be due to itching. He further submits that no specific evidence specifying any instance which could constitute the ingredients for commission of the offence of outraging the modesty of the victim was present. He submits that when the prosecution case regarding commission of rape has been disbelieved, no case for conviction either u/s 354 IPC or u/s 448 IPC can be made out without any independent evidence. He also submits that it is highly improbable that the accused, who is charged with commission of the offence of rape, will drag the prosecutrix outside the house and not inside the house. He finally submits that the appellant had already undergone detention for about 4 (four) months. He was arrested on 22.12.2008 and released on 20.04.2009. He, therefore, seeks quashing of the conviction and for setting the appellant at liberty.

9. Opposing the submissions made by the learned Amicus Curiae, learned Addl. Public Prosecutor has referred to the evidence of PW 1 (Prosecutrix) and PW 2, who is her husband, and submits that from a conjoint reading of the evidence of the aforesaid two witnesses, it is clear that offence u/s 354 /448 IPC had been committed and, therefore, the learned trial Court was justified in convicting the accused under the aforesaid provisions of law. He submits that no interference in so far conviction of the appellant is concerned is called for. However, on the point of sentence, he fairly submits that in view of the fact that the appellant had already undergone detention for a period of about 4 (four) months, the Court may consider modifying the sentence to the period already undergone.

10. Submissions made have been considered.

11. I have also perused the evidence adduced and the other materials on record.

12. Since the charge u/s 376 IPC could not be proved in the trial, the same is not required to be gone into by this Court. Coming to the sections under which the appellant has been convicted, a brief dilation on the same is considered necessary.

13. Section 354 IPC provides that whoever assaults or use criminal force on any woman intending to outrage her modesty or knowing it likely that by assault or by use of such criminal force her modesty may likely to be outraged, shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both. A careful reading of the aforesaid provision would indicate that committing assault or using criminal force on any woman with intent to outrage her modesty are the conditions precedent for commission of an offence u/s 354 IPC.

14. Force is defined in Section 349 IPC whereas criminal force is defined in section 350. Again, assault is defined in Section 351 IPC. On the other hand, Section 448 IPC provides for punishment for house trespass which is defined in Section 442 IPC.

15. Coming to the evidence of PW 1, she stated that the accused had entered into her house and dragged her out to the courtyard where he tried to commit

illicit acts on her. She raised hue and cry and thereafter became unconscious. According to her, hearing her hue and cry, her husband, who was not at home, came home and seeing her husband, the accused fled away. She reported the incident to her husband. The evidence of the husband, PW2, corroborates the evidence of PW1. He saw the accused fleeing from the place of occurrence and found his wife lying on the courtyard. She told him about the illicit acts committed by the accused on her. The accused in his statement u/s 313 Cr.PC. admitted going to the residence of the prosecutrix. The plea taken that he had gone there to demand repayment of money which he had allegedly given to the prosecutrix and her husband does not inspire confidence and this aspect was also not brought out during cross-examination.

16. In view of the factum of presence of the accused in the residence of the prosecutrix, that too, in the late evening hours in a rural setup when her husband was not present, coupled with the evidence of PW 1 and PW 2, a clear case of commission of offence under Sections 354 /448 IPC is made out against the accused. To that extent, the finding of the learned trial Court cannot be said to be erroneous.

17. In view of above, the conviction of the appellant under Sections 354 /448 IPC is upheld.

18. Coming to the question of sentence, learned trial Court had ordered both the sentences to run concurrently, meaning thereby that appellant would have to undergo SI for 6 (six) months and in case of default in the payment of fine, to undergo SI for another 15 days. As seen from the record, the appellant was arrested on 22.12.2008 and continued to remain in custody till 20.04.2009 i.e., for a period of about 4 (four) months.

19. Considering the period undergone by the appellant and taking an overall view of the matter, the sentence imposed on the appellant is modified to the period already undergone.

20. Accordingly, the appellant be set at liberty. Appeal stands disposed of as indicated above. Registry to send down the record. Before parting with the record, this Court would like to place on record its appreciation of the assistance rendered by Mr. A.K. Bhuyan, learned Amicus Curiae, who shall be paid the prescribed fee.