

(2021) 03 GAU CK 0031
In the Gauhati High Court
Case No : Criminal Appeal No. 98 Of 2018

Tingkuabe Nariame	Vs	APPELLANT
State Of Assam And Anr		RESPONDENT

Date of Decision : 26-03-2021

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 164, 313, 374
Indian Penal Code, 1860 — Section 375, 376, 451, 511

Citation : (2021) 03 GAU CK 0031

Hon'ble Judges : Ajit Borthakur, J

Bench : Single Bench

Advocate : S Bharali

Final Decision : Disposed Off

Judgement

1. Heard Mr. B. Baruah, learned counsel appearing for the appellant and Ms. A. Begum, learned Addl. Public Prosecutor for the State respondent. None appears for the respondent No. 2/victim woman.

2. This appeal under Section 374 Cr.P.C. is preferred against the judgment and order dated 11.01.2018 passed by the learned Sessions Judge, Dima Hasao, Haflong, in Sessions case No. 11/2014 whereby the accused appellant was convicted and sentenced to rigorous imprisonment for 6 months and to pay fine of Rs. 1,000/- in default simple imprisonment for one month under Section 451 of the IPC and also to suffer rigorous imprisonment for 7 years and pay fine of Rs. 3,000/- in default to undergo simple imprisonment for three months under Section 376 of the IPC.

3. The prosecution case in brief is that an ejahar was lodged before the officer-in-charge of Haflong P.S. on 17.11.2013 alleging that, on 16.11.2013 at about 7 p.m., the accused appellant trespassed into the dwelling house of the victim woman, in absence of her husband and raped her and then left threatening her not to disclose the aforesaid incident to anybody.

4. Based on the above F.I.R. Haflong P.S. case No. 140/2013 dated 17.11.2013 under Sections 451/376 of the IPC was registered and after investigation laid a charge-sheet accordingly against the accused appellant. As the offence is under Section 376 of the IPC is exclusively triable by the court of Sessions, the case was committed to the court of learned Sessions Judge, Dima Hasao for trial and thereupon the Sessions Case No. 11/2014 was registered. The learned Sessions Judge, after perusal of the case diary framed charges under Section 451/376 of the IPC against the accused appellant and on being read over, the accused appellant pleaded not guilty. In order to establish the charges aforementioned the prosecution examined 10(ten) number of witnesses including the victim woman. After closing the evidence of the prosecution side the statement of the accused under Section 313 Cr.P.C. was recorded. The accused appellant reiterated his innocence and declined to examine any witness in defence. Thereafter, the learned trial court, upon hearing the arguments of both the sides and appreciation of the evidence on record held the accused appellant guilty of the charges and accordingly convicted and sentenced the accused as stated above.

5. Mr. B. Baruah, learned counsel appearing for the accused appellant submitted that the learned trial court recorded the conviction of the accused appellant on surmises and conjectures on erroneous appreciation of evidence on record inasmuch as the material contradictions in the evidence of the prosecution witnesses which are fatale to the prosecution case were not taken into consideration and further, the evidence adduced by the prosecution suffers from inherent inconsistencies, exaggerations and omissions. According to Mr. Baruah, the prosecution witnesses number 2, 3, 5 & 6 are related and so interested witnesses and P.W.4 who is the Secretary of the Village and PWs 3, 4, 5 & 6 are being apparently heresay their testimony is inadmissible in evidence. It was also submitted that P.W.8, the Doctor, who examined the victim woman did not find any mark of injury on the persons of the victim woman suggesting that she was raped.

6. Ms. A. Begum, learned Addl. Public Prosecutor, submits that the impugned judgment and order of the learned trial court being a well reasoned one no interference is called for in appeal.

7. I have given due consideration to the above submissions made by the learned counsel for both the sides and perused records.

8. Now let us analyse the evidence on record.

9. As stated above, the F.I.R., dated 17.11.2013, vide Ext.1 revealed that the accused/appellant, on 16.11.2013, at about 7 p.m. trespassed into the dwelling house of the victim, who is a married woman (P.W.1), in absence of her husband and raped her and then left threatening her not to disclose the said incident to anybody. P.W.7, S.I. Minakshi Chakraborty, the investigating officer, had drawn the sketch map of the place of occurrence vide Ext. 4 and it indicates that the

occurrence took place inside the house of the victim.

10. A perusal of the evidence of the victim(P.W.1), it is noticed that she supported the facts alleged in the F.I.R. and in her statement recorded under Section 164 Cr.P.C. vide Ext.2. It is further noticed that at the relevant time of the occurrence, there were her children including P.W.2 son, aged about 12 years, who witnessed the occurrence. Immediately after the occurrence, she along with her children including her said son (P.W.2) ran to the house of P.W.5, Smti. Jaugimai Singh and reported the incident. According to P.W.1, the accused is her husband's distant relative. Ext. 4, the sketch map of the place of occurrence shows that the accused is a neighbour of P.W.1 with some distance, without any house inbetween. P.W.2 stated that the accused came to their house in the relevant night, turn off the light and made her mother (P.W.1) naked and then tied her (P.W.1) hands. He (P.W.2), thus, corroborated the facts narrated in his statement, recorded under Section 164 Cr.P.C. vide Ext. 3 in material particulars. P.W.3, the husband of the victim woman, stated that in the night of the occurrence, he was not at home and accused is his maternal uncle's son. As a reported witness, he (P.W.3) corroborated the evidence of his wife/victim woman. P.W.4 Wangrai Reine, the Secretary of the Village Committee, stated that he came to know that the accused committed rape on P.W.1, the victim, during the period of absence of her husband (P.W.3).

11. Coming to the evidence of P.W.5, Smti. Jaugimai Singh, it is noticed that she has corroborated the testimony of P.W.1, the victim, deposing that on 16.11.2013 at about 10 p.m., P.W.1 along with her children, in a condition of breathlessness and whole body covered with muds came to her house and reported that 'the accused chased her and tried to commit rape.' P.W.6 Sri Pausahingbe Zeme, another neighbour, deposed that on 16.11.2013 at about

10 p.m., P.W.1, the victim, along with her children appeared at his home and reported that in absence of her husband (P.W.3), the accused committed rape of her. He (P.W.6) sent them to the house of Mahadev Tilla, her (P.W.1) sister's house for stay as there was no accommodation. It is seen that the defence declined cross-examination of P.Ws 3, 4, 5 and 6 and as such, their evidence in examination-in-chief remained undisputed. It is further seen that the defence has put some insignificant suggestions to the P.Ws 1 and 2, the material witnesses, but no defence evidence was led in support of these suggestions and therefore, those suggestions have also remained not proved.

12. P.W. 8, Dr. Mousumi Bhattacharjee, the doctor, examined P.W.1, the victim woman, on 17.11.2013 and found as under-

"1. As she is the mother of four children sign of child birth and sexual relation present.

2. No mark of injury sustained in her body and private parts.

3. Only tenderness over grain (upper part of thigh present).

4. White discharge and dry stain of white discharge present."

13. She (P.W.8) recognised Ext.6, the medical report and stated in cross-examination that the white discharge found in the body of the victim (P.W.1) was due to chronic infection.

14. The accused in his statement under Section 313 Cr.P.C., as stated above, denied the incriminating evidence against him.

15. On close scrutiny of the above testimony of the prosecution witnesses more particularly the evidence of P.W. 1(the victim) and P.W.2, her son, it is apparent that there is no evidence of penetration even to a slight degree of the male organ of the accused. The accused's medical examination in this regard was not done. It is well settled that while construing a penal provision, the rule of strict interpretation shall be adhered to. The evidence simply shows the use of the term 'rape' without any further details of it. Here, one must not lose sight of the legal requirement that in order to punish for the offence of 'rape' it is necessary to prove beyond doubt that the accused had sexual intercourse with a woman under any of the circumstances mentioned in six clauses of Section 375 of the IPC. There is no evidence to suggest that the sexual intercourse was actually committed by the accused/appellant with the victim woman against her consent as the medical evidence of P.W.8 shows that there was no mark of injury sustained by her on her body and private parts rather shows that she was suffering from chronic infection which resulted in white discharge. Therefore, this court is of the opinion that the term 'rape' as understood in common parlance in the rural society can't legally be accepted being not within the definition of 'rape' provided in Section 375 of the IPC. However, as the evidence conclusively shows that the accused/appellant, aged about 20 years, stripped off the victim woman naked and then made her hands tied with a rope, without any evidence of further implicating unwarranted act, there was actually an attempt to commit rape upon the victim woman (P.W.1).

16. For the above stated reasons, this court is of the considered opinion that the offence under Section 376 of the IPC is not proved beyond all reasonable doubts, but it is held that there was an attempt to commit rape and accordingly, the conviction is modified to Sections 376/511 of the IPC. As the accused was aged about 20 years on the date of occurrence, the sentence of rigorous imprisonment of 7 years is reduced to half of it only affirming, of course, the fine amount imposed by the learned trial court as stated above.

17. Resultantly, the sentence passed under Section 351 of the IPC is affirmed.

18. Also for the reasons set forth above, the sentence of rigorous imprisonment for 7 years under Section 376 of the IPC is modified to rigorous imprisonment for 3 ½ years and to pay fine of Rs. 3,000/- in default to undergo simple imprisonment for 3 months under Sections 376/511 of the IPC.

19. The appeal stands disposed of.

20. Return the LCR.