

GAHC010106212020



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./176/2020

JAHANGIR ALOM AND ANR
S/O MD. ABDUL KHALEK MUNCHI, R/O TINJ HAZAR BIGHA, P.S. KAKI,
DIST. HOJAI, ASSAM.

2: ELIYAS ALI
S/O LATE HOBIB ALI
R/O NO. 2 KHAGORIJAN
P.S. LUMDING
DIST. HOJAI
ASSAM

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY THE PP, ASSAM.

2:ASIS DALU
S/O AMENDRA DALU
R/O NO. 4 DERAPATHAR
P.S. KALI
DIST. HOJAI
ASSAM
PIN 78244

Advocate for the Petitioner : MR D TALUKDAR

Advocate for the Respondent : MS. B BHUYAN(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MITALI THAKURIA

JUDGMENT

Date : 09-10-2023

(Michael Zothankhuma, J)

1. Heard Mr. A.M. Bora, learned Senior Counsel for the appellant assisted by Mr. D. Talukdar, learned counsel. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor assisted by Ms. P. Bora, learned counsel.

2. This appeal has been filed against the impugned judgment dated 24.02.2020 passed by the learned Court of the Additional District & Sessions Judge, Fast Tract Court, Hojai, Sankardev Nagar in Special (POCSO) Case No.13(N)/2018, by which the two appellants, Jahangir Alom and Eliyas Ali have been convicted under Section 376(1) IPC and sentenced to undergo rigorous imprisonment for life, with a fine of Rs.50,000/- each, in default, to suffer simple imprisonment for 6 (six) month, vide sentence order dated 28.02.2020. They would also be debarred from any kind of remission.

3. The prosecution case in brief is that an FIR was submitted on 19.11.2017 by Prosecution Witness No.1 (PW-1) to the Officer-in-Charge, Kaki Police Station, which is to the effect that on 18.11.2017, at around 7 p.m. when his daughter, aged 16 years, went out of the house to ease herself, the appellants gagged her and took her forcibly to the house of the appellant Md. Eliyas Ali, wherein Md. Jahangir Alom raped her. Later on his daughter escaped and thereafter came back to their house. In pursuance to the FIR submitted by PW-1, Kaki P.S. Case No.191/2017 under Section 363/376(2)(i) IPC was registered.

The victim girl was thereafter taken for medical examination on 20.11.2017 and her statement under Section 164 Cr.P.C was also recorded before the concerned Magistrate on 21.11.2017. After completion of investigation, the Investigating Officer submitted the charge-sheet, wherein he found a prima facie case under Section 366/342/376(2)(G) IPC against the appellants.

4. In the "Form" used by the learned Trial Court for framing charges against the appellants, charges were framed by the learned Trial Court under Section 363-A IPC, Section 376 IPC and under Section 4 of the POCSO Act, to which the appellants pleaded not guilty and claimed to be tried.

5. Thereafter 7 (seven) prosecution witnesses were examined by the learned Trial Court. The appellants were thereafter examined by the learned Trial Court under Section 313 Cr.P.C and after hearing the final arguments, the learned Trial Court came to a finding that the prosecution had failed to bring home the offence under Section 363-A IPC and Section 4 of the POCSO Act against the appellants beyond all reasonable doubt. The learned Trial Court however held that the prosecution could prove the guilt of the appellants under Section 376(1) IPC for committing rape upon the victim girl. Subsequent to the impugned judgment passed by the learned Trial Court on 24.02.2020 convicting the appellants under Section 376(1) IPC, the appellants were sentenced to undergo rigorous imprisonment for life with a fine of Rs.50,000/- each, in default, simple imprisonment for 6 (six) months.

6. Mr. A.M. Bora, learned Senior Counsel for the appellants submits that the

victim girl was 21 years of age at the time of the incident and was having a romantic affair with the appellant Jahangir Alom. He submits that though it is proved that the appellant Jahangir Alom had committed rape upon the victim girl, the harsh sentence imposed upon the said Jahangir Alom should be reduced to the minimum sentence possible provided in Section 376(1) IPC, as Jahangir Alom and the victim girl were involved in a romantic relationship. The learned Senior Counsel also submits that the fact that there was a romantic relationship between the victim girl and the appellant Jahangir Alom is proved by the evidence given by PW-4 (mother of the victim girl) in her cross-examination and the evidence given by PW-6 (uncle of the victim girl) in his cross-examination. The learned Senior Counsel also submits that the statement made by the victim girl under Section 164 Cr.P.C was not exhibited by the prosecution during the evidence. He submits that even otherwise, a statement made under Section 164 Cr.P.C is not a positive evidence and can only be used for corroboration of evidence.

7. The learned Senior Counsel for the appellants also submits that as the evidence recorded by the learned Trial Court shows that it was only Jahangir Alom who had sexually assaulted the victim girl, the co-appellant Eliyas Ali could not have been convicted under Section 376(1) IPC, in the absence of any charge being framed under Section 34 or 109 IPC. He submits that though the evidence of PW-3 (victim girl), is to the effect that the appellant Eliyas Ali had removed her clothes forcefully and the appellant Jahangir Alom had committed rape upon her, the evidence given by PW-3 regarding removal of her clothes by Eliyas Ali has been contradicted by the evidence given by the Investigating Officer (PW-7), who states that the victim girl had not stated before the I.O.

that the appellant Elias Ali had disrobed her. The learned Senior Counsel submits that as the appellant Jahangir Alom had been convicted for rape under Section 376(1) IPC, the co-accused/appellant Elias Ali could not have been convicted and sentenced on the basis of the same section of law, in the absence of any charge of common intention under Section 34 IPC or abetment under Section 109 IPC having been framed. He thus submits that the case should be remanded back to the learned Trial Court, in so far as the appellant Elias Ali is concerned, to enable the learned Trial Court to take a fresh decision, in relation to the charges framed against him.

8. The learned counsel for the appellants also submits that in the alternative, the appellant Elias Ali can be convicted for the charge of kidnapping under Section 366 IPC as he was charged under Section 363-A IPC pertaining to kidnapping or maiming a minor for the purpose of begging is punishable with imprisonment for a terms which may extend to ten years and fine, while the punishment for kidnapping or abducting a women for marriage or illicit intercourse can extend for a term of 10 years and fine. He submits that when a person is charged with an offence and the facts are proved which reduces it to a minor offence, he may be convicted of the minor offence, although he is not charged with it, in terms of Section 222(2) Cr.P.C.

9. Ms. B. Bhuyan, learned Additional Public Prosecutor submits that there is no infirmity with the impugned judgment passed by the learned Trial Court, inasmuch as, the charge under Section 34 IPC had also been framed against both the appellants, as can be seen from the order dated 02.05.2019 recorded

in the order-sheet of the learned Trial Court. She submits that the framing of charge under Section 34 IPC has inadvertently not been recorded in the "Form" used by the learned Trial Court, while framing charges against the appellants. However, the order-sheet dated 02.05.2019 of the learned Trial Court shows that the learned Trial Court had framed charges under Section 34 IPC also against the appellants. She accordingly submits that there being no infirmity with the conviction and sentence of the appellants, the same should not be interfered with.

10. The learned Additional Public Prosecutor also submits that while the evidence of PW-4 and PW-6 in their cross-examination, could be suggestive that there was some romantic relationship between the victim girl and the appellant Jahangir Alom, there is no positive evidence proving any romantic relationship between the two. In any event, there is nothing to show in the evidence that there was any consent given by the victim girl, for having any sexual intercourse with Jahangir Alom. On the other hand, the evidence of the Doctor (PW-2) and his medical report indicates that there was bleeding in the private parts of the victim girl at the time of her medical examination, which was two days after the incident. Further, the evidence of PW-3 shows that rape had occurred. She accordingly submits that no grounds for interference with the impugned judgment has been made out by the appellants. At this stage, the learned counsel for the appellants submits that in view of the fact that charge under Section 34 IPC has been framed against the appellants, in the order dated 02.05.2019 by the learned Trial Court, the only prayer of the appellants is to reduce the sentence imposed upon the appellant Eliyas Ali, keeping in view the fact that he had not raped the victim girl.

11. We have heard the learned Counsels for the parties.

12. As can be seen from the learned Trial Court records, seven prosecution witnesses have been examined. The incident occurred on the night of 18.11.2017 and the FIR was lodged by PW-1 on 19.11.2017. PW-1 is the father of the victim girl and the informant. PW-2 is the Medical Officer (Doctor) who medically examined the victim girl on 20.11.2017. PW-3 is the victim girl, while PW-4 is the mother of the victim girl. PW-5 is the Scientific Officer, Serology Division working in the Directorate of Forensic Science, Assam, Kahilipara, who reported that on examination of the seized panty, the presence of spermatozoa was found. PW-6 is the uncle of the victim girl. PW-7 is the Sub Inspector of Kaki Police Station who stated that Shri Bipin Chandra Nath, who was the Investigating Officer of the case and was also the Officer-in-charge of the Police Station had retired about nine months ago.

13. PW-3, who is the victim girl, has stated that she knew both the appellants and that at the time when her mother was cooking food, she had gone out of the house to attend to a call of nature at around 7 p.m, whereupon the appellants covered her mouth with cloth and took her forcibly to the house of the appellant Eliyas Ali. The appellant Eliyas Ali thereafter removed her clothes forcibly. The appellant Jahangir Alom then raped her, while appellant Eliyas Ali held her mouth tightly. Later on, by using the excuse of needing to respond to the call of nature, she came back to her house and told her parents about the incident. Police took her for medical examination and also took her to the Court for recording her statement under Section 164 Cr.PC. Police also seized her

panty.

In her cross-examination, the victim girl (PW-3) denied that she was having any love affair with the appellant Jahangir Alom or that she had voluntarily gone with the appellants.

14. The evidence of PW-2, who is the Medical Officer (Doctor), is to the effect that he examined the victim girl on 20.11.2017 at B.P. Civil Hospital, Nagaon, where he was working as a Medical & Health Officer. During his examination, he found the following injuries on the victim girl, which were as follows:

- “1. *Hymen torn.*
2. *Active bleeding present. Tear seen on the left lateral wall of vagina.*
3. *Mark of violence : Active bleeding present. Tear seen on the left lateral wall of vagina. L.M.P. on 05.11.2017.”*

PW-2 also states in his opinion that there was evidence of recent sexual intercourse on the victim and there was evidence of violence on the private parts. He also stated that the age of the victim girl was 19 years according to the radiologist. He also exhibited the Medical Report made by him as Ext.-1 and identified his signature as Ext.1(1).

15. The evidence of the father of the victim girl (PW-1) and the mother of the victim girl (PW-4) is that when the victim girl went out for a call of nature at around 7 p.m. and did not return back, they searched for her the whole night. When the victim girl returned back to her home in the morning, she narrated the entire incident to them. Thereafter an FIR was lodged by PW-1 and the

victim was taken for medical examination and her statement was recorded under Section 164 Cr.P.C.

In her cross-examination, PW-4 stated that on the date of occurrence when her daughter was found missing, the neighbouring people came to her house and told her that the relation of her daughter with a Muslim boy was very bad. The above, in our view, though suggestive that there was a relationship between the victim girl and the appellant Jahangir Alom, the same cannot be said to be conclusive proof of there being any romantic relationship/affair between them.

16. The evidence of PW-5, who was the Scientific officer, Serology Division at Directorate of Forensic Science, Assam, Kahilipara is to the effect that one dirty and old ash coloured underwear (panty) was sent to them for examination and the same gave positive test for human spermatozoa. The above report on its own, in our view, does not prove that the spermatozoa belonged to Jahangir Alom, though it is suggestive of the same. The evidence of PW-2 (Doctor), coupled with the presence of spermatozoa in the victim girl's panty however corroborates the testimony of the victim girl that PW-3 was raped by Jahangir Alom.

The evidence of PW-6, who is the uncle of the victim girl, shows that his evidence is basically hearsay, which is to the effect that he heard his niece was raped from his wife.

17. The evidence of PW-7, who is a Sub Inspector of the Kaki Police Station is to the effect that an FIR was submitted by PW-1, on the basis of which Kaki P.S.

Case No.191/2017 under Sections 363/376(2)(i) IPC was registered. The place of occurrence was visited and a rough sketch-map was drawn. The statements of the witnesses were examined and the victim girl was medically examined by a Doctor. The victim girl was also sent to the Magistrate for recording her statement under Section 164 Cr.P.C. On completion of the investigation, charge-sheet was filed against the appellants under Section 366/342/376(2)(G) IPC read with Section 4 of the POCSO Act. He also stated that the Officer-In-Charge of the Kaki Police Station, who was also the Investigating Officer had retired about nine months ago. He also stated that he did not have any involvement with the case in hand.

In his cross-examination, PW-7 states that the victim girl had not stated before the Investigating Officer that the appellant Eliyas Ali had disrobed her. Though there is discrepancy in the evidence given by PW-3 and the evidence of PW-7 with regard to the act of disrobing of PW-3 by the appellant Eliyas Ali, the facts still remains that there is no contradiction of the evidence of the victim girl with regard to her statement that the appellant Eliyas Ali was holding her mouth tightly, while the appellant Jahangir Alom was raping her.

18. There is no discrepancy in the evidence given by PW-3, except to the issue of her being disrobed by Eliyas Ali. However, the issue that now arises is as to whether the non-examination of the retired Investigating Officer is fatal to the case of the prosecution. In the case of ***Bihari Prasad vs. State of Bihar***, reported in ***(1996) 2 SCC 317***, the Supreme Court has held that non-examination of the Investigating Officer is not fatal to the prosecution case, especially when no prejudice was likely to be suffered by the accused. In the case of ***Dhenu Tudu vs. State of Assam (Crl.A.(J) 89/2020)***, this Court

has also held that the prosecution can bring home the guilt of the accused only on the basis of the evidence of the wholly reliable eye-witnesses and in the absence of the Investigating Officer being examined by the learned Trial Court, provided no prejudice is caused to the accused. In the present case, there is nothing to show that any prejudice has been caused to the appellants due to non-examination of the Investigating Officer, who had retired a few months earlier. In fact, no such submission has been made by the learned counsels for the appellants on this aspect. Further, there being no major discrepancy in the evidence of PW-3 and PW-3 not being confronted with any alleged discrepancy in her evidence, the non-examination of the Investigating Officer is not fatal to the prosecution case.

19. We have also perused the statement made under Section 164 Cr.P.C by the victim girl before the learned Magistrate on 21.11.2017 and find that there is no discrepancy, when comparing the same with the evidence given by PW-3 (victim). The above being said, the statement made under Section 164 Cr.P.C. cannot be taken into consideration even for the purpose of corroboration, as the same was not exhibited by the prosecution during trial.

20. The answers given by the appellants Jahangir Alom and Eliyas Ali during their examination under Section 313 Cr.P.C. are to the effect that they had not committed the offence of rape nor did the appellant Eliyas Ali close the mouth of PW-3 forcibly, while appellant Jahangir Alom raped her.

21. Though the evidence recorded by the learned Trial Court shows that the

appellant/co-accused Elias Ali did not rape the victim girl by having forceful sexual intercourse with the victim girl, the appellant Elias Ali had held the mouth of the victim girl tightly, in furtherance of the common intention to rape the victim girl, which was done by Jahangir Alom.

22. Section 34 of IPC states as follows:

“34. Acts done by several persons in furtherance of common intention — When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.”

23. Though the “Form” used by the learned Trial Court for framing charges against the appellants does not show that charge under Section 34 had been framed against the appellants, the order dated 02.05.2019 passed by the learned Trial Court in the order-sheet shows that charge under Section 34 IPC had also been framed against the appellants. The appellant Elias Ali had participated in the trial proceedings knowing fully well that charge under Section 376(1) IPC had been framed against him and Jahangir Alom in the “Form” used by the learned Trial Court and as such, we are of the view that no prejudice was caused to Elias Ali during the trial proceedings, because of the absence of the charge under Section 34 IPC in the “Form” used by the learned Trial Court. Further, the fact that the charge under Section 34 IPC had also been considered and framed in the “Form” is also evident by the use of the words “in furtherance of common intention an offence punishable under Section 376 of the Indian Penal Code”, without actually writing the words and numbers “Section 34 IPC”. The framing of the second charge in the “FORM” is reproduced as follows:-

*“Secondly-That on the same day and same time, you committed rape on the victim and thereby you both in furtherance of common intention committed an offence punishable under Section **376** of the Indian Penal Code and within (4) the cognizance of this Court”*

As the evidence shows that the appellant Eliyas Ali committed a criminal act in furtherance of the common intention to rape the victim, we are of the view that there is no infirmity with the learned Trial Court coming to a finding that the appellant Eliyas Ali was guilty of the charge of having committed the offence under Section 376(1) IPC, as the same has to be and can be read as Sections 376(1)/34 IPC.

24. The order dated 02.05.2019 passed by the learned Trial Court in the order sheet of the trial court records states as follows:-

“2/5/19 Accused are present.

Heard Id. counsel as well as accused persons on consideration of charge.

Perused the C/R, C.D. as well as chargesheet. Having found prima facie offences u/s 363/376/34 IPC, r/w S-4 of POCSO Act against the accused Jahangir Ali and Ilias Ali, the charges are framed. The contents of charges are explained and readover to them to which they pleaded not guilty and claim to be tried.

Issue summons to PWs.

Fixed- 3/06/19 for PWs.”

25. On perusing the impugned judgment, we find that the learned Trial Court has not made a mention of Section 34 IPC while convicting Elias Ali of Section 376(1) IPC. This can be due to inadvertence or negligence. However, in the beginning part of the impugned judgment, the learned Trial Court has made a mention that the present case arose out of Kaki Police Station Case No. 191/2017 under Sections 363-A/376(1)/**34** IPC R/W Section 4 of the POCSO Act. It has also recorded that the criminal case was set into motion against the accused Jahangir Alom and Elias Ali on the charges under Sections 363-A/376(1)/**34** IPC R/W Section 4 of the POCSO Act. The learned Trial Court has also made a mention of Section 34 IPC in paragraphs 2 and 11 of the impugned judgment. As such, the above facts shows that the charge under Section 34 IPC had been framed by the learned Trial Court against the appellants.

26. In the case of ***M.T. Khan Vs. Government of A.P.***, reported in **(2004) 2 SCC 267**, the Supreme Court has held that it is now a well settled principal of law that non mentioning or wrong mentioning of a provision of law does not invalidate an order in the event it is found that the power therefor exist. As such, in view of the law laid down by the Supreme Court, the conviction of the appellant/co-accused Elias Ali under Section 376(1) IPC will have to be construed to be a conviction under Sections 376(1)/34 IPC. As such, there is no infirmity with the conviction of the appellant Elias Ali under Sections 376(1)/34 IPC, even though the learned Trial Court has not mentioned Section 34 IPC in the impugned judgment.

27. On considering the evidence and the findings made by the learned Trial Court, we do not find any infirmity in the conviction of the appellants under Section 376(1) IPC, as the same has to be construed to be a conviction made under Sections 376(1)/34 IPC. The next question that needs to be decided is whether the sentence imposed upon the appellants can be reduced. Section 376(1) IPC provides that a person who commits rape shall be punished with rigorous imprisonment for either description, for a term which shall not be less than ten years, but which may extend to imprisonment for life and shall also be liable to fine. In the present case, the appellants have been sentenced to suffer rigorous imprisonment for life with a fine of Rs.50,000/- each, in default of payment of fine, to suffer simple imprisonment for six months. The learned Trial Court also held that the appellants would be debarred from being given any kind of remission.

28. As far as sentencing is concerned, one of the prime objectives of criminal law is the imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of the crime. In the case of ***Akhilesh Arya vs. State***, reported in ***2023 0 Supreme (Del) 228***, the Delhi High Court held that sentencing is an important task while convicting a person for a crime. It is trite that a sentence has to be commensurate with the nature and gravity of the offence and also the manner in which the crime is committed, the victim's condition and age of the accused and other relevant factors. There is no straight jacket formula for sentencing the accused. However, the twin objectives of the sentencing Policy, i.e., deterrence and correction needs to be kept in mind. In the case of ***State of M.P. vs. Babulal***, reported in ***2007 0 Supreme (MP) 1146***, the Supreme Court has held in paragraph No. 27 that

"Penal laws, by and large, adhere to the doctrine of proportionality in prescribing sentences according to culpability of criminal conduct. Judges in principle agree that sentence ought always to commensurate with the crime. In practice, however, sentences are determined on other relevant and germane considerations. Sometimes it is the correctional need that justifies lesser sentence. Sometimes the circumstances under which the offence is committed play an important role. Sometimes it is the degree of deliberation shown by the offender in committing a crime which is material. Sentencing is thus a delicate task which requires skill, talent and consideration of several factors, such as, the nature of offence, circumstances extenuating or aggravating in which it was committed, prior criminal record of the offender, if any, age and background of the criminal with reference to education, home life, social adjustment, emotional and mental condition, prospects of his reformation and rehabilitation, etc. All these and similar other considerations can, hopefully and legitimately, tilt the scale on the propriety of sentence."

29. In the present case, the appellant Jahangir Alom was approximately 29 years of age and the appellant Eliyas Ali was approximately 43 years of age at the time of the incident. Though their crime is heinous, there was no weapon used by them. We are also of the view that there is a chance of reformation and rehabilitation of the appellants.

On considering the age of the appellants and keeping in view the fact that the appellants do not have any criminal past, we are of the view that the sentence imposed upon the appellants should not only be a deterrent, but also correctional in nature. Accordingly, on considering the facts and circumstance of the case in its entirety, we are of the view that the ends of justice would be met

if the sentence inflicted upon the appellants is lessened, as the same would also serve the purpose of proportionality, deterrence, correction and rehabilitation of the appellants.

30. In view of the reasons above, the sentence imposed upon the appellants by the learned Trial Court, vide sentence order dated 28.02.2020, is hereby set aside. The appellants are accordingly sentenced under Sections 376(1)/34 IPC to undergo rigorous imprisonment for 12 (twelve) years each with a fine of Rs. 50,000/- each, in default to suffer simple imprisonment for 6 (six) months. The impugned judgment dated 24.02.2020, convicting the appellants, is however not interfered with. The appeal is accordingly disposed of.

31. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant