

GAHC010180602015



THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 338 of 2015

Md. Abu Bakkar Siddique,
S/o, Late Abdul Rahman,
Bagaribori, P.S-Mikirbheta,
District- Morigaon (Assam)

.....
Accused/Appellant

-Versus-

1. The State of Assam,
Represented by the Public Prosecutor, Assam,
Gauhati High Court, Guwahati - 1.

2. Md. Abdul Rahman,
S/o Md Abdul Khalek,
Vill- Madhyam Kalikajari,
P.S.-Mikirbheta,
District – Morigaon, Assam.

.....Respondents

Advocates for the appellant : Ms S K Nargis,
Advocate for the respondents : Mr P S Lahkar, Addl. PP.
Mr A M Khan.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Judgment : 04.01.2023

JUDGMENT AND ORDER (CAV)

Heard Ms S K Nargis, learned counsel for the petitioner and Mr P S Lahkar, learned Additional Public Prosecutor for the State of Assam. Also heard Mr A M Khan, learned counsel appearing on behalf of the respondent No. 2.

2. This appeal under Section 374(2) of the CrPC, has been filed by the accused appellant against the Judgment and Order dated 21.08.2015, passed by the learned Assistant Sessions Judge, Morigaon, in Sessions Case No. 161/2014, whereby the accused appellant was convicted and sentenced to undergo Rigorous Imprisonment for 10 (ten) years for committing offence under Section 376 (2) (f) IPC and fine of Rs. 3,000/-, in default to undergo further Rigorous Imprisonment for 3 months and also to undergo RI for 7 (seven) years for committing offence under Section 306 IPC and fine of Rs. 2,000/- in default stipulation. He is also sentenced to undergo Rigorous Imprisonment for 6 (six) months for committing offence under Section 506 IPC. All the sentences were directed to run concurrently.

3. The brief facts of the case is that one Abdul Rahman lodged an FIR before the Officer-In-Charge, Mikirbheta Police Station, stating *inter alia* that the accused, Abu Bakkar Siddique took his niece, aged about 11 years to his house, prior to 20 days of the incident. On 26.07.2011, at about 5:00 pm, his niece came to his house and informed that the accused, committed rape on her and she was also threatened with dire consequences by the accused if she disclosed the matter to any other person. His niece was step-daughter of the accused. On 27.07.2011, she had attempted to commit suicide to set fire on her body. Immediately after the incident, she was taken to the hospital.

4. On receipt of the FIR, a case was registered vide Mikirbheta PS Case No. 126/2011 under Sections 417/376(f)/506 IPC. Subsequently, during treatment, the victim died in the hospital and the Investigating Officer prayed to add Section 306 IPC, and accordingly, the offence under Section 306 IPC was added.

5. During investigation, the statement of the mother of the victim, Husnara Begum was recorded under Section 164 CrPC and the statements of other witnesses were recorded by the Investigating Officer. After completion of the investigation charge sheet was submitted against the accused/appellant under Sections 417/376(f)/506/306 IPC before the learned SDJM, Morigaon. As the offence under Section 376 and Section 306 IPC are exclusively triable by the Court of Sessions, the case was committed accordingly for trial.

6. During trial, the accused put his appearance before the learned trial Court and charge was framed under Sections 376 (f)/306/506 IPC, which was read over and explained to the accused, to which he pleaded not guilty and claimed to be tried.

7. To prove the guilt of the accused/appellant, the prosecution examined 11 (eleven)

witnesses, including three Court witnesses. On the other hand, one witness was examined in support of the case of defence. The plea of the defence was of total denial. After completion of the trial, the statement of the accused was recorded under Section 313 CrPC, wherein the incriminating materials found in the evidence of witnesses were put to him, to which the accused denied the allegations and submitted that he has been falsely implicated in the case.

8. After hearing the learned counsel for both the parties, the learned trial Court has delivered the Judgment, convicting the accused appellant as aforesaid. Hence, this appeal.

9. Learned counsel for the appellant has argued only on the point that the accused appellant has been detained in custody since the date of delivery of the judgment. Seven years have gone and the accused has already completed the period of imprisonment for the offence under Section 306 IPC. But for the offence under Section 376 IPC, the learned counsel has prayed to reduce the sentence from 10 years to 7 years.

10. It is also submitted by the learned counsel for the appellant that after 7 (seven) years of remaining in jail, she is not going to argue the matter on merit. However, she has prayed to release the accused against the period already undergone by him,

11. Learned Additional Public Prosecutor has also not raised any objection on the prayer of the appellant.

12. I have considered the submissions of the learned counsel for the appellant as well as the learned Additional Public Prosecutor. I have also perused the judgment of the learned trial Court as well as the evidence of the witnesses recorded in Sessions Case No. 161/2014.

13. PW-1, is the mother of the victim. From her deposition, it reveals that she got married to accused Abu Bakkar Siddique about 10 years back, as per Muslim Shariat and out of their

conjugal relationship, two children were born. Prior to her marriage with the accused, victim was her daughter through her first husband, Shahar Uddin. Accused married her after she had been divorced by her husband. At the time of her marriage with the accused Abu Bakkar Siddique, she brought her daughter to the house of the accused and she was staying with them. At the time of incident, the victim was about 11 years old. On the relevant night, she along with the victim and the accused were sleeping in the same bed in the same room. At about 3:00 am, her daughter was crying by saying – “Amma amma”. Then, she woke up and switched on the light and found her daughter in a naked position and she became unconscious. Immediately she poured water on the head of her daughter. The accused was also awoken. He threatened her not to raise halla and otherwise to face dire consequences. On the next morning, her daughter regained her sense. On being asked, she stated that the accused had done bad act with her. As such, she was no more staying at her house and she wanted to go to her maternal uncle’s house.

14. The demeanor of the witness was also recorded by the trial Court by stating that at this stage, the witness (i.e., PW-1) was crying.

15. This PW-1 also stated in her deposition that she could not inform the matter to other person, as the accused constantly threatened her. On the next morning, at about 5/6 am, her daughter had gone to her maternal uncles’ house. Out of shame and defame, her daughter had committed suicide by burning herself. Thereafter, her father informed her about the incident over telephone. On receipt of the information, she went to the house of her father. Her daughter was taken to GMCH. She died at GMCH, after 8 days of the occurrence. Her elder brother lodged the FIR.

16. In her cross-examination, PW-1 replied that Sharifa Khatun, the relative of the accused had lodged a rape case against her younger brother Osman Gani. She did not know if a case was filed against her brother Abdul Rahman, by alleging rape of the daughter of Abdul Hannan.

17. PW-2 is Jiarul Islam, and PW-5 is Abul Hussain. They did not support the case of prosecution and they were declared hostile at the instance of prosecution.

18. PW-3 is the informant, Abdul Rahman. He deposed in his evidence that his niece was taken by the accused to his house, as he is her stepfather, about 20 days prior to the incident. Just before the date of the incident, she returned to his house in the evening at about 5 pm. During night time, she reported him that she had been raped on the previous night by the accused person. She stated that the accused having done bad act with her, threatened her with dire consequences not to disclose it to others. She asked him to lodge a case. Then he replied that let him understand the matter. On the next day, during noon, while he was pondering over the matter, he heard hulla at the house of his father, which is intervened by a Fishery. After arrival, he had seen that his younger sister Monora Khatoon was inside the kitchen and his niece was burning herself in fire, inside the residential house. His sister doused the fire by pouring water. The victim was crying that she should die and fire should not be doused. She cried as to why she had been saved as Abu Bakkar had done bad act with her. At this juncture, Mukleswar Rahman and Abdul Rashid arrived there. They also witnessed the incident. Mukleswar Rahman called one ambulance, informing over his telephone to Morigaon Civil Hospital. She was referred to GMCH. She had expired after 6/7 days of the incident at GMCH. Thereafter, he lodged the FIR, vide Exhibit -1.

19. In his cross-examination, PW-3 replied that his house is at a distance of 200 metres away from his father's house. Makbul Hussain and Abdul Barek are immediate neighbours of her father's house. At the relevant time, his father was not at home.

20. The Medical Officer, Dr Mrinal Haloi was examined in the case as PW-4. He deposed in his evidence that on 02.08.2011, while he was working in the Department of Forensic Medicine, GMCH, he conducted post-mortem examination on the dead body of the victim girl, on police requisition and found as follows:-

A female body of average built. Swarthy complexion, found naked. Surgical bandage seen over both upper limbs, thorax, abdomen and both lower limbs up to knee joint. Eyes closed. Mouth partly open. Body is cold on touch externally, but warm on touch on internal examination. Burn injury present over vagina and anus. Rigor mortis is present and developed in all body parts.

External wound:- Dermoepidermal burn injuries are present all over the body except head, back of chest and abdomen, back of right thigh and portion of back of left thigh, front and back of both leg. All the burn injuries are covered with unhealthy granulation tissues and green cover, thick foul smelling fluid. All the burn injuries were ante mortem covering about 50% of total body surface area.

N.B.-Vaginal smear on glass slide are taken from lateral and posterior fornixes of vagina and preserved and properly packed, sealed, leveled. Signed vaginal smear on glass slide sent to the department of forensic medicine for detection of spermatozoa. Vaginal smear on glass slide are stained and examined under

microscope.

Mark of ligature on neck:- No ligature mark detected around the neck.

On dissection under lying neck tissues are found to be healthy.

Scalp, Skull, Vertebrae- all are healthy.

Membrane- pale. Brain-pale. Spinal cord not examined. Liver-pale. Spleen-pale and on dissection thick foul smell fluidly materials comes out from cut margins. Kidneys both are pale and swollen. On dissection thick foul smelling materials comes out from cut margins. Bladder-mucosa, pale and empty.

Organ of generation, Externally- old tear present at 3 and 7 O'clock position of the hymen (hymen ruptured with old tear). Hymenal orifice admits two fingers. Vaginal orifice admits three fingers easily.

Internally:- Uterus is healthy and empty.

Abdomen:- (wall as described).

Peritoneum:- pale.

Mouth, Pharynx, esophagus- Mucosa pale.

Stomach and its contents:- Mucosa pale and contains liquid substances which do not have any suspicious smell.

Small intestine and its contents:- Mucosa pale contains blue like substances.

Large intestine and its contents:- Mucosa pale. Contains gases and fecal matter present.

Thorax: (wall as described). Ribs and cartilages:- All are healthy.

Pleurae:- pale, Larynx and trachea:- Mucosa pale.

Lungs:- both are pale. Pericardium:- pale.

Heart:- healthy and chambers contains liquid and clotted blood.

Vessels:- all are healthy. Injury:- as described.

Disease or deformity:- as described. Dislocation:- not detected.

Opinion as to the cause of death:- Death was due to exhaustion as a result of burn injuries during life covering approximately 50% of total body surface area and it is of old dermoepidermal in nature. Genital findings are suggestive of recent sexual intercourse.

On being asked by the Court, PW-4 clarified the point by stating that spermatozoa can be detected inside the vaginal canal up to services. Life or death spermatozoa can be found inside the vaginal canal, even it is found concerned places from 50% burn injury over her body surface.

In his cross-examination, PW-4 replied that there is no clear cut definition of recent, but it may be within five days.

21. PW-6 is the Investigating Officer, Bhadr Ram Borah. He deposed in his evidence that, on

27.07.2011, he was the attached officer of Mikirbheta Police Station. On that day, the then OC of Mikirbheta PS, on receipt of an FIR from one Abdul Rahman registered a case and endorsed him to investigate the same. During investigation, he visited the place of occurrence, drew the sketch-map vide Exhibit-3. The informant and other witnesses were examined at the place of occurrence. The accused subsequently surrendered at the Police Station. He arrested the accused and forwarded to Court, with a prayer to send him to jail custody. On transfer, he had handed over the Case Diary to the OC of Mikirbheta PS.

22. In his cross-examination, PW-6 replied that although in the FIR, it was mentioned that the victim had been admitted to GMCH, Guwahati, but he did not personally go there. He made a requisition for collection of medical report, but not for medical examination. He did not take steps for recording the statement of the victim. He did not collect the Post-Mortem report of the victim. In the sketch map, it is mentioned that the kitchen and other houses belong to accused, Abu Bakkar Siddique.

23. PW-7 is another IO, who had collected the post-mortem examination report, inquest report, dead body challan and death certificate of the victim from GMCH and handed over the same to the OC, Mikirbheta PS.

24. PW-8 is also IO, who had only submitted charge sheet vide Exhibit- 4.

25. CW-1 is the IO, who had conducted inquest on the dead body of the victim at GMCH, vide Exhibit-6, the Inquest Report. He deposed in his evidence that he had noticed burn injuries over the mouth from neck to leg and the entire body was wrapped with cotton cloth.

26. CW-2, Abdul Rashid deposed in his evidence that on the date of incident, his niece (victim), set fire on her body by pouring kerosene oil. At that time, he was in his paddy field.

After the occurrence, while he was returning home to have his food, he got the information about the incident. Immediately, he rushed to the place and he and Mukleswar accompanied the victim to the hospital. While going towards hospital he asked the victim inside the ambulance, for what reason, she took such drastic steps. She replied that she should die because Abu Bakkar, whom she was regarding as her father, committed rape on her. Just before the day of occurrence, she had returned from the house of Abu Bakkar. After 6 days of her admission to GMCH, she had expired. At the relevant time of incident, the victim was about 12/13 years of age.

27. In his cross-examination, CW-2 replied that Gulzar Hussain was also with him at the time of treatment of the victim at the GMCH, Guwahati.

28. CW-3, is Gulzar Hussain. From his deposition, it reveals that on the date of incident, on hearing hue and cry at the house of his uncle, he rushed to the place and had noticed the victim with burn injury on her person. He and his uncle Abdul Rashid accompanied the victim to the hospital. On being asked, the victim replied that she did not want to live in the world as because Abu Bakkar Siddique has done bad act with her. The victim died during treatment at GMCH.

29. After going through the evidence of aforesaid witnesses, it reveals that there is no direct evidence relating to commission of rape, as the victim is dead, so also about commission of suicide. The prosecution is sought to establish its case by way of circumstantial evidence. Law relating to the appreciation of evidence in a case which is based on circumstantial evidence is clear and it is required to be proved by the prosecution that each of the circumstances have been clearly established beyond all reasonable doubts and

the circumstances cannot be explained under any other hypothesis. The circumstances taken together should form a complete chain unerringly pointing towards the guilt of the accused that it is the accused and accused alone and none else, who has committed the crime.

30. In the case in hand, the occurrence took place on 26.07.2011, in the house of the accused at night, while the victim and PW-1 were sleeping in the same bed along with the accused in the same room. From the evidence of PW-1, it reveals that on the day of incident, at about 03:00 am, she woke up on the calling of the victim- "Amma", "Amma" and she found her naked and subsequently, the victim became unconscious. On the next day morning, she regained her sense. On being asked, the victim replied that accused had committed rape on her and she told her mother that she was not willing to stay with them and had gone to the house of her uncle, i.e., PW-3.

31. The second incident took place in the house of PW-3, while the PW-3 was not at home. The victim committed suicide in the house of PW-3. According to the PW-3, prior to the incident of suicide, the victim told him that she should die as because the accused had committed rape on her. It is alleged by PW-1 that she did not disclose the commission of rape by the accused before any person because the accused had constantly threatened her with dire consequences. Ultimately, on the death of her daughter, her elder brother lodged the FIR. Though the witnesses, i.e. PW-1 and PW-3 were cross-examined at length by the defence, but nothing has been elicited in the cross-examination to disbelieve the evidence of PW-1 and PW-3.

32. The Medical Officer also supported the fact that on examination he found the injury on the private part of the victim, he had also found spermatozoa on the private parts of the

victim and explanation is given in cross-examination that there is no clear cut definition of recent, but it may be within 5 days.

33. From the evidence of PW-1 and PW-3, it reveals that due to commission of rape by the accused to the deceased, the deceased could not tolerate the shame, for which she took such extreme step of commission of suicide. CW-2 and CW-3 also supported the fact by stating that on being asked, while the victim was taken to the hospital along with them, she replied that she did not want to live because the accused had done bad act with her.

34. Therefore, the cumulative effect of the evidence of PWs-1, 3, 4 and CWs- 2 and 3 is that immediately after the incident, the victim narrated about the incident to her mother, i.e., PW-1 and her maternal uncle, i.e., PW-3. The immediate disclosure by the victim after the occurrence is admissible as *res gestae* under Section 6 of the Evidence Act. Section 6 is an exception to the general rule, whereunder, hearsay evidence becomes admissible. What is required to be established is that it must be contemporaneous with the acts and there should not be any interval which allowed fabrication of any evidence.

35. The surrounding circumstances under which the dead body was found in the house of the maternal uncle of the deceased, the findings in Post Mortem Report and statement of the deceased before her mother that she should die on account of the incident, clearly establishes that the deceased had committed suicide and the conduct of the accused/appellant has got proximate link with the commission of suicide of the victim.

36. The use of words in Section 32 (1) of the Evidence Act, circumstances of transaction, which resulted in her death, is apparently of wider amplitude than saying circumstances which caused her death. There need not necessarily be direct nexus between "circumstances"

and death. It is enough if the words spoken by the deceased has reference to any circumstance which has connection with any of the transaction which ended off in the death of the deceased. Such statement would also fall within the purview of Section 32 (1) of the Evidence Act.

37. In case of abetment of suicide, statement made by the deceased prior to her death to her mother and to her maternal uncle PW-3 is admissible in evidence as it relates to the cause of her death or circumstances of transaction which resulted in her death. Since, I am of the view that the circumstance of the death of the victim has got proximate relation with the commission of rape, therefore, the statement made by the deceased immediately after the occurrence is admissible under Section 32 (1) of the Evidence Act.

38. The victim was raped at a tender age by her step-father and the psychological traumatic experience was apparent in her mind. She cried in distress. She disclosed before her mother as well as her maternal uncle about such heinous act committed by the accused appellant. But she was not courageous enough to fight for justice. The background of her family that is her mother got married to the accused appellant and she used to live with her mother in the house of the accused appellant. It transpires that she had no other alternative to live in except in the house of the accused appellant. She perhaps did not get the mental support from the persons around her to raise the voice against the misdeed committed by the accused appellant. She became a broken girl, emotionally imbalanced. She started fearing to live and felt every moment of her life is going to give her immense pain and endless suffering. Perhaps in a state of anxiety she decided to end her life. Death was the greatest loss to her, which left her family hurt and wounded forever.

39. In view of the foregoing discussions, I am of the considered view that the prosecution has considerably established the case beyond all reasonable doubt against the accused/appellant and the learned trial Court has not committed any illegality in convicting the accused/appellant under Section 376 (f) and 306 IPC. The sentence, which has been imposed by the trial court, cannot be said to be excessive under any stretch of imagination.

40. In the result, the criminal appeal being devoid of any merit, is dismissed, accordingly.

41. Send down the LCR.

JUDGE

Comparing Assistant