

GAHC010139022022



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

Case No. : Crl.A./135/2022

HABIBAR RAHMAN
S/O ABDUL HOQUE
VILLAGE BHATNAPAITY
PO ALOPATICHAR DIST BARPETA, ASSAM,

VERSUS

THE STATE OF ASSAM
REPRESENTED BY PP ASSAM

2:MRS. HAZIRAN NESSA
W/O DILBAR PARAMANIK
VILL.- BHATNAPAITY
PO - BAGHMARACHAR
PS - ALOPATICHAR
DIST. - BARPETA
ASSAM
PIN 78112

Advocate for the Petitioner : MR. N UDDIN

Advocate for the Respondent : MR. R R KAUSHIK(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGEMENT AND ORDER (CAV)

Date : 25-04-2024

1. This appeal is directed against the Judgment and Order dated 30.06.2022, passed by the learned Additional Sessions Judge (FTC), Barpeta, in connection with Sessions Case No. 181/2021, convicting Habibur Rahman (hereinafter, referred to as the accused or the appellant), under Section 448 of the Indian Penal Code, 1860 (IPC, for short), and sentencing him to undergo Rigorous Imprisonment for 1 (one) year and a fine of Rs. 1,000/- (Rupees One Thousand Only) with default stipulation, and under Sections 376/511 of IPC, sentencing him to undergo Rigorous Imprisonment for 7 (seven) years and to pay a fine of Rs. 10,000/- with default stipulation.

2. The State of Assam represented by the Public Prosecutor and the victim, are arrayed as respondent Nos. 1 and 2, respectively.

3. The genesis of the case was that the informant (also referred to as the victim or X), lodged an FIR with the Police at Alopachar Police Station, alleging that on 15.09.2021, at about 08:00 pm, while the victim was alone at home and was inside the kitchen, the appellant entered into her house and gagged her by her mouth with a piece of cloth and threatened her. Thereafter, the appellant pinned her to the ground and committed rape on her. However, the victim-X managed to scream and her neighbours came to her rescue and caught the appellant red-handed. An FIR regarding this incident was lodged with the Police and was registered as Alopachar PS Case No. 124/2021, under Sections 448/376 IPC and the Investigating Officer (IO, in short) embarked upon the investigation. The IO went to the place of occurrence (PO, in short), prepared the sketch map and recorded the statements of the witnesses and forwarded the victim to the Magistrate, who recorded her statement under Section 164 of the Code of Criminal Procedure, 1973 (CrPC, for short). The victim was also

forwarded for medical examination. On conclusion of investigation, charge sheet was laid against the appellant. The learned Chief Judicial Magistrate, Barpeta, furnished copies of relevant documents to the appellant and thereafter, committed this case for trial.

4. At the commencement of trial, the learned Additional Sessions Judge, FTC, framed charges under Sections 448/376 IPC, against the appellant and the appellant abjured his guilt and claimed innocence.

5. To substantiate its stance, the prosecution adduced the evidence of 7 (seven) witnesses, including the Medical Officer (MO, in short), whereas the defence cross-examined the witnesses to refute the charges. On the incriminating evidence of the prosecution witnesses, several questions were asked to the appellant under Section 313 CrPC. His answer to the Question No. 12 is reproduced hereinbelow verbatim:-

“Question No. 12: Do you have anything else to say?”

Answer:- I lodged a case against the husband of informant for raping my wife. After lodging the case at Alopaticchar PS the family members of the informant had been threatening me constantly and pressurizing me to compromise the matter. Informant was threatening to compromise me or else she would trap me up in a rape case or got me murdered. I thereupon instituted a proceeding under section 107 Cr.P.C against Dilwar, Umar Ali, Jel Haque, Jamir Ali, Dulu Paramanik. On the day of the occurrence, I came to Barpeta to take the papers of 107 Cr.P.C by hand as the above mentioned persons are relative to informant. While returning home on the night

occurrence, I just get passed the house of Lal Mia, Dilwar, Dholu when these persons caught hold of me from behind. Jamir Ali was also there. All of them started assaulting me and after calling the police, had handed me over to them. To reach my house one have to cross over the house of informant as her house is located at the Tiniali. The case lodged by my wife is at evidence stage and pending in the court of Addl. Session Judge, Barpeta."

DECISION OF THE LEARNED TRIAL COURT:-

6. The learned trial Court delineated the following points to decide the case:-

“(a) Whether AI on 15.09.2021 at about 8:00 PM, at village Bhatnapaity within the jurisdiction of Alopaticchar police station, District Barpeta, committed house-trespass into the house belonging to the informant/victim, used as a human dwelling, in order to commit an offence and thereby committed an offence punishable u/s 448 IPC ?

(b) Whether AI on the same date, time and place committed rape upon the informant/victim against her will and thereby committed an offence punishable u/s 376 IPC?”

7. It was held by the learned trial Court that it has been proved through the evidence of PWs-1, 2, 4 and 5, beyond reasonable doubt that at the time of the incident, the appellant was inside the victim’s house. Although PWs-2, 4 and 5 did not witness the incident, they saw

the victim lying on the floor, half naked and unconscious. PW-5 sprinkled water on her head. It was held by the learned trial Court that although the witnesses were cross-examined and although the plea of the defence was that it is not possible to commit rape inside a house, where the eldest daughter of the victim, who was 12 years old was studying in the drawing room, yet the circumstances and the evidence of the prosecutrix incriminates the appellant. The evidence of PW-4 has also supported the fact that PW-1's (victim's) eldest daughter was studying. The victim has also admitted that at the time of the incident, her husband was in the jail, as there were allegations against her husband of having committed rape upon the appellant's wife. The victim has stated that her husband is innocent and he was being framed due to business rivalry.

8. According to the learned trial Court, the rivalry between both the parties was the reason, which led to the instant case. The learned trial Court disbelieved the plea of the appellant that a false case was slammed against him, but the Court believed the submission of the prosecutrix/victim that a false case has been slammed against her husband. The appellant was held guilty by the learned trial Court as the clinching evidence of independent witnesses has proved, beyond reasonable doubt, the sequel of events after the incident. It has also been held by the learned trial Court that the extra-judicial confession has also substantiated the chain of circumstances, leading to the guilt of the appellant. It was held by the learned trial Court that there was clinching and cogent evidence that the appellant attempted to commit rape on the victim-X and the victim was found lying disrobed inside her house by PWs-2, 4 and 5. They came to her rescue when the victim raised alarm.

SUBMISSIONS:-

9. The learned counsel for the appellant laid stress in his argument that the statement of the victim u/s 164 Cr.PC is not similar to her evidence. The neighbour named Jhumur Ali who according to PW-1 allegedly caught the appellant red handed was not examined as a witness. The victim's 13 year old daughter, who was present in the house at the time of the incident was also not examined as a witness. It is also submitted that the appellant has been prejudiced as no question was asked to the appellant u/s 313 Cr.PC, - "if he attempted to commit rape on the victim?". The appellant did not even get the privilege to reply to such a question to prove his innocence and on this ground alone the appellant deserves acquittal. Both the appellant and the victim's family has an acrimonious relationship and the victim's husband is facing trial in connection with a criminal case with allegation of rape on the appellant's wife. There is no medical evidence and there is no eye-witness. The victim had feigned unconsciousness with malicious intent. No diligent person will ever believe that with two children in the same household, any intruder would be able to sexually assault a woman. There is not even a whisper in the evidence, if the children raised alarm and it is intriguing that instead of the children raising alarm, some co-villagers came to rescue the victim. The learned counsel for the appellant has prayed to set aside the judgment and order of conviction and extend the benefit of doubt to the appellant.

10. Per contra the learned Addl. PP laid stress in his argument that although the appellant has stated u/s 313 Cr.PC that a criminal case is pending against the victim's husband, the appellant failed to produce any copy of the case record or the case number of the case pending against the victim's husband. The appellant's submission relating to a criminal case pending against the victim's husband is not sufficient to exonerate the appellant of such serious allegations. The sequel of events lead us to believe that the appellant is complicit.

PW-1 raised alarm and immediately, PW-2 went to the informant's house and saw the appellant rushing out from the house. He (PW-2) caught the appellant and confronted him but the appellant did not reply. Meanwhile many neighbours like Dilawar Rahman, Dholu Paramanik and Omar Ali also reached the spot. On being confronted, the appellant falsely stated that he was apprehended by PW-2 on the road. PW-2 also further stated that he saw the victim lying on the floor at that time and the victim informed them that the appellant committed rape on her. It is further submitted by the learned Addl. PP that the evidence of PWs-4 and 5 also corroborates PW-1's evidence. It is further submitted that in a case of sexual assault, the sole testimony of the victim is sufficient to bring home the charges levelled against the appellant. In addition to the evidence of the victim, there is clinching evidence of independent witnesses who have incriminated the appellant. The reason of animosity between both the parties is sufficient for such an offence to occur.

11. The remaining part of the arguments will be discussed at the appropriate stage.

DECISION AND CONCLUSION:-

12. The question that falls for consideration is that whether the trial Court erred in convicting the appellant u/s 448 IPC and section 376/511 IPC.

13. To decide this case in its proper perspective the evidence is re-appreciated.

14. The victim deposed as PW-1 that the incident occurred about 2½ months back. On the fateful evening, at about 8 PM while she was in her kitchen, the appellant grabbed her from behind, gagged her by her mouth and pinned her to the ground and committed rape on her. When she raised alarm, her neighbour Jhumur Ali came to her rescue and took the appellant to their main house. Many neighbours including Dilwar Hussain, Mazibur Rahman had

assembled at that time. Her neighbours took the appellant to the police station, as her husband was not present at that time. She lodged an FIR with the police and the police forwarded her to the hospital for medical examination. She was also forwarded to the Magistrate who recorded her statement. In her cross-examination, she testified that there are about 10 houses between her house and the appellant's house. Earlier, her husband had a friendly relationship with the appellant and they used to frequently visit each other. Her elder daughter is 12 years old and she was studying in the drawing room at the time of the incident.

She further deposed in her cross-examination that her husband was in a jail at the time of the incident because he has been alleged with the offence of committing rape on the appellant's wife. She has further deposed that a false case has been foisted by the appellant's wife against her husband. She has vehemently denied that to avenge this, she has slammed a false case against the appellant. She has stated in her cross-examination that the appellant who had borrowed money from her husband is yet to repay Rs. 1.5 lacs and when her husband demanded back the money, the appellant framed her husband with false allegations of rape.

15. The fact that the victim's husband is behind bars in connection with a case of sexual assault has been admitted by the informant negating the argument of the learned Addl. PP that the case number or any copy of the document relating to the criminal case against the victim's husband has not been produced by the appellant. Another discrepancy in the evidence is that the police was immediately informed about the incident and the victim was immediately forwarded for medical examination, but no evidence of sexual assault could be detected by the Medical Officer on examination of the victim.

16. The Medical Officer Dr. Mamata Devi deposed as PW-3 that on 17.09.2021, she examined the victim aged 25 years, who was escorted by WPC Arati Das and she found the following on examination:-

“Hairs: Axillary/Body: 1-2 cm in length, black in colour.

Breast: Pendulous, soft in consistency. Nipple and areola dark brown in colour. On gentle squeezing discharge absent.

Puberty: 14 years

Menstruation: Regular, 30 days cycle.

LMP: 15.9.21.

Mental Condition: No abnormality detected.

Gait: Normal

Intellegence: Average

Wearing garment: Intact & any suspected stains absent.

Bodily Injury: Not detected at the time of examination.

Genital Examination:

Pubic Hairs: 1-2 cm in length, black in colour.

Vulva (Labia majora & Minora): Labia minora exposed in lithotomy position.

Hymen: Carunculae myrtiformes.

Vagina: Healthy

Cervix- Healthy & Uterus: not palpable per abdominally.

Fourchette & Perineum-Healthy.

Result of Vaginal swab smear examination:

Microscopic examination of vaginal swab reveals no spermatozoa.

Opinion: 1. Evidence of recent sexual intercourse is not detected at the time of examination. 2. No injury or violence marks is detected. 3. Foreign particles like hair, blood, semen etc. are not detected at the time of examination.

Ext.1 is the Medical Examination Report of Female Victim of Alleged Sexual Offence, in which Ext.1(1) and 1(2) are my signatures.

XXXX

Ext.1 is the original copy and not extract. As per victim's version the occurrence took place 15.09.2021 at about 8 PM and the victim was produced for medical examination on 17.09.2021 at 2:13 PM."

Although the victim was taken to the Medical Officer after less than 2 days, it has been opined by the Medical Officer that there were no signs of recent sexual assault on the victim.

This belies the evidence of PW-5 who stated that the victim was lying in an unconscious condition and water was being sprinkled to revive her.

The Medical Officer could not detect any injuries on examination of the victim, but the victim was found by PW-5 in an unconscious state.

17. Although, no contradiction could be elicited through the cross-examination of PW-1 vis-à-vis the cross-examination of the IO, yet the dissimilarities emerging from the evidence of the witnesses casts a shadow of doubt over the veracity of the evidence. It was the duty of the IO to record the statement of the

victim's elder daughter who was about 12 year old at the time of the incident.

18. ASI Sahajahan Ali Ahmed is the IO and he deposed as PW-6 that on 15.09.2001 at about 9:50 PM, the informant-cum-victim X lodged a written FIR with the OC of Alopachar PS who entrusted him with the investigation of the case. He identified the FIR as Ext.P-2 and the signature of the OC SI Bidyut Kr. Thakuria as Ext. P-2(2), as he is familiar with his signature. The IO further deposed that on receipt of the FIR, he examined the informant at the police-station and went to the village and took custody of the appellant who was confined by the villagers after apprehending him at the place of occurrence (PO for short). He could

not record the statements of other witnesses on the same night, due to the chaotic situation and on the following morning he went to the PO and prepared the sketch-map which is proved as Ext.-3 and his signature on the sketch-map as Ext.-3(1).

19. The place of occurrence is shown as the kitchen and it is marked as 'A'. It appears from the sketch-map that the victim's house is a homestead and the place marked as 'B' is her rest room. 'C' is shown as the neighbouring house of Jelowar Hussain. The IO has failed to show the drawing room where the victim's daughter was studying at the relevant time. If it is considered, after scrutinizing the sketch-map that 'B' is the rest room or the drawing room, then the victim's daughter ought to have reached the PO immediately to rescue her mother who was in the kitchen instead of another neighbour who resides farther away from the victim's house. In this case, the statement of the victim u/s 164 Cr.PC is also not similar to her deposition in the Court. In her statement u/s 164 Cr.PC the victim has stated that on 25.09.2021 while she was inside the kitchen, the appellant came from behind and gagged her by her mouth. He started to disrobe her and while he climbed atop her and was about to commit rape, her child came to the kitchen and then the appellant went away. This belies the deposition of the victim who stated that the appellant committed rape on her. In her statement u/s 164 Cr.PC the victim stated that the appellant attempted to commit rape on her but on the contrary in her deposition, the victim has stated that the appellant had already committed rape on her.

20. The learned counsel for the appellant has submitted that the victim kept vacillating while making statements at different stages of investigation and trial.

21. The statement was recorded by the Magistrate Smt. Shatabdi Bhuyan who deposed as

PW-7 and has proved the statement of the victim as Ext.-5. The Magistrate Smt. Shatabdi Bhuyan has deposed that on 16.09.2021, she was posted as SDJM(S), Barpeta. On that day the victim was produced before her in connection with Alopachar PS Case No. 124/2021 u/s 448/376 IPC. She recorded the victim's statement u/s 164 Cr.PC and the victim's thumb impression was taken. PW-7 has proved the statement of the victim as Ext.-5 and the Magistrate has identified the thumb impression of the victim.

22. The learned counsel for the appellant has laid stress in his argument that the vacillating statements of the victim clearly reveals that the victim is not a reliable witness.

23. The learned Addl. PP laid stress in his argument that the victim's thumb impressions were erroneously identified by the Magistrate, as thumb impressions cannot be exhibited.

This argument of the learned Addl. PP holds no water. The Magistrate has identified the statement of the victim as Ext.-5 and she has recorded the statement of the victim.

24. It is apt to mention at this juncture that PW-1 herself did not depose that she became unconscious after the assault but Majida Khatun who deposed as PW-5 stated that when she rushed to the house of PW-1/victim, she saw the victim lying in an unconscious state and water was being sprinkled over her. She heard the commotion, at about 8 PM when she was cooking in her house. As soon as she went to the victim's house, she also noticed that the appellant was confined by Jamir Ali (PW-2) and Umar Ali (not examined). She also noticed that the appellant was pleading and requesting to be set free and repeatedly assuring them that he would not repeat such a deed in future. PW-5, Majida Khatun further deposed that the appellant committed sexual intercourse with the victim and he was begging to be pardoned. Jamir and Umar informed her that the appellant committed misdeed with the

victim. Thereafter she returned home.

In her cross-examination, PW-5 deposed that the victim's husband was not at home at the time of the incident, because he was at his place of work. Later she deposed that as the appellant's wife has lodged a rape case against him, the victim's husband was in jail.

25. A scrutiny of the evidence of PW-5 reveals that she was a very enthusiastic witness, as she stated about certain instances which were not even mentioned by the victim herself. The victim has mentioned the names of Dilwar Hussain, Mazibur Rahman and Jhumur Ali who were present at the time of the incident but she has not mentioned PW-5's name as one of her neighbours, who was present at the time of the incident. The victim has not stated that she became unconscious after the incident and people sprinkled water over her to revive her but PW-5 went a step further and deposed that the victim was unconscious and people sprinkled water over her to revive her.

26. The evidence of PW-1 as well as the evidence of PW-5 does not inspire confidence. Jhumur Ali named by PW-1 may be the neighbour, whom PW-5 has described as Jamir Ali.

27. Jomir Ali deposed as PW-2 that about 2½ months ago, at about 8 PM, he was chatting with his neighbour Tobir Ali after dinner, when he heard a commotion and went to the informant's house. As soon as he reached the informant's house, he saw the appellant coming out of her house and he caught him and confronted him, but the appellant did not reply. Meanwhile many neighbours assembled at the place of occurrence. Dilwar Rahman, Dholu Paramanik and Omar Ali were present. They all confronted the appellant, who falsely stated that he was caught from the road.

PW-2 further deposed that when they asked the victim about the incident, the victim

informed them that the appellant committed rape on her. He also deposed that he noticed that the victim was lying on the floor when the appellant was caught. One Advocate named Billal wrote the FIR which was lodged with the police.

The evidence of PW-2 also reveals that he has mentioned the names of Dilwar Rahman, Dholu Paramanik and Omar Ali as the neighbours who were present at the place of occurrence, immediately after the incident but he has not mentioned the name of Majida Khatun, PW-5.

28. As it could not be ascertained whether Jhumur Ali is Jamir Ali, a benefit of doubt has to be extended to the appellant. PW-1 stated that Jhumur Ali came to her house and caught the appellant and took him to the main house but Jamir Ali deposed that he caught the appellant and confronted him but the appellant did not reply, and meanwhile the other neighbours arrived at the place of occurrence. Jamir Ali, PW-2 also did not mention that he took the appellant to the main house from the kitchen. Thus it could not be ascertained whether Jhumur Ali and Jamir Ali is the same person. Jamir Ali has stated that he is a co-villager whereas PW-1 has stated that Jhumur Ali is her next door neighbour. Jamir Ali has stated that his house is located at a distance of 50 meters away from the appellant's house. Thus, it could not be ascertained if he is the next door neighbour as shown in the sketch-map (Ext.P-3). PW-3, too has deposed in his cross-examination that the victim's husband was in jail at the time of the incident as the appellant's wife had brought up allegations of rape against the victim's husband.

29. Another neighbour is Jel Haque, son of Dhulu Paramanik who deposed as PW-4 that the incident occurred about 5/6 months back. At about 8 PM, he heard a commotion emanating

from the informant's kitchen and he rushed to her house. On reaching the kitchen, he saw the victim lying in a half-naked condition. He also saw Jamir and Umar Ali had apprehended the appellant and had kept him confined. The appellant was repeatedly uttering that he would not repeat (such act) and he pleaded and requested to be set free. He also noticed that Umar and Jamir were reluctant stating that it would establish a negative precedent.

PW-4 further deposed that the appellant might have committed rape on the victim because he was begging and pleading to be pardoned. He also noticed that the victim's head was soaked with water.

In his cross-examination PW-4 deposed that he met Jamir Ali and Umar Ali with 3/4 other women when he reached the PO, but he did not mention the name of Majida Khatun, PW-5 as one of the women who were present at the PO, at the time of the incident. He further deposed that the victim has three daughters and the elder one was reading books at the time of the incident. The victim was clad in a saree at the time of the incident. There was no electricity at the time of the incident but a wick was burning in the kitchen.

This witness (PW-4) has vehemently denied that the appellant's wife had lodged the case against the victim's husband. Now, this casts a shadow of doubt over the veracity of the evidence of this witness. Earlier he deposed in his evidence-in-chief that the victim was half-naked and later in his cross-examination he stated that the victim was clad in a saree. Again he has vehemently denied that a rape case is pending against the victim's husband whereas the victim herself, and all the other independent witnesses have stated that a rape case brought up by the appellant's wife is pending against the victim's husband and the victim's husband was in jail, in connection with the case, at the time of the incident. Although he has

stated that he was present at the place of occurrence at the time of the incident and he met Jamir Ali and Umar Ali, PW-1, PW-2 - Jamir Ali has not mentioned that he was present in the PO at the time of the incident. Jamir Ali has stated that Dilawar Rahman, Dulu Paramanik and Umar Ali were present at the place of occurrence at the time of the incident. The victim herself PW-1 has not mentioned that he was present in her house at the time of the incident. He has stated that Dilwar Hussain, Mazibur Rahman and Jhumur Ali reached her house after the incident. It has also surfaced through the cross-examination of the witnesses PWs-1, 2, 4 and 5 that the appellant's family and the victim's family had a friendly relationship but their relationship turned sour. Thus *mens rea* has been manifested by the defence-appellant by projecting the animosity between both the parties.

30. It is true that after a day or two, if a victim is examined, evidence of sexual assault may not be detected. Evidence of the prosecutrix is sufficient to bring home charges of sexual assault, but in this case the evidence of the victim/prosecutrix is not found worthy of credence. Her statement u/s 164 Cr.PC is not similar to her deposition in the Court. PW-7 who has recorded her statement u/s 164 Cr.PC has also mentioned in her cross-examination that it is not mentioned in Ext.-5 that the victim tried to scream when she was gagged by the appellant. It has also been affirmed by the cross-examination of PW-7 that the victim did not mention that the appellant committed rape on her but she stated that the appellant attempted to commit rape on her. This statement of the victim was read over to her. The prevarication of the statements of the victim u/s 164 Cr.PC vis-à-vis her deposition in the Court casts a shadow of doubt over the veracity of her evidence. The sequel of events has been relied upon by the learned Addl. PP, but in the view of my foregoing discussions, it is thereby held that the dissimilarities emerging from the testimonies of the witnesses scuttle

the evidence. The animosity between both the rival groups cannot be ignored. The answer of the appellant to question No. 12 u/s 313 Cr.PC reveals that the appellant had already instituted a proceeding u/s 107 Cr.PC against the witnesses PW-2 – Jomir Ali, PW-4 - Jel Haque - husband of PW-5 Majida Khatun and Dilwar Hussain. It has also been mentioned u/s 313 Cr.PC by the appellant that these witnesses are related to the victim. Although the statement of the appellant that he has lodged a proceeding u/s 107 Cr.PC against the above named witnesses cannot be considered to be a Gospel truth, yet the animosity between both the parties has not been disputed even by the prosecution witnesses. The witnesses have admitted of a rape case pending against the victim's husband who is alleged to have committed sexual assault on the appellant's wife.

31. In view of my foregoing discussions, it is held that the contradiction and dissimilarities between the evidence of the witnesses and the dissimilar statement of the same witness i.e. PW-1 before the Magistrate vis-à-vis her deposition in the Court, extends a benefit of doubt to the appellant.

32. Relating to varying statements of a witness u/s 161 Cr.PC vis-à-vis her deposition in the Court, I would like to rely on the decision of Hon'ble the Supreme Court in ***Darshan Singh v. State of Punjab in Criminal Appeal No. 163 of 2010*** decided on 04.01.2024, wherein it has been observed that:-

“26. If the PWs had failed to mention in their statements u/s 161 CrPC about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such witness had not stated to police

during investigation. The evidence of that witness regarding the said improved fact is of no significance. [See : (i) **Rohtash Vs. State of Haryana**, (2012) 6 SCC 589 (ii) **Sunil Kumar Shambhu Dayal Gupta Vs. State of Maharashtra**, 2011 (72) ACC 699 (SC). (iii) **Rudrappa Ramappa Jainpur Vs. State of Karnataka**, (2004) 7 SCC 422 (iv) **Vimal Suresh Kamble Vs. Chaluverapinake**, (2003) 3 SCC 175].”

33. In the instant case, in my foregoing discussions, it has already been held that the initial statement of the victim that the appellant attempted to commit rape on her is not similar to her testimony in the Court when the victim deposed that the appellant had committed rape on her. The learned trial Court scaled down the offence to Section 376/511 IPC from Section 376 IPC and convicted and sentenced the appellant to undergo Rigorous Imprisonment for 7 years and a fine of Rs. 10,000/- with default clause. As the trial Court did not rely on the deposition of the victim that the appellant had committed rape on her, the conviction of the appellant in connection with a lower offence or in connection with an attempt to commit such an offence under the facts and circumstances of this case, is unfounded. The decision of the trial Court thus, does not stand the scrutiny of law. The conviction of the appellant u/s 448 IPC is also liable to be set aside. The trial Court’s observation that the acrimonious relationship between both the parties being the reason to commit such an offence is also unfounded. The trial Court has also erred when no question was asked to the appellant u/s 313 Cr.PC that whether he had attempted to commit rape. When the trial Court decided to convict the appellant u/s 376/511 IPC, failure of the trial Court to ask any question relating to any allegation of an attempt to commit rape and thereafter convicting the appellant on the offence of attempt to commit rape, indeed causes a prejudice to the appellant. In the light of the decision of the Hon’ble Supreme Court in *Darshan Singh’s case (supra)*, it is held that the appellant deserves a benefit of doubt.

34. The appellant Habibar Rahman is thereby acquitted from the charges u/s 448 IPC and from charges u/s 376/511 IPC on benefit of doubt and is set at liberty forthwith.

35. However, keeping in view the provisions of Section 437-A Cr.PC, the appellant Habibur Rahman is directed to furnish a personal bond in the sum of Rs. 30,000/- (Rupees Thirty Thousand) and a surety bond in the like amount before the learned trial Court, which shall be effective for a period of 6 (six) months.

Send back the trial Court records.

JUDGE

Comparing Assistant