IN THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MEGHALAYA, MANIPUR, TRIPURA, MIZORAM AND ARUNACHAL PRADESH)
AIZAWL BENCH

Crl. A. No. 32 of 2012 (J)

APPELLANT :

Sh. Biaktincheuva@ Biakenga

By Advocate :

Mr. Zochhuana (Amicus Curiae).

RESPONDENT :

State of Mizoram.

By Advocate:

Mr. A.K.Rokhum, P.P, Mizoram.

BEFORE
HON'BLE MR. JUSTICE UJJAL BHUYAN

Date of hearing : 8.1.2013

Date of judgment and order : 9.1.2013

JUDGMENT AND ORDER (ORAL)

This criminal appeal is directed against the judgment and order dated 16.7.2012 passed by the learned District and Sessions Judge, Lunglei Judicial District, Lunglei in Crl. Tr. No. 29/2011 convicting the appellant under Section 376 (2)(f)/511 IPC and sentencing him to undergo Rigorous Imprisonment (RI) for 5 years and to pay fine of Rs. 1000/-, in default, to undergo Simple Imprisonment (SI) for another 3 months.

2. Facts of the case may be briefly noted.

3. On 8.2.2011, one Sri Lalramhluni, wife of Thangmawia of Dengsur, Lunglei District lodged a complaint before the Officer-in-charge, Bunghmun Police Station stating that on 7.2.2011 at about 3 p.m., Biaktincheuva (appellant herein) had raped her 10 year old daughter inside their house. She further stated that the appellant had raped her daughter four times. It was treated as First Information Report(FIR) and on the basis of the same, Bunghmun PS Case No. 3/2011 under Section 376 (2) (f) IPC was registered.

4. Appellant was arrested and kept in custody. Police investigated the case and on completion of investigation, submitted charge sheet against the appellant under Section 376 (2)(f) IPC.

5. Being a Sessions triable case, it was taken up by the Court of Sessions, Lunglei. Charge was framed against the appellant under the aforesaid section. When the charge was read over and explained to the appellant, he pleaded not guilty and claimed to be tried.

6. In the trial, prosecution examined as many as 7(seven) witnesses to prove the charge against the appellant. The defence examined 2(two) witnesses. The appellant was also examined under Section 313 of the Code of Criminal Procedure (CrPC). The plea of the defence was that of total denial. At the end of the trial, the learned Trial Court by the impugned judgment and order dated 16.7.2012 convicted and sentenced the appellant as indicated above.

7. Heard Mr. Zochhuana, learned Amicus Curiae appearing for the appellant and Mr. A.K. Rokhum, learned P.P, Mizoram.

8. Learned Amicus Curiae submits that there are serious discrepancies in the version of the prosecutrix and, therefore, conviction based on such testimony would not be safe. He submits that the medical report totally belied the allegation of rape on the prosecutrix. He contends that from a reading of the impugned judgment itself, it would be clear that no rape was committed. At best, it could be a case of molestation. He, therefore, prays for appropriate intervention by the Appellate Court.

9. Resisting the submissions made by the learned Amicus Curiae, Mr. Rokhum, learned P.P., submits that victim is a 10 year old girl, who was closely known to the appellant. Appellant had misused the trust of the parents of the victim. He submits that the prosecutrix in her statement recorded under Section 164 CrPC as well as in her evidence was consistent in saying that the accused had committed rape on her. He contends that there is no reason to disbelief the testimony of a 10 year old girl, who had clearly stated that the appellant had inserted his penis inside her vagina. He, therefore, submits that there is no merit in the appeal and the appeal should be dismissed.

10. The submissions made have been considered.

11. The statement of the victim/prosecutrix was earlier recorded under Section 164 CrPC. In her said statement, she clearly stated that on previous occasions, the appellant tried to commit sexual acts on her but there was no intercourse as such. But on 5.2.2011 night she alongwith her younger sister went to sleep in the residence of the appellant on his request. He being the friend of her father, her parents allowed them to go on good faith. When her younger sister had fallen asleep, appellant inserted his penis inside her vagina a little deep whereafter she ran back home. This was repeated again on 7.2.2011 when appellant came to the house of the prosecutrix when there was no one at home. Later on, the victim told everything to her grandmother.

12. In her deposition as PW5, the victim stated that her date of birth was 12.3.2001. In her deposition, she clearly stated that the appellant had committed sexual acts on her several times. Sometimes there was little penetration. She narrated the two incidents as stated above. Her testimony was more or less on similar lines as her statement recorded under Section 164 CrPC. She stated in clear terms that the appellant's male organ penetrated little deep into her vagina and she felt pain.

13. PW1 is the mother of the victim, who was the first informant. She stated that on 7.2.2011, she had gone out to collect firewood. When she returned home, her mother Kailiani told her that the appellant had committed rape on her daughter. When she asked her daughter, the latter told her that the accused had committed rape on her.

14. PW2 is a member of the Village Council and a seizure witness.

15. PW3 is Kailiani, grandmother of the victim. She stated that in the evening of 7.2.2011 while she was cooking food, her granddaughter came to her and told her that the accused had sexual intercourse with her against her will many times. She narrated about the particular incident of that evening. Thereafter, PW3 informed the mother of the victim, PW1. Both PW1 and PW3 discussed the matter the whole night with the other family members. On the following morning, PW3 informed the local President of Y.M.A.

16. PW4 is the local President of Y.M.A. He stated that PW3 had reported to him that the accused had raped her granddaughter. On her request,

he informed the police about the matter over telephone. As requested by the police, PW4 and others detained the accused till arrival of the police.

17. PW6 is the doctor who had examined the victim on 9.2.2011 and gave his medical report (Ext.-P IV). He stated that he did not find any external injury on the body of the victim. He also found that her hymen was intact and there was no injury mark on her private part. He also did not find any injury on the body or private part of the accused.

18. PW7 is the Sub-Inspector of Police who had investigated the case and submitted the charge sheet.

19. Though the 2(two) defence witnesses certified that the accused was a person of good character and that they did not believe that he could commit a sexual offence but in their cross-examination, they admitted that they had no personal knowledge about the incident.

20. The accused, when he was examined under Section 313 CrPC, stated that the victim's father was his best friend and that they were living like a

family. While he denied the allegation of rape, he stated that he was wrongly accused because of some money dispute with the family of the victim.

21. The evidence on record clearly indicates that the prosecutrix has been consistent in her stand that the accused had committed sexual acts on her on several occasions. Regarding the particular incident on the evening of 7.2.2011, she had categorically stated that taking advantage of the absence of other family members, the accused had come to the residence of the prosecutrix and had sexual intercourse with her. She stated that she felt that his male organ had penetrated little deep into her vagina and she felt pain. The victim is a young girl of 10 years old. The accused is a close friend of her father. There can be no justifiable reason as to why a young girl of such a tender age will testify falsely to implicate a friend of her father. Her testimony inspires confidence and there is no reason to disbelief the statement of the prosecutrix. Her statement is also fully supported by the statements of the other witnesses.

22. Section 375 IPC defines rape. It is, however, not necessary to delve into the definition of rape. Suffice it to say that in the Explanation to Section 375 IPC, it is clearly stated that penetration is sufficient to constitute the sexual

intercourse necessary to the offence of rape. Under Section 376 (2) (f), whoever commits rape on a woman when she is under twelve years of age shall be punished with RI for a term which shall not be less than ten years but which may be for life and shall also be liable to fine. Section 511 IPC provides for punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment. It says that whoever attempts to commit an offence punishable by IPC with imprisonment or to cause such an offence to be committed and in such attempt does any act towards the commission of the offence, shall, where no express provision is made for punishment of such attempt, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of imprisonment provided or with fine or with both.

23. In the case of State of U.P vs. Babulnath reported in (1994) 6 SCC 29, the Apex Court held that even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of sections 375 and 376 IPC.

Therefore, it was held that it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.

24. In the case of State of Punjab vs. Gurmit Singh and others reported in AIR 1996 SC 1393, the Hon'ble Supreme Court held that testimony of the victim in rape case is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable.

25. The Hon'ble Supreme Court in the case of Koppula Venkat Rao vs. State of Andhra Pradesh reported in (2004) 3 SCC 602 held that the sine qua non of the offence of rape is penetration and not ejaculation. On the offence of attempt to commit rape, the Apex Court held as under:-

> "10. An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended,

happens to prevent this. An attempt may be described to be an act done in part-execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the cases of a mere preparation and an attempt.

11. In order to find an accused guilty of an attempt with intent to commit a rape, court has to be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person, but that he intended to do so at all events, and notwithstanding any resistance on her part. Indecent assaults are often magnified into attempts at rape. In order to come to a conclusion that the conduct of the accused was indicative of a determination to gratify his passion at all

events, and in spite of all resistance, materials must exist. Surrounding circumstances many times throw beacon light on that aspect."

26. In the case of Aman Kumar and Another vs. State of Haryana reported in (2004) 4 SCC 379, the Hon'ble Supreme Court again held that penetration is the sine qua non for an offence of rape. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen.

27. In the background facts of the present case, it is clear that there was not only intention on the part of the accused to perform various sexual acts on the victim but there were clear attempts to have sexual intercourse with the victim. The victim is below 12 years of age. In her innocent state of mind, she has stated what was committed on her. As a matter of fact, she had stated that there was little penetration of the male organ of the accused into her private part. Though the medical evidence says that there was no sign of sexual intercourse with her hymen being intact, the medical report shows that medical examination of the victim was conducted on 9.2.2011, i.e., 2(two) days after the incident occurred on 7.2.2011. It is also stated in the report that the victim had

taken bath and had changed her cloth. The plea of the accused that he was framed on account of some financial dispute with the family of the victim does not inspire any confidence in as much as it is not only contradictory to his own stand that victim's father was his best friend and that they were living as family but also lacks any corroboration.

28. In the circumstances of the case, learned Trial Court took a lenient view of the matter and opined that it was a case of attempted rape and not actual rape. Accordingly, the accused was convicted under Section 376 (2) (f)/511 IPC and sentenced as indicated above.

29. In view of the discussions made above, this Court finds no good ground to interfere with the findings of the learned Trial Court.

30. For the aforesaid reasons, there is no merit in the appeal which is accordingly dismissed.

31. Before parting with the record, the Court would like to place on record its appreciation of the assistance rendered by the learned Amicus Curiae, whose fee is quantified at Rs. 10,000/-(Rupees Ten thousand).

32. Registry to send down the case record.

JUDGE

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