

SUPREME COURT OF INDIA

Musauddin Ahmed

Vs.

State of Assam

Crl.A.No.879 of 2004

(Dr. Mukundakam Sharma and B.S. Chauhan JJ.)

06.07.2009

JUDGMENT

Dr. B.S.Chauhan, J.

1. This appeal has been preferred against the judgment and order of the Gauhati High Court dated 20.2.2004 passed in Criminal Appeal No.188/2003 by which appeal against the judgment and order of the Sessions Court Kamrup, Guwahati in Sessions Case No.87(K)/97 (GR. Case No.47/95) has been dismissed wherein the appellant was convicted under Section 376 *Indian Penal Code* (in short IPC) and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,000/-, in default to undergo imprisonment for another six months. However, the High Court reduced the sentence to four years and fine to Rs.1000/-.

2. The facts and circumstances giving rise to this case are that the appellant Musauddin Ahmed alias Musa allegedly abducted a minor girl namely Mira Begum on 7.1.1995 took her to a hotel and committed rape on her.

3. The victim PW.4 Mira Begum was working as a maid servant in the house of PW.2 Abdul Hai Laskar and his wife PW.3 Hasmat Ara Begum at Gandhibasti, under Paltanbazar Police Station, Guwahati. Appellant was a security guard in the house of one Imran Shah of that locality. The appellant and prosecutrix knew each other from before.

4. According to the prosecution, on 7.1.1995, PW.4 Mira Begum, without informing her employer PW.2 Abdul Hai Laskar and PW.3 Hasmat Ara Begum went to see the zoo with one Suleman who was known to her. While they were coming back from the zoo they met the appellant near Ulubari Chowk. On seeing them together the appellant got annoyed and he slapped Suleman and threatened that he would hand them over to police. Out of fear Suleman ran away. The appellant on the pretext of taking the prosecutrix PW.4 Mira Begum, to the police station took her to Sodhi Hotel situated at Paltanbazar. In the hotel he hired a room in fictitious names and kept her in the room for the whole night and committed rape on her three times. On the next morning he sent her in a rickshaw. PW.4 Mira Begum came to the house of a person near Hazi Musafir Khana and telephonically informed her employers about

the incident. PW.2 Abdul Hai Laskar brought her to his house and she narrated the whole incident before him. The written FIR relating to the incident was lodged by PW.2 Abdul Hai Laskar in the morning of 8.1.1995. Police registered the FIR and investigation was conducted by PW.7 Kanak Ch. Das, Sub- Inspector of Police. During investigation he got prosecutrix medically examined in the G.M.C.H. by PW.1 Dr. Pratap Ch. Sarma. The statement of the prosecutrix was recorded by PW.5 Parthiv Jyoti Saikia Judicial Magistrate Ist Class, Guwahati under Section 164 Criminal Procedure code (in short Cr.P.C.).

5. After completion of the investigation, PW.7 Kanak Ch. Das submitted charge- sheet against the accused under Section 366/342/376 IPC.

6. On committal of the case to the court of Sessions, charges under Sections 366/376 IPC were framed against the appellant. The appellant pleaded not guilty to the charge and hence trial commenced.

7. During the trial the prosecution examined seven witnesses including the Investigating Officer. The Trial court found appellant guilty of the offence punishable under Section 376 IPC and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- in default to undergo imprisonment for another six months.

8. Being aggrieved the appellant preferred the appeal before the High Court. The High Court upheld the conviction under Section 376 IPC but reduced the sentence to a period of four years and to pay a fine of Rs.1000/- in default to further imprisonment for one month. Hence this appeal.

9. Shri Vishal Arun, learned counsel for the appellant has submitted that the prosecutrix was eighteen years of age. Even if the prosecution case is believed, charge of rape cannot be held proved. The appellant as well as PW.4 Mira Begum prosecutrix were neighbours and knew each other. On 7.1.1995 she had gone along with Suleman to the zoo. When she was coming along with Suleman, they met the appellant who scolded both of them. Suleman ran away out of fear. Appellant asked the prosecutrix to accompany him and took her in a rickshaw. Both of them kept roaming in the city in rickshaw and city - buses and at about 9 O'clock in the night, the appellant took the prosecutrix to Hotel Choudhury at Paltan Bazar, wherein he took the room on rent. The prosecutrix accompanied the appellant to that room. Appellant closed the door and windows and committed rape on her. Both of them remained there throughout the night and next day left the Hotel. The appellant left the prosecutrix near Musafirkhana and went away.

10. Learned counsel for the appellant has submitted that during this period, had it been a case of no consent, the prosecutrix had enough time and opportunities to inform the police or any other person in the hotel or on the road about the incident. Statement of the prosecutrix recorded under Section 164 Cr.P.C. revealed that she remained along with the appellant for a very long time and had been roaming in the city by rickshaw and buses. She went to the Hotel without any protest and accompanied the appellant to the room, spent the whole night with him, came out in the morning after checking out the hotel, traveled with him in a

rickshaw from Hotel to Musafirkhana but did not raise any hue and cry or inform anybody that the appellant had misbehaved with her in any manner. Such conduct of the prosecutrix makes the prosecution case unbelievable. PW.1 Dr Pratap Ch. Sarma who medically examined the prosecutrix found that she was used to sexual intercourse and that there was no injury of any kind on her body or private parts. The prosecutrix was examined as PW.4. There are serious contradictions in her deposition in Court and her statement recorded under Section 164 Cr.P.C. The prosecutrix deposed in the Court that on the date of occurrence at about 10 O'clock she went out through the road. The appellant was there and on the pretext of taking her to the cinema hall, the appellant took her in a rickshaw to the Paltan Bazar area where he hired a room in the hotel and committed rape on her. It was a forcible act. In examination-in-chief she did not disclose anything about her visit to zoo on the same day along with Suleman. However, in the cross-examination on being asked, she stated that Suleman had taken her to zoo by car. While returning back from zoo, she met with the appellant at Ulubari Chowk. The appellant wanted to assault Suleman, thus he ran away. Prosecutrix could not furnish any explanation in her cross-examination, on being asked, as to why she could not inform anybody in the hotel or while coming from the hotel on next day or on the road about the incident. From the conduct of the prosecutrix during these two days, it can be inferred that it was a clear cut case of consent.

11. So far as the question of age of the prosecutrix is concerned, PW.1 Dr Pratap Ch. Sarma who had examined her, opined that she was 18 years of age. According to the prosecutrix she was only 13 years of age at the time of incident. PW.2 Abdul Hai Laskar, informant, deposed that prosecutrix was 13/14 years of age. However, PW.3 Mrs. Hasmat Ara Begum kept silence on this point. There is nothing on record to show as on basis, PW.2

“Abdul Hai Laskar had given her age. It appears very unnatural as none of the family members of the prosecutrix comes to the scene. Her parents or either of them or any other family member could be most reliable and natural witness on the point of her age. PW.2 Abdul Hai Laskar, in his examination in chief stated as under: Later the girl's mother came and took her away. At present she is staying with her parents.”

12. Thus, it cannot be assumed that prosecutrix did not have parents or other family members. Prosecution for the reasons best known to it examined her employer PW.2 Abdul Hai Laskar and his wife PW.3 Hasmat Ara Begum but did not examine any of her family member on the point of age.

13. It is the duty of the party to lead the best evidence in its possession which could throw light on the issue in controversy and in case such a material evidence is withheld, the Court may draw adverse inference under Section 114 illustration (g) of the Evidence Act notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence (vide *Ors.¹*).

14. The Trial Court and the High Court proceeded with altogether different set of facts. Before the trial Court the prosecution case had been that the prosecutrix went to zoo along with Suleman and on her return from zoo the appellant had seen both of them together and

slapped Suleman who ran away and thereafter the appellant took the prosecutrix on the pretext of taking her to movie and roamed; took her on a rickshaw to the hotel where she was kept and raped. However, before the High Court the case has been entirely different as in paragraph 5 of the High Court judgment it has been stated that when the prosecutrix came out from the house of informant PW.2 Abdul Hai Laskar the appellant met her and proposed to take her to witness a movie and she went along with him. In para 2, the High Court has mentioned the facts that as per the FIR lodged by PW.2 Abdul Hai Laskar, to the effect that on the previous evening, the accused appellant Musauddin Ahmed @ Musa entered into the house and forcibly abducted his maid servant. There had been material contradictions regarding the factual aspects of the incident itself. There is nothing on record to show or furnishing any explanation as to why the Investigating Officer did not seize any material objects like, clothes, blood samples etc. from the prosecutrix and the place of occurrence. PW.4 Mira Begum, prosecutrix has stated in her examination in chief as under:

He took me to a room at Paltan Bazar. There the accused forcibly tears open my clothes.

15. The torn clothes were not recovered by the Investigating Officer. The I.O. did not make any effort to take the semen, blood samples etc. from the appellant which could have given the prosecution an opportunity to obtain medical reports of the appellant as it was necessary to establish the guilt of the appellant. No person has been examined from the hotel to identify the appellant or the prosecutrix as the I.O. has only seized the register of the hotel to establish that room No.102 was booked in the name of appellant Musauddin Ahmed and Marzina Begum as husband and wife. Admittedly, the name of the prosecutrix was not Marzina Begum. Therefore, some person from the hotel should have been examined to identify her as well as the appellant.

16. Learned Standing counsel for the State, Mr. Jr. Luwang, could not satisfy the court as to why in absence of any allegation of threat or coercion, the prosecutrix could not have raised the alarm or informed any person on the road. Nor he could explain as to why the independent witness or an employee of the hotel was not examined and why parents of the prosecutrix were not examined to find out her age.

17. The prosecutrix appears to be a lady used to sexual intercourse and a dissolute lady.

She had no objection in mixing up and having free movement with any of her known person, for enjoyment. Thus, she appeared to be a woman of easy virtues.

18. In this view of the above, we are of the considered opinion that the prosecution failed to prove its case against the appellant beyond reasonable doubt. The appeal is allowed. The impugned judgment of the High Court and the trial court are set aside. Appellant is acquitted of the charge under Section 376 IPC. The appellant is on bail. His bail bonds are discharged.

¹AIR 1968 SC 1413