

Sessions Case No. 167(S)/2013.

U/S /376 IPC

State

Vs.

Sumar Singh @ Sube Singh ... Accused.

***PRESENT : Smt. M. Nandi,
Sessions Judge,
Bongaigaon.***

*ADVOCATES APPEARED : Sri A. K. Nath, Public Prosecutor
for the State.
Sri M. Kalita
Sri N.I. Siddique, Advocates
for the accused.*

Date of Argument : 21.04.2014.

Date of Judgment : 02.05.2014.

JUDGMENT AND ORDER

1. The prosecution case, in brief, is that the informant Rajkumar Sah lodged an ejahar before the I/C, Garubhasa O.P under Sidli Police Station stating inter-alia that on 26.08.2013 at about 11.30 A.M. his daughter Gayabati Sah, who is the student of Class IX of Garubhasa High School, while coming from school towards her house, Sumar Singh, employee of BSF, took his daughter from the road by applying force towards VCDC office and committed rape on her on the verandah of the said office. Some of the people having seen them in compromising position, went there and apprehended the accused and handed over him to the police of Garubhasa Out Post.

2. On receipt of the ejahar, police registered a case and after completion of investigation submitted charge-sheet against the accused Sumar Singh @ Sube Singh U/S 376 IPC and Section 6 of Protection of Children from Sexual Offence Act. During trial, accused has been in jail custody. Charge was framed U/S 376 IPC which was read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.

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3. In this case prosecution examined 13 (thirteen) witnesses and the defence examined none. The plea of defence is the plea of denial.

4. **Point for determination:**

1. *Whether the accused person on 27.08.2013 at about 11.30 AM in the verandah of VCDC office under Sidli P.S. has committed rape on Gayabati Sah and thereby committed an offence U/S 376 IPC ?*

DECISION AND REASONS THEREOF

5. To arrive at just decision of the case, let me consider the evidence of the witnesses.

6. PW 1 is the informant Rajkumar Singh. He deposed in his evidence that his daughter Gayabati Sah is a student of Class IX and her age is 17 to 18 years. On the date of incident, he came to Bongaigaon at about 7 AM. At about 11 AM, his wife Medhia Devi informed him over phone and asked him to come home immediately. On receipt of the information, he immediately came home and found 60/70 persons in the courtyard. His wife stated that the accused dragged his daughter Gayabati to the office of VCDC and committed rape on her. Thereafter he lodged the ejarah vide Ext-1. His daughter was examined by police. Her statement was also recorded by the Magistrate. At present his daughter is studying in Class X.

In his cross-examination, PW 1 replied that the accused is a BSF employee and staying in BSF Camp adjacent to their house. He used to visit their house and his daughter Gayabati treated him as her elder brother. On the date of occurrence his daughter went to school but as she was not feeling well, she returned back home. But people suspected them to do some wrong acts and handed over the accused to police.

7. PW 2 is Medhia Devi, who is the mother of the victim. She deposed in her evidence that his daughter Gayabati Sah is a student of Class X. the occurrence took place about four months back. On that day, after taking

permission from the School while she was returning back, she sat in the verandah of VCDC office. On that day the office was closed. The accused was also sitting with her. The people found them sitting on the verandah suspected them to do wrong acts and informed them and she informed her husband over phone.

In her cross-examination, PW 2 replied that the accused used to visit their house. The people of their village asked her husband to lodge the ejahar. The accused did not commit any wrong towards her daughter.

8. PW 3 is Rajeswar Wary. He deposed in her evidence that about five months back at about 11/12 AM, work of repairing was going on in the village community hall. He, Purna Brahma, Kamal Narzary were supervising the repairing work. At that time, they had seen the daughter of the informant Gayabati and the accused sitting on the verandah of VCDC office. Later on, the people went there and handed over the accused to police.

In his cross-examination, PW 3 replied that the VCDC office is situated in the market area. Police Station is adjacent to the VCDC office. The road was in front of the office. People used to go through the said road. On suspicion, the accused was taken to the police station.

9. PW 4 is Kamal Narzary and PW 5 is Purna Brahma. Both of them stated before the police when their statements were recorded U/S 161 CrPC that they had seen that the accused placing the victim on her lap committed sexual harassment towards her. But subsequently while they deposed before the Court, they did not support the case of prosecution. They stated before the Court that about 4/5 months back while they along with Rajeswar Wary were supervising the repairing work of Garubhasa community hall at about 11.30 AM, they found the accused and the daughter of the informant Gayabati sitting on the verandah of VCDC office and they had handed over the accused to the Police Station. Both PW 4 and 5 were declared hostile by the prosecution.

10. The victim was examined in the case as PW 6. She deposed

in her evidence that the occurrence took place about 4/5 months back. At that time, she was studying in Class IX in Garubhasa High School. On the date of incident at about 9 AM, she went to the school. As she was not feeling well, at about 11 AM she took leave from the school authority and at the time of returning, she met the accused on the way and the accused expressed that as she was not feeling well, asked her to sit on the verandah of the VCDC office and accordingly, she accompanied the accused to the verandah of VCDC office wherein they were sitting for 10 minutes. While they were talking, the people of their village suspected them to do any wrong acts and handed over the accused to police. She was examined by the doctor. Her statement was recorded by the Magistrate.

In her cross-examination, PW 6 also replied that one BSF camp is established adjacent to their house wherein he accused was staying and the accused used to visit their house. She treated him as her elder brother. They have cordial relationship. The accused did not commit any misdeeds towards her.

11. After going through the evidence of aforesaid witnesses, it is seen that the informant lodged ejahar immediately after the incident alleging that the accused committed rape on his daughter Gayabati Sah. He was reported by his wife Medhia Devi but subsequently he denied the fact of lodging ejahar by allegation of commission of rape by the accused. Rather he replied in his cross-examination that he could not say what was written in the ejahar. He did not read over the same. He also could not recollect who wrote the ejahar. As the people of their village asked him to put signature, accordingly he put his signature. He also stated that the accused did not apply any force towards the victim. He hold her hand as the head of his daughter was feeling nausea. PW 2 Medhia Devi did not say anything about the commission of rape by the accused. The other witnesses (PW 3, 4 & 5) also did not say anything. They stated before the police that they had seen the accused committing rape towards the victim but while deposed before the Court, did not support the prosecution case and PW 4 & 5 were declared hostile by the prosecution. The victim also did not say anything regarding commission of rape by the accused. But she

stated before the Magistrate that the accused gagged her mouth, took her to the verandah of VCDC office and committed rape on her by lifting her wearing cloths.

12. Learned counsel for the accused has submitted that there is no single piece of substantive evidence suggesting the involvement of the accused in the commission of the alleged crime as there is no substantive evidence adduced during trial to be corroborated by the aforesaid auxiliary evidence recorded U/S 164 CrPC during investigation, as such, the statement recorded U/S 164 CrPC as a substantive piece of evidence is not tenable in any valid law.

13. In support of his submission, learned counsel placed reliance on some case laws:-

- (i) *Abdul Kalam v. State of Tripura.*
- (ii) *Criminal Appeal 22(J)/2004*
(*Bijoy Majhi v. State of Assam*)

14. In both the cases, it was observed that law is well settled that statement made U/S 164 CrPC is not a substantive evidence. The statement recorded U/S 164 CrPC not being substantive evidence, the same cannot be accepted as legal evidence to base conviction.

15. In the case of *Abdul Kalam v. State of Tripura*, it was held that in view of the proviso to Section 162(1) CrPC, no statement of any witness recorded by Police Officer during investigation of a criminal case can be used for any purpose during trial of that case save and except for the purpose of contradicting the said witness.

16. In the case of *Bulu Das v. State of Bihar reported in (1988) 8 SCC 130*, it was held that whatever previous statement of a witness was brought on record after declaring him hostile, the same cannot be treated as substantive piece of evidence.

17. In that view of the matter, the contradicted portion of the

statement recorded during investigation by the Investigating Officer though put on record, cannot be treated as substantive evidence and this can only be used to contradict the witness who allegedly made the statement. In view of the definition of 'evidence' available under Indian Evidence Act, the recorded statement of the witnesses during investigation even by the Magistrate cannot be treated to be a evidence during trial. It could at best be said the statements of any witness recorded by any Magistrate U/S 164 during investigation is auxiliary evidence either to contradict or to support the substantive evidence recorded during trial by the Court.

18. In the case in hand, there is no substantive evidence available during trial to implicate the accused in the commission of alleged offence. The statement recorded under Section 164 CrPC of the victim did not corroborate her evidence. According to her, she stated before the Magistrate implicating the accused as she was afraid of the police who asked her to tell before the Magistrate implicating the accused. The victim clearly replied in her cross-examination that the accused did not commit any bad acts towards her and she did not state before the police that accused committed any bad acts to her. On careful examination of the entire case record, it appears that there is no single piece of substantive evidence suggesting the involvement of the accused in the commission of the alleged crime. As such, there is no substantive evidence adduced during trial to be corroborated by the aforesaid auxiliary evidence recorded U/S 164 CrPC during investigation. As such, the statement recorded U/S 164 CrPC cannot be taken into consideration.

19. According to the learned counsel, direct or circumstantial evidence including the medical evidence does not prove conclusively the guilt of the accused. To constitute rape, it must be proved that some part of the male organ of the accused should have gone into the girl's genital, no matter how little and the only thing to be ascertained is whether the private part of the male accused entered into the private part of the girl or not. It is not essential that the hymen should be ruptured provided it is established that there was penetration even though partial. It is also submitted that seminal emission is not necessary to establish the offence of rape and what is necessary is that there must be

penetration.

20. It is noticed that at the time of incident, the accused was staying in the BSF camp adjacent to the house of the informant. He used to visit the house of the informant. As such, there was intimacy with the family and the victim treated the accused as her elder brother. None of the witnesses had stated that they had seen accused committed rape or inserting his male organ in the female genital of the minor girl. The mother of the child also denied that she had stated to police the fact that she informed the matter to her husband about the incident of rape by the accused on her daughter.

21. Doctor Minakshi Kalita was examined in the case as PW 7. She deposed in her evidence that on 27.08.2013 she was posted at Bongaigaon Civil Hospital. On that day at about 7.45 PM, she examined Gayabati Sah, 14 years, female identified by Alia Khatoon, Home-guard and Meghia Devi, mother of the victim.

No injury mark seen on her body. Hymen tear present at 6 O'clock position. Echymosis and tenderness present on lower part of vagina. The age of the victim is in between 16 to 20 years. Doctor also opined that no opinion can be given whether she is raped or not. Her age is between 16 to 20 years.

In her cross-examination, PW 7 replied that the age mentioned as 16 to 20 years means the victim may be 20 years of age.

22. From the evidence of the Doctor, it is seen that the victim may not be a minor girl at the time of incident. Echymosis or tenderness may be present due to rubbing or any other reason.

23. In the case of *Chander Dv Rai v. State 2009(1) JCC 67* and *Dhanpal v. State by Public Prosecutor, Madras 2009d(4) JCC 2914*, it was held that if there is no evidence to show conclusively that the girl child was raped and if two reasonable or plausible view can be reached, one that leads to acquittal and the other to conviction, the Court must rule in favour of the accused.

24. The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in a case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted.

25. Under such circumstances, the benefit of doubt was given to the accused. Hence, the accused is acquitted on benefit of doubt and set at liberty forthwith.

26. Send back the GR case record to the learned Committal Court along with a copy of this Judgment.

Given under my hand and the seal of the Court on this 2nd day of May, 2014.

Dictated and Corrected by me,

*(M. Nandi)
Sessions Judge
Bongaigaon.*

*(M. Nandi)
Sessions Judge
Bongaigaon.*
