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GAHC010120942012

THE GAUHATI HIGH COURT AT GUWAHATI

(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

Criminal Appeal No. 68 of 2012

Nilima Begum,
Daughter of Jalaluddin Ahmed,
Resident of FA Ahmed Nagar, No. 2,
Mothgharia, Guwahati, under Noonmati Police Station,
In the district of Kamrup (Metro), Assam.
District- Morigaon (Assam).

……Appellant

-Versus-

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

2. Md. Habibur Rahman,
Son of Md Sahar Ali,
Resident of Village-Baruahgaon,
P.O.- Baruahpathar under Boko Police Station
In the district of Kamrup, Assam.

……Respondents

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Advocates for the appellant : Mr B M Choudhury,
Mr N Ahmed,
Mr I Ahmed

Advocate for the respondents : Mr K K Das, Addl. PP.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Judgment : 23.01.2023

JUDGMENT AND ORDER (CAV)

Heard Mr N Ahmed, learned counsel appearing on behalf of the appellant and Mr K K Das, learned Additional Public Prosecutor for the State of Assam. None has appeared on behalf of the respondent No. 2.

2. This appeal has been preferred by the victim herself under Section 372 CrPC, challenging the Judgment and Order of acquittal dated 03.02.2012, passed by the learned Assistant Sessions Judge No. 3, Kamrup, Guwahati, in Sessions Case No. 165 (K-G)/2010 under Section 376 (1)/313 IPC.

3. The case of the prosecution what emerges from the FIR is that the victim lodged an FIR on 22.07.2009, before the Officer-In-Charge, Noonmati Police Station, stating *inter alia* that about 4 years back she had introduced herself with a boy, namely, Habibur Rahman. Hence,

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they came to know each other and their acquaintance developed into friendship. It is alleged that without her consent the boy committed bad acts with her and thereby she was conceived. Afterthat, she was compelled to terminate her pregnancy by administering medicine. It is alleged that subsequently, the boy was avoiding her. After several search and enquiry, Habibur was apprehended and handed over to the Police.

4. On receipt of the complaint, a case was registered vide Noonmati PS Case No. 221/2009, under Sections 376/315/323 IPC and investigation was initiated. During investigation, the Investigating Officer visited the place of occurrence, prepared the sketch map and recorded the statement of the witnesses. After completion of investigation, charge sheet was submitted against the respondent No. 2 under Sections 376/315/323 IPC, before the learned CJM, Kamrup. As the offences under Sections 376/315 IPC are exclusively triable by the Court of Sessions, the case was committed accordingly.

5. During trial, on appearance of the respondent No. 2, charge was framed under Sections 376(1)/313 IPC, which was read over and explained to the accused appellant, to which he pleaded not guilty and claimed to be tried.

6. To substantiate the case of the prosecution, 10 (ten) witnesses were examined, but the respondent No. 2 did not adduce any witness in support of his case. The case of the accused was of total denial and after hearing both sides, the respondent No. 2 was acquitted by the Sessions Court.

7. It is submitted by the learned counsel for the appellant that though charges under Sections 376/313 of IPC were framed, but even after materials found under Sections 323/417 IPC, no charges were framed under the said sections and that has been overlooked by the

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learned trial Court. The prosecution was able to establish a case against the respondent No. 2 under Sections 376/315/417/323 IPC, but the trial Court erroneously came to a finding that no case was proved against the respondent No. 2 and accordingly, acquitted him.

8. On the other hand, learned Additional Public Prosecutor has submitted that the prosecution has considerably proved the case against the respondent No. 2 under Section 417 IPC, though charge was not framed, but applying the provision under Section 222 CrPC, the acquittal could be reversed and the respondent No. 2 be convicted thereon.

9. It is also the submission of the learned counsel for the appellant that from the evidence of the victim, it has been fully established that respondent No. 2 forcefully committed rape upon her against her will, with a promise to marry her, but subsequently, he fled away. Hence, the judgment and order of acquittal is liable to be set aside.

10. I have considered the submissions of the learned counsel appearing for both the parties. I have also perused the Judgment of the learned trial Court and the evidence of the witnesses.

11. As is evident from the above facts, it is an appeal against the Judgment of acquittal. The judgment of acquittal has the obvious consequence of granting freedom to the accused. Hon'ble Supreme Court has taken a consistent view that unless a Judgment in appeal is contrary in evidence palpably erroneous or a view which could not have been taken by the court of competent jurisdiction, keeping in view the settled canons of criminal jurisprudence, Hon'ble Supreme Court has been reluctant to interfere with such judgment of acquittal.

12. The penal laws in India are primarily based upon certain fundamental procedural values which are right to fair trial and presumption of innocence. A person is presumed to be

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innocent till proven guilty and once held to be not guilty of a criminal charge, he enjoys the benefit of such presumption, which could be interfered with only for valid and proper reasons. An appeal against acquittal has always been differentiated from a normal appeal against conviction. Wherever, there is perversity of facts and/ or law appearing in the judgment, the appellate Court will be within its jurisdiction to interfere with the judgment of acquittal but otherwise such interference is not called for.

13. In the case of *State of Rajasthan vs. Abdul Mannan*; (2011) 8 SCC 65, wherein Hon'ble Supreme Court discussed the limitation upon the powers of the appellate Court to interfere with the judgment of acquittal and reverse the same.

14. The Hon'ble Supreme Court referred to its various judgments and held as under:-

"*12. As is evident from the above recorded findings, the judgment of conviction was converted to a judgment of acquittal by the High Court. Thus, the first and foremost question that we need to consider is in what circumstances, this Court should interfere with the judgment of acquittal. Against an order of acquittal, an appeal by the State is maintainable to this Court only with the leave of the Court. On the contrary, if the judgment of acquittal passed by the trial Court is set aside by the High Court and the accused is sentenced to death or Life Imprisonment or Imprisonment for more that ten years, then the right of appeal of the accused is treated as an absolute right, subject to the provisions of Articles 134 (1) (a) and 134 1 (b) of the Constitution of India and Section 379 of the Code of Criminal Procedure, 1973. In light of these, it is obvious that an appeal against acquittal is considered on slightly different parameters, compared to an ordinary appeal, preferred to this Court.*

13. When an accused is acquitted of a criminal charge, a right based in him to be a free

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citizen and this Court is very cautious in taking away that right. The presumption of innocence is further strengthened by the fact of acquittal of the accused under our criminal jurisprudence. The Courts have held that if two views are possible on the evidence adduced in the case, then the one favourable to the accused may be adopted by the Court. However, this principle must be applied keeping in view the facts and circumstances of the case and the thumb rule is that whether the prosecution has proved its case beyond reasonable doubt. If the prosecution has succeeded in discharging its onus and the error in appreciation of evidence is apparent on the face of the record, then the court can interfere in the judgment of acquittal to ensure that the ends of justice are met. This is the linchpin around which the administration of criminal justice revolves.

14. It is a settled principle of criminal jurisprudence that the burden of proof lies on the prosecution and it has to prove a charge beyond reasonable doubt. The presumption of innocence and the right to fair trial are twin safeguards available to the accused under our criminal justice system, but once the prosecution has proved its case and the evidence led by the prosecution in conjunction with the chain of events as are stated to have occurred, if, points irresistibly to the conclusion that the accused is guilty, then the Court can interfere even with the judgment of acquittal. The judgment of acquittal might be based upon misappreciation of evidence or apparent violation of settled canons of criminal jurisprudence.

15..... .... The principle to be followed by the appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by the Hon'ble Supreme

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Court in the case of ***Shivaji Sahebrao Bobade & Anr vs State Of Maharashtra 1974 SCR (1) 489; Ramesh Babulal Doshi vs The State Of Gujarat; 1996 AIR 2035; Jaswant Singh VS State of Haryana; (2000) 3 Supreme 320; Raj Kishore Jha vs. State of Bihar****; (****2003) 4 Crimes(SC) 248; State of Punjab vs. Karnail Singh; 2003 0 Supreme(SC) 760*** *etc."*

15. To put it appropriately, we have to examine with reference to the present case whether the impugned judgment of acquittal recorded by the trial Court suffers from any legal infirmity or is based upon erroneous appreciation of evidence.

16. The victim was examined in the case as PW-3. She deposed in her evidence that the respondent no. 2 was her tutor. He used to come to their residence. On 15th day of August, 2006, she was called upon to his residence and he committed bad acts with her against her will. He promised to marry her. As such, she did not disclose the affairs to her parents. After some days, she could realize that her monthly menstruation had stopped. The respondent No. 2 brought some medicine for termination of her pregnancy and accordingly, she took the said medicine and her pregnancy was terminated. It is alleged by PW-3 that likewise, due to physical relationship, she became again pregnant and two times, her pregnancy were terminated. In the year 2008, the boy left the place. On 22.07.2009, when the boy came to Noonmati area to look after his landed property, the members of Mahila Samity apprehended the respondent No. 2 and handed over him to the Police.

17. In her cross-examination, PW-3 admitted that in her statement before the Police and the Magistrate, she did not mention that on 15th August, 2006, she was called upon to the residence of the respondent No. 2 and he committed bad acts against her will. She also

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admitted that the respondent No. 2 had not given her medicine for abortion. She admitted that after five months of her first abortion she again conceived. She categorically admitted that she had done the acts with her own consent. She had not disclosed about her pregnancy and abortion to anybody else. The victim also admitted that as the respondent No. 2 had given verbal assurance to marry her, she had continued physical relationship with him.

18. It also appears from the cross-examination of PW-3 that since 2008, respondent No. 2 was working as an LICI agent. She and her mother were also engaged, as agents in the LICI. During her service period in LICI, she met with the respondent No. 2. In the year 2008, respondent No. 2 left the place where he was residing earlier adjacent to their (victim's) house. The respondent No. 2 refused the proposal of marriage. She was eager to marry him.

19. The other witnesses examined by the prosecution are the reported witnesses, who came to know about the incident from the victim herself.

20. PW-1 is the mother of the victim. From her deposition, it discloses that the respondent No. 2 was the tutor of the victim and he used to come to their residence to teach her and their relationship developed. According to her, her daughter was conceived through the respondent No. 2 and the respondent No. 2 proposed her daughter for abortion and accordingly, her daughter had terminated her pregnancy. The victim had not disclosed the matter to her.

21. As deposed by the victim, at the time of incident, her age was around 18 to 20 years and she was working as an LICI agent. Therefore, it is apparent that she was a major lady and she was aware of implications and consequences of her own acts. According to the victim, though at first, the respondent No. 2 had committed rape on her by using force, and

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she became pregnant, but subsequently, when the respondent No. 2 promised to marry her, she was willing to have sexual intercourse with him. After termination of her pregnancy as per evidence of the victim, thereafter, also she continued to have sexual intercourse with respondent No. 2 and became pregnant for two times and her pregnancy were terminated.

22. It is alleged by the victim that on the 15th day of August, 2006, the respondent No. 2 had committed rape on her by using force, but at that time she did not lodge any FIR, but after 3 (three) years, the FIR was lodged. Thus, bare perusal of the evidence of the victim is more than sufficient to prove whatever sexual relations she had with respondent No. 2, those were by her own consent and free will. Regarding promise of marriage, the other witnesses, including her mother (PW-1), did not utter a single word that the respondent No. 2 had made any promise to marry her. Rather PW-3, i.e., the victim stated that the respondent No. 2 had refused the proposal of marriage. The alleged promise of marriage, as per her own evidence, was given quite subsequently, when the respondent No. 2 refused to marry her.

23. Recently, the Hon'ble Supreme Court has held that it is not rape if consensual physical relationship was based on genuine promise of marriage which could not be fulfilled. The Court quashed an FIR registered in 2016. A woman had accused the appellant of rape and cheating. They were in a consensual relationship on the basis of an assurance of marriage given by the man. However, the duo fell apart. Three years later, the woman filed the complaint against him just like the present case.

24. In view of the above discussion, I do not find any infirmity in the Judgment and Order of acquittal dated 03.02.2012, passed by the learned Assistant Sessions Judge No. 3, Kamrup, Guwahati, in Sessions Case No. 165 (K-G)/2010.

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25. In the result, appeal stands dismissed.

26. Send down the LCR.

JUDGE

Comparing Assistant

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