STATE OF ASSAM

v.

RAMEN DOWARAH

(Criminal Appeal No. 668 of 2011)

JANUARY 11, 2016

[KURIAN JOSEPH AND ARUN MISHRA, JJ.]

Penal Code, 1860 – ss.302/376/454 – Prosecution under – Of respondent-accused alongwith co-accused – For the commission of offence of rape and thereafter causing death of prosecutrix setting her ablaze by pouring kerosene – Incident seen by brother of prosecutrix (minor witness-PW5) – In oral Dying Declaration prosecutrix named the respondent-accused having committed the acts – Trial Court convicted the respondent-accused while acquitting the co-accused – High Court acquitted the accused u/s.376 and altered the conviction u/s.302 to 304(Part II) holding that it was a consensual sexual intercourse and the accused set the prosecutrix ablaze in the spur of moment – On appeal, held: In view of the evidence and the circumstances of the case, it cannot be called a case of consensual sexual intercourse – The respondent-accused had the intention to eliminate the prosecutrix by setting her ablaze, so that the commission of offence of rape did not see the light of the day – No circumstances were brought on record to indicate that it was case of any exception to take it out from the realm of s.300 IPC – The act amounts to murder – Therefore, the respondent-accused is liable to be convicted u/s.302 and u/s. 376 – Order of trial court is restored.

Allowing the appeal, the Court

HELD: 1.1 In view of the evidence and circumstances of the case, what emerges is that it could not be said to be a case of consensual sexual intercourse. The victim had made a hue and cry on commission of rape on her and also on being threatened that she would narrate the incident to her mother, respondent-accused had set her ablaze after pouring kerosene over her body. Thus the High Court has erred in upsetting the finding of the trial court which was based on the circumstances of the case and the evidence on record which clearly makes out that it was not a case of consensual sexual intercourse. In the case of consensual

A sexual intercourse victim would not have raised a hue and cry and would not have immediately threatened the perpetrator of the crime with the disclosure of the incident to her mother. She was clothless when kerosene oil was poured on her as stated by her brother PW-5. It was in fact in order to remove the evidence of rape, the respondent-accused had poured kerosene on her and set her ablaze. However, the minor brother had witnessed the incident by peeping from the slit of door and victim also survived for some time to narrate the incident. The High Court has erred in law in acquitting the respondent-accused from commission of the offence under section 376 IPC.[Para 9] [184-C B, F-H; 185-A-B]

1.2 The age of the victim was mentioned in the FIR as 14 years. In the medical report, Doctor has recorded the age of the victim to be 14 years. In the postmortem report also age is mentioned as 15 years. However, radiological examination D evidence so as to ascertain the age of the deceased has not been adduced. Hence, the Court would not upset the finding of the High Court that the prosecution has not been able to establish the age of the deceased. However it remains that she was young and not well-built and could be over-powered very easily. [Para 9] [184-C-D]

E 1.3 Men may lie but the circumstances do not, is the cardinal principle of evalution of evidence. The circumstances, the oral evidence and dying declarations of the deceased unerringly pointed out that it was not a case of consensual sexual intercourse. The dying declarations read together with the immediate conduct F of victim takes it out to be a case of consensual sexual intercourse. [Para 9] [185-B-C]

State of Punjab v. Gurmit Singh & Ors. 1996 (1) SCR 532 : (1996) 2 SCC 384 – referred to.

2. In view of the finding that it was not a case of consensual G sexual intercourse and the shameful method and manner in which the incident has taken place, leaves no room for any doubt that the accused wanted to eliminate the deceased for all time to come. He intended to cause death by setting her ablaze so that commission of offence of rape does not see the light of the day. No circumstance has been brought on record to indicate that it H was a case of any exception, to take it out from the realm of section

300 IPC. Thus the High Court has erred in holding that accused did not intend to cause death. The act was done with the intention of causing death. The intention to kill is present in the case. The act amounts to murder. The judgment and order of conviction and sentence passed by the trial court is hereby restored. [Paras 10 and 11] [185-H; 186-A-B, D-E, G]]

Bandarupalli Venkateswarlu v. State of Andhra Pradesh **(1975) 3 SCC 492 – relied on.**

Case Law Reference

1996 (1) SCR 532	**referred to.**	**Para 9**
(1975) 3 SCC 492	**relied on.**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 668 of 2011

From the Judgment and Order dated 12.03.2010 of the High Court of Gauhati in Criminal Appeal No. 215 of 2005.

Avijit Roy, Vatika Sahay, Corporate Law Group for the Appellant.

Sanjay Kumar Dubey, Rakesh Kumar Tewari, Krishna Kant Dubey, S. S. Nehra for the Respondent.

The Judgment of the Court was delivered by

ARUN MISHRA, J. 1. The appeal has been preferred by the State against the judgment and order of the High Court thereby setting aside the conviction of the accused under section 376 IPC and altering the conviction under section 302 to section 304 Part II IPC, sentencing the accused to 7 years' imprisonment while maintaining the conviction recorded by the trial court under section 454 IPC thereby sentencing him to undergo RI for one year.

2. As per the prosecution case the incident took place on 1.5.2003 at about 5 p.m. when accused Ramen Dowarah and Janmejoy Gogoi alias Sanju entered the house of victim and committed rape on her and after pouring kerosene oil set her ablaze. When the victim raised hue and cry, people assembled and the victim was taken to the Civil Hospital. She sustained 55% burn injuries as her condition was serious she was referred to AMCH, Dibrugarh where in the course of her treatment she died after 2 months on 11.7.2003. On the date of the incident the paternal uncle of the victim Mr. Khirode Hazarika, PW 1, lodged a First Information Report at P.S. Tinsukia.

A 3. The accused were chargesheeted. After committal they were tried for commission of offences under sections 454/376(G)/302/34 IPC. The prosecution examined 11 witnesses. The accused persons abjured the guilt and contended that they had been falsely implicated in the case. The trial court convicted the accused/respondent Ramen for commission of offence under sections 454/376/302 IPC, and sentenced him to 1 B year, 10 years and life imprisonment respectively and a fine of Rs.3,000; in default of payment of fine to undergo simple imprisonment for 1 month. Aggrieved thereby, accused Ramen preferred appeal before the High Court and the same has been partly allowed. Aggrieved thereby State has come up in appeal.

C 4. The High Court has found that it was a case of consensual sexual intercourse with the accused Ramen and when the victim threatened him that the incident would be disclosed by her to mother, on the spur of the moment he poured kerosene oil on her so as to cause burn injuries. It could not be said to be a case of intentionally causing D death falling under section 300 IPC, Hence conviction under section 302 IPC has been set aside. Conviction has been recorded under section 304 Part II IPC.

5. Learned counsel appearing on behalf of the State has submitted that it was not a case of consensual sexual intercourse. The High Court E has gravely erred in law in reversing the finding of the trial court. The victim had raised a hue and cry and threatened the accused that she would disclose the incident to her mother. On that accused had poured kerosene oil on her and set her ablaze. It could not be said to be a case falling under section 304 Part II IPC. The conviction was rightly recorded by the trial court under sections 302 and 376 IPC.

F 6. Learned counsel appearing on behalf of the respondent has strenuously argued that the victim had not resisted when the sexual intercourse was performed. In her dying declaration she has not stated that she resisted the commission of sexual intercourse. In the circumstances as the victim had threatened accused to disclose the G incident to her mother, in a fit of rage, the accused had poured kerosene oil over her without intending to cause death of the deceased. There was no pre-meditation. Thus considering the relatively young age of the accused the conviction under section 304 Part II IPC calls for no interference. Accused could not have been convicted in view of the H evidence adduced by the prosecution under section 376 IPC.

7. We have carefully assessed the evidence adduced by the prosecution. When we consider the evidence of the various witnesses examined by the prosecution, Khirode Hazarika – PW1 – has stated that the deceased had made oral dying declaration as to the complicity of the accused. Mridula Hazarika, PW2, saw the accused Ramen and other acquitted accused fleeing the house, in oral dying declaration victim had told her that Ramen had destroyed her life. She heard the shrieks of the brother of the victim and then came to the house. Lalita Hazarika, PW3, is another witness. Victim was her niece. In the oral dying declaration made to her, victim had informed that Ramen and other accused had ruined her life. Aoilabati Hazarika, PW4, is the mother of the victim. She saw the victim lying burnt in the house. The victim told to her that when she stated she would disclose the incident to her, on that accused had poured kerosene oil and set her ablaze. Manash Hazarika, PW5, a minor aged 14 years, brother of the deceased has stated that while grandmother Maniki Hazarika and the witness were in the kitchen, her elder sister the victim was lying on the bed as she was not feeling well, grandmother Maniki was deaf and blind; for that very reason the witness was with her at that time accused Ramen and Sanjay came to the house. They had shut the rear door and committed sexual intercourse with the deceased. It was further stated that there was a door between kitchen and bedroom which was also closed by the accused. He witnessed the incident through a slit in the door. When his sister the victim cried accused Ramen threatened to kill the witness. When the victim told that she would narrate the incident to her mother, this prompted the accused to pour kerosene over her and set her ablaze. Victim was wearing a frock. Ramen had taken off the clothes of his sister and committed the bad act. His sister had no clothes on her when the accused poured kerosene oil over her and set her ablaze. The witness raised commotion and on that Mridula Hazarika, his elder sister, arrived on the scene and thereafter the victim was taken to the hospital. According to the witness both the accused persons committed rape. However, other accused Sanjay has been accorded the benefit of doubt by the trial court as deceased in her dying declaration did not attribute commission of sexual intercourse to Sanjay, the acquitted accused.

8. Dr. B.C. Roy Medhi performed postmortem and stated that the victim died due to burn injuries. Dr. Alaka Devi, PW9, initially examined the victim on the date of the incident. She has stated that the victim had stated to her that when she cried, accused poured kerosene

A oil on her and set her ablaze. PW-10, Judicial Magistrate had recorded the dying declaration of the deceased under section 164 Cr.P.C. in which she has clearly stated that accused Ramen had committed sexual intercourse with her and on being told that she would disclose the incident to her mother, after pouring kerosene oil on her, she was set ablaze.

B 9. Considering the aforestated state of evidence what emerges is that it could not be said to be a case of consensual sexual intercourse. Evidence and circumstances militate against it being consensual sexual intercourse. The age of the victim was mentioned in the FIR as 14 years. In the medical report, Doctor has recorded the age of the victim to be 14 years. In the postmortem report also age is mentioned as 15 years. C However radiological examination evidence so as to ascertain the age of the deceased has not been adduced. Hence we refrain from upsetting the finding of the High Court that the prosecution has not been able to establish the age of the deceased. However it remains that she was young and not well-built and could be over-powered very easily. It has D come in the evidence that the evidence of PW5 namely, Manash Hazarika who is the brother of the victim, that when the victim had cried, the witness was threatened by accused Ramen and thereafter accused Ramen had poured kerosene oil on the victim and set her ablaze. It has also come in the statement of PW9 Dr. Alka Devi that when the victim had given history which is to be treated as dying declaration she stated E to the effect that when "she cried, accused poured kerosene oil on her and set her ablaze". There is nothing to doubt the veracity of the statement recorded in the medical report which was based upon the statement made by the victim and has been proved by PW-9 Dr. Aiaka Devi. Thus, it is crystal clear that it was not a case of consensual sexual intercourse, F but the victim had made hue and cry on commission of rape on her and also on being threatened that she would narrate the incident to her mother, accused Ramen had set her ablaze after pouring kerosene over her body. Thus the High Court has erred in upsetting the finding of the trial court which was based on the aforesaid circumstances and the evidence on record which clearly makes out that it was not a case of consensual G sexual intercourse. In the case of consensual sexual intercourse victim would not have raised hue and cry and would not have immediately threatened the perpetrator of the crime with the disclosure of the incident to her mother. She was clothless when kerosene oil was poured on her as stated by brother PW-5. It was in fact in order to remove the evidence H of rape accused Ramen had poured kerosene on her and set her ablaze

so that she is silenced and his sin does not see the light of the day. However, the minor brother had witnessed the incident by peeping from the slit of door and victim also survived for some time to narrate the incident. In our opinion the High Court has erred in law in acquitting the accused Ramen from commission of the offence under section 376 IPC. Men may lie but the circumstances do not is cardinal principle of evalution of evidence. The circumstances, the oral evidence and dying declarations of the deceased unerringly pointed out that it was not a case of consensual sexual intercourse. The dying declarations have to be read together immediate conduct of victim takes it out to be a case of consensual sexual intercourse. Accused has denied in toto the commission of offence in the statement recorded under section 313 Cr.P.C. Thus in view of the aforesaid evidence we have no hesitation in setting aside the finding of the High Court to the effect that it was a case of consensual sexual intercourse. We restore the finding recorded by the trial court. In *State of Punjab v. Gurmit Singh & Ors.* (1996) 2 SCC 384, this Court has observed :

> *"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case of even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook..."*

10. Coming to the question whether it was a case under section 302 or under section 304 Part II IPC for recording the aforesaid conclusion, the High Court has held that on the spur of the moment the accused had set ablaze the victim on being threatened that the incident of consensual sexual intercourse would be disclosed by her to mother. In view of our finding that it was not a case of consensual sexual intercourse and the shameful method and manner in which the incident has taken place, leaves no room for any doubt that the accused wanted to eliminate the deceased for all time to come. He intended to cause

A death by setting her ablaze so that commission of offence of rape does not see the light of the day. No circumstance has been brought on record to indicate that it was a case of any exception, to take it out from the realm of section 300 IPC. Thus the High Court in our opinion has erred in holding that accused did not intend to cause death. The facts and circumstances which have been proved indicate that the accused wanted B to get rid of the victim by causing her death. The doctor has also opined that the injuries were dangerous to life and victim was taken in a precarious condition to the doctor PW-9. She could survive for 2 months, is not the test. It is a case where accused clearly intended to kill deceased after committing the crime so as to silence her. The overall circumstances C established to the hilt that accused intended to cause death by setting her ablaze after committing forcible sexual intercourse. The submission of the counsel appearing on behalf of the accused that the accused poured kerosene oil on being threatened disclosure of the incident by victim to her mother, was the cause of setting her ablaze. The aforesaid conduct does not exculpate but indicates the intendment of accused to D cause death and makes him liable for punishment under section 302 IPC. The act was done with the intention of causing death. The intention to kill is present in the case. The act amounts to murder. In *Bandarupalli Venkateswarlu v. State of Andhra Pradesh* [(1975) 3 SCC 492], this Court has considered intention of pouring kerosene and causing fire and E observed thus :

> *"Relying on the circumstance that the appellant tried to put out the fire, learned Counsel for the appellant urged that the appellant had no intention to commit the murder of the deceased and cannot therefore be convicted under Section* F *302. It is impossible to accept this submission because if the appellant set fire to the deceased after accused No.6 had poured kerosene on his body, there cannot be any doubt that the intention of the appellant was to kill the deceased."*

11. In view of the aforesaid discussion, we are of the considered opinion that the judgment and order partly allowing the appeal by the G High Court, deserves to be and is hereby set aside. The judgment and order of conviction and sentence passed by the trial court is hereby restored. The appeal is accordingly allowed.

12. The accused to be taken into custody forthwith to serve out the remaining period of sentence.

H Kalpana K. Tripathy Appeal allowed.