

Present:

Mr. Justice Md. Shohrowardi

Criminal Appeal No. 146 of 2000

Md. Iman Ali

...Appellant

-Versus-

The State

...Respondent

Mr. Kamal Hossain, Advocate

...For the appellant

Mr. S.M. Golam Mostofa Tara, D.A.G with

Mr. A. Monnan (Manna), A.A.G with

Mr. Md. Shaifour Rahman Siddique Saif, A.A.G

...For the State

Heard on 10.10.2023, 17.10.2023, 29.10.2023,
30.10.2023 and 01.11.2023**Judgment delivered on 02.11.2023**

This criminal appeal under Section 410 of the Code of Criminal Procedure, 1898 is directed challenging the legality of the impugned judgment and order dated 25.01.2000 passed by the Sessions Judge, Nilphamari in Session Case No. 32 of 1997 arising out of Nilphamari Police Station Case No. 8 dated 24.09.1997 G.R. No. 109 of 1997 convicting the appellant under Section 354 of the Penal Code, 1860 and sentencing him thereunder to suffer rigorous imprisonment for 2(two) years and fine of Tk. 1,000, in default, to suffer rigorous imprisonment for 3(three) months.

The prosecution case, in a nutshell, is that the complainant Anita Rani filed a petition of complaint on 16.09.1997 in the Court of Magistrate, First Class, Nilphamari alleging, inter alia, that she is a mother of a son and lives in the house of her father. Her neighbour Iman Ali used to give bad proposals. Recently he proposed to marry her. At the advice of the accused Nos. 2 to 5, accused Iman Ali made a plan to rape her to marry subsequently. On 30th of Bhadra 1404 at 6/6.30 am the complainant started to go to the cluster of bamboos of Anil Barman and Ozanul Barman to answer the natural call. On the way to her natural call, the accused Iman Ali tied her mouth with gamsa and the accused Iman Ali

committed rape. At that time, it was raining. The accused Humayun was standing near Iman Ali and accused Tojammel Haque, Mojammel Haque and Shamsul Haque remained on armed guard. At the time of committing rape, the victim raised hue and cry. Hearing the hue and cry of the victim, the witnesses assembled at the place of occurrence. The accused Humayun fled away from the place of occurrence but accused Tojammel, Mojammel and Shamsul Haque with the help of bamboo sticks tried to snatch away Iman Ali. The locals present at the place of occurrence detained Iman Ali and they also made an attempt to detain Tojammel Haque, Shamsul Haque and Mojammel Haque but they fled away from the place of occurrence. The locals took the accused Iman Ali to the house of Khitis Member. At that time, Khitis Member was not present there and the locals were waiting for the local Chairman and Members. At 3/4 pm Khitis Member came to his house and attempted to send the accused Iman Ali to Thana with the help of Chowkidar. At that time, accused Humayun, Tojammel Haque, Mojammel Haque and Shamsul Haque snatched away accused Iman Ali. The informant claimed that after the occurrence, the accused and their men made an attempt to convert her religion to Islam and also made arrangements for marriage with the accused Iman Ali. The accused persons and their men obstructed the road to restrain the victim from going to Nilphamari. Subsequently, she came to Court secretly and filed the complaint petition on 16.09.1997.

After filing the complaint petition, the learned Magistrate, First Class, Court No. 1, Nilphamari by order dated 16.07.1997 directed the O.C, Nilphamari to take legal action urgently and the Officer-in-Charge, Nilphamari Thana registered the complaint petition as Nilphamari Police Station Case No. 8 dated 24.09.1997 under Section 6(1)14 of the Nari-O-Shishu Nirjatan Daman Ain, 1995.

P.W. 11 S.I. Abul Kashem took up investigation of the case. During investigation, the investigating officer visited the place of occurrence, prepared the sketch map and index, seized the alamat, sent the victim to the doctor for medical examination, recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and

after completing investigation submitted charge sheet under Section 376/511 of the Penal Code, 1860 against only accused Iman Ali and submitted final report in favour of accused 1. Md. Tojammel Haque, 2. Mojammel Haque, 3. Md. Shamsul Haque and 4. Md. Humayun Ali.

The case record was sent to the Sessions Judge, Nilphamari and the case was registered as Session Case No. 32 of 1997. During the trial, charge was framed under Section 376/511 of the Penal Code, 1860 against the accused which was read over and explained to the accused and he pleaded not guilty to the charge and claimed to be tried following law. During the trial, the prosecution examined 11(eleven) witnesses to prove the charge against the accused and the defence cross-examined the prosecution witnesses. After examination of the prosecution witnesses, the accused was examined under Section 342 of the Code of Criminal Procedure, 1898 and he declined to adduce any defence witness. After concluding the trial, the trial Court by impugned judgment and order convicted the accused and sentenced him as stated above against which he filed the instant appeal.

P.W. 1 Sreemati Anita Rani Das is the complainant and mother of a son. She stated that she resides along with her son in the house of her father. On the third of Bhadra at 6/6.30 am she went to the cluster of bamboos of Anil to answer the natural call. At that time, Iman Ali tied her mouth with gamsa and accused Humayun was also present there. The accused Iman Ali forcibly pushed her to the ground and made an attempt to outrage her modesty. He touched the chest of the victim. At that time, she caught the gamsa of Iman Ali and raised a hue and cry. Arabinda and Brozen came to the place of occurrence and detaining Iman took him to the house of Kheritis Member from where the locals forcibly snatched away Iman Ali. Since the local Thana refused to accept the case, the clerk of an Advocate filed the case. She proved the complaint petition as exhibit 1 and her signature as exhibit 1/1. She identified the accused Iman Ali in Court. She stated that her medical test was not done. The reason is that the case was filed long after. Due to fear of the accused it was delayed to file the case. During cross-examination, she stated that her son is aged about 7/8

years and her mother sells fish in the market. The accused Iman is a shopkeeper and her neighbour. At the time of filing the case, Lal Babu came along with her. He was convicted for 10 years for dacoity committed in the house of the maternal uncle of Tojammel. Anil is the owner of the cluster of bamboos. House of Suruj, Ishaq, Kutub, Abbas and Shamsul Haque were situated adjacent to the place of occurrence. She could not say whether there was any debt of her mother with the shop of Iman Ali. She denied the suggestion that the accused Iman Ali requested to pay the debt and consequently, a scuffling took place. She affirmed that she went to Chairman Alamgir. She denied the suggestion that at the instigation of Lal Babu, she falsely implicated accused Tojammel. The accused Iman was detained at the cluster of bamboos and he could not be freed from her hand. Iman Ali came to the cluster of bamboos from the western side. At that time, the accused Humayun was along with him and both of them pushed down her on the ground. At that time, none was present there. She denied the suggestion that she filed the false case.

P.W. 2 Arabindu stated that on the 30th of Bhadra at 6.30 am he heard the hue and cry of the victim P.W. 1 Anita in the cluster of bamboos of Anil. He went to the place of occurrence and saw that the accused Iman and Anita were embracing. Anita told him that Iman caused injury to her chastity. Thereafter, detaining Iman took him to the house of Kherit Member from where his people snatched away accused Iman Ali. During cross-examination, he stated that the victim is his sister. The victim detained the accused Iman. 4/5 persons jointly went to the place of occurrence and subsequently, many people assembled there. Brozen was also there. He denied the suggestion that he deposed falsely and that the accused did not commit rape. At that time, he remained silent.

P.W. 3 Kherit Chandra stated that about 3 years ago at 7/7.30 am he was present in his house. At that time, Iman Ali and a lady were taken to his house. Anita told that attempt was made at the cluster of bamboos to rape her and the locals detained the accused Iman Ali. He sent to the Chairman for his opinion. P.W. 3 claimed that he is a Member. During cross-examination, he stated that he is the brother of Lal Babu and witness

Kanu is the husband of his daughter and brother of the victim, the mother of the victim sells fish in the market.

P.W. 4 Gozendra stated that $1\frac{1}{2}$ year ago in the morning, he heard the hue and cry to the south of his house. At that time, he saw that Anita and Iman were embracing. Iman was detained. He was taken to the house of Member. The investigating officer seized the cloth and blouse. He proved the seizure list as exhibit 2 and his signature as exhibit 2/1. He proved the sharee and gamsa as material exhibit I and II. He could not say who detained Iman. Iman was detained beside the cluster of bamboos situated on the south side of the house of Anil, Kalu and Arabindu. He affirmed that Iman was detained on their land and his uncle Ozanu cultivated the land. During cross-examination, he stated that the occurrence took place in the month of Bhadra and many locals used to go to the cluster of bamboos to answer the natural call. The locals went outside their houses along with goats. The owners of the houses situated along with the cluster of bamboos are Muslims. There were also houses of Hindus. He denied the suggestion that he deposed falsely.

P.W. 5 Anil Chandra Roy stated that $1\frac{1}{2}$ year ago at 6.00 am, he heard the hue and cry to the south west side of his house at the cluster of bamboos. He saw that Iman and Anita were embracing themselves. The locals detained Iman and took him to the house of a local Member. A gamsa, blows and shares were seized. He proved the seizure list as exhibits 2 and his signature as 2/2. During cross-examination, he stated that Anita brought the clothes. He signed the seizure list in the house of Anita. He affirmed that he, Arabindu, Bahadur and Anil detained Iman on the land of Ozanur. He affirmed that he did not disclose to the police that he detained accused Iman. He denied the suggestion that he saw that accused Iman was embracing with Anita is false.

P.W. 6 Kanu Das was tendered. During cross-examination, he stated that Anita is his sister.

P.W. 7 Anil Chandra was tendered. During cross-examination, he stated that he is the maternal uncle of Anita.

P.W. 8 Tarini Barman stated that he is the Chowkidar of Gour Gram Union. About 2 years ago he heard that Khitis Member called him. He heard that while Anita went to answer the natural call, accused Iman Ali raped her. He did not see the accused. During cross-examination, he stated that he could not say anything from whom he heard about the occurrence.

P.W. 9 Bhabesh Chandra stated that the occurrence took place two years ago in the early morning. Hearing hue and cry, he went to the house of the complainant. He affirmed that he did not know for which mother of the complainant and accused Iman Ali made the quarrel. At that time, he was declared hostile. During cross-examination on behalf of the State, he stated that he came to Court along with the accused. During cross-examination by the defence, he stated that he is the nephew of Gozen. He knows nothing.

P.W. 10 Khagen Chandra was tendered. During cross-examination, he stated that he is the uncle of Arabinda.

P.W. 11 S.I. Abul Kashem is the recording officer as well as the investigating officer. He stated that on 24.09.1997 he was posted at Nilphamari Thana. He filled up the FIR form. He took up the investigation of the case. He stated that he went to the place of occurrence and prepared the sketch map. He proved the sketch map as exhibit 2 and his signature as exhibit 2/1. He seized the alamat. He proved his signature on the seizure list as exhibit 3/1. He proved the gamsa, sharee and blouse as material exhibits I, II and III. During the investigation, he recorded the statement of witnesses under Section 161 of the Code of Criminal Procedure, 1898 and after completing the investigation submitted charge sheet against the accused. He proved the handwriting of O.C Ahammad Ali as exhibit 1(a) and 1(a)/1.

Learned Advocate Mr Kamal Hossain appearing on behalf of the accused Md. Iman Ali submits that in the complaint petition, the complainant alleged that accused Iman Ali with the help of co-accused

Humayun, Tojammel, Mojammel and Shamsul Haque committed rape on the victim Anita but while he deposed in Court as P.W. 1 stated nothing as regards the rape committed by the accused and at the time of examination of the victim, the doctor opined that no sign of rape was found on the body of the victim. He further submits that the complaint petition was filed at the instance of one Babu Lal who was convicted and sentenced to suffer rigorous imprisonment for 10 years for committing dacoity in the house of the uncle of co-accused Tojammel and harassing and humiliating the accused persons filed the false case against them at the instance of Babu Lal. He also submits the victim is a mother of a son aged about 8 years and the accused was aged about 13 years at the time of occurrence. Therefore, the prosecution case that the accused committed rape to marry the victim is preposterous and an afterthought story. He lastly submits that admittedly the owners of the houses situated along with the place of occurrence were not examined and the prosecution only examined the witnesses who are related to the victim. There is a contradiction in the evidence of the prosecution witnesses in respect of detaining the accused Iman Ali from the place of occurrence and subsequent handing over to the house of Khatib Member. The prosecution failed to prove the charge against the accused beyond all reasonable doubt. Therefore, he prayed for setting aside the impugned judgment and order passed by the trial Court.

Learned Assistant Attorney General Mr. Md. Shaifour Rahman Siddique Saif appearing on behalf of the State submits that the sole evidence of the victim is sufficient to conclude that the accused outraged the modesty of the victim. He further submits that P.Ws. 2, 3, 4, 5 and 8 also corroborated the evidence of P.W. 1 as regards the outraging modesty of the victim. The prosecution proved the charge against the accused beyond all reasonable doubt. Therefore, he prayed for the dismissal of the appeal.

I have considered the submission of the learned Advocate Mr. Kamal Hossain engaged on behalf of the accused Md. Iman Ali, learned Assistant Attorney General, perused the evidence, impugned judgment and order passed by the trial Court and the records.

On perusal of the evidence of the prosecution witnesses, it appears that P.W. 1 Anita Rani Das is a mother of a son aged about 8 years and she resides in the house of her parents. In the complaint petition, charge sheet and the charge age of the accused were not mentioned. At the time of examination of the accused under Section 342 of the Code of Criminal Procedure, 1898 on 13.01.2000 the trial Court mentioned that the accused Iman Ali is aged about 16 years. The alleged occurrence took place on 14.09.1997 corresponding to 30th Bhadra 1404 at 6/6.30 am. Therefore, it is clear as day light that at the time of occurrence, the accused was a minor boy aged about 13 years.

It is a settled proposition that admitted fact need not be proved. Although charge sheet is not evidence the accused is legally entitled to rely on the prosecution materials in support of his defence. In the charge sheet, the investigating officer stated that the doctors after examining the victim opined that “তাহার শরীরে কোন ধর্ষনের চিহ্ন পাওয়া যায় নাই” and after completing investigation, the investigating officer firmly opined that “মামলাটি নিরপেক্ষ ভাবে তদন্ত কালে এজাহারে উল্লেখিত বিষয় গুলি ভিত্তিহীন ও বানোয়াট বলিয়া প্রতিয়মান হয়।” Be that as it may, during investigation, the allegation made against the accused in the complaint petition was not proved and there was no reason to submit the charge sheet against the accused under Section 376/511 of the Penal Code, 1860.

The victim P.W. 1 Anita Rani Das stated in the complaint petition that the accused Iman Ali committed rape on her. When she deposed in Court, she completely remained silent regarding the rape allegedly committed by the accused Iman Ali and made out a case of outraging modesty. There is a material contradiction in the evidence of P.W. 1 and her statement made in the complaint petition. Although the investigating officer mentioned in the charge sheet that the doctor examined the victim and opined regarding the alleged rape allegedly committed by the accused but P.W. 1 firmly stated that no medical examination was done. The alleged occurrence took place on 14.09.1997 and the complaint petition was filed on 16.09.1997 after two days of the occurrence. The evidence of

P.W. 1 that the complaint petition was filed long after the occurrence is found untrue.

P.W. 3 Khitis Chandra is a local Member. P.W. 1 claimed that she detained accused Iman Ali at the time of occurrence and Arabindu, Bahadur and Anil took him to the house of P.W. 3 Khitis Chandra. P.W. 3 Khitis Chandra Member stated that after the occurrence, he sought the advice of the local Chairman. P.W. 3 Khitis Chandra was examined on 1.03.1999. He stated that about 3 years ago at 7/7.30 am Iman Ali was taken to his house along with a woman. Anita told him that accused Iman Ali attempted to commit rape on her. From the statement of P.W. 3, it reveals that the occurrence took place in March 1996 which contradicts the evidence of P.W. 1 regarding the date of occurrence.

During cross-examination, P.W. 1 affirmed that one Lal Babu who was sentenced to suffer rigorous imprisonment for 10 years for committing dacoity in the house of the maternal uncle of co-accused Tojammel accompanied the victim at the time of filing the complaint petition. In the charge sheet, the investigating officer mentioned that Lal Babu is the brother of Khitis Member who is also a relation of the victim. Therefore, I am of the view that Lal Babu is the sole engineer of the prosecution case and the prosecution withheld him with an oblique motive to shield the truth. Furthermore, admittedly the houses of Suruj, Ishaq, Kutub, Abbas and Shamsul were situated along with the place of occurrence but the prosecution did not examine those witnesses. Therefore, non-examination of those witnesses raised an adverse presumption under Section 114(g) of the Evidence Act, 1872 against the prosecution.

It is found that at the time of occurrence, the accused Iman Ali was a minor boy aged about 13 years. It is hard to believe that a minor boy aged about 13 years committed rape on a mother of a son aged about 8 years to subsequently marry her. Furthermore, the statement made in the complaint petition regarding rape was found false by the investigating officer. After that, the prosecution made out a false and after thought case of outraging modesty.

Because of the above evidence, findings, observation and proposition, I am of the view that the prosecution made out a false and an afterthought case of outraging modesty of P.W. 1 Sreemati Anita Rani Das against the accused.

I find merit in the appeal.

In the result, the appeal is allowed.

The impugned judgment and order of conviction and sentence passed by the trial Court are hereby set aside.

Send down the lower Court's records at once.