

IN THE COURT OF JUDICIAL MAGISTRATE FIRST CLASS,
UDALGURI.

Present: Smt. Taslima Firdosa,
J.M.F.C., Udalguri.

G.R.NO. 1145/16 (PRC No. 1047/19).

U/S 294/354 I.P.C.

STATE OF ASSAM

Vs

1. Sri Bikash Das

.....Accused Person.

Advocate Appeared:-

For Prosecution: Smti. Dipali Deka, A.P.P.

For Defence: Md. N. Islam.

Charge Framed on: 19.11.2019.

Evidences recorded on: 29.02.2020, 29.10.2021, 26.11.2021.

Arguments heard on: 20.12.2021.

Judgment delivered on: 30.12.2021.

J U D G M E N T

1. Prosecution story in brief is that Sri Dithakananda Hazarika lodged an F.I.R. on 09/11/2016 before the Kalaigaon P.S., alleging inter-alia that on 05/11/2016 one Sri Bikash Kr. Das , son of Late Paniram Das, Vill.- No. 2: Kalaigaon had uploaded a few derogatory remarks through the Social

Media, Facebook. That after going through the writings uploaded through the accused person's own Facebook account it was found that he has put some baseless allegations personally against the informant. That the accused person had also abused the informant with filthy language without any reason. Further, Bikash Kr. Das/ the accused person had personally attacked the informant's wife Smti Anjalee Devi Hazarika, a teacher of a reputed school at Tangla with unprintable slang words. That the accused person even put objection regarding election of a life-size statue of a global icon singing maestro Dr. Bhupen Hazarika within the circle office, Kalaigaon campus, thereby dishonouring the good name of great Sudhakanta. The informant further stated that the accused person had been involved in various antisocial activities by harassing innocent people of greater Kalaigaon.

2. On receipt of the F.I.R., Kalaigaon police station (hereinafter referred to as P.S.) Case No.154/2016 was registered and investigated into. No seizures were made during the investigation. On completion of the investigation the Investigating Officer (hereinafter referred to as I.O.) has submitted the Charge sheet U/S 294/354 of Indian Penal Code (hereinafter referred to as I.P.C.) against the accused person, Sri Bikash Das.
3. On his appearance before the Court, copies of relevant documents were furnished to him as per Sec 207 of the

Code of Criminal Procedure (hereinafter referred to as Cr.P.C.) After hearing both the sides and upon perusal of the case record and case diary grounds for presuming that the accused person Sri Bikash Das committed an offences triable U/S- 294/354 of I.P.C. were found and accordingly formal charges under the said sections were framed against the accused person. The particulars of offence U/S 294/354 of I.P.C. were read over and explained to the accused person to which he pleaded not guilty and claimed to be tried.

4. During the trial prosecution side examined 3 prosecution witnesses (hereinafter referred to as P.W.s.). The learned Assistant Public Prosecutor (hereinafter referred to as A.P.P.) had prayed before this Court to dispense with the examination of the I.O. Sri Dimbeswar Das who did the preliminary investigation in this case as it is necessary according to the nature of this case. This is an old pending case and already the I.O. Sri Bhabananda Deka who had submitted the charge-sheet was examined, cross-examined and discharged. All the necessary police papers were also exhibited by the I.O. Sri Bhabanada Deka. Accordingly, this Court allowed the prayer of learned A.P.P and thus the examination of the witness Sri Dimbeswar Das was dispensed with.

The deposition of the of the witnesses are discussed as follows-

5. P.W.1, Sri Jayanta Kr. Das has deposed that the accused person is his own brother. That in the year 2016, the accused made derogatory remarks against the informant and his wife in his Facebook account. That he saw such comments in Facebook account. That he saw such comments in Facebook. That the accused made comments against the wife of the informant using obscene words. That he commented that the wife of the informant had illicit relation with others. That later on, informant lodged ejahar against the accused.

In his cross examination he has stated that he knows the informant well. That he used to attend meeting with him. That his father was a freedom fighter. That his father established a trust namely Sewashram. That there were 125 bighas of land in the name of the said trust. That trust allotted 12 bighas of land to each of their five brothers and names of three brothers have been mutated accordingly over 36 bighas of land. That remaining 24 bighas of land remained in the trust. That the names of two brothers have not mutated in 24 bighas of land. That the accused is not his Facebook friend. That he does not know whether the informant is Facebook friend of the accused. That he came to know about the Facebook post made by the accused from public at Kalaigaon. That the informant might inform him about the Facebook post made by the accused. That he could not say the date of Facebook post made by the accused. He denied the fact that the accused did not comment

Facebook against the informant and his wife. That he further denied the fact that he had adduced false evidence against the accused as P.W.1 and his other brothers mutated their names over the land of the accused by the informant when he was working as circle officer.

6. P.W.2, Sri Dithakananda Hazarika, the informant has deposed that he knows the accused person. That in the year 2016 the accused person had spread and uploaded some obscene posts on Facebook against him and his wife. That in the post it was mentioned that he was engaged in illegal land sale activities. That further he had used a filthy language against him "bastard" and "that his wife had sex with all". That P.W.2 further stated in the post that without permission he had constructed a statue of Bhupen Hazarika at Circle Office campus. That it was his tribute to Bhupen Hazarika and nothing else. That as a result he filed this case as he and his wife were mentally harassed by the post of the accused person. The F.I.R. is exhibited as Ext. 1 and Ext.1(1) as his signature.

In his cross examination he has stated that he does not remember whether the police had recorded his statement U/S- 161 Cr.P.C. That he had no knowledge who are the witnesses in this case however he know Jayanta Kumar Das. That he knows that Jayanta Kumar Das is the brother of the accused person. That the accused person was not included in his friend list in his

Facebook account. That he does not remember who had handed over to him the print copy of the alleged Facebook post. That he had not submitted any technically approved copy of the alleged Facebook post. That he had only submitted whatever he had received. That he does not remember that when he was the Circle Officer at Udalguri district whether he had received any complaint against the accused person or not. That the accused person had harassed other people also but he had not taken any action against the accused person for such harassment. P.W.2 knows that the witness Jayanta Kumar Das have five (5) brothers including him. That he knows that Jayanta Kumar Das and his brothers had around 60 bighas of land which they had given in trust of "Sewa Ashram". He denied the fact that the 60 bighas of land were in the name of/"namjari" in the name of the 3 brothers Jayanta Kumar Das, Naba Kumar Das and Bhargab Kumar Das. He further denied the fact that the accused person had come to me to include his name in the "namjari" of the 60 bighas of land and the accused told him that he is not the son of his father. He denied the fact that when the accused person threatened him that he will file a case against P.W.2. P.W.2 had filed this case against the accused person. He had never filed any F.I.R. representing any of the victims harassed by the accused person. He denied the fact that that the accused person never posted any such alleged Facebook post on the other hand P.W.2 had himself posted it by someone

else in order to dominate the accused person. He denied the fact that when the accused person had visited him to include his name for the 60 bighas of land P.W.2 demanded him Rs.50,000/- to construct the statue of Bhupen Hazarika in return of fulfilling his request.

7. P.W.3, Sri Bhabananda Deka has deposed that he had submitted the charge sheet in this case. That he had dock identified the accused person that day in this Court. That the preliminary investigation was done by Dimbeswar Das. That on 09/11/2016 at around 11.30 A.M. an F.I.R. was lodged by Dithakananda Hazarika at Kalaigaon P.S. The O/C Kalaigaon P.S. Sri Dimbeswar Das himself took the charge of investigation. That he recorded the statement of the complainant Dithakananda Hazarika and other 1 witness namely Jayanta Kr. Das U/S- 161 Cr.P.C. at the P.S. That he was handed over the charge of investigation of this case on 04/12/2018. That he searched for the accused person of this case but could not find him. That on completion of the investigation he submitted charge sheet on 31/03/2019 U/S-294/354 of I.P.C. The charge sheet is exhibited as Ext.2 wherein Ext. 2(1) as his signature.

In his cross examination he has stated that he had not investigated this case. That he had not recorded any statement in this case. That there was no statement U/S- 161 Cr.P.C. present in the case diary except of the witness Jayanta Kr. Das. That the statement of the complainant U/S- 161 Cr.P.C. was not recorded in this

case. That he had not seized any documents or collected any expert opinion in this case. That he had not made the witnesses present during his house search of the house of the accused person in this case. That he had not prepared any sketch map. That he had not visited the house of the witness Jayanta Kr. Das. That he know that the witness Jayanta Kr. Das is the brother of the accused person and their houses are nearby to each other. That however when he went to find the accused person at his house he did not visit the house of the witness Jayanta Kr. Das. He denied the fact that as the case was filed by the Circle Officer Sri Dithakananda Hazarika and only for his sake he had submitted the charge sheet.

8. The examination of the accused person U/S 313 Cr.P.C. was recorded wherein he has stated that he is an innocent person. That he is no way connected with this case. That he is a retired Air Force Officer and he is staying at Bangalore since May, 1998. That P.W.1 is his brother. That without his knowledge three of his brothers namely Jayanta Kr. Das (P.W.1), Naba Kr. Das, Bhargav Kr. Das had made "naamjari" of their ancestral property in their own names. That in total they have 120 bighas of ancestral property. Out of which his brothers had made the "naamjari" in their names on 31/10/2009 for 60 bighas of their ancestral land. That his brothers had kept with themselves in possession the rest of their ancestral property. That on 11/11/2013 the accused person came back to Assam at his home when on enquiring in the

Revenue Circle Office, he came to know that his brother had already made "naamjari" in their names for 60 bighas of land without his permission (N.O.C.) and knowledge. That when he enquired the matter with his brothers they told him that it was none of his business and already the "naamjari" process had been completed. That eventually they started torturing him and they engaged some "goons" militants to assassinate him on 2nd December 2014. That again he went to the Revenue Circle Office on 18th November 2015 to discuss about the "naamjari". That then Dithakananda Hazarika (P.W.2) the informant misbehaved with him and told him that Paniram Das (his father) is not his father. That P.W.2 further told him that he do not know who is Paniram Das and P.W.2 himself knows his father more than him. That P.W.2 also told him that P.W.2 wants to construct a statue of Bhupen Hazarika at the office campus and so he kept a deal before him that if he pays P.W.2 Rs.50,000/- than P.W.2 will help him in his land dispute with his brothers. That he denied to P.W.2's offer and so he threatened him that P.W.2 will see him in the future. That after this incident P.W.2/the informant filed this false case against him. That this case was nothing but a revenge and a conspiracy of P.W.1 his brother and P.W.2 the informant against him. Finally he had prayed that he should be acquitted from this case. The accused person denied adducing any defence witness (hereinafter referred to as D.W.).

9. I have heard arguments from both the sides and also perused the case record. The learned A.P.P. has stated that the ingredients of Section 294 and Section 354 of I.P.C. were attracted in this case and so this is a fit case of conviction.

On the other hand the learned Defense Counsel submitted in his argument that the informant and P.W.2 came to know about the Facebook posts from the public and they cannot say the exact date of the post. Further he has submitted that neither the informant nor P.W.1 has the accused in their friend list. The learned defense counsel has stated that the printout of the alleged Facebook post was not even seized by the I.O. of this case. The learned Defense Counsel had further stated that the I.O. of this case did not record the statement of the complainant. That the I.O. had not made the witnesses present during the house search of the house of the accused person in this case He has further submitted that the ingredients of Section 354 of I.P.C. are not at all found in this case as no assault or criminal force was committed in this case on any one. Similarly he has stated Section 294 of I.P.C. was also not proved as the prosecution failed to produce any credible evidence to prove the authenticity of the case against the accused person in support of its case.

10. After going through the evidences on record I have framed the following points for determination in order to decide the case.

POINTS FOR DETERMINATION:-

- I. Whether the accused person namely Sri Bikash Das on 05/11/2016 at Kalaigaon Town, P.S.- Kalaigaon, District- Udalguri had uttered obscene words towards the informant and thereby committed the offence punishable U/S- 294 of I.P.C.?
- II. Whether the accused person namely Sri Bikash Das on 05/11/2016 at Kalaigaon Town, P.S.- Kalaigaon, District- Udalguri intended to outrage the modesty of the wife of informant and that thereby committed an offence punishable U/S- 354 the I.P.C.?

DISCUSSION, DECISION AND REASONS THEREOF:-

After going through all the evidence, facts and materials on record it is clear that this case revolves around an alleged Facebook post which was suspected to have been posted by the accused person Sri Bikas Das. However this case is filled with lacunae on the part of prosecution.

11. At the foremost I would like to discuss Section 65B of the Indian Evidence Act that is admissibility of electronic records. According to Sec 65B of the Indian Evidence Act, 1872 *any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question*

and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any content of the original order of any facts stated herein of which direct evidence would be admissible.

The conditions are mentioned in sub clauses 2 to 5 of Sec 65 of Indian Evidence Act. One of the most important condition that is to be fulfilled under Section 65B(4) of Indian Evidence Act is that such document being a secondary evidence has to be accompanied with a certificate or else it is in admissible as evidence.

In the case of Harpal Singh v. State of Punjab, 2017 (1) SCC 734: 2017 (1) SCC (Cri) 513: AIR 2016 SC 5389:2017 (169) AIC 113:2017 Cri LJ 551 (SC). The Hon'ble Supreme Court of India has held that any electronic record in the form of secondary evidence cannot be admitted in evidence unless the requirements of section 65B are satisfied.

In Anvar P.V.v. P.K Basheer, (2015) 1 SCC (Cri) 24:2015 (3) supreme 453:2014 (9) SCJ 1:2014 (10) scale 660:2014 (10) JT (SC) 459:(2014) 10 SCC 473 The Hon'ble Supreme Court of India had pronounced that in the case of CD, VCD, chip, et cetera, the same shall be accompanied by the certificate in terms of section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to the electronic record is in admissible.

In another landmark case law of Arjun Panditrao Khotkar Vs Kailash Kushanrao Gorantyal, 2020 0 Supreme(SC) 446; The Hon'ble Supreme Court of India has stipulated the following guiding principles.-

(i) Certificate required under Section 65B(4) of Evidence Act is a condition precedent to admissibility of evidence by way of electronic record.

(ii) In a fact circumstance where requisite certificate has been applied for from person or authority concerned, and person or authority either refuses to give such certificate, or does not reply to such demand, party asking for such certificate can apply to Court for its production under provisions aforementioned of Evidence Act, CPC or Cr.P.C.

12. However in this instant case the printout copy of the alleged Facebook post itself which was the prime source of this dispute was not seized by the investigating officer. On perusal of the case record the printout copy of the alleged Facebook post has been found appended with the case record without being seized by the I.O. and without any certificate. Moreover in this case no one had applied for the certificate from any person or authority concerned.

13. Further the prosecution failed to produce any primary evidence in this case as the I.O. of this case failed to seize the electronic record that is the device where the alleged Facebook post was posted.

14. The printed copy of the alleged Facebook post is a secondary evidence. It has just the name Bikas Kumar Das and the date November 5 at 9.19 P.M. which cannot be considered as any kind of proof to decide whether the alleged Facebook post was posted from the account of the accused person of this

case or not. Thus without any certificate the same is not admissible as evidence as it has not satisfied the conditions of mentioned in Sec 65B of the Indian Evidence Act 1872.

15. Most importantly P.W.2/the informant has himself not seen the alleged Facebook post in its electronic form in any electronic record (computer/device) with his own eyes. He has stated in his deposition that he does not remember who handed over to him the print copy of the alleged Facebook post. Moreover P.W.1 who happens to be the brother of the accused person has stated in his examination in chief that he saw the comments made by the accused person in the Facebook. But the I.O. failed to seized or submit before the court any device where P.W.1 saw such comments. P.W.1 also contradicted to his own statement in his cross examination stating that he came to know about the alleged Facebook post by the public. Later he again said that he may know about it from the informant.

16. Therefore none of the witnesses have stated in their deposition that they had seen with their own eyes the alleged Facebook post in its electronic form in any device. Thus we can derive to the conclusion that P.W.2 has filed this case only on the basis of a random print out of the alleged Facebook post which he was handed over by some person and he does not even know the name of that person. From the foregoing discussion it is clear that the prosecution failed to produce any cogent evidence to prove that the post was uploaded from the Facebook account of the accused person.

17. This case also suffers from some serious procedural defects in the investigation. There were two investigating officers in this case one was Sri Dimbeswar Das the then O.C. of Kalaigaon Police Station who did the preliminary investigation in this case and then the charge of investigation was handed over to P.W.3 who had submitted the charge sheet in this case. However both of them failed to find out the person who had handed over the alleged Facebook post to the informant. Hence the prosecution failed to produce a potential witness of this case.

18. Even in this technologically advanced and digital era the I.O failed to find out the source where the alleged Facebook post was first uploaded. The I.O could have contacted the cyber department to track down the culprit of the alleged Facebook post but he did not do so. Both of the Investigating Officers have miserably failed in collecting any primary evidence or authentic secondary evidence to prove the case of the prosecution. They also failed to collect any expert opinion as to whether the alleged Facebook post was uploaded from the genuine account of the accused person or whether it was a fake account.

19. Further the F.I.R. of this case was lodged on 10/11/2016 and the charge-sheet of this case was filed on 31/03/2019. That means the Investigating officer took almost two and half years for submitting charge-sheet in this case. Even after taking so long none of the investigating officers had either recorded the statement of the informant or the statement of

the informant's wife U/S 161 Cr.P.C who were the prime victims of this case. The case diary also reveals that after the opening date of the case diary i.e. on 09/11/2016 no activity was recorded in the case diary till 04/11/2018. The case diary also does not reveal any reason as to why the investigation was paused for 2 long years. The charge of investigation was then handed over to P.W.3 on 4/12/2018.

20. The I.O./P.W.3 has stated that he tried to find the accused person but as he could not find him he sent up the accused person in the charge sheet as an absconder. However no search was made or notice was issued to the accused person in the time between that 2 year gap periods (09/11/2016-04/11/2018) even if the accused person was a F.I.R. named accused.

21. Thus both the Investigating officers of this case failed to find out the source of the origination of the alleged Facebook post to ascertain the culprit of this case. They failed to collect any primary evidence. They failed to collect a single device/electronic record containing the alleged Facebook post in its electronic form. They even failed to seize the print out of the alleged Facebook post. They also failed to collect the certificate for the authenticity of the secondary evidence that is the print out as needed under Section 65B (4) of the Indian Evidence Act, 1872.

22. Though this case involves document produced from electronic record however in the above backdrop the charges

under Section 67 of Information Technology Act, 2000 (Amended in 2008) were not framed.

23. In order to attract section 354 of I.P.C. there has to be some kind of assault or criminal force committed against any women intending to or knowing it that such act shall likely outrage her modesty. Sec 294 of I.P.C also specifically states that there has to be the use of obscene words in a public place. However except the allegations made by the informant based on the print out of the alleged Facebook post which is already discarded as above none of the witnesses had deposed in their evidence that the accused had physically used any assault or criminal force against the wife of the informant or used any obscene language to the informant and his wife at any public place.

24. Thus on minute perusal of all the facts and materials on record I did not find a single iota of credible evidence to support the case of the prosecution. The prosecution failed to inspire the confidence of this Court that the alleged Facebook post was uploaded from the account of the accused person and so this Court extends the benefit of doubt to the accused person. Thus in absence of any concrete materials on record the accused cannot be booked under Section 294/354 I.P.C. Thus, point no. I & II are decided in negative.

25. In view of the aforesaid discussions, it is hold that the prosecution has failed to prove the charges against the accused person, Sri Bikash Das beyond reasonable doubt and as such,

he is acquitted from the charges U/S 294/354 I.P.C. and thus he is set at liberty forthwith.

Order

26. The accused person namely Sri Bikash Das is acquitted from the charges of this case U/S- 294/354 I.P.C. and is set at liberty.

27. The bail bond for the accused person namely Sri Bikash Das shall be in force for next six (6) months.

28. Judgment is pronounced in open court. Case is disposed of on contest.

Given under my hand and seal of this Court on this the 30th day of December, 2021 at Udalguri.

Judicial Magistrate 1st Class,
Udalguri.

APPENDIX

1. **Prosecution Witnesses:-**

P.W.1: Sri Jayanta Kr. Das.

P.W.2: Sri Dithakananda Hazarika.

P.W.3: Sri Bhabananda Deka.

2. **PROSECUTION EXHIBITS:-**

Ext.1: F.I.R.

Ext.2: Charge sheet.

3. **DEFENCE WITNESSES:-**

NONE

4. **DEFENCE EXHIBITS :-**

NONE.

Judicial Magistrate 1st Class,
Udalguri.