

HIGH COURT OF TRIPURA
AGARTALA

Crl. Rev. P. No. 81 of 2018

1. Najmul@ Nazmul Islam,

Son of Md. Basir Ali, resident of Village: Safrikandi, Tillagaon, P.S.-Irani,
District- Unakoti, Tripura.

2. Rahim Amin,

Son of Md. Manjil Ali, resident of Village: Safrikandi, Tillagaon, P.S.-Irani,
District- Unakoti, Tripura.

----- Petitioner(s)

Versus

**The State of Tripura represented by the Secretary, Home Department,
Government of Tripura**

-----Respondent(s)

For Petitioner(s) : Mr. Raju Datta, Advocate.

For Respondent(s) : Mr. S. Debnath, Additional Public Prosecutor.

Date of Hearing : *10th March, 2021.*

Date of Pronouncement : *30th June, 2021.*

Whether fit for reporting :

Yes	No
	✓

B_E_F_O_R_E_

HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

JUDGMENT & ORDER

This criminal revision petition is directed against the impugned judgment dated 17.11.2018 delivered by the Sessions Judge, Unakoti Judicial District, Kailashahar in Criminal Appeal No. 16(4) of 2018 affirming the judgment

and order of conviction and sentence dated 06.10.2018 passed by the Assistant Sessions Judge, Unakoti Judicial District, Kailashahar in ST 09 (UK) of 2017. By the said judgment and order of conviction and sentence, the learned Assistant Sessions Judge held the petitioners guilty of offence punishable under sections 457 & 366 read with sections 511 & 34 IPC and imposed the following sentence upon them:

<i>Sl. No.</i>	<i>Offence</i>	<i>Sentence of Imprisonment</i>	<i>Fine</i>	<i>Default Sentence</i>
1.	Section 457 read with Section 34 IPC	RI for 1 year	Rs.5,000/-	RI for 1 month
2.	Section 366 read with Section 511 & 34 IPC	RI for 2 years	Rs.10,000/-	RI for 2 months

Said judgment & order of conviction and sentence having been affirmed by the appellate court vide the impugned judgment, aggrieved petitioners have challenged the said judgment of the appellate court in this criminal revision petition.

[2] Stated in essence, prosecution case is as under:

Informant mother of the victim lodged a written FIR with the officer in charge of Irani police station at Kailashahar at 12.20 noon on 17th October, 2015 alleging, inter alia, that in the previous night at around 02.30 O' clock the accused

petitioners broke open the door of her dwelling hut and entered into her bedroom. Accused petitioner Rahul Amin started beating her after catching hold of her while the other petitioner namely, Najmul Islam tried to lift her daughter from the room forcibly. When her daughter started crying for help, the neighbouring people rushed to her house and detained accused petitioner Najmul Islam. The other accused attacked Sayed Manjur Hassan and Sayed Masum Reza, son of her brother in law with a dao. In fear of injury, the neighbours who came to their rescue left the place. Both the petitioners then fled away.

[3] Based on the said FIR, IRN P.S case No. 026 of 2015 under sections 457 & 366 read with sections 511 & 34 IPC was registered and investigation of the case was taken up.

[4] Smt. Aparna Das, Woman Sub Inspector of police of Irani police station conducted an elaborate investigation of the case. In the course of her investigation, she visited the crime scene. After inspection of the crime scene she had drawn up hand sketch map thereof indicating the material locations in a separate index [Exbt.5]. She also met the material witnesses of the case including the informant mother of the victim and recorded their police statements under section 161 Cr.P.C. Victim was medically examined and after her medical examination, she was produced before the nearby Judicial Magistrate for recording her statement under section 164(5) Cr.P.C and it was recorded by the

Judicial Magistrate First Class, Kailashahar. Raid was conducted in the house of the petitioners for arresting them but both were found absconding. At the conclusion of investigation, the investigating officer having found sufficient materials in support of the charges submitted charge sheet No. 42 of 2016 dated 31.12.2016 against the petitioners for having committed offence punishable under sections 457 & 366 read with sections 511 & 34 IPC.

[5] Having received the case record on commitment from the court of the Judicial Magistrate First Class, the learned trial court framed the following charges against the petitioners:

“That on 17.10.2015 at around 2.30 am at midnight at Tillabazar under Irani P.S both of you in furtherance of common intention trespassed into the house of the complainant (name withheld) by breaking her door with intent to commit an offence and thereby committed an offence punishable u/s 457/34 of the Indian Penal Code, 1860 and within my cognizance.

Secondly, on the above said date, time and place both of you used force in order to take daughter of the complainant from lawful custody of her mother and it was few hours prior to her marriage and thereby committed an offence punishable u/s 366/34 read with section 511 of the Indian Penal Code, 1860 and within my cognizance.

AND I do hereby direct that both of you be tried on the aforesaid charges.”

They pleaded not guilty to the said charges and desired to stand the trial.

[6] During trial, prosecution examined as many as 9 (nine) witnesses including the complainant and victim and also introduced 5 (five) documents to establish the charges against the petitioners. Among the witnesses examined by the prosecution, PW-1 is the informant mother of the victim, PW-2 is the victim daughter of the informant, PW-3 is the sister of the victim, PW-4 is their neighbour, PW-5 and PW-6 are also their neighbours. PW-7 is the scribe of the FIR. PW-8 was the officer in charge of Irani police station on the material date who received the FIR and endorsed the case to PW-9 for investigation. PW-9 is the investigating officer of this case.

[7] At the conclusion of prosecution evidence, both the petitioners were separately examined under section 313 Cr.P.C. They pleaded innocence and claimed that the charges were foisted on them.

[8] On appreciation of evidence, the trial court found the petitioners guilty and convicted them. After hearing the petitioners on the question of sentence, trial court sentenced the petitioners as aforesaid. Relevant extract of the findings of the trial court is as under:

“26.....In this case, considering evidence of prosecution witnesses, I find, the evidence of relative witnesses are cogent, corroborative and credible and can be relied on for nothing material came out in cross-examination to discard their evidence as held by the Hon’ble Supreme Court in Ganapathi & Anr. (supra) and by the Hon’ble High Court of

Tripura in Barun Debbarma (supra) (being relied on by learned Addl. P.P.).

Thus, therefore, considering all these aspects, I find, the prosecution is able to prove the fact that on 17.10.2015 at about 2.30 am both the accused persons with common intention committed lurking house trespass in the house of informant Jabeda Khatun to commit an offence and tried to abduct Sayeda Tarana Rahaman, the daughter of informant.

Accordingly, Point No. (i) & (ii) are decided in affirmative and in favour of the prosecution but against the accused persons.

ORDER

In the result, I find, the prosecution is able to prove its case of offences punishable under Section 457/366/511/34 of IPC against the accused persons namely, Nazmul Islam and Rahul Amin and, accordingly, both the accused persons are convicted for the offences punishable under Section 457/366/511/34 IPC.....

SENTENCE

Accordingly, convicts Nazmul Islam and Rahul Amin each are sentenced to suffer RI for 01 (one) year and fine of Rs.5,000/- (Rupees Five Thousand) only for offence punishable under Section 457/34 of IPC and a sentence of RI for 02 (two) years and fine of Rs.10,000/- (Rupees Ten Thousand) only for offence punishable under Section 366/511/34 IPC.

Both the above mentioned(substantive) sentences shall run concurrently.

In default of payment of fine of Rs.5,000/- (Rupees Five thousand) only both the convicts are to suffer further RI for 1(one) month and in default of payment of fine of Rs.10,000/- (Rupees Ten thousand) only both the convicts are to suffer further RI for 2 (two) months.....”

[9] The petitioners challenged the judgment in appeal before the Sessions Judge of Unakoti Judicial District, Kailashahar. The learned Sessions Judge by the impugned judgment dated 17.11.2018 affirmed the judgment and order of conviction and sentence passed by the trial court and dismissed the appeal observing as under:

“9. Now, the mens rea of the alleged crime is to be looked into, It is in the evidence of PW 1 that appellant Nazmul Islam sent one marriage proposal to the complainant through her brother-in-law for marrying PW 2, daughter of the complainant, but the complainant did not agree to the proposal of Nazmul and she fixed her daughter's marriage with one Azahar Ul Alam of Bishalgarh as it was settled by her deceased husband during his lifetime. The marriage of the PW 2 was settled on 18.10.2015 and the incident alleged to have occurred on 17.10.2015. IT can easily be presumed that for denying the marriage proposal Nazmul nourished grudge against the complainant and her daughter and when the marriage of PW 2 was fixed on 18.10.2015 appellant Nazmul with a pre plan entered into the house of the complainant and tried to take away PW 2 forcefully. From the side of the defence it is argued that the appellants have been roped falsely. The complainant and her daughter, PW 2 are graduates, as gathered from the evidence and as such, it is hardly believable that the complaining party will fabricate a false case against the appellants one day before marriage putting stigma on PW 2 and the family as well. It is also argued from the side of the defence that out of enmity the appellants have been entangled in a false case as the uncle of the PW 2 lost panchayet election due to the appellants. Enmity cuts in both ways and so it is highly risky to infer that out of enmity the appellants were pushed in a case. Again, from the defence side argument is placed that no electric bulb was seized by the IO by which the appellant were identified. The place of occurrence is at Tilla Bazaar, which is a developed area. The complainant is an educated persona and the PW 2 is a Government servant and their house will be having electricity in all cases. Defence could not prove that on the alleged time incident there was no electricity at Tilla Bazaar area and as

such, the pleas of the defence that the mode of identification is not proved is not a correct proposition. Further, from the defence side it is echoed that no dao was seized by the IO. It is not the prosecution case that the appellants left the dao at the PO. Rahul Amin is alleged to have used the dao and both the appellants ultimately were freed and they went away and as such, the seizure of dao is considered to quite immaterial and insignificant in this case. From the side of the defence it is strongly argued that in this case the IO only recorded statements of the relative witnesses, no independent witness is neither examined by the IO nor deposed before court, though there are so many houses nearby to the house of the complainant and as the incident occurred one day prior to the proposed marriage, there must be lot of gathering of relations in the house of the complainant. But on careful perusal of the evidence on record it is found that on that day no other persons except the inmates of the house of the complainant were present in the house and hearing the cry of the complainant and her daughters only PW 5 and PW6 appeared and they also witnessed the occurrence and in their deposition they clearly unfolded the incident. It is also found from the record that houses of other persons are situated about 200 meters away from the PO. The incident occurred at dead of night and people are expected to be in sound sleep at such hour and so, even a full throat cry may not attract other persons. PW 5 and PW 6 and their mother heard the cry and they accordingly appeared at the spot.

10. Defence could not refute the evidence of the prosecution witnesses. Defence only wanted to shake the credibility of the prosecution witnesses, but efforts are found to be futile and the evidence on record are found to be cogent, corroborative and trustworthy in all points and as such, it is held that the learned trial court arrived at a correct findings in awarding conviction to the appellant. The crimes against women are now a days very much rampant and the offenders should not be indulged in any way by showing any leniency and hence, it is also viewed that the sentence awarded to the appellant is just and proper and is not required to be interfered with.

Learned trial court has already opined regarding the entitlement of the appellant in regard to Probation and it is correctly viewed.

The point is accordingly decided.

ORDER

11. In the result, the instant criminal appeal is dismissed. The judgment of conviction and sentence passed by the learned trial court (learned Assistant Sessions Judge, Unakoti Judicial District, Kailashahar) in Case No. ST 09 (U/K) of 2017, dated 06/10/2018 in respect of the appellants are hereby confirmed. The learned trial court is directed to secure the appellants to serve the period of sentence, if the appellants fail to surrender themselves before the trial court within one month from today.

12. The appeal stands disposed of accordingly.”

[10] The petitioners have challenged the said judgment of the appellate court mainly on the following grounds:

(i). The courts below erroneously arrived at the conclusion of guilt of the petitioners without proper appreciation of evidence.

(ii). The courts below failed to appreciate that except the informant and her daughters, no independent witness supported the prosecution case.

(iii). The courts below relied on the testimony of the witnesses despite serious discrepancies appearing in their statements.

(iv). The trial court as well as the appellate court did not record any reason as to why the benefit of Probation of Offenders Act was not extended to the petitioners.

[11] While arguing in the case on behalf of the accused petitioners Mr. Raju Datta, learned counsel contended that charge under section 457 IPC for commission of lurking house trespass does not survive unless it is established that the accused had taken precautions to conceal his presence. According to Mr. Datta, learned counsel, lurking house trespass or house breaking by night punishable under section 457 IPC is an aggravated form of house trespass and the mere fact that house trespass was committed by night does not make the offence one of lurking house trespass in terms of section 457 IPC unless it is proved against the accused that he committed such trespass after taking precaution to conceal himself. In support of his contention Mr. Datta, learned counsel has relied on the decision of Orissa High Court in *Akhaya Behera Vs. State of Orissa* reported in **1996 CRI. L.J. 334** wherein the Orissa High Court set aside the conviction of the appellant for commission of offence punishable under section 457 IPC observing as under:

"8. I shall first deal with the plea relating to offence punishable under Section 457, IPC. The offence under the said section is an aggravated form of the offence described in Section 456, IPC. In order to support a conviction under Section 457, it is necessary to prove that the lurking house-trespass by night or house breaking by night was committed in order to the committing of any offence punishable with imprisonment. "Lurking house-trespass" is defined in Section 443, IPC, while "lurking house-trespass by night" is defined in Section 444. The said section provides that whoever commits lurking house-trespass after sunset and before sunrise, is said to commit lurking house-trespass by night. "House-trespass" is defined in Section 442. House-trespass may be aggravated by being

committed in a surreptitious or in a violent manner. The former aggravated form of house-trespass is designated as "lurking house-trespass", the latter is designated as "house-breaking". The offence of "criminal trespass" as defined in Section 441, may be aggravated in several ways. It may be aggravated by the way in which it is committed and by the ends for which it is committed. House-trespass in every form may be aggravated by the time at which it is committed. Trespass of this sort has for obvious reasons, always been considered as a more serious offence when committed by night than when committed by day. More aggravated form of that sort of criminal trespass have been designated as house-trespass, lurking house-trespass, house breaking, lurking house-trespass by night and house breaking by night. In order to constitute lurking house-trespass the offender must take some active means to conceal his presence. The mere fact that a house-trespass is committed by night and darkness helped the accused to conceal his presence, does not make the offence one of lurking house-trespass. The mere fact that a house-trespass was committed by night does not make the offence one of lurking house-trespass within the meaning of Section 457. In order to constitute lurking house-trespass, the offender must take some active means to conceal his presence. Where the accused made no attempt to conceal himself offence punishable under Section 457 is not committed.

In the instant case there is no material to show that the accused persons made any attempt to conceal themselves. Therefore, Section 457, IPC has no application. The charge related to commission of offence relating to house-trespass by night punishable under Section 457, IPC. In view of insufficiency of materials about attempt to conceal offence under Section 457, IPC is not made out, as far as the accused persons are concerned."

[12] Mr. Datta, learned counsel also argued that conviction of the petitioners under section 366 IPC was also erroneous because evidence available on record did not establish the essential ingredients of section 366 IPC. According to Mr. Datta, learned counsel, in a case under section 366 IPC, it must

be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. In support of his contention, learned counsel has relied on the decision of the Apex Court in ***Kavita Chandrakant Lakhani Vs. State of Maharashtra & Anr.*** reported in (2018) 6 SCC 664 wherein the Apex Court while examining the maintainability of charge under section 366 IPC in appeal against the order of the trial court framing charge under the said section observed as under:

“21. This Court has time and again held that mere abduction does not bring an accused under the ambit of Section 366 IPC. It must be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

22. It is evident on record that Respondent 2 and the appellant herein were in a relationship which was known to their families also. The primary allegations are that Respondent 2 took her forcibly to his house. But it was not with intent to seduce her to illicit intercourse. Actually, as per the prosecutrix, Respondent 2 first expressed his love for her and afterwards he started beating her with waist belt and using his hands which fact is evident on record. The statement of being molested at the hands of Respondent 2 was not given at once and was given later. The very same acts of Respondent 2 do not

show his intent to abduct her in order to marry her against her will or to force her or seduce her to illicit intercourse.

23. Even if it is proved that Respondent 2 forcibly took her to his house, but the later version that his intention was to marry her or to force or seduce her to illicit intercourse is clearly an afterthought. At the highest, the case can be put that both of them were in a relationship and due to sudden outbreak of emotions or due to sense of insecurity on the part of Respondent 2, the above act was done. Further, the decisions relied upon by learned Senior Counsel for the parties have no application to the facts of the present case.

24. In view of the foregoing discussion, we are of the opinion that the charge under Section 366 IPC is not maintainable and the High Court was right in upholding so. We are in agreement with the order passed by the High Court. However, since the matter is pending since 2003 and is still at the stage of charge-framing, we deem it appropriate to direct the trial Court to conclude the trial within 6 (months) from the date of passing of this judgment. It is also made clear that the observations recorded in this judgment are for the purpose of applicability of Section 366 IPC only and trial Court shall decide the matter on merits. The appeal is dismissed.”

It is submitted by Mr. Datta, learned counsel that neither the offence under section 457 IPC nor the offence under section 366 IPC has been proved against the petitioner. Therefore, the petitioners deserve an order of acquittal.

[13] Mr. S. Debnath, learned Additional Public Prosecutor appearing for the State respondent on the other hand contended that the courts below have concurrently found the petitioners guilty and convicted and sentenced them for committing offence punishable under section 457 & 366 IPC. According to Mr.

Debnath, learned Additional Public Prosecutor, the prosecution witnesses have given consistent and corroborative statements supporting the said charges against the accused petitioners and the courts below by an elaborate judgment after complete reassessment of evidence have found the petitioners guilty. It is submitted by learned Additional Public Prosecutor that no ground has been made out by the petitioners which calls for interference with the said judgments of the courts below. Learned Additional Public Prosecutor, therefore, urges the court for dismissal of the petition.

[14] While advancing their arguments learned counsel of the parties had taken this court to the evidence of the prosecution witnesses.

[15] PW-1 is the mother of the victim who has stated in her examination in chief that the incident occurred during the night on 17.10.2011. While unfolding the backdrop of the case before the trial court, the PW stated that after the death of her husband she got a government job in die-in-harness scheme. The marriage of her elder daughter was settled with Azahar Ul Alam of Bishalgarh during the lifetime of her husband. After the death of her husband, she settled the date of the said marriage of her daughter. Before the date was settled, accused petitioner Najmul Islam sent proposal to her brother in law for marrying the said daughter of the PW. The PW did not agree to his proposal. Marriage of her daughter was then fixed on 18.10.2015. The incident occurred on 17.10.2015 i.e

the day before the marriage of her daughter. At around 02.30 at night, the PW heard someone trying to break open the door of her hut. Before she could do anything, the petitioners entered into her room. The accused petitioner Rahul Amin caught hold of her and gagged her mouth. The other petitioner pulled her said daughter down from her bed and grounded her. Seeing this, younger daughter of the PW raised hue and cry. Brother in laws of the PW were sleeping in the adjoining hut. Following the cry of her daughter they appeared for their rescue. Before they appeared, accused petitioner Rahul Amin left the PW and both the petitioners were trying to take away said daughter of the PW from her house by force. By that time her two nephews arrived and restrained the petitioners from doing any harm to her daughter. One of his nephews caught hold of accused Najmul Islam. The other accused then left for a while and came back with a dao (sharp edged weapon). In fear of injury, her nephew freed accused Rahul Amin. Both of the accused then left the place. The PW then reported the matter to police.

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She was subjected to a lengthy cross examination. She was asked to disclose her educational qualifications. She stated that she was a graduate in arts. Then she was asked why she did not write the FIR herself. She stated that she got the FIR written by her brother in law because she was not in normal frame of mind after the occurrence. Her attention was drawn to her 161 statement where she stated that the wife of her brother in law cried and asked her son to leave

Najmul Islam. The PW confirmed that there was no such statement of her in her police statement. She also stated in answer to the cross examination of the counsel of the accused that she was aware about the availability of police patrolling in her neighbourhood and she was also aware of the border fencing nearby her house and the presence of the flashlight at the BSF check post at the border. She also stated that she did not notice any weapon in the hands of accused Rahul Amin when he entered into her room. She denied the suggestion of the accused that there were iron doors in her house. She also denied the suggestion of the accused that the accused petitioners did not enter into her house and they did not try to take away her daughter from her house. She denied that she lodged the case due to her animosity towards the accused petitioners.

[16] PW-2 is the victim daughter of PW-1. In her examination in chief, she consistently supported her mothers' testimony. It would be appropriate to reproduce her examination in chief which is as under:

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"The incident occurred on 17.10.2015 at around 2.30 am. I was sleeping on a bed along whereas my mother and my sister Sayada Afsana Rahaman were sleeping on a separate bed. It was around 2.30 am when suddenly we heard that someone kicked and broke our door. Two persons rushed into our house. By this time we woke up with the huge sound they created and saw their face in the electric light of our house. One of them was Rahul Amin and another Najmul Isalm. This Najmul pulled me down from my bed and dragged me. By this time my mother came for my rescue and they assaulter her badly. My younger sister raised a huge cry and I also tried to raise my voice. My two cousins namely Sayad Majur Hassan and

MAsum Reja were sleeping in the hut beside my house and they heard the cry and came for our rescue. My cousins arrived at the spot and restrained Najmul Islam but Rahul Amin fled away and came back with a “dao”. He threatened to leave Najmul or else he will kill them. My cousins’ mother i.e. my aunt arrived at the spot and asked them to leave Najmul. Accordingly Najmul and Rahul led free and they went away. My mother lodged this case. I gave statement to a Magistrate at Kailashahar. These are my signature on all the three pages of my statement to the Magistrate marked Ext.2/1, Ext.2/2 and Ext.2/3 respectively. Witness identified both the accused in the dock. The Indo-Bangla border is on the Western side of our house at a distance of 2 Km. Except our relatives there is only one house of Firoz Ali on the adjacent Eastern side. The remaining houses nearby are at a distance and only huge cry may be audible. Najmul Islam was my classmate and I know prior to the incident.”

Counsel of the accused also put her to incisive cross examination with a view to discredit her. During cross examination, she stated that she was a graduate in science. Counsel of the accused suggested to her that the accused petitioners did not enter into their house at the material time and they did not commit any offence. The PW denied the suggestion. It would appear from her evidence that accused failed to impeach her evidence to any extent by cross examination. Rather her evidence was absolutely consistent with the evidence of her mother without the slightest discrepancy.

[17] Similar evidence was given by PW-3 who is another eye witness to the occurrence. She was in the same room with her mother [PW-1] and victim sister. She saw the accused petitioners in their room in the midnight of 17.10.2015. Horrified by the said incidence, the PW raised the alarm. Her cousin

brothers appeared from the adjacent hut. When one of her cousin brothers restrained accused petitioner Najmul Islam, the other accused brought a dao (a sharp edged weapon) and asked her cousin brother to leave Najmul else he would kill him. Then the mother of his cousin brother appeared and cryingly asked her son to leave Najmul. Both the accused petitioners then left the place.

In her cross examination, the PW also denied the suggestion of the accused that they did not enter into their house nor they made any attempt to take away her sister which were denied by the PW. Nothing could be extracted from her to embellish her statement made in her examination in chief.

[18] Abdul Hai [PW-4] is a neighbour of the informant who noticed a crowd in the house of the informant in the morning of 17th October, 2015. He also noticed presence of police at that place. From the members of the crowd, the PW came to know that the accused petitioners entered into the house of the informant in the previous night.

In his cross examination, it was suggested to the PW that he did not come to know that the accused persons entered into the house of the informant in the previous night. The PW denied the suggestion.

[19] Sayad Manjur Hassan [PW-5] is the nephew of the informant who came to save of the informant and her daughters along with his brother during the

fateful night. He has lent corroborative support to the evidence of PW-1, PW-2 & PW-3. His brief examination in chief is as under:

“The incident occurred on 17.10.2015 at around 2.30 am. I was sleeping when suddenly I heard a huge cry. Coming out I saw Rahul Amin and another Najmul Islam is dragging my real cousin Sayada Tarana Rahaman and her mother from their house. Myself and my brother Sayad Masum Reza went for their rescue. We restrained Najmul Islam and started beating him but Rahul Amin fled away and came back with a “dao”. He threatened to leave Najmul or else he will kill us. My mother at this moment cried and told us to leave him. Accordingly Najmul and Rahul was led free and they went away. Witness identified both the accused in the dock.”

During cross examination, the accused petitioners tried to establish that it was a border area and there was constant patrolling around the area. The PW admitted these facts. He also stated that during marriage in their family, guests start pouring in 2/3 days prior to the ceremony and huge decoration takes place in the house which is maintained for 2/3 days. He denied the suggestion of the accused that he made false statement before the court.

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[20] Sayed Masum Reza [PW-6], brother of PW-5 gave similar statement in his examination in chief which is as under:

“The incident occurred on 16.10.2015 at about 2.30 to 3.00 am at night in our house near Tillabazar. At that time I was sleeping in my house. Suddenly I heard hue and cry from the room of my aunt Jabeda Khatun and I and my brother Sayed Manjur Hassan went there and saw that Najmul Islam and Rahul Amin were dragging my sister Sayada Tarana Rahaman

by holding her hand and when we reached there they tried to flee away and we tried to detain them and scuffle occurred in between us and Rahul Amin tried to give a blow on my back with a dao and as we are unarmed they fled away. Thereafter, my aunt Jabeda Khatun filed this case. I can identify Najmul Islam and Rahum Amin and today they are present before the court.”

In his cross examination, he also stated that decoration was made in their house for the marriage of his cousin sister. Nothing could be elucidated from him to impeach his evidence to any extent.

[21] PW-7 is the scribe of the ejahar. He stated that he wrote the ejahar to the dictation of his sister in law.

In his cross examination, it was suggested to him that he wrote the ejahar according to his imagination. He denied the suggestion.

[22] Sri Shyamal Murasingh [PW-8] was the officer in charge of Irani police station who stated in his examination in chief that he received the FIR of PW-1 on 17.10.2015 and after registration of the case endorsed the matter to woman Sub Inspector Aparna Das for investigation.

His cross examination was declined by the accused.

[23] WSI Smt. Aparna Das [PW-9] is the investigating officer who stated that in the course of her investigation she recorded the police statements of

the material witnesses. Statement of the daughter of the informant whom the petitioners tried to abduct was also recorded under section 164(5) Cr.P.C by the Judicial Magistrate. Since the materials collected by her during investigation supported the charges, she filed charge sheet against the accused petitioner. The PW has stated in her examination in chief that she did not try to ascertain as to whether accused Najmul Islam had given any proposal to the mother of the victim for marrying her daughter. She denied that her investigation was perfunctory and the charge sheet was submitted by her mechanically.

[24] It would emerge from the evidence that the core of the allegations against the petitioners are that petitioner Najmul Islam wanted to marry the daughter [PW-2] of the informant and to fulfil his desire he also sent a proposal to the informant. Since the marriage of the said daughter of the informant was already settled with another person while her father was alive, the informant discarded the proposal the petitioner and scheduled the marriage of her daughter on 17.10.2015. In the intervening night between 16.10.2015 and 17.10.2015, accused petitioner Najmul Islam along with the other petitioner made an entry into the house of the informant to abduct her daughter with an intent that she may be compelled to marry him against her will. But their attempt failed short of success because soon after they entered into the house of the informant, the informant and her daughters raised alarm and following their alarm, two nephews of the informant [PW-5 & PW-6] appeared there and prevented the petitioners

from taking away the daughter of the informant. Since they made an attempt to abduct the daughter of the informant to compel her marriage against her will they were fastened with a charge of section 366 read with section 511 IPC and for committing lurking house trespass by night they were also charged with section 457 IPC.

[25] Coming to the charge under section 366 read with section 511 IPC, it appears that the trial court found the evidence of the prosecution witnesses very consistent and coherent and based on their evidence found the petitioners guilty. According to the trial court, it was quite unlikely that the mother of the bridegroom would expose her daughter to such scandal day before her marriage. It was also held by the trial court that no inimical relationship between the family of the informant and the accused petitioners was established. The story of animosity of the brother in law of the informant towards the petitioners due to his defeat in last Panchayat election was too remote to relate to the incident. The trial court, therefore, believed the evidence of the prosecution witnesses and on the basis of their evidence, convicted the petitioners.

[26] The informant and her two daughters have given very consistent and coherent statements at the trial court. At around 02.30 O'clock in the night they heard a robust sound on the door of their room and immediately the two petitioners rushed into their room by breaking open the door. Petitioner Rahul

Amin gagged the informant mother of the victim to prevent her from shouting while the other petitioner caught hold of the victim and tried to take her away. By that time her younger sister who was sleeping in the same room also woke up from sleep and started crying for help. Following their cry, two cousin brothers of the victim came to their rescue from the adjacent house. One of his cousin brothers caught hold of accused Najmul Islam when Rahul Amin, other accused attacked him with a dao. In fear of injury, his brother released the petitioner from his hold.

[27] From a critical analysis of the evidence of PW-1, PW2, PW-3, PW-5 & PW-6, it appears that their evidence is very consistent and coherent. There is no material discrepancy or slightest exaggeration in their evidence. Evidently, the marriage of PW-2 was scheduled on the following day and petitioner Najmul Islam whose marriage proposal with PW-2 was turned down by her mother attempted to abduct her to compel her marriage with him with the aid of accused Rahul Amin day before the solemnization of her marriage. It was quite unlikely that the family members of PW-2 would expose her to such scandal day before her marriage particularly when they had no kind of proven animosity towards the petitioners. The trial court, therefore, committed no wrong in appreciating the evidence and convicting the petitioners for having committed offence punishable under section 366 read with section 511 IPC.

[28] Now, coming to the charge under section 457 IPC, it provides punishment for commission of lurking house trespass or house breaking by night in order to commit an offence punishable with imprisonment. Section 443 IPC defines lurking house trespass. The essential ingredient of lurking house trespass defined under section 443 IPC is that the offender must have taken some kind of precautions to conceal such house trespass from some person who has a right to exclude or eject the trespasser from the building, tent or vessel which is the subject of such trespass. In the case of *Akhaya Behera (Supra)* which has been relied upon by learned counsel of the petitioners, the Orissa High Court also held that in order to constitute lurking house trespass the offenders must take some active means to conceal his presence. Therefore, mere fact that a house trespass was committed by night did not make it lurking house trespass punishable under section 457 IPC.

[29] In the given context, the accused petitioners entered into the dwelling hut of the informant without taking any kind of precautions to conceal their presence. They neither masked themselves nor they tried to avoid any sound. They were so adamant in fulfilling their mission that both of them kicked on the door of the hut together to break open the door of the hut of the informant. Even though the offence under section 457 IPC is not attracted in the case, there are adequate materials to make out an offence punishable under section 448 IPC against the petitioners. Section 448 IPC provides punishment for house trespass

defined under section 442 IPC. It is true that no charge was framed under section 448 IPC against them during trial. But the petitioners would not be prejudiced since a charge was framed under section 457 IPC which is an aggravated form of house trespass. Since it is proved that they had committed house trespass within the meaning of section 442 IPC, their conviction under section 457 IPC is altered to that under section 448 IPC.

[30] With regard to sentence, the trial court seems to have convicted the petitioners to RI for 2 (two) years and fine of Rs.10,000/- with default stipulation for offence punishable under section 366 read with section 511 IPC. Section 511 IPC provides that for an attempt the term of imprisonment of either description may extended to one half of the longer term of imprisonment provided for the main offence or with such fine as is provided for the offence or with both. Therefore, for an attempt to commit offence under section 366 IPC, term of imprisonment of either description may extend to 5 (five) years.

[31] In view of the given facts and circumstances of the case, this court is of the view that sentence awarded to the petitioners for having committed offence punishable under section 366 read with section 511 IPC should be reduced to RI for 1 (one) year with a fine of Rs.2,000/- each in default to SI for 2 (two) months. Since their conviction under section 457 IPC is altered to that under section 448 IPC and the punishment provided under section 448 IPC is

lesser, the accused petitioners are sentenced to imprisonment for 3 (three) months each for committing offence punishable under section 448 IPC.

[32] In the result, conviction of the petitioners under section 366 read with section 511 IPC is upheld. Their sentence is reduced to RI for 1 (one) year and a fine of Rs.2,000/- each and ID to SI for 2 (two) months. Their conviction under section 457 IPC is altered to that under section 448 IPC and they are sentenced to SI for 3 (three) months for the said offence. Both the sentences would run concurrently and the fine, if realized be paid to PW-2.

[33] The criminal revision petition is, thus, allowed in part. The LC record be sent back forthwith. The petitioners are directed to surrender before the trial court within a period of 2 (two) months to serve out the sentence failing which trial court shall take steps in accordance with law to make them suffer the sentence.

In terms of the above, the petition is disposed of. Pending application(s), if any, also stands disposed of.

JUDGE

Rudradeep