

GAHC010029272021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRL.A(J)/9/2021

SAHABUDDIN
S/O. MD. ABDUL ROHIM, R/O. KOROIYANI, BONGALIGAON, P.S. TEZPUR,
DIST. SONITPUR, ASSAM.

VERSUS

THE STATE OF ASSAM
REP. BY PP, ASSAM.

Advocate for the Petitioner : MS R D MAZUMDAR, AMICUS CURIAE,

Advocate for the Respondent : PP, ASSAM,

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGEMENT AND ORDER (ORAL)

Date : 05-09-2024

1. Heard Ms. R.D. Mozumdar, learned Amicus Curiae for the appellant and Mr. R.R. Kaushik, learned Additional Public Prosecutor for the respondent.
2. Md. Sahabuddin (hereinafter will be referred to as the appellant) has preferred this appeal challenging the judgment and order dated 24.12.2019, passed by the learned Sessions

Judge (FTC), Sonitpur at Tezpur convicting the appellant under Section 376 of the Indian Penal Code, 1860 (IPC, for short) to undergo Rigorous Imprisonment for 7 (Seven) years and to pay a fine of Rs.5000/- (Rupees Five Thousand) with default stipulation.

3. The Criminal Case was set in motion by an FIR lodged by the informant 'Y' on 08.10.2017, alleging that since 1 ½ months, the appellant used to visit his house frequently and taking advantage of the absence of his family members, the appellant committed rape on his specially abled sister (hereinafter also referred to as 'X' or the victim) aged about 18/19 years. Her menstrual cycle stopped and on being confronted by the family members, the victim informed them about the entire incident and how she was impregnated. A GD entry being 62, dated 04.10.2017 was registered and the same was forwarded from Borghat Out Post to Tezpur Police Station and Tezpur Police Station Case No. 2024/2017 was registered under Section 376 IPC and investigation commenced.

4. The Investigating Office (IO, for short) embarked upon the investigation and after completion of investigation, he submitted charge sheet against the appellant under Section 376 IPC. On appearance of the appellant, this case was committed to the Court of Sessions Judge, which was subsequently transferred to the Additional Sessions Judge (FTC), Sonitpur for disposal. At the commencement of trial, a formal charge under Section 376 IPC was framed, read over and explained to the appellant who abjured his guilt and claimed innocence.

5. To substantiate its stance, the prosecution adduced the evidence of 7 (Seven) witnesses and exhibited several documents and the defence cross examined the witnesses to refute the charges and also examined one witness. On the incriminating circumstances projected

through the evidence of the witnesses by the prosecution, several questions were asked to the appellant under Section 313 of Code of Criminal Procedure, 1973 (CrPC for short) and the appellant took the plea of total denial.

6. The trend of cross examination of the witnesses reveals that the plea of the appellant is that a false case has been brought up against him to avenge the land dispute prevailing between him and the victim's family.

7. Learned Trial Court delineated the following points to decide this case :

“(1) Whether the accused person, about 1-1 ½ months prior to 04-10-2017 at Koroiyani Bengali gaon under Tezpur PS, committed rape on victim "X"?”

Submissions for the Appellant : -

8. Learned *Amicus Curiae* laid stress in her argument that admittedly there was a delay in lodging the FIR. The FIR was lodged after the victim was found to be pregnant. This delay in lodging the FIR exonerates the appellant. Learned counsel for the appellant laid stress in her argument that the FIR and the evidence of PW-1 and PW-2 reveals that the appellant assaulted the victim about 1 ½ months back, whereas the victim stated that in her evidence and in her statement under Section 164 CrPC that the incident occurred about 2 (two) years back. This contradiction also extends a benefit of doubt to the appellant. Not a single independent witness, who was present in the Mel (Bichar), was examined by the prosecution. All the witnesses are interested witnesses as they are all family members. No documents relating to abortion of the victim, were exhibited as evidence. The abortion of the victim was not proved neither was the paternity of the child proved.

9. It is further emphasized through the argument that when the statement of the victim was recorded under Section 164 CrPC, presence of victim's elder sister with the victim in the Magistrate's chamber has surfaced. This statement of the victim under Section 164 CrPC cannot be accepted as evidence as the victim's elder sister has interpreted the victim's gestures as it has been claimed that the victim was specially abled. The victim was short of hearing and she could not speak properly and thus, the victim's sister interpreted the gestures of the victim to the Magistrate when the statement of victim under Section 164 CrPC was recorded. The remaining part of the argument of the learned counsel for the appellant will be discussed at the appropriate stage.

Argument by the prosecution : -

10. Learned Additional Public Prosecutor Mr. R.R. Kaushik laid stress in his argument that the statement of the victim under Section 164 CrPC has been substantiated by her evidence. The evidence of the victim is reliable. In cases of rape, sole evidence of the victim can be relied upon to bring home the charges against the appellant. The evidence of the prosecution witnesses clearly reveal that the victim was impregnated by the appellant. The evidence of the Medical Officer has affirmed that the victim was pregnant at the time of examination. The victim was immediately examined after it was discernible that she was pregnant. She was missing her menstrual periods and her elder sister confronted the victim and the victim revealed that the appellant had committed forceful sexual assault on her.

11. It is submitted by the learned Additional Public Prosecutor that in this case, no document of abortion is required nor any paternity test is required as this is a case of sexual assault and it has been proved beyond a reasonable doubt that the appellant has committed

the offence of sexual assault. The victim and her family members are from a rural area and such offences are a taboo in the society and this is the reason why the victim could not immediately inform her family members about the incident.

12. Learned Additional Public Prosecutor has relied on the decision of the Hon'ble Supreme Court in ***Ranjit Hazarika –Vs- State of Assam;*** reported in **(1998) 8 SCC 635**. The remaining part of argument of the learned Additional Public Prosecutor will be discussed at the appropriate stage.

13. Now the question that arises for consideration is that whether the Trial Court has erred while convicting the appellant under Section 376 IPC.

Discussions and decision : -

14. To decide this case in its proper perspective, the evidence is re-appreciated. 'Y' is the elder brother of the victim and he has testified as PW-1 that he is the informant of this case. The incident occurred about 15 (fifteen) months ago. His old mother, his wife and two sisters reside with him in the same household. His sister 'X' is physically challenged and she stays indoors most of the times. Few days, prior to the lodgment of the FIR, his elder sister noticed that the victim was not having her menstrual periods. On being confronted, the victim 'X' informed that in the absence of family members, the appellant used to visit her and he forcefully maintained physical relationship with her and threatened her with death. The appellant also promised to marry her. His elder sister then informed them about the incident and he too confronted the victim. The victim then informed him about the entire incident. His elder sister also stated that she had noticed the appellant visiting their house frequently for

the last 1 ½ months prior to the lodgment of the FIR.

15. PW-1 further deposed that he informed the matter to the villagers and a meeting was called in the village and the appellant admitted that he had been maintaining a physical relationship with his sister and the appellant tried to compensate by money, but they did not accept the money. He lodged the FIR. He has proved the FIR as Exhibit-1 and his signature on the FIR as Exhibit-1(1). He further deposed that one scribe wrote the FIR according to his narration.

16. PW-1 further stated that police forwarded his sister to the doctor and the doctor has confirmed that his sister was pregnant. After a few days, his sister complained of severe stomachache and she was taken to TMCH where the doctor provided medicine and, the victim's pregnancy was terminated.

17. In his cross examination PW-1 deposed that the village Mel was held in Ali Akbar's house and 20-30 people were present in the village Mel amongst whom, Abdul Barek and Abdul Hakim were prominent members. He has also admitted that his sister i.e. the victim can talk but she cannot talk normally and a stranger cannot easily understand her signs and gestures but they (family members) can easily understand her gestures and speech.

18. It is pertinent to mention at this juncture that the learned Amicus Curiae for the appellant has emphasized through her argument that the victim cannot be categorized as deaf or dumb. The victim can speak despite the fact that her speech may be slurred. Through her gestures she could convey her message.

19. It is true that contradictions could also be elicited through the cross-examination of PW-

1, as per Section 145 of the Indian Evidence Act, 1872 (The Evidence Act, for short) qua Section 162 of the CrPC.

20. It has been affirmed by the IO, Nilutpal Bhuyan, who deposed as PW-7 that, PW-1 has not mentioned in his initial statement that in the village meeting, the appellant was present and he admitted his relationship with the victim and offered to pay compensation, but the informant did not accept the compensation. He has also not mentioned in his initial statement that about 1-½ months prior to the incident, his sister had noticed the appellant visiting their house frequently. Will these contradictions cause a dent in the evidence?

21. PW-1 has also admitted about a land dispute between both the sides. He has admitted that his uncle Joynal Abedin provided land to the appellant's father as they had no landed property of their own.

22. Smt Wahida Khatun deposed as PW-2 that, X is her sister. The incident occurred about 1 ½ years ago. She noticed that her sister was not having her menstrual periods. On being confronted, her sister informed that the appellant forcefully maintained physical relationship with her (victim X) 4 or 5 times. Whenever she (victim) was alone at home, the appellant used to visit her and he committed sexual intercourse with her about 1 ½ months before the fateful day when the victim's pregnancy was discovered.

23. PW-2 further deposed that she informed her brother about the incident. She has further stated that her sister is physically handicapped. Her sister (X) had a hearing problem and she could not talk properly. A meeting was held to discuss about the incident and the appellant, who was present in the meeting, admitted that he maintained physical relationship with her

sister, X. In her cross-examination, PW-2 deposed that she resides in her parental home along with her husband. She is an Asha worker and she regularly visits the Kanaklata Civil Hospital at Panchmile and she is well acquainted with the doctors and the employees. She has further deposed that the informant, Y resides in the same compound but in a separate house. The Police did not record her statement (under 161 CrPC). She accompanied her victim sister to the Court and her sister's statement was recorded in her presence. While the Magistrate recorded her sister's statement, she interpreted the victim's speech as the Magistrate found it difficult to understand the victim's slurred or mumbling speech.

24. This witness was cross-examined *in extenso*. Several questions were asked relating to her initial statement under Section 161 CrPC, but as this witness has already stated that the Police did not record her statement, it is not required to dilate further on the cross-examination relating to her earlier statements. She has also admitted in her cross-examination that they did not inform the doctor, Police or the Court regarding the miscarriage of the victim. PW-2 further testified that several days after her miscarriage, the victim, X was taken to the doctor as the victim was suffering from gall bladder stone.

25. At this juncture, it is pertinent to mention that the learned counsel for the appellant laid stress in her argument that this evidence of PW-4 has been contradicted by the evidence of PW-6. PW-6 has stated that their family members took steps for abortion of the foetus, as the victim, X was suffering from appendicitis. PW-6 is the brother-in-law of the victim, X. However, it is held that these dissimilarities relating to gall bladder stone and appendicitis are minor contradictions and can be safely brushed aside.

26. In sync with the evidence of PW-1, PW-2 has also admitted in her cross-examination

that the appellant's grandfather (father of his step mother,) provided 1 Katha of landed property to the appellant's father as they had no place to stay.

27. By projecting that the appellant and his father were provided with land, the appellant took the plea that due to the prevailing land dispute between both the parties and as the victim's family members were desirous to evict the appellant from his property, they have brought up a false case against the appellant.

28. Now, after scrutinizing the evidence of PW-1, 2 and 3, it can be held that there is not even an iota of doubt that the victim was pregnant at the time of the incident and a gift of landed property has been admitted by the prosecution witnesses, but the question that has to be considered is whether the appellant committed sexual assault on the victim and whether the appellant forcefully impregnated the victim and committed the offence of rape.

29. The victim, X deposed as PW-3 that the appellant is known to her. During absence of the other members of the family, the appellant used to visit her and he used to gag her by her mouth and commit rape on her and in this manner, he committed rape on her on 4 or 5 occasions, after disrobing her. She has proved her statement under Section 164 CrPC as Exhibit-2 and Exhibit 2 (1) and Exhibit-2(2) are her signatures.

30. The learned counsel for the appellant laid stress in her argument that PW-1, informant deposed that the appellant threatened the victim with dire consequences and thereafter, he committed rape on her, whereas the evidence of the victim does not reveal that the appellant had threatened to eliminate her. It is submitted that due to several dissimilarities surfacing in the evidence of the witnesses, a benefit of doubt ought to be extended to the appellant. PW-

3 has mentioned in her cross-examination that the appellant committed rape on her during the daytime, whereas on the contrary, PW-1 stated in his deposition that the appellant committed rape on her at night. PW-3 has admitted that she did not inform about the offence of rape to her family members, but she has not stated that as she was terrified and was under duress, she refrained from informing about the incident of rape.

31. I therefore find substance in the submission of the learned counsel for the appellant.

32. PW-3 further testified in her cross-examination that a village meeting was held.

33. It is apt to mention at this juncture that the demeanour of the witness was recorded by the learned trial Court. It was observed that the witness had hearing problem, but she could understand Bengali properly and she could answer the questions and she also used gestures while answering the questions. The trial Court has also observed mood swings and observed that at times, the witness did not reply to the questions posed to her.

34. Another witness, 'Z' deposed as PW-4 that the victim is her sister-in-law. The incident occurred about 1 ½ years/2 years back. Her other sister-in-law Wahida Khatoon informed her that the victim has skipped her menstrual periods. They confronted the victim and the victim then informed them that the appellant committed rape on her. As she was terrified she did not disclose the incident to the family members. The appellant threatened the victim with death. Her husband (PW-1) lodged the FIR. A village meeting was held. Her husband informed her that the appellant proposed to compensate the victim, but her husband refused. The doctor detected pregnancy on examination of the victim.

35. The learned counsel for the appellant laid stress in her argument that the

embellishment in the evidence can be taken note of. PW-3 never mentioned that the appellant threatened her with dire consequences. The evidence of PW-3 clearly reveals that the appellant gagged her by her mouth and committed rape on her, whereas, on the contrary, the other witnesses, PW-1 and PW-4 exaggerated the incident by adding that the appellant threatened the victim with her life. The embellishment and exaggeration, of course, cannot be ignored and I therefore, find force in the argument of the learned counsel for the appellant. This Court cannot be oblivious of the fact that the victim who was carrying for 5 weeks 6 days, kept mum and did not disclose about her pregnancy despite the allegation that she was forcefully assaulted by the appellant continuously for 4 or 5 days. This casts a shadow of doubt over the veracity of her evidence. PW-3 disclosed about her pregnancy when her sister realized that she was not having her menstrual periods and when she was confronted by all her family members, she informed them about the entire incident. She has not stated that she was under any threat or duress which prevented her from revealing about the incident.

36. Learned Additional Public Prosecutor has submitted that in ***Ranjit Hazarika's case (supra)***, it has been held and observed that-

“6. The evidence of the prosecutrix in this case inspires confidence. Nothing has been suggested by the defence as to why she should not be believed or why she would falsely implicate the appellant. We are unable to agree with the learned counsel for the appellant that in the absence of corroboration of the statement of the prosecutrix by the medical opinion, the conviction of the appellant is bad. The prosecutrix of a sex offence is a

victim of a crime and there is no requirement of law which requires that her testimony cannot be accepted unless corroborated. In State of Punjab v. Gurmit Singh, to which one of us (Anand, J.) was a party, while dealing with this aspect 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 or 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. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a

victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

We are in agreement with the aforesaid view."

37. Reverting back to this case, it is held that the victim immediately did not inform her family members about the incident. She was assaulted for 4 or 5 days and she chose to remain mum and when she was confronted due to her missing menstrual periods, she revealed about the sexual assault. Moreover, the evidence of the prosecution witnesses is not similar. According to the victim, the incident has been occurring for 2 years, whereas according to the evidence of PW-1 and PW-2, the incident has been occurring for about 1 ½

months. Major contradictions also could be elicited through the cross-examination of the witnesses and the IO. So, this is not a case where there are no glaring contradictions. Major contradictions could be elicited through the cross-examination of the witnesses as well as through cross-examination of the IO and several discrepancies emerged in the evidence of the witnesses. The cross-examination of the IO reveals that PW-4 has not mentioned before the IO that a village meeting was held and later her husband informed them that the appellant proposed to compensate the victim by paying money. This has been contradicted by the cross-examination of the PW-4, vis-à-vis the cross-examination of the IO. Moreover, PW-4 has also admitted in her cross-examination that the victim's problem of hearing is negligible. Benefit of doubt has to be extended to the appellant. It is discernible that the appellant promised to marry the victim. The victim did not disclose about any sexual assault despite the fact that she has alleged that the appellant committed sexual assault on her for 4/5 days and he also promised to marry her. When tell tale signs could be detected, the victim disclosed about the incident.

38. Another witness, Md Aminul Islam deposed as PW-6 that the informant is his brother and the victim is his sister-in-law. The incident occurred about 1 year 8 months back. His wife informed him that the victim was not having her normal menstrual cycle. He learnt that the victim was impregnated by the appellant who committed rape on her. The appellant threatened the victim not to divulge about the incident. He then went and confronted the appellant, who admitted that he had committed the offence and he offered Rs. 5,000/-. The appellant also admitted that he committed rape on the victim on 3 or 4 occasions. The evidence of the PW-6 has been contradicted by the evidence of the IO. The cross-examination of the PW-6, vis-à-vis the cross-examination of the IO, PW-7, reveals that PW-6

has not mentioned before the IO that he learnt from his wife that the appellant committed rape on the victim. The IO has also affirmed that PW-6 did not state under Section 161 CrPC that on the next day, he confronted the appellant and the appellant admitted that he committed rape on the victim on 3 or 4 occasions and the appellant also offered Rs. 5,000/- as compensation, but he did not accept the money as the incident was a grave incident. The IO, PW-7 has also affirmed that PW-6 has not mentioned in his initial statement that a village meeting was held.

39. It can thus be held that the evidence of PW-6 cannot be relied to convict an accused of such a grave offence. A grave offence has to be proved with convincing evidence and beyond a reasonable doubt without contradictions and discrepancies. The graver the offence the stricter the proof. This Court cannot be oblivious of the fact that when it was unearthed that the victim was pregnant, the family members of the victim went ahead with the abortion of the victim. The evidence of the witnesses who are also family members, clearly reveals that the victim was taken for abortion.

40. PW-2 has categorically admitted that the victim had suffered miscarriage at home itself and the victim was taken to the doctor after many days of her miscarriage as she was suffering from gall bladder stone. They never informed the doctor, Police or Court about the victim's miscarriage.

41. The Medical Officer, Dr Amarjit Kour, deposed as PW-5, that on 04.10.2017, while posted as SDM & HO at Kanaklata Civil Hospital, Tezpur, she examined the victim, X. According to her opinion, the victim was pregnant and the gestational age was 5 weeks 6 days. She has proved the Medico-Legal Report as Exhibit-3 and Exhibit-3(1) as her signature.

42. The IO Sri Nilutpal Bhuyan has conducted the investigation and his evidence clearly reveals that the evidence of PW-1, PW-2, PW-4 and PW-6 is contradictory to their statements under Section 161 CrPC. His evidence reveals that on 04.10.2018, he was posted at Borghat Police Outpost as In-charge. On receiving the FIR, from Y, he registered a GD Entry and forwarded the FIR to the Tezpur Police Station. He was entrusted with the investigation and he embarked upon the investigation. He has proved the sketch map of the place of occurrence (PO, for short), as Exhibit-4 and Exhibit-4 (1), as his signature. On completion of investigation, he submitted charge sheet and he has proved his charge sheet as Exhibit-5 (1).

43. Md Saidul Haque is the defence witness and he deposed that about 1-2 years back, a meeting was called by the appellant's father in connection with land and in the meeting, the appellant's father informed that the land occupied by them and under their possession, was gifted to him by his father-in-law and now, after the death of his father-in-law, the informant is claiming back the land.

44. The cross-examination of this witness is not noteworthy.

45. It is true that the appellant tried to project a land dispute between the parties and has pleaded that false case was slammed against him but the appellant gets the benefit of doubt due to the contradictions elicited through the cross-examination of the witnesses vis-à-vis the cross-examination of the IO. Several dissimilarities have emerged. The discrepancies cannot be ignored. The appellant deserves a benefit of doubt.

46. In the wake of the foregoing discussions, it is held that the prosecution has failed to prove this case beyond a reasonable doubt. The appellant is acquitted from the charges

under Section 376 IPC, on benefit of doubt and he is set at liberty forthwith.

47. However, keeping in view the provisions of Section 437-A CrPC/481 BNSS, the accused appellant is directed to furnish a personal bond in the sum of Rs. 40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months.

48. Send back the Trial Court Records.

JUDGE

Comparing Assistant