

GAHC010003372012



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

Case No. : CrI.A./26/2012

DHANESWAR DAS
S/O SRI SUREN DAS, R/O VILL. BATHAN, P.O. SUALKUCHI, ASSAM.

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR.S S SHARMA

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

Date : 07-08-2023

1. Heard Mr. H Buragohain, learned counsel for the appellant and Mr. K.K. Parashar, learned Addl. PP, appearing for the State of Assam.
2. The present appeal is directed against the impugned judgment and order dated 30.01.2012 passed by the learned Sessions Judge, Kamrup, Guwahati in Sessions Case No.98(K)/2007, sentencing the

accused to undergo rigorous imprisonment for 7 (seven) years and to pay a fine of Rs.2,000/- in default to undergo further rigorous imprisonment for 2 (two) months.

3. The prosecution was launched on the basis of an FIR filed by the PW-1 the father of the victim girl. According to FIR, the informant who was hospitalized for some disease, after coming back from the hospital on 07.08.2005 he was informed that at around 2.00 PM on 04.08.2005 when his elder daughter had gone to the back of his house to attend nature's call, the accused had taken her to a newly built house in the backside of the backyard pulling her by the hand and threatening her if she scream and tried to commit rape on her.

4. On receipt of the said FIR, Sualkuchi PS case No.64/2005 (corresponding to GR Case No.187/2005) under sections 376/511 was registered. Accordingly, investigation was started, the victim was medically examined, her vaginal swabs were taken, the victim's statement under section 164 Cr.P.C. was recorded before the Magistrate, the witnesses were examined and thereafter the investigating officer laid charge sheet under section 376 IPC.

5. Thereafter, the committal court committed the matter to the learned Sessions Judge, Kamrup to try the case. Charges were framed on 21.09.2007 against the appellant and the charge was read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried. Accordingly, the trial was commenced.

6. To bring home the charges, the prosecution side examined as many as 11 witnesses including the victim as PW-5 and the Doctor who examined the victim. The defence did not led any evidence, however,

his statement under section 313 Cr.P.C was recorded and finally by the impugned judgment and order, the appellant was convicted under section 376 IPC and was sentenced to undergo rigorous imprisonment for a period of 7 years and to pay a fine of Rs.2,000/- and in default to undergo further rigorous imprisonment for another 2 (two) months for the offence committed under section 376 IPC. Assailing such judgment of conviction and sentence, the present criminal appeal is filed before this Court.

7. On the basis of the materials available on record, the learned court below convicted the appellant as discussed hereinabove which is under challenge in the present case. Before determining the legality and validity of the aforesaid judgment, let us first consider the deposition of the witnesses.

I. PW-5 Smti. X, the victim (name is withheld as she was a minor at the relevant point of time of commission of offence) deposed that she knows the accused in the dock. In the year 2005 on a particular date at around 2-2.30 pm, when she went to the backyard of her house, suddenly the accused came there, caught hold of her by the hand and dragged her to a half built school nearby. She wanted to shout but the accused gagged her mouth. He raped her therein and thereafter, she came back to her home as her parents were not at home for the reason that her father was at hospital. She informed the matter to her mother after 2 (two) days when her mother came back from hospital. According to her, at the relevant point of time she was reading in class VIII and was aged about 14/15 years. Police asked about the incident and she was examined by the doctor and her statement was recorded by the Magistrate. She proved her statement as exhibit-2 and

her signature as exhibit-2(1) and 2(2). She submits that subsequently, she was married to another boy. During her cross-examination, she reiterated her statement given during the examination-in-chief and denied the suggestion that she had love affair with the accused and she wrote love letter to him and that her name is Pretty. During cross-examination, she deposed that she was wearing churidar at the relevant point of time but she did not observe what the accused was wearing. During cross-examination she specifically stated that the accused penetrated his genital into her female organ (vagina). She further denied the suggestion of the defence that the accused did not rape her but allegation has been made as he refused her offer to love him. She also denied that she has not stated before the I/O that the accused did not rape her.

II. **PW-11 Dr. Tapan Das** examined the victim on 10.08.2005. According to him, the victim was accompanied by her mother and one police constable. The victim was physically examined as well as radiological examination was also done by him including the collection of vaginal swab. He deposed that evidence of injury on her body or private parts were not clinically detected. It was also deposed that vaginal smears were taken on glass slides and were sent for laboratory investigation. On the basis of radiological report the Professor of the Radiology Medical College Hospital opined that the vaginal examination does not show present of spermatozoa and gonococci. On the basis of physical examination, radiological and laboratorial investigation done the doctor opined that

a. Genital examination findings are suggestive of forceful sexual intercourse.

b. No injury marks is detected on her body or private parts.

c. Her age is about 14 years and below 16 years.

III. During cross-examination, he deposed that he had not mentioned that the instrument used at the time of radiological examination were tested prior to examination of the victim girl.

IV. **PW-10** is the Professor and Head of Forensic Medicine, GMCH. He also opined that genital examination findings are suggestive of forceful sexual intercourse. He only forwarded the report of the PW-11 who was the radiologist and he opined on the basis of the report given by the PW-11.

V. **PW-1** is the father of the victim who lodged the FIR. He repeated the statement as written in the FIR with an additional fact that he was hospitalized due to his gastric burst. He proved the FIR as exhibit-1 and his signature as exhibit-1(1) and exhibit-1(2). During cross-examination, he deposed that his wife PW-2 went to the hospital while he was undergoing treatment as indoor patient and the hospital is about $\frac{3}{4}$ km from their house. He also deposed during cross examination that his wife PW-2 used to visit his house often during his stay in the hospital. He also deposed that the victim and two other daughters also went to the hospital to enquire about his health. He further deposed that his victim daughter got married in the month of November/December in that year. He deposed that he knows the accused but did not write the FIR himself. He deposed that he could not say if the accused committed raped upon the victim.

VI. **PW-2** is the mother of the victim. She also deposed regarding the illness of her husband and his stay at the hospital and also that the victim along with two others minor daughters were at their

residence. She deposed that at the relevant point of time the victim was a student of class – VIII and she took tuition at the house of the accused and she stopped tuition after knowing that the victim was developing some affairs with the accused. She further deposed that on the date of the alleged incident, the victim was taken to backyard and she was raped and she was informed by the victim on her return from hospital on the 8th day i.e., next day. She further deposed that she reported the matter to her husband on his coming back from the hospital and they filed the FIR. During the cross-examination nothing substantial was extracted from her except the fact that the victim had already been married and two years back she had given birth to a female child. During cross-examination, she deposed that her daughter's cloths were torn away by the accused.

VII. **PW-3** is the neighbour of the victim. She deposed that she knows nothing about the occurrence and deposed that the victim loved number of boys. She was not cross examined.

VIII. **PW-4** is the uncle of the victim. He deposed that he is the scribe of the FIR and he read over the same to his elder brother, the informant and he proved his signature in the FIR as exhibit-1. During cross-examination he deposed that on the instruction of his elder brother he wrote the FIR. He further deposed during cross examination that he has not mentioned in the FIR that he has read over the FIR to the informant.

IX. **PW-6** is the aunt of the victim. She deposed that she knows the victim girl and the victim girl had a love affair with the accused at the relevant point of time. She said that at the time of the occurrence she was not at her house so she knows nothing what

happened to the victim and the accused.

X. **PW-7** is the IO who started the preliminary investigation. According to him, he proceeded to the place of occurrence, prepared sketch map and exhibited the same. He also examined the witnesses. According to him, the victim was not found in her house and asked her family to produce her before the police station. He tried to apprehend the accused but could not locate him. On 09.08.2005, the victim was produced before the police station by the guardian of the victim and she was examined under section 161 Cr.P.C., however, in the meantime he was transferred and handed over the case diary to the officer in charge. During-examination cross he has not stated anything regarding delay of four days in filing the ejahar. He denied the suggestion that the victim did not state before him that the accused tried to rape her but she was not raped by the accused. The statement under section 161 Cr.P.C., was proved as exhibit-4.

XI. **PW-8** is another investigating officer who entered into the investigation at a later stage and he found that the case was pending for too long for the reason of non collection of medical report. Therefore, after collecting the medical report he filed the charge sheet and after examining the medical report he exhibited the same as exhibit-5. During cross examination he submitted that he did not perform any investigation and only submitted the charge sheet on the basis of the investigation already done.

XII. **PW-9** is the police person who registered the FIR in question. He also proved the ejahar as exhibit-1 and his signature as exhibit-1(1). He deposed that he sent the girl for medical examination arrested the accused and forwarded him to custody and thereafter he

was transferred. He admitted during cross-examination that there was a delay in lodging the FIR but he did not enquire about the cause of delay in lodging the FIR.

9. The learned counsel for the appellant assailing the impugned judgment and conviction submits the following arguments:

- Firstly that the FIR was filed at a belated stage, that itself shows that it was a concocted story inasmuch as the PW-6 aunt admitted that there was a love affair between the accused and the victim. Such fact was also corroborated by the PW-2, the mother of the victim. Therefore, the testimony of the prosecutrix is not trustworthy and on the basis such sole evidence, the appellant could not have been convicted.
- Secondly, the learned counsel for the appellant argues that in the FIR and in the 161 statement the accused was only alleged to have made an attempt of rape, however a serious and material improvement was made before the court as well as while recording her statement under 164 that she had been raped. Therefore, on this count also the prosecutrix cannot be said to be trustworthy that there was no rape is also evident from the evidence of the doctor as no injury mark has either been found in the body or the private part of the prosecutrix. Therefore, the prosecution has miserably failed to prove the case beyond reasonable doubt.
- The learned counsel for the petitioner submits that even if there was a sexual relation, it was a consensual relation inasmuch as the age of the girl itself is doubtful for the reason that the informant's father has deposed that on the same year

the marriage of the victim was solemnised and she was more than 18 years. Therefore such vital material facts having been ignored, the impugned judgment is not sustainable in law.

Accordingly, the same is liable to be set aside.

10. Per contra, Mr. Borthakur, learned Addl. PP submits that in a case of sexual offence on the basis of sole testimony of the prosecutrix a person can be convicted. In the case in hand, in the FIR though there was an allegation of attempt of rape, however, such FIR was lodged by the father of the victim and was written by her uncle. Mr. Borthakur, further contends that FIR cannot be an encyclopedia and during investigation as well as during trial it was established beyond reasonable doubt that it is the accused appellant who committed the rape upon the minor girl. While further arguing Mr. Borthakur submits that the evidence/testimony of the prosecutrix remains unshaken during the trial rather during cross examination she has reaffirmed the sexual penetration by the accused. The medical evidence further corroborates that the test conducted is suggestive of having a forceful sexual assault. Therefore, the unshaken testimony of the prosecutrix has also been corroborated by the evidence of the doctor and therefore the prosecution has been able to establish beyond reasonable doubt that it is the appellant and none other that has committed rape upon the minor girl.

11. This court has given anxious consideration to the arguments advanced by the learned counsel for the parties and also perused the materials available on record.

12. From the evidence on record as discussed herein above, this court can have the following unhesitant conclusion:

- The victim was aged between 14-16 years and as such she was a minor. Such conclusion is drawn on the basis of the testimony of the victim herself, the mother of the victim as well as on the basis of the radiological report.
- The evidence of the victim remained unshaken that on the fateful day at around 2-2.30 pm she was forcefully sexually penetrated/raped by the accused.
- As discussed herein above, the allegation of rape and sexual penetration was not only testified by the victim during her evidence in chief that she had further she reaffirmed it during the cross examination.
- Such testimony is corroborated by the medico legal report which discloses that " The genital examination findings are suggestive of forceful sexual intercourse".
- From the evidence of the prosecutrix this court is not having any doubt upon the testimonies of the prosecutrix/victim. Her testimony is reliable and trustworthy.

13. The Hon'ble Apex court in the case of ***Ganesan Vs. State represented by its Inspector of Police*** reported in ***(2020) 10 SCC 557***, ***Santosh Prasad @ Santosh Kumar vs. The State Of Bihar*** reported in ***(2020) 3 SCC 443*** in no unambiguous term held that law is well settled that there can be a conviction when the victim/prosecutrix's deposition is deemed to be trustworthy, immaculate and credible and her evidence is of pristine quality.

14. In the case in hand, as held by the Hon'ble Apex court in the case of ***State of Maharashtra Vs. Chandraprakash Kewal Chand Jain*** reported in ***1990 AIR 658***, the victim is not an accomplice to the crime

but is a victim of another person's lust and therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. In the present case, the victim's evidence not only in the considered opinion of this court is trustworthy and of sterling quality but also her testimony and deposition has been fully corroborated by the medical evidence that rape was committed by the accused.

15. In view of the foregoing finding, this court is of the view that the learned trial court has not committed any error either in law or fact in convicting the appellant. Accordingly, the impugned judgment and sentence dated 30.01.2012 passed by the learned Sessions Judge, Kamrup, Guwahati in Sessions Case No.98(K)/2007 is upheld.

16. Send down the LCR to the Court of the learned Sessions Judge, Kamrup, Guwahati with a copy of this judgment and order.

17. This Court noticed that while convicting the appellant, the learned trial Court did not pass any order for payment of compensation to the victim or her family members as contemplated under section 357A of the Cr.P.C. It is also brought to the notice of this Court that there is a scheme prepared by the State of Assam under sub-section 9 of clause 5 of the Assam Victim Compensation Scheme, 2012 as notified on 05.03.2016 and which has also been revised on 01.02.2019, if that is so, let the compensation fixed by the State in terms of the aforesaid notification dated 01.02.2019 be paid to the victim after making necessary verification.

18. The aforesaid exercise will be carried out in association with the District Legal Services Authority, Kamrup at the earliest and preferably within a period of 3 months from the date of receipt of a copy of this order.

19. A copy of this order be furnished to the Secretary, District Legal Services Authority, Kamrup.

JUDGE

Comparing Assistant