

GAHC010005682011



## IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

### CRL. APPEAL No. 78 OF 2011

1. Md. Abdul Karim Bhuyan @ Abdul Kasim Bhuyan,  
S/o- Nur Uddin Bhuyan,  
Village- Tinthengia, P.S. Bihpuria,  
Dist- Lakhimpur, Assam.
2. Md. Abdul Wahab,  
S/o- Sabed Ali,  
Village- Ahmedpur No. II, P.S. Bihpuria,  
Dist- Lakhimpur, Assam.
3. Md. Osman Ali,  
S/o- Innas Ali,  
Village- Daulatepur, P.S. Bihpuria, Dist- Lakhimpur,  
Assam.

.....**Appellants**

**-Versus-**

The State of Assam

.....**Respondent**

**:: BEFORE ::**  
**HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA**

For the Appellants :Mr. N. Uddin, Advocate

For the Respondent :Ms. B. Bhuyan,  
Additional Public Prosecutor, Assam.

Date of Judgment :14.09.2023

**JUDGMENT & ORDER**

**1.** Heard Mr. N.Uddin, learned counsel for the appellants. Also heard Ms. B. Bhuyan, learned Additional Public Prosecutor, representing the State of Assam.

**2.** This criminal appeal has been filed under Section 374 of the Code of Criminal Procedure, 1973 by the appellants, namely, *1. Md. Abdul Karim Bhuyan @ Abdul Kasim Bhuyan, 2. Md. Abdul Wahab & 3. Md. Osman Ali*, impugning the Judgment and Order dated 05.01.2011, passed by the learned Additional Sessions Judge (F.T.C.), Lakhimpur, in Sessions Case No. 20(NL)/2010, arising out of Bihpuria P.S. Case No. 103/2008, whereby the present appellants were convicted under Section 457 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for 6(six) months with a fine of Rs.2,000/- each and in default of payment of fine to undergo further rigorous imprisonment for 45 (forty five) days. They were also convicted under Sections 354/34 of the Indian Penal Code and were sentenced to

undergo simple imprisonment for a period of 3(three) months and to pay a fine of Rs.1,000/- each and in default of payment of fine to undergo for simple imprisonment for 20(twenty) days. It was directed that both the sentences shall run concurrently.

**3.** The facts relevant for adjudication for this appeal, in brief, are as follows:-

**i.** That on 08.04.2008, the victim "X" (*name of the victim not disclosed*) had lodged an FIR before the In-Charge of Bangalmara Police Out Post, *inter alia*, alleging that on the night of 07.04.2008, at about 11.00 PM., when the husband of the first informant was not in the residence, the present appellants trespassed into her residence and by threatening her of her life tried to outrage her modesty. At this, the first informant made hue and cry, on which the neighbours gathered there and the appellants fled away there from stealing some materials from the residence of the first informant. On the basis of the said FIR, the Bihpuria P.S. Case No. 103/2008 under Sections 457/380/376/511/506/34 of the Indian Penal Code was registered and investigation was initiated. After completion of the investigation, the Investigating Officer laid the charge-sheet against the present appellants under Sections 457/354/506/34 of the

Indian Penal Code. The appellants faced the trial remaining on bail.

**ii.** On 14.06.2010, the learned Additional Sessions Judge (F.T.C.), Lakhimpur, North Lakhimpur, after considering the materials on record and after hearing both the sides, framed charges against the present appellants under Sections 457/376/501 of the Indian Penal Code. When the said charges were read over and explained to the present appellants, they pleaded not guilty and claimed to be tried. In support of the case of the prosecution, total seven prosecution witnesses were examined by the prosecution side.

**iii.** The appellants were examined under Section 313 of the Code of Criminal Procedure, 1973 during which they pleaded their innocence and denied the incriminating evidence adduced against them by the prosecution witnesses. The appellants declined to adduce any evidence in their defence.

**iv.** Ultimately, by the judgment, which is impugned in this appeal, the present appellants were convicted and sentenced in the manner as described hereinabove in Paragraph No. 2.

**4.** Before considering the rival submissions of learned counsel for both sides, let me go through the evidence of the prosecution witnesses, which is available on record.

**5.** The victim, who has deposed as PW-1, has stated in her evidence that on the night of the alleged incident, at about, 11.00 p.m., when her husband was not in her house, all the appellants entered into her house by cutting the bamboo door of the room and Karim (appellant No. 1) gagged her mouth and Osman Ali (appellant No. 3) used force on her in order to perform bad act (*Beya-kaam*). PW-1 has stated that the appellants torn her saree and blouse and on her alarm, her children and one of her sister, namely, Rosana Begum woke up. At that time, the lamp which was burning was broken down by the appellants with a *dao*. She has also stated that on hearing the alarm, the neighbouring people gathered there and the appellants fled away from there. PW- 1 has also stated that the appellants also assaulted her, on her back, causing injury on her person. She has further stated that she went to the Panigaon Police Out Post after the incident. However, as the In-charge of the Out Post was not present there at that time, she lodged the FIR on the following morning. She has also deposed that Police had seized her torn *saree* and blouse and also a *dao* which were exhibited by her as Material Exhibit Nos. 2 and 1 respectively.

**5.1** During cross-examination, she has stated that prior to the incident, her husband had purchased 1 Katha 5 Lochas of land from one Hasen Ali and they were possessing the said

land and the appellants tried to dispossess them. She has also stated that one Joynal Abedin lodged a complaint case against her husband. She was also asked some suggestive questions by the defence side which were answered in negative by her. She has also stated that after the alleged incident, she left her house due to fear and, thereafter, the appellant No. 3, namely, Osman Ali occupied her house.

**6.** PW-2, Abdul Hannan, has deposed that on the day of occurrence, he was at home which is situated at a distance of about 2/3 *noll*. He has deposed that on the date of incident at about 11.00 p.m., when he was sleeping in his room, he heard alarm made by the victim and when he came out of his house, he saw the victim along with her children in front of her house who were crying at that time. He also stated that the people gathered there and the victim told that the appellants did bad act (*Beya-kaam*) with her. PW-2 has also stated that he noticed that the wearing apparels of the victim were torn. On the following morning, the Police came to the place of occurrence and seized the *saree*, blouse and a *dao* and PW-2 put his signatures on the seizer list, as a witness, which is exhibited as Exhibit- 3.

**6.1** During cross-examination, PW- 2 has stated that Joynal Abedin is the uncle of the appellant No. 3, namely, Osman Ali. He has also stated that the house of the appellant Osman Ali is adjacent to the house of the victim. He denied

the suggestion that the victim did not state before him about commission of *Beya-kaam* (*bad act*) by the appellants.

**7.** PW-3, Md. Jamiruddin has stated that his house is situated at a distance of about 1/2 Km. from the place of occurrence and on the day of incidence at about 1.00 a.m. at night, the villagers called him and requested him to help the victim by providing his tempo service. PW- 3, has further deposed that he, accordingly, brought the victim to Bangalmara Police Out Post. However, the In-charge of the Out Post was not there, so they returned back and on the following morning at about 7.00 a.m., he again took the victim to the Bangalmara Police Out Post in his tempo. He also deposed that when he went to the house of the victim at night, he found victim wearing only a blouse and petticoat. He also found bamboo door of the house in a broken condition. He has also signed, as a seizure witness, the seizure list, which is exhibited as Exhibit- 3.

**7.1** During cross-examination, PW- 3 has deposed that on the day of occurrence, it was a dark night. Some suggestive questions were put to PW- 3 by the defence side, which were answered in negative.

**8.** PW-4, Abdul Sattar, has deposed that on the day of alleged incidence, he was in his house and after hearing alarm of the victim and her children, he came out of his

house and saw that the victim was sitting in the verandah of the house of Abdul Sattar. On query, the victim told him that someone did bad act and on the following morning, the Police came to the place and seized one *dao* and the PW- 4 put his signatures, as a witness, on the seizure list.

**9.** PW-5, Dr. Parimal Das, who is the doctor who examined the victim, has deposed that on 08.04.2008, when he was working in Islampur State Dispensary as Medical and Health Officer, he examined the victim on Police requisition and found no sign of injuries on her person. He exhibited the inquiry report as Exhibit- 4.

**10.** PW-6, Md. Rafiqul Islam, has stated that he visited Bangalmara Police Out Post where Police took his signature on seizure list, which is exhibited as Exhibit- 2. However, no seized material was shown to him.

**11.** PW- 7, Md. Badrul Islam Mazumdar, who is the Investigating Officer of Bihpuria P.S. Case No. 103/2008, has deposed that on 08.04.2008 he was posted at Bangalmara Police Out Post as In-charge and on that day, he received one FIR from the victim and on receipt of the said FIR, he made GD Entry No. 113 dated 08.04.2008 and forwarded the FIR to Officer-in-Charge of Bihpuria Police Station for registration of case. The said GD Entry is exhibited as Exhibit- 1. He has also stated that after taking up the

investigation, he recorded the statement of the witnesses and visited the place of occurrence and also seized the material exhibits along with a broken bamboo door. He also prepared the sketch map of the place of occurrence, which is exhibited as Exhibit- 5. He has also stated that the statement of victim was recorded under Section 164 of the Code of Criminal Procedure, 1973. Ultimately, on completion of the investigation, he laid the charge-sheet under Sections 457/354/506/34 of the Indian Penal Code against the present appellants. The said charge-sheet is exhibited as Exhibit- 6.

**11.1** During cross-examination, he had stated that the victim did not state before him that on hearing alarm, her children and one of her sister got awoken. PW- 7 has also deposed that the victim did not state before him that at the time of occurrence one lamp was burning and which was broken by the appellants with a *dao*. It is also stated by the PW- 7 that the victim did not give detail account of the incident by stating that at the time of attempt to rape, the appellants, namely, Kasim and Wahab Ali caught hold of her and appellant, namely, Osman Ali attempted to rape her.

**12.** The appellant No. 1, during his examination, under Section 313 of the Code of Criminal Procedure, 1973 pleaded his innocence and has denied the incriminating evidence against him.

**13.** The appellant No. 2, during his examination under Section 313 of the Code of Criminal Procedure, 1973 had also pleaded his innocence and has stated that he has been falsely implicated in this case. He has also stated that there is a civil dispute pertaining to land between the victim and one Joyanal Abedin in which the appellant No. 1 has deposed as a witness and, therefore, he has been falsely implicated in this case by the victim. He has also stated that his residence is 1/2 km. away from the house of the victim. He has also stated that after the alleged incident, the appellant No. 3, namely, Osman Ali started staying in the place where the victim used to stay.

**14.** The appellant No. 3, during his examination under Section 313 of the Code of Criminal Procedure, 1973, has also pleaded his innocence. He has also stated that his uncle, namely, Joyanal Abedin and the victim(PW-1) had a land dispute between them and the present case has been falsely lodged against the present appellants by the victim out of grudge. He has also stated that after the incident, the victim left the house where she was staying and his uncle, namely, Joyanal Abedin (appellant No. 3) asked him to stay in that house and accordingly he is staying there.

**15.** Mr. N. Uddin, learned counsel for the appellants has submitted that there is no other eye witness to the alleged incident except the victim and there are contradictions in her

deposition which she made during trial *viz-a-viz* her statement which she has made before the Police during investigation and her testimony is not corroborated by any other witnesses, it is also submitted that PW- 1, being herself the alleged victim in this case is an interested witness and, hence, her testimony should not be relied upon.

**16.** It is also submitted by learned counsel for the appellants that the victim had mentioned in the FIR, filed by her, that the appellants tried to outrage her modesty, however, as she raised hue and cry, they could not do so, whereas, in her testimony, deposing as PW-1, during the trial, she has developed her story and have specifically implicated appellant, namely, Karim (appellant No. 1) and appellant, namely, Osman Ali (appellant No. 3) and due to embellishment made by her, her testimony should not be relied upon. It is also submitted by learned counsel for the appellants that as per testimony of PW-1, her younger sister, namely, Rosana Begum also woke up when the appellants entered in her residence, however, she has not been cited as a prosecution witness and thereby an inference may be drawn that had she been examined as prosecution witness, it would have been unfavourable to the prosecution side and, therefore, her evidence was withheld. It is also submitted by learned counsel for the appellants that even the statement of the victim (PW-1) recorded under Section 164 of the Code of

Criminal Procedure, 1973 was not exhibited by prosecution side as the documentary evidence during the trial. It is also submitted learned counsel for the appellants that the doctor who examined the victim, while deposing as PW-5 has also stated that he found no injuries on examination of the victim, which only leads to the inference that the victim has falsely implicated the present appellants only because they had a land dispute with Joynal Abedin, the uncle of appellant No. 3

**17.** The learned counsel for the appellants has also submitted that as the victim was having a land dispute with the uncle of appellant No. 3, namely, hence, the appellants were falsely implicated by the victim. Learned counsel for the appellant has also submitted that the testimony of victim (PW-1) is not worthy of any credence and hence, the conviction which was solely based on her testimony may be set aside and the appellant may be set at liberty.

**18.** On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor has submitted that even the uncorroborated testimony of the victim is sufficient to convict the appellants, if her testimony appears to be reliable and trustworthy. She has further stated that though there were some lapses of the prosecution side, during trial, by not exhibiting the statement of the victim which was recorded under Section 164 of the Code of Criminal Procedure, 1973, however, same is available in the case record and it may be

perused by the Court. Moreover, learned Additional Public Prosecutor has also submitted that during the cross-examination of the PW- 1, her attention was not brought to her previous statement which she had given before the Investigating Officer under Section 161 of the Code of Criminal Procedure, 1973 for the purpose of contradicting her as required under Section 145 of the Indian Evidence Act, hence, it is submitted by learned Additional Public Prosecutor that the contradiction in the testimony of the victim was not as per the guidelines laid down by the Apex Court in catena of judgments and, therefore, same should not be taken into consideration. In support of said contention, learned Additional Public Prosecutor has relied upon a ruling of Hon'ble Supreme Court of India in **"V.K Mishra And Another Vs. State of Uttarakhand And Another"** reported in **"(2015) 9 SCC 588"** wherein, Hon'ble Apex Court observed as follows:-

*"19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his*

*cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.”*

**19.** Learned Additional Public Prosecutor also submits that the statement of the appellant No. 3 recorded under Section 313 Code of Criminal Procedure, 1973 clearly shows that the

place where the incident had occurred is now possessed by appellant No. 3, which itself makes the testimony of the victim believable. The learned Additional Public Prosecutor also submits that the testimony of other witnesses, namely, PW- 2 and PW- 4 also shows that they also heard alarm made by victim on the night of the incident and they also saw the door of the house of the victim in a broken condition.

**20.** I have considered the submissions made by learned counsel for both sides and have perused the materials available on record meticulously.

**21.** Learned Trial Court has convicted the appellants mainly on the basis of the testimony of the victim, i.e. PW- 1. If we examine the testimony of PW- 1, which is discussed herein before in Paragraph No. 5 of this Judgment, it appears that she has stated that on the day of alleged incident, at about 11 p.m., at night, all the appellants entered into her house by cutting the bamboo door of the room and Karim (appellant No.1) gagged her mouth and Osman Ali (appellant No. 3) used force on her in order to perform bad act (*Beya-kaam*). This testimony of PW-1 as remained consistent throughout the different stages of instant criminal proceeding as she had stated same facts before the Investigating Officer also. Moreover, the defence side, while intending to contradict her testimony, which she made during trial, did

not brought to her notice the statement which she made before the Investigating Officer, with which it was intended to contradict her, in the manner as suggested in "**V.K. Mishra and another**" (supra), hence, due to non-compliance of provisions of Section 145 of the Indian Evidence Act, this Court is of considered view that the defence side has failed to contradict the testimony of PW-1 in material particulars. The testimony of PW-1 shows that the appellants committed house breaking by night in order to outrage her modesty by cutting the bamboo door of the room in which she was sleeping in absence of her husband. The testimony of PW-2 and PW-4, who were the neighbours of the victim, to the effect that on the day of the incident, at about 11 p.m., on hearing alarm made by the victim they came out of their house and saw the victim along with her children, who were crying, in front of their house and victim told them that the appellants did bad act with her and they also noticed that the wearing apparels of the victim were torn also lend credence to the testimony of PW-1. The testimony of PW-3 that the victim, immediately after the incident, in the night itself, at about 1 a.m., accompanied by PW-3, went to Bangalmara Police Outpost to lodge the FIR and that he found the bamboo door of the house of the victim in broken condition and also found the victim wearing only a blouse and a petticoat and the torn apparels of the

victim were also seized also lends credence to the testimony of PW-1.

**22.** It is also to be noted that in their examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant Nos. 2 and 3 have stated that after the incident, it is the appellant No. 3, namely, Osman Ali who started staying in the place where the victim was earlier staying which shows that the victim was compelled to leave her own residence after the incident and the incident as alleged had actually occurred.

**23.** The victim's testimony that the appellant Nos. 1 and 3 tried to outrage her modesty and they fled away when she made hue and cry does not indicate as to how long the scuffle continued. It may be for a short period which did not cause any injury on the person of the victim, hence, testimony of PW-5, i.e., the doctor, who examined her later on and did not find any injury on her person may not in itself be a ground to discard or disbelieve the testimony of the victim.

**24.** For the reasons mentioned hereinbefore, this Court does not find any cogent ground to discard the testimony of victim which is corroborated by other evidence, namely, testimony of PW-2, PW-3 and PW-4, recovery of broken bamboo door and torn apparels of the victim from the place of occurrence. Hence, the conviction of the appellants under

Sections 457/354/34 of the Indian Penal Code is hereby upheld. However, considering the fact that the incident had occurred about 15 years ago and as submitted at bar the appellants have already undergone a period of detention of 69 days each and also considering the facts and circumstances of this case, the sentence imposed by the Trial Court on the appellants is hereby modified as follows:-

- A.** The sentence under Section 457 of the Indian Penal Code imposed on the appellants by the Trial Court, by impugned judgment, is modified into imprisonment for the period of detention already undergone by the appellants instead of rigorous imprisonment for six month and also to pay a fine of Rs.10,000/- each and in default of payment of fine to undergo simple imprisonment for two months.
- B.** The sentence under Section 354/34 of the Indian Penal Code imposed on the appellants by the Trial Court, by the impugned judgment, is modified into imprisonment for the period of detention already undergone by the appellants instead of rigorous imprisonment for three month and also to pay a fine of Rs.10,000/- each and in default of payment of fine to undergo simple imprisonment for two months.

**C.** The fine amount, if realised, shall be paid as compensation to the victim (PW-1) under section 457 of the Code of Criminal Procedure, 1973.

**25.** The appellants shall surrender before the learned Trial Court within a month from the date of this judgment to serve out the sentence imposed on them.

**26.** This appeal is, accordingly, disposed of.

**27.** Send back the LCR.

**JUDGE**

**Comparing Assistant**