

GAHC010069022011



**IN THE GAUHATI HIGH COURT
(The High Court of Assam: Nagaland: Mizoram &
Arunachal Pradesh)**

Crl. A. 13/2011

Md. Nurul Haque,
S/O Lt. Abdul Fattah R/O Vill. Ratanpur P.S. Patharkandi Dist.
Karimganj, Assam

..... Appellant

Versus

THE STATE OF ASSAM

..... Respondents

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Petitioners : Mr. A.K. Purkayastha

Advocate for the Respondents : Mr. D. Das (learned Addl. P.P. res No. 1.)

Date of Hearing : **11.05.2023**

Date of Judgment : **10.08.2023.**

Judgment and ORDER (CAV)

1. Heard Mr. A.K. Purkayastha, learned counsel for the appellant. Also heard Mr. D. Das, learned Addl. P.P. for the respondent.
2. This appeal is directed against the judgment and order of conviction and sentence

dated 30.11.2010 passed by the learned Sessions Judge, Karimganj, in Sessions Case No. 80/2009, convicting the appellant under Section 354/34 IPC and sentencing him to undergo rigorous imprisonment for two years and under Section 457/34 IPC and sentencing him to undergo rigorous imprisonment for 3 (three) years and to pay a fine of Rs. 1,000/- with default stipulation.

3. The genesis of the case was that on the midnight of 11.09.2007, two persons, Md. Nurul Haque and a child in conflict with law (CICL for short) knocked the informant's door and called out her husband's name. When the informant heard them, she could recognise them and sensing trouble, she answered that her husband was not at home and she also questioned about their intention for visiting her late at night as the visitors were well aware that her husband was not at home. Both the accused named in the FIR then broke into her house by smashing the window panes on the northern side of the informant's house and attempted to commit rape on her. When the informant screamed, the neighbouring people arrived and the accused persons fled the scene. The informant then could recognize the accused persons through the flash of her torchlight. After a telephonic conversation with her husband and on his approval, she went to the police station and lodged the FIR, which was registered as Patharkandi P.S. Case No. 144/2007, under Sections 457/376 read with Sections 511/34 of the Indian Penal Code (IPC for short). The Investigating Officer (I.O. in short) embarked upon the investigation. He recorded the statements of the witnesses and forwarded the victim for medical examination and for recording her statement under Section 164 of the Code of Criminal Procedure (Cr.P.C for short).

4. On completion of investigation, charge-sheet was laid against Md. Nurul Haque (hereinafter referred to as the appellant) and the CICL under Sections 457/376/34 IPC. The

case of the CICL was taken up by the Juvenile Justice Board, Karimganj and this case against Md. Nurul Haque was committed for trial. At the commencement of trial charges under Sections 457/376/511/34 were framed and read over and explained to the appellant, who abjured his guilt and claimed innocence. Who substantiate its stance, the prosecution adduced the evidence of 5 (five) witnesses and the defence cross-examined the witnesses to refute the charges. On the incriminating circumstances arising against him, several questions were asked to the appellant and his responses were recorded.

5. The trial Court decided this case on the following points :-

“(1) Whether accused along with CICL committed house breaking by night on 11.09.2007 at or about mid night and criminally trespassed into the dwelling house of the complainant namely 'X' at Narayanpur for committing robbery and rape upon 'X',

(2) Whether the accused at or about the same time, same date and same place made attempt to commit rape upon 'X', and

(3) Whether the accused did as above in furtherance of common intention of the accused and another (name withheld).”

6. After scrutinising the evidence, it was held by the learned trial Court that the informant, PW-1, was the sole witness to the occurrence and the other witnesses PW-2 and PW-4 arrived at the place of occurrence on the following day, as the occurrence took place at midnight. The PW-2 and PW-4 noticed that the window was broken, supporting the contention of PW-1 that the culprits broke into the house of the victim by smashing the window. The victim's evidence substantiates the contents of the FIR. The victim also could recognize her assailants, by the flash of her torch light. She also could recognise them

through their voice. She flashed the torch light and noticed the appellant and the CICAL escaping. She stated that her garment was pulled up by the appellant and the CICAL and she resisted their assault. Relying on the credibility of the evidence of PW-1, the appellant was convicted under Sections 354/34 IPC and sentenced to undergo rigorous imprisonment for 2(two) years and under Section 457/34 IPC and was sentenced to undergo rigorous imprisonment for 3(three) years and to pay a fine of Rs. 1,000/- with default stipulation.

7. The learned counsel for the appellant has assailed the impugned judgment and order of the trial Court, on the ground that the appellant was convicted without corroborating evidence and hence, the sentence is not sustainable. The conviction and sentence is seriously vitiated by perversity and material discrepancies. The informant's evidence does not inspire confidence. The evidence of the prosecutrix was *inter-se* contradictory. The PW-2 and PW-4 were not eye-witnesses and their evidence does not stand on strong footing as the evidence of the prosecutrix was not found to be creditworthy. The evidence of the prosecutrix belies the contents of her FIR. It is not believable that when two persons are escaping, the flash of a torch light will be sufficient for anyone to identify the escaping persons. The evidence of the prosecution clearly reveals she is not closely acquainted with the accused and the CICAL and in such a situation, it is not possible for her recognize any person through the flash of a torch light at midnight. It is also not possible for any miscreant to break into a house and attempt to commit rape, when other family members were present in the house. It has surfaced from the evidence that the victim's handicapped mother-in-law and her son was at home with her. When the evidence reflects that a lamp was burning in the room, it was not necessary for PW-1 to flash on her torch light for identification of the miscreants. The trial court relied on the statements of the witnesses under Section 161 Cr.P.C and convicted the appellant. The

remaining part of the argument will be discussed at the appropriate stage.

8. The question that falls for consideration is whether the trial Court erred in convicting the appellant.

9. To decide this case in its proper prospective, the evidence is reappraised. The victim/prosecutrix testified as PW-1 that the incident occurred on 11.09.2007. The appellant and the CICIL came to her house at midnight and called out her husband. The prosecutrix did not open the door and replied from inside that her husband was not at home. The appellant and the CICIL then went away, but after some she fell asleep. She was with her handicapped mother-in-law and her son. While, she was sleeping, one person came gagged her mouth by mouth and another person grabbed her abdomen. They used criminal force and pulled her garments. She kicked away one miscreant. Her mother-in-law raised alarm. The miscreants attempted to commit rape on her but they raised alarm and she lit a torch light and saw the miscreants escaping. She recognized the miscreants and the CICIL. They are known to her. She noticed that the window of her adjacent room was broken and she realised that the miscreants entered through the window. Karna Muni Sinha and his wife arrived at the place of occurrence. Thereafter, the neighbouring people assembled in the morning. Sri Nanda Sinha and Sri Brojendra Sinha came to her house and she informed them about the incident. She called proved husband and lodged the FIR. She has put the FIR as Exhibit-1 and her signature as Exhibit-1(1). The police recorded her statement and she was forwarded for medical examination and for her statement to be recorded by Magistrate.

In her cross-examination, she has stated that there are other residences near her house. Her mother-in-law used to sleep in the adjacent room. The window in her mother-in-

law's room was broken. The door however was latched till the miscreants left. Her husband resides in another place (Diphu). The accused never visited her house prior to the incident, but they are known to her. A lamp was burning inside her house at that time. She has denied that she owes money to the appellant as she used to purchase articles from the appellant's shop on credit.

10. Sri Nanda Kumar Singh testified as PW-2 that the incident occurred about three years ago. At midnight, he heard a commotion emanating from the informant's house and he went to her house in the morning. The informant told him that the appellant and the CICL entered into her house by breaking the window and attempted to commit rape on her but failed in their attempt and fled. He noticed that the window was broken. The police came to the place of occurrence in the afternoon and recorded his statement.

In his cross-examination, he has admitted that when he heard the commotion at night, he was not certain from which direction, the commotion arose. The victim's house was within the vicinity.

11. Another neighbour Sri Brojendra Sharma testified as PW-4 that the prosecutrix is known to him. The incident occurred about three years ago. He was sleeping in his house at midnight and he did not hear any commotion. Next morning, he was called to the informant's house. He saw a broken window in her house and the informant told him that two persons came to her house and called her husband, who was not at home and thereafter, the appellant along with another person entered in her house by breaking the window. The informant also told him that the miscreants had fled. He saw the appellant at the police station along with the CICL.

In his cross-examination, he has admitted that the victim's house is within audible distance from his house.

12. Now, the witnesses of PW-1, 2 and 4 have stated that a windowpane was broken but no broken windowpane was seized in connection with this case.

No seizure list was exhibited relating to seizure of any broken window. The victim's garment was not seized in connection with this case. The prosecution also failed produce the mother-in-law of the victim to substantiate her evidence. The evidence of PW-2 depicts that he heard the commotion at night but he could not ascertain from which direction the commotion was arose. He went to the victim's house on the following morning. On the other hand, the evidence of PW-4, Sri Brojendra Sharma depicts that he is a neighbour, but he heard no commotion on the night of the incident. The failure of the prosecution to examine the victim's husband as a witness also casts a shadow of doubt over the veracity of the victim's evidence. The evidence of the Medical Officer also does not reveal any evidence of struggle as alleged by the victim. The Medical Officer Dr. Matindra Sutradhar has deposed as PW-3 that on 12.09.2007, while working as Senior Medical & Health Officer at Patharkandi, he examined 'X' on police requisition at 2.30 P.M. and found the following:-

“She was conscious. Pulse and BP-normal. Chest & cus- NAD injuries-

(1) No sign of injury was found in any part including secret parts of her body clinically.

(2) Vaginal examination- healed tear of cervix. No congestion or sign of inflammation was detected.”

13. The Investigating Officer's evidence also depicts that no broken windowpane was seized. The I/O Sri Rajib Baruah deposed as PW-5 that on 12.09.2007, he was working as

attached officer of Patharkandi P.S. On that day, at 2.30 P.M, the informant 'X' lodged the FIR against the appellant and the CICL, which was registered as Patharkandi P.S. Case No. 144/2007 and Sri Kanak Kanti Bhattacharjee embarked upon the investigation. He is well-acquainted with the signature of the Investigating Officer. PW-5, further deposed that the I/O recorded the statements of the witnesses and went to the place of occurrence and forwarded the victim for examination. The sketch-map was prepared. On the death of Kank Kanti Bhattacharjee, he was entrusted the complete the investigation. The CICL surrendered in the police station. On 20.12.2017, he submitted the charge-sheet. His cross-examination is not noteworthy. Although, the charge-sheet was laid by the I/O, under Sections 457/376/511/34 IPC, due to lack of evidence, the alleged offence of attempt to commit rape was scaled down by the trial Court to Section 354 IPC.

14. The evidence of victim does not inspire confidence. Her evidence is not supported by the evidence of the other witnesses. No broken window was seized by the I/O. Her mother-in-law who was present at the place of occurrence was not examined as a witness. Her husband was not examined as a witness. Her son, who was present at the place of occurrence, was not examined as a witness. Another important witness to the occurrence was Karna Muni Sinha and his wife. They were not examined as a witness. Credence cannot be given to the evidence of the prosecutrix whose evidence is not even substantiated by the evidence of her mother-in-law and husband. If a lamp was burning in her house then why did she have to flash a torch light to recognize the appellant. The sketch map was also not exhibited to prove the seizure of broken windowpanes and seizure of the torch. The accused is deserves benefit of doubt.

15. In view of my foregoing discussions, it is thereby held that the conviction is not

sustainable. The impugned judgment and order dated 30.11.2010, convicting the appellant under Sections 354/457 IPC is hereby set aside. The appeal is allowed. The appellant is to be released if he is in custody.

16. Surety stands discharged.

Send back the LCR.

JUDGE

Comparing Assistant