

GAHC010077652020



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

CrI. A. (J) 24/2020

Delbar Ali
S/O. Majafar Ali,
R/O. Bagurapara (Kayakuchi),
P.S. Barpeta, Dist.
Barpeta.

..... Appellant

Versus

The State Of Assam

..... Respondent

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Advocate for the Appellant : Dr. B.N. Gogoi, Amicus Curiae

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

Date of Hearing : **15.05.2023**

Date of Judgment : **17.08.2023.**

Judgment and ORDER (CAV)

1. Heard Dr. B.N. Gogoi, learned Amicus Curiae 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 dated 03.07.2019 passed by the learned Sessions Judge, Barpeta convicting the appellant, namely, Delbar Ali (herein after the accused) under Section 376(1) of the Indian Penal Code (IPC for short) to undergo rigorous imprisonment for 10(ten) years and to pay a fine of Rs. 10,000/- and under Section 341 IPC to undergo simple imprisonment for 6(six) months. The sentences are to run concurrently.
3. The prosecution case as unfolded from the FIR is that on 23.08.2018 at around 11.30 P.M. 'X' (name withheld), aged 31 years and mentally challenged was returning home from a function, when the accused waylaid her, gagged her by mouth and dragged her to the field, and repeatedly committed rape on her against her will and abandoned her in the field. The victim 'X' was bleeding profusely but she managed to reach home. The accused confessed that he committed rape on the victim. The younger brother victim 'X' lodged the FIR, which was registered as Barpeta Road P.S. Case No. 426/2018, registered under Section 341/376 IPC and investigation commenced. The victim was forwarded to the Medical Officer and to the Magistrate. The statements of the witnesses were recorded. On completion of investigation, charge-sheet laid against the accused and this case was committed for trial. At the commencement of trial, a formal charge under Sections 341/376 IPC was framed and read over and explained to the accused, who abjured his guilt and claimed innocence. To substantiate its stance, the prosecution adduced the evidence of 7(seven) witnesses including

the Medical Officer (M.O. for short) and the Investigating Officer (I.O for short). The statement of the accused was recorded under Section 313 Cr.P.C and his tenor of answers depicts that his plea was of total denial.

4. The learned Amicus Curiae for the appellant Dr. B.N. Gogoi, laid stress in his argument that the FIR clearly reveals that the victim is mentally challenged and conviction was not justified because the trial Court relied on the sole evidence of the victim. There were no eye-witnesses to the incident. The victim was 31 years old, whereas, the accused was only 26 years old. The trial Court ignored the fact that the incident occurred at night and the victim has categorically stated that it was dark. Identification of the accused was not possible at night? If she was alone then why was she alone at night? It is also submitted that the medical evidence reveals that the victim did not sustain any injuries of sexual assault.

5. Per contra, the learned Addl. P.P. laid stress in his argument that the victim was mentally challenged and her evidence cannot be discarded. Her evidence is corroborated by the evidence of PW-3. Corroboration is not *sine qua non* in a rape case. The incident occurred at midnight and immediately on the following day, the FIR was lodged. No sign of sexual assault could be detected as the victim took bath after the incident.

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

“ (1) Whether the accused on 23.08.2018, at about 11:30 P.M., at Kalahbhanga, within the jurisdiction of Barpeta Road P.S., District Barpeta, restrained Jahanara Begum (mentally ill), who is the elder sister of the informant Abdul Hannan, on the road when she was returning home after enjoying a function and thereby committed an offence punishable u/s 341 of the Indian Penal Code?

(2) Whether the accused, on the same date, time and place as mentioned above, committed rape on Hanara Begum and thereby committed an offence punishable u/s 376 of the Indian Penal Code?”

The learned trial Court convicted the accused relying on the evidence of the victim.

7. The question that falls for consideration is that whether the trial Court erred while convicting the accused under Section 341/376 IPC.

8. In this case at hand, the victim 'X' has testified as PW-2 that the accused is known her and he is married to a girl from their village. The incident occurred about 7(seven) months back. She was returning at 10.00 P.M. from a function, near her house. She went to the function with Asmina, but she was returning alone when the accused dragged her forcibly to the nearby jungle and did not allow her to raise alarm. The accused undressed her and committed bad act with her. Then she went to Asmina's house and narrated the incident to her. Thereafter, she informed her brother about the incident. Blood oozed from her private parts. Her brother then tied the accused in the courtyard and informed the police. The police came and took away the accused. Her brother lodged the case in the police. The police forwarded her for medical examination. She gave her statement before the Magistrate.

9. In her cross-examination, she admitted that the accused person's father-in-law is her aunt's husband and the wife of the accused is a distant cousin. She also reiterated in her cross-examination that she returned alone from the function at about 11.30 P.M. As it was dark at night, she did not see the face of the person and she did not raise alarm. The people present in the function did not inform about the incident as she did not informed them about the incident. She did not know inform about the incident to her brother. She has also

admitted in her cross-examination that at the time of the incident she was having her menstrual periods. She has admitted that sometimes she used to suffer from mental ailments.

10. The contradiction that could be elicited through the cross-examination of this victim, PW-2 and the cross-examination of the Investigating Officer Kandarpoo Talukdar, PW-7 is that PW-2 did not mention in her initial statement before the I/O that she informed her sister Asmina about the incident and blood oozed from her private parts. She also did not mention in her initial statement that her brother tied the accused after the incident and handed him over to the police.

11. The learned counsel for the accused, however, emphasised through his argument that the victim has categorically stated in her cross-examination that she did not recognize the person in the dark. In this aspect, the accused deserves a benefit of doubt. The victim's statement is inter-se contradictory.

In her evidence-in-chief, she has stated that the accused dragged her and committed rape on her, whereas, in her cross-examination the victim stated that she did not recognize the accused. Although, her statement was recorded by the Magistrate under Section 164 Cr.P.C, this statement was not proved by the maker of the statement. The other defect in the evidence is that Asmina, who was informed about the incident was not examined as a witness. According to the victim's cross-examination, Asmina also noticed that blood oozed out from her body, after the incident.

12. The victim's brother testified as PW-3 that the incident occurred about 7/8 months ago. He was at home at the time of the incident. Asmina came to her house at about

10/10:30 P.M. and informed them that 'X' was taken by the accused and raped. Asmina also informed them that the victim was bleeding. Then he sent his sister-in-law and he followed her at about 11.00 P.M. His sister-in-law informed him that the victim was bleeding and she was taken to the hospital. He brought back his sister (PW-2) to his house. The victim informed him that the accused committed rape on her. Then, he went to the accused person house along with two other boys and he brought the accused to their village and he tied him in his house. Then the villagers informed the police and he lodged the FIR as Exhibit-2 and proved his signature on the FIR as Exhibit-2(1).

It is clear from the evidence of PW-2 that she was returning alone from the function. The PW-3 was informed about the incident by Asmina, but Asmina was not produced as a witness. The scribe of the FIR was also not examined as a witness. The PW-3 has also admitted in his cross-examination that his sister is mentally challenged and some time she talks incoherently.

13. The Medical Officer's evidence also does not at all indicate any marks of violence or evidence of sexual intercourse on examination of the victim. Dr. Mamata Devi has testified as PW-1 that on 24.08.2018, she examined the victim and according to her opinion, no evidence of recent sexual intercourse was detected on examination of the victim, and no marks of injury or violence was noticed. The Medical Officer proved the medico legal report as Exhibit-1 and Exhibit-1(1) as her signature. The age of the victim was recorded as 32 years. Even the medical history of the doctor depicts that the victim did not know the name of the aggressor

When the victim herself mentioned in the cross-examination that she did not recognize the face of the aggressor, it would be perilous to saddle the accused with a serious offence. It is true that the evidence of prosecutrix is sufficient proof of sexual assault against the

perpetrator of the crime, but in this case benefit of doubt has to be extended to the accused. PW-3 has admitted that the victim is mentally challenged.

14. Another witness Diljan Nessa testified as PW-4 that the victim is her sister-in-law. The incident occurred about 9(nine) months ago. The victim went to attend a function, and the accused dragged the victim forcefully while she was returning home from the function and took her to the nearby field. Asmina came to their house and informed that the victim is about to die due to the heavy bleeding. Then, she went to Asmina's house and found the victim in her house and the victim told her that the accused committed bad work with her. Her husband also came and caught the accused and brought him to their house. On being confronted by her husband and the others, the accused confessed his guilt and he was handed over to the police.

The cross-examination of this witness reveals that the victim went to the function alone.

15. On the contrary that the victim stated that she went to the function with Asmina. The victim stated that she returned alone from the function. Why did she return alone from the function so late at night? The prosecution's failure to produce the witness Asmina casts a shadow over the veracity of evidence. The victim has also stated that she was having her menstrual period at the time of the incident. This explains why the doctor did not detect any injuries, despite the fact that the victim, PW-2 and the other witnesses PW-3 and PW-4 have stated that the victim was bleeding profusely after the incident. The PW-5 has also admitted that the victim was mentally weak and sometimes her speech is incohesive. Thus, it can be safely held that the evidence of PW-4 was not of much help to the prosecution.

16. Isab Ali has testified as PW-5 that at the time of the incident Asmina came to their

house and informed that the victim went to the function and the accused dragged the victim along with him and committed rape on her and left her in the field. The victim then somehow managed to reach Asmina's house. The accused was brought to the victim's house and he confessed his guilt. Although, there is evidence of oral extra judicial confession, yet this extra judicial confession cannot be held as conclusive proof to rope in the accused with the offence of rape and the reason is that the evidence of the victim does not inspire confidence. The victim has mentioned in her cross-examination that she could not recognize her aggressor. She has also stated that she was having her menstrual periods at the time of the incident. She went to a function and returned alone late at night at about 11.30 P.M. The evidence of all the witnesses PW-3, PW-4 and PW-5 clearly depicts that the victim is mentally challenged. The FIR also clearly depicts that the victim was mentally challenged. No injuries were detected despite the fact that the victim has stated that she was bleeding after the incident.

17. PW-6 has also stated that he saw that the victim was bleeding but he did not mentioned in his evidence that the accused confessed before him or before any of the family members about the incident. The PW-6 was also present with the victim's brother, PW-3. Isab Ali, PW-5, but he did not mention that the accused confessed about the incident.

18. Kandarpoo Talukdar is the I/O and he stated as PW-7 that on the day of the incident, the victim's brother lodged the FIR and the O/C registered the Barpeta Road P.S. Case No. 426/2018 and entrusted him with the investigation. He conducted the investigation and finally submitted charge-sheet against the accused.

19. It has already been held in my foregoing discussions, that PW-2 has failed to mention in her earlier statement before PW-7 that she was bleeding and her brother tied the accused,

after the incident and handed him over to the police. I/O's evidence also depicts this contradiction. PW-4 failed to mentioned in her initial statement before the I/O that Asmina came to her house and informed her that the victim was about to die, as the accused had committed bad work with the victim. These major contradictions indeed casts a shadow of doubt over the veracity of the victim's evidence.

20. In view of my foregoing discussions, it is thereby held the accused deserves the benefit of doubt. The victim's evidence is not found to be credible. The judgment and order dated 03.07.2019 holding the appellant guilty of offence under Sections 376/341 IPC is hereby set aside. The accused is to be set at liberty forthwith, if he is not wanted in any other case. The bail bonds are discharged.

21. Send back the LCR.

JUDGE

Comparing Assistant