

GAHC010120772012



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

Case No. : Crl.Rev.P./166/2012

MD. BAREK ALI
SON OF LATE HASMAT ALI VILL- NO. 4, BARUAH JHAR P.S. DALGAON,
DIST. DARRANG

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR.A ROSHID

Advocate for the Respondent : PP, ASSAM

BEFORE
THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the Appellant	: Mr. A. Rashid, Advocate
For the Respondents	: Mr. B. Sharma, Addl.P.P. Assam.
Date of Hearing	: 01.11.2022, 21.12.2022, 24.01.2023
Date of Judgement	26.04.2023

JUDGEMENT & ORDER (CAV)

Heard Mr. A. Rashid, learned counsel for the petitioner. Also heard Mr. B. Sharma, learned Additional Public Prosecutor for the State of Assam.

2. The present CrI. Revision Petition under Sections 397/401 read with Section 482 of the Cr.P.C. 1973 is filed assailing the judgment dated 02.03.2012 passed in Criminal Appeal No. 8 (D-2)/09 by the learned Sessions Judge, Darrang whereby the conviction and sentence dated 17.03.2009 passed by the learned Assistant Sessions Judge, Darrang in Sessions Case No. 21(DM-1)/2008 was affirmed.

3. The prosecution was launched on the basis of an F.I.R. dated 13.03.2007 by the informant before the Officer-in-Charge, Dalgaon, Police Station alleging that on 12.03.2007 at 11:00 PM while she came out of the house to respond to nature's call, the accused forcefully laid down her on the ground showing a dagger and committed rape on her.

4. On receipt of the F.I.R. the Officer-in-Charge, Dalgaon P.S. registered Dalgaon P.S Case No. 107/2007 under Section 376 of IPC for investigation. Accordingly, the investigation was conducted and thereafter, charge sheet was filed under Section 376 of the IPC against the accused petitioner.

5. Thereafter, committal Court committed the matter to the learned Session Judge, Darrang who in turn empowered the learned Assistant Sessions Judge to try the case. Charges were framed on 26.02.2008 against the petitioner and

was explained to the accused, to which the accused pleaded to be not guilty and claimed to be tried. Accordingly, trial was commenced.

6. To bring home the charges, the prosecution examined as many as six witnesses, however, defence examined none. The statement of the accused was recorded under Section 313 of the Cr.P.C.

7. Thereafter, the learned trial Court convicted the petitioner under section 378 IPC and sentenced him to undergo RI for five years and to pay fine and in default, to undergo RI for three months.

8. Such judgment was challenged before the learned Sessions judge in Criminal Appeal No. 8 (D-2)/09, which was also dismissed. Assailing such judgements and conviction, the present revision petition is filed.

9. Before determining the legality of the judgments, let this Court looked into the evidence that were brought on record to prove the guilt of the accused.

I. **PW.1.** is the victim. She deposed that she knew the accused well. She deposed that on the date of occurrence when she went out of her house at around 11:00 PM, to respond nature's call, the accused grabbed her from behind and forcefully took her near to the tube well and had forceful sexual intercourse with her. As the accused showed a dagger and threatened to kill the victim, she did not shout out of fear. When the accused left, she raised hue and cry and then PW-3, Abdul Mazid, one Mahiran and Ahuja came near her. She further deposed that her husband was not at home at that point of time and went to the place of Abdul Awal to enjoy C.D. She further deposed that after an hour, her husband came back and the FIR was lodged.

During cross-examination, she deposed that on the date of occurrence it was a dark-night and season was warm. She deposed that near the place of occurrence only her and her brother-in-law's houses were situated. At the time of occurrence, brother-in-law's family members were not present. She further deposed that she has two children. She also re-affirmed during cross-examination that the accused grabbed her from behind and therefore, she did not at first see the accused. She denied the suggestion that there had a quarrel with the accused regarding a well. She also disclosed that the after the incident, the village head brought the accused and his wife to the house of the victim.

- II. **PW.2.** is the husband of the victim. He deposed that he was not at his home at the time of occurrence and was enjoying the C.D at the place of Abdul Awal. One Mazid (PW-3) brought him from the house of Awal. When the victim wife informed him regarding the incident, he informed the village head and the villagers.

During cross-examination, he deposed that the accused used to come to their place and denied the suggestion that there had been a quarrel between him and the accused person. He further deposed that he saw the wife of the accused coming to their house and also saw that people were gathering in his house.

- III. **PW-3** is Abdul Mazid, who deposed that at the time of incident, he was at his residence. After hearing hue and cry of the victim, he and his mother Mohiran Nessa and his wife Ahuja went near the victim. On being asked, she replied that the accused had forcefully committed rape on her when she went outside to meet nature's call.

He further deposed that thereafter he went to the place of Awal and brought back the husband of the victim and the villagers called the Gaon burah.

During cross-examination, he deposed that he saw the victim standing in the backyard and she was shivering. During cross-examination, he further deposed that he witnessed that the children of the victim were sleeping.

IV. **PW-4** is the Doctor, who examined the victim after the alleged incident. He opined that the vaginal swab shows no spermatozoa. He also opined that no definite opinion regarding rape could be given and no sign of injury could be noted. He exhibited and proved the medico legal report. The said witness was not cross-examined by the defence.

V. **PW.5** is one Saukat Ali. His deposition discloses that he was not an eye witness, however, at about 12:00 midnight, while he was asleep, some villagers came to his place and informed that the victim had been beaten up by accused and thereafter, there was a meeting amongst villagers. The accused in the villagers meeting denied the allegation and stated before the public that he went to the victim's place to borrow rice as he had no rice at home and some guest came to his house. Thereafter, he left the place saying that he will discuss the matter on the next day.

During cross-examination, he deposed that the distance between his house and house of the accused is about half KM.

VI. **PW.6** is the investigating officer. He deposed that he received the

FIR and registered the case. He visited the place of occurrence, examined the witnesses and recorded their statements. He also deposed that he got the statement of the victim recorded under Section 164 of Cr.P.C. and also got the victim medically examined. He exhibited and proved the statement of the victim as Exhibit-2 and the FIR as Exhibit-3. He also exhibited the charge sheet as Exhibit-4.

During cross-examination, he deposed that he had not seized the wearing apparel of the victim. He also deposed that during the investigation he could not arrest the accused person.

10. During statement recorded under Section 313 Cr.P.C., the accused had denied the statement of witnesses being false. Thereafter, the learned trial Court convicted the accused under Section 376 of the IPC and sentenced him to undergo rigorous imprisonment for 5 (five) years and to pay fine of Rs. 3,000/- and in default in payment of fine to suffer further rigorous imprisonment for 3 (three) months.

11. Such decision was challenged before the learned appellate Court. However, the learned appellate Court did not find any infirmity in the judgment of the trial Court and accordingly dismissed the appeal by upholding the conviction and sentence.

12. Mr. Rashid, learned counsel for the petitioner submits that the accused has been convicted only on the basis of sole testimony of the victim and there was no independent corroboration of such offence. Therefore, the learned courts below ought not to have convicted the petitioner. He further contends that the Doctor could not assert whether there is rape inasmuch as the Doctor did not find any sign of forceful sexual intercourse or Spermatozoa in vaginal

swab. Such evidence clearly establishes that the victim had falsely deposed.

13. Per contra, Mr. B. Sharma, learned Additional Public Prosecutor, for the State of Assam argues that the evidence of the victim has remained unshaken and her evidence is of sterling quality. Therefore, only on the sole testimony of the victim, the accused can be convicted. He further contends that there is also corroboration from the witness i.e. PW-3 regarding hue and cry raised by the victim and her physical and mental condition at the place of occurrence. Accordingly, Mr. Sharma submits that in the present case, there is corroboration too. The learned Counsel further contends that not having injury and not getting spermatozoa need not be given much importance in view of the evidence of PW1 and PW3.

14. This Court has given anxious considerations to the arguments advanced by the learned counsel for the parties and also perused the materials available on record.

15. By now, it is well settled that a conviction can be given in a case of rape only on the basis of sole testimony of the victim subject to condition that her evidence is of sterling quality. The Hon'ble Apex Court in the case of ***Bharwada Bhoginbhai Hirjibhai –Vs- State of Gujrat reported in AIR 1983 SC 753*** and in the case of ***Gagan Bihari Samal, -VS- State of Orissa*** reported in ***1991 3 SCC 562***, held that corroboration is not a *sine qua non* for conviction in a rape case.

16. In the case in hand, the victim has specifically deposed that on the date of occurrence at about 11:00 PM in the night, when she came out of the house to respond to nature's call, the accused grabbed her from behind and took her near the tube well and forcefully committed sexual intercourse against

her will. She did not raise hue and cry as the accused threatened her life by showing a dagger and the moment, the accused left the place, she started hue and cry. During cross-examination, she reaffirmed that the accused has grabbed her from behind. The factum of raising hue and cry by the victim and the place of occurrence has been corroborated through the evidence of PW-3 and also the factum of absence of her husband in the residence at the time of commission of the offence. The PW-3's evidence that he along with his mother and wife came out of their house hearing hue and cry raised by the victim and saw the victim at the place of occurrence traumatized and shivering has been established beyond any reasonable doubt. Though the defense has tried bring a defence that due a previous quarrel regarding a well, the victim had falsely implicated the accused, however, no such material has been brought by adducing evidence. Thus, this Court cannot find fault on the finding that the testimony of the victim was trustworthy and was corroborated by the PW-3.

17. In the case of ***State of Himachal Pradesh - vs - Lekh Raj*** reported in ***1999 Supp(4) SCR 286***, after dealing with different earlier judgements and some text books written by expert, it was held that the presence of spermatozoa, dead or alive, would be different from person to person and its positive presence depend upon various circumstances. Otherwise also, the presence or absence of spermatozoa is ascertained for the purposes of corroboration of the statement of the prosecutrix. If the prosecutrix is believed to be truthful witness in her deposition, no further corroboration may be insisted. Corroboration is admittedly only a rule of prudence.

18. The Hon'ble Apex Court in ***State of Maharashtra vs. Chandra Prakash Kewalchand Jain*** reported in ***1990-1-SCC-550*** relying upon medical evidence observed that absence of spermatozoa in the vaginal smear

and slides, cannot cast doubt on the creditworthiness of the prosecutrix.

19. In the case in hand, in considered opinion of this Court, the evidence of PW-4, i.e. the Doctor is inconclusive inasmuch as the Doctor has opined that it is not possible to give definite opinion regarding rape. Therefore, in the aforesaid backdrop, this Court also cannot find fault with the courts below relying on other evidences as discussed hereinabove by not giving serious considerations to the evidence of Doctor.

20. The object of the revisional jurisdiction is to correct, patent illegality and error of jurisdiction. Such power is exercised by a revisional Court when the decision under challenge is grossly erroneous or the finding is based on no evidence. It is also well settled that such power is not to be exercised as matter of course. In the case of **Chandra Babu –Vs- State** reported in **2015 8 SCC 774**, the Hon'ble Apex Court held that normally the revisional jurisdiction should be exercised on a question of law and factual appreciation can be made in those cases where decision has resulted in perversity. In the case in hand, in view of the finding as discussed hereinabove, this Court cannot appreciate the evidence to come into a different finding to that of the learned Courts below.

21. In view of the aforesaid discussion and reason, this Court finds no merit in the present case. Accordingly, same is dismissed.

22. LCR be sent back forthwith along with order of this Court to the learned Courts below.

JUDGE

Comparing Assistant