

GAHC010184642014



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

Case No. : CrI.A./90/2014

PARESH NATH
S/O LATE SUREN NATH, R/O VILL. AATHIABARI, P.O. and P.S.
BILASHIPARA, DIST. DHUBRI, ASSAM, PIN 783301

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MS.N MITRA

Advocate for the Respondent : MR. K K PARASHAR(ADDL.PP, ASSAM)

BEFORE
HONOURABLE MRS. JUSTICE MALASRI NANDI

JUDGEMENT AND ORDER (CAV)

Date : 09-02-2023

Heard Mr. R. De, learned counsel for the accused-appellant. Also heard Mr. K.K. Parasar, learned Additional Public Prosecutor for the State/respondent.

2. This is an appeal filed under Section 374 Cr.P.C. 1973, challenging the judgment and order dated 19.12.2013 passed by the leaned Assistant Sessions Judge, Sonitipur, Tezpur in

Sessions Case No. 146/2012, whereby the accused/appellant was convicted under Sections 457/376 IPC and sentenced him to undergo simple imprisonment for 7 years and to pay a fine of Rs.3,000/- in default to undergo simple imprisonment for another 3 months for the offence under Section 376 IPC and to undergo simple imprisonment for 3 years and to pay a fine of Rs.1,000/- in default to undergo simple imprisonment for 2 months for the offence under Section 457 IPC. Both sentences were directed to run concurrently.

3. The brief facts of the case is that one Jitu Kalita lodged an FIR on 17.02.2012 before the Officer-in-Charge, Dhekiajuli Police Station stating *inter alia* that on 15.02.2012 at about 12 o'clock (mid night), while he was watching 'bhawna' at Ward No. 6, one Paresh Nath, a resident of Ward No. 6, entered into his house by taking advantage of his absence and forcefully committed rape on his wife while she was sleeping inside the room and fled away.

4. On receipt of the complaint, a case was registered vide Dhekiajuli P.S. Case No. 80/2012 under Section 457/376 IPC and the investigation was commenced. During investigation, the investigating officer visited the place of occurrence, recorded the statement of the victim as well as other witnesses and after completion of investigation submitted charge-sheet against the accused/appellant under Section 457/376 IPC before the Court of Judicial Magistrate First Class, Sonitpur, Tezpur. As the offence under Section 376 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

5. During trial, the accused/appellant had appeared before the court of Assistant Sessions Judge, Sonitpur as the case was transferred to the said court for trial. The learned trial court on considering the materials available in the case had framed charges against the accused/appellant under Sections 457/376 IPC to which the accused/appellant pleaded not guilty and claimed to be tried.

6. To substantiate the case of the prosecution, 7(seven) witnesses were examined on behalf of the prosecution. After completion of trial, the statement of the accused/appellant was recorded under Section 313 Cr.P.C., wherein he denied all the allegations levelled against

him. On the other hand, the accused stated that he had been falsely implicated in this case. After hearing the arguments advanced by the learned counsel for the parties, the learned Assistant Sessions Judge had delivered the judgment convicting the accused/appellant as aforesaid. Hence, this appeal.

7. The learned counsel for the appellant has argued that there are lots of contradictions in the statement of the victim as well as other witnesses and the allegation of committing such offences either Section 376 IPC or 457 IPC are not made out against the accused/appellant. Thus, in absence of any evidence to that effect, the learned trial court has committed error in coming to the conclusion that the accused had committed the alleged offences and as such, the judgment and order passed by the learned trial court is liable to set aside.

8. It is also the submission of learned counsel for the appellant that the incident occurred on 15.02.2012 whereas the FIR was lodged on 17.02.2012 but there was no explanation regarding delay of lodging the FIR which creates a serious doubt in the prosecution story and as such, the impugned judgment is liable to be interfered by this Court.

9. The appellant has challenged his conviction and sentences on the ground that the learned trial court has not properly appreciated the evidences adduced by the prosecution. It is submitted that serious omissions, contradictions and anomalies present in the testimony of the prosecutrix (P.W.1) and the informant who is the husband of the victim, which have been ignored by the learned trial court. It is contended that no mark of injury on the person or private parts of the victim was found by the medical officer who had examined the victim during investigation which belies the prosecution story that the victim was subjected to rape inside her house for 30/40 minutes. Hence, the conviction and sentence is liable to be set aside.

In support of his submission learned counsel has placed reliance on the following case law-(2013 CRI. L.J. 1634 State of Rajasthan vs Babu Meena)

10. Per contra, the learned Additional Public Prosecutor has supported the findings of learned trial court regarding conviction recorded thereon by stating that the testimony of the victim (P.W.1) stood well corroborated by other witnesses as well as the surrounding circumstances. It is further submitted that there was no motive for false implication, therefore, the findings of conviction recorded by the learned trial court and the sentence imposed against him does not call for any interference by this Court.

11. I have considered the submissions of learned counsel for the parties and I have also perused the case record of Sessions Case No. 146 of 2012 as well as the documents available in the record.

12. The law is well settled that in a rape case, conviction can be recorded on the basis of sole testimony of the prosecutrix provided the same is found cogent,, consistent, clear and credit worthy (*State of Pubjab vs Gurmit Singh 1996(2) SCC 384*). It is further well settled that even in case of a married woman, the corroboration cannot be insisted as a rule of law, however, as a rule of prudence, it is always safe to look for corroboration when the charge with regard to rape has been levelled by a grown-up and married woman. In this connection, following observations made by the Hon'ble Apex Court in the case of *Sheikh Zakir vs State of Bihar, AIR 1983 S.C. 911* which is reproduced as follows-

".....In the case of a grown up and married woman, it is always safe to insist on such corroboration. Where corroboration is necessary, it should be from an independent source but it is not necessary that every part of the evidence of the victim should be confirmed in every detail by independent evidence. Such corroboration can be sought from either direct evidence or circumstantial evidence or from both."

13. The case of the prosecution is primarily based on the testimony of the prosecutrix (P.W.1). Though, the learned trial court has found the same worthy of reliance, however, close scrutiny of her testimony reveals that on various aspects, she has deposed in an inconsistent manner. Apart from this, her statement on number of important points is not

inconformity with the First Information Report as well as statement recorded before the Magistrate. Under such backdrop, it is required to look into the evidences of the witnesses.

14. P.W.1 is the victim. From her deposition, it reveals that the accused Paresh Nath was known to her as because he used to work in the same factory along with her husband. The incident took place at her house on 15.02.2012 at about 12 a.m.(midnight). At that time, she was sleeping inside the room when the accused had entered into her house and forcefully had committed rape on her. He gagged her mouth as such, she was unable to make hue and cry. He committed the act for 30/40 minutes and she became unconscious and fell down. She did not know how the accused entered into the room. She told about the incident to her husband when he returned back home at about 4.30 a.m. Her husband lodged the FIR on 17.02.2012. On the next date, police sent her for medical examination and also took her to the court for recording her statement vide Ext.1.

15. In her cross-examination, P.W.1 replied that the door of her house is on the southern side. There are three rooms in her house. The house is in broken condition. She locked the hook of the door while she was sleeping. She went to sleep at about 10.30 p.m. Her daughter is about 5 years old. On the date of occurrence, she was sleeping along with her daughter. Her mother-in-law, Karuna Kalita was sleeping in the next room. Her brother-in-law and his wife were sleeping in the room adjacent to the room of her mother-in-law.

16. P.W.2 is the informant, Jitu Kalita, who is the husband of the victim. He deposed in his evidence that the incident took place in his house at about 12/12.30 a.m. At that time, he went to watch 'bhawna'. After returning home from 'bhawna' he went off to sleep. On the next day at about 12 noon, his wife told him about the incident that the accused had committed rape on her. On that day, after discussion with the neighbor, he lodged the FIR vide Ext. 2.

17. In his cross-examination, P.W.2 replied that his house comprises of three rooms, which is made up of bamboo coated with earth. His wife was sleeping by closing the door. On the

day of incident, his mother was sleeping behind the curtain in the other room. There was partition of wall between two rooms. His daughter, aged about 5 years, who was sleeping along with his wife on the day of the incident. His wife was sleeping when he returned home at about 4 a.m. after watching 'bhawna'.

18. P.W.3 Niju Kalita, who is sister-in-law of the victim. According to her, on the next day morning, the victim had cried and told her that the accused had committed rape on her while she was alone.

19. In her cross-examination, P.W.3 replied that she had heard about the incident while the victim was telling her brother-in-law about the incident at about 6 a.m. The victim was sleeping in the middle room and her mother-in-law was sleeping in the next room. There was no door between the room where mother-in-law and the victim were sleeping. The accused had entered into the house by breaking the bamboo wall. The said broken wall was on the eastern side of the house.

20. P.W.4 Karuna Kalita, who is the mother-in-law of the victim. From her deposition, it discloses that on the next day morning of the incident, her daughter-in-law(P.W.1) told that accused had come and committed bad act. She had told that some mischief was done. She told that the accused had entered into her room by breaking bamboo wall. She had seen the broken wall. Later on, her son had lodged the FIR.

21. In her cross-examination, P.W.4 replied that there was no electric light in the bedroom since construction was going on. She did not know when Jitu Kalita returned from 'bhawna'. The broken door was in the southern part. On the next day, she had noticed bruise mark on the face of the victim.

22. P.W.5 Purna Lakhi Nath, who is the neighbor of the victim. She deposed before the court that on the next day Jitu had told that on the previous night, when he was not at home, one boy had come and committed rape on his wife.

23. In her cross-examination, P.W.5 replied that on the next day at about 10 a.m. she was told about the incident. At that time, no other persons were there.

24. P.W.6 is the medical officer who had examined the victim on police requisition. She deposed in her evidence that on 18.02.2012, she was at Kanaklata Civil Hospital, Tezpur. On that day, she examined the victim in reference to Dhekiajuli P.S. Case No. 80/2012. After medical examination, she found one bruise mark present over left side of mandible and no injury had seen in her private parts as well as no marks of violence also noticed. Active menstrual bleeding present. At the time of alleged incident, the victim was above 18 years of age.

25. In her cross-examination, P.W.6 replied that the victim was in active menstrual bleeding at the time of examination. At that time, the menstruation was in normal course. She did not mention the size of bruise and age of the causing bruise in the report. She also did not mention the colour of the bruise. After six hours, the colour of the bruise usually differs.

26. P.W.7 is the investigating officer, Smti. Jonali Das. From her deposition, it reveals that on 17.02.2012, while she was working as an attached officer of Dhekiajuli P.S., one Jitu Kalita had lodged a written complaint and on that basis, the O/C, Dhekiajuli had registered a case and entrusted her to investigate the same. After taking the charge, she had recorded the statement of the complainant as she found him present in the police station. On the very day, she visited the place of occurrence, i.e. the house of the victim at Ward No. 6 of Dhekiajuli Town. There she had prepared the sketch map vide Ext. 8. On that day, she recorded the statements of other witnesses. On 18.02.2012, she forwarded the victim for medical examination. During investigation, she arrested the accused person and forwarded him for judicial custody. On that day, she also sent the victim to the court for recording her statement. Thereafter, she collected the medical report of the victim. On completion of investigation, charge-sheet was submitted against the accused/appellant Paresh Nath under Sections 457/376 IPC, vide Ext.9.

27. In her cross-examination, P.W.7 replied that as per the ezahar, the incident took place on 15.02.2012 at about 12 a.m. But the said ezahar was lodged on 17.02.2012 at about 9 p.m. The reason for delay in lodging the FIR was not mentioned in the ezahar. The distance between Dhekiajuli police station and the place of occurrence is about half a kilometer. She did not record the statement of Dhruba Prasad Nath, Nripen Kalita and Rajesh Nath as mentioned in the sketch map. It is not mentioned in Ext.8 as to how many windows and doors were there in the house of the complainant.

28. Admittedly, the incident occurred in the midnight of 15.02.2012 but the FIR was lodged on 17.02.2012 by the husband of the victim(P.W.2) without mentioning the cause of delay in lodging the FIR. According to the victim as she was not well her husband had lodged the FIR. There was no explanation in her evidence as to why there was delay in lodging the FIR. According to P.W.2, the informant, on the next day, a discussion about the incident was held amongst Deben Kalita, Manama Nath, Moon Kalita and Nirmal Nath etc. and they advised him to lodge an FIR before the police station. Ultimately, there was no explanation given by the victim or her husband regarding delay of lodging the FIR which is fatal to the prosecution case.

29. There is yet another anomaly found in the prosecution evidence with regard to the timing of disclosure about the incident to the inmates of the house by the victim. On the date of the incident, the husband of the victim was not at home. The victim stated that she told about the incident to her husband when he returned back home at 4.30 a.m. But according to P.W. 2, when he returned back home, his wife was found sleeping. On the next day, at about 12 noon, his wife told him about the incident but P.W.3 has stated something different. She stated that she heard about the incident while the victim was telling about the incident to his brother-in-law i.e. P.W.2 at about 6 a.m. According to P.W.5, Jitu told her about the incident on the next day at about 10 a.m. but P.W.2 i.e. Jitu Kalita replied in his cross-examination that he woke up on the next day morning at about 10.30 a.m.

30. Another glaring mistake which has been noticed in the statement of the victim that

while statement of the victim was recorded under Section 164 Cr.P.C., she disclosed before the Magistrate that the accused had entered into her house by breaking the wall. However, while she deposed before the court, she stated that she did not know as to how the accused had entered into her house. The broken wall was not seized during investigation. According to P.W.4, her daughter-in-law told her that the accused had entered into the house by breaking the bamboo wall and she had seen the broken wall which was in the southern part of the house. But P.W.3 stated that the said broken wall was on the eastern side of the house.

31. It is an admitted fact that the victim was sleeping along with her 5 years old daughter but she did not utter a single word regarding her daughter whether she woke up or not. It is quite natural that if any unnatural thing was going on inside the room in the same bed, a five years old girl would wake up by calling or making a cry. Admittedly, the mother-in-law of the victim i.e. P.W.4 was also sleeping in the very next room. P.W.4 clearly stated in her evidence that the distance between her bed and the bed of her daughter-in-law i.e. P.W.1 was about 5 feet. It is very difficult to believe that P.W.4 did not hear anything while the accused had committed rape on the victim for 30/40 minutes.

32. It is true that the medical officer had found one bruise mark over left side of mandible of the victim. But none of the witnesses had stated that they had noticed any injury on the face of the victim. The victim was examined by the doctor after three days of the incident. The medical officer did not mention whether the injury was fresh or not. In her cross-examination P.W. 6 admitted that she did not mention the colour of bruise in medical report and after six hours, the colour of bruise usually differs.

33. It appears from the evidence of the witnesses that the construction of the house of the informant was going on at the relevant time of the incident. It was alleged that a month before the incident, P.W.2 the husband of the victim had taken a loan for an amount of Rs.10,000/- from the accused. He stated that if the amount was not paid in time, then an interest of Rs.15/- would be required to be paid per month. But to prove the fact in question, no witness was examined by the accused/appellant before the learned trial court. It somehow

indicates that the relation between the accused/appellant and the victim or her family members was not cordial at the relevant time of the incident.

34. In the considered opinion of this Court, the testimony of the prosecutrix(P.W.1) does not inspire confidence and which suffers from serious anomalies. The learned trial court while appreciating the evidence of the prosecutrix(P.W.1) had not taken into consideration the aforesaid vital aspects of the evidence of the witnesses

35. In view of the above, it cannot be held beyond reasonable doubt that the accused/appellant had committed rape on the victim. Therefore, the conviction and sentences imposed against him cannot be sustained.

36. In the result, the appeal is allowed. The conviction and sentences recorded by the learned trial court against the accused/appellant in connection with Sessions Case No. 146/2012 under Sections 457/376 IPC is hereby set aside. The accused/appellant is acquitted on benefit of doubt.

37. Send back the LCR.

JUDGE

Comparing Assistant