

GAHC010190992020



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

Case No. : Crl.A./141/2021

1. PARESH KAKOTY
S/O- LATE ATUL KAKOTY,
R/O- KHEMDOI KAKOTY GAON, P.S.-AMGURI,
DIST- SIVASAGAR, ASSAM.

VERSUS

1. THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP, ASSAM.

2: PURABI SARMA
W/O- SRI RABIN SARMA
R/O- KHEMDOI KAKOTY GAON
P.S.- AMGURI
DISTRICT- SIVASAGAR
ASSAM.

Advocate for the Petitioner : MR J I BARBHUIYA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGEMENT (CAV)

Date : 27-01-2023

Heard Mr. J.I. Barbhuiya, learned counsel for the appellant. Also heard Mr. BB Gogoi, learned Addl. P.P., Assam, representing the State respondent.

2. In this appeal under Section 374(2) of the CrPC, the appellant has challenged the correctness or otherwise of the judgment and order dated 22.10.2019, passed in Sessions Case No.89(S-S)2011, arising out of G.R. Case No.1110/2009, by the learned Addl. Sessions Judge, Sivasagar. It is to be noted here that vide the impugned judgment and order, the learned Court below has convicted the appellant, under Section 376(f) of the IPC, and sentenced him to suffer rigorous imprisonment for 10 years and also to pay a fine of Rs.5,000/-, with default stipulation.

3. The factual background, leading to filing of the present appeal, are briefly stated as under:-

“On 21.09.2009, Smti. Purabi Sarma of Khemdoi Kakoty Gaon, under Amguri Police Station lodged on FIR with the Officer-in-Charge, Amguri P.S. to the effect that on 12.09.2009, in the evening, while she went to take bath, then one Paresh Kakoty of her locality engaged in indecent activities with her five years old daughter, Smti 'X' (name withheld). Then, seeing the same, she raised hue and cry and then the accused fled away”.

4. Upon the said FIR, the Officer-in-Charge, Amguri P.S., registered the Amguri P.S. Case No.82/2009, under Section 376(f) of the IPC and himself investigated the same. During investigation, he had visited the place of occurrence, examined the witnesses and got the victim examined by the Doctor and collected the report and also got her statement, under Section 164 CrPC, recorded in the Court and arrested the accused and forwarded him to the Court and thereafter, on completion of investigation, he laid charge sheet against the accused to stand trial, in the Court under Section 376 of the IPC.

5. On commitment of the case to the Court of Sessions and having been transferred the same to the Court of learned Addl. Sessions Judge, Sivasagar, the learned Addl. Sessions Judge, had framed charge against the appellant, after hearing learned Advocates of both sides, to which the appellant pleaded not guilty and claimed to be tried. Thereafter, the learned Court below has examined as many as eight witnesses, including the M.O. and the I.O. and thereafter, found that the prosecution has succeeded in establishing the case against the appellant under Section 376 of the IPC and sentenced him, as aforesaid.

6. Being aggrieved, the appellant preferred this appeal on the ground that: the learned Court below has erred in law as well as on fact and as such the impugned order is bad in law, that the evidence on record does not warrant conviction and the learned Court below has failed to appreciate the evidence in its proper perspective and that the Court below has wrongly relied upon the evidence of PW.4 and her version under Section 164 of the CrPC, as the same has contradicted the contention made in the FIR dated 21.09.2009 and the evidence of PWs were not corroborated by the evidence of other witnesses and that the learned Court below has failed to rely upon the evidence of PW.1 and PW.6, though evidence were corroborated by other prosecution witnesses and that no materials ingredients of Section 376 of the IPC was available in the instant case, which are full of contradiction with the medical report as well as the statement of the victim, recorded under Section 164 of CrPC and the learned Court below has failed to apply its judicial mind into the legal proposition relating to the evidence adduced by the prosecution side, that the learned Court below has only relied upon the evidence of the victim girl and that the learned Court below has failed to appreciate the settled legal proposition, that the conviction can be recorded on the basis of the testimony of sole prosecution witness, provided that the same is reliable and is of starling quality and that the learned Court below has failed to appreciate that the prosecution side has failed to examine some material witnesses and therefore, it contended to allow the appeals, by setting aside the impugned judgment and order.

7. Mr. J.I. Barbhuiya, learned counsel for the appellant, apart from reiterating the points mentioned in the Memo of Appeal, also argued on following points, and contended to allow the appeal, by setting aside the impugned judgment and order:-

- 1) There is contradiction in the version of the witnesses regarding the date of occurrence with that of the FIR. It is stated in the FIR that the occurrence took place on 12.09.2009, whereas in her application to the Officer-in-Charge, dated 22.09.2009, she has stated that the occurrence took place on 10.09.2009 and because of her ignorance, the aforesaid mistake has been committed and the same is found to be not at all reliable and there is also delay in lodging the FIR.
- 2) Secondly, it is pointed out that the PW.1, who lodged the FIR has not supported the prosecution case and there is material contradiction in her version and as such,

she cannot be relied upon.

3) Thirdly, it is pointed out that Civil Suit was pending between the accused and some of the persons of the village, who have instigated the complainant and the victim to adduce evidence against him.

4) Fourthly, it is submitted that no ingredients under Section 376(f) of the IPC attracted here in this case.

8. On the other hand, Mr. B.B. Gogoi, learned Addl. P.P., Assam submits that out of eight witnesses examined by the prosecution side, the prosecution side has examined the victim as PW.4 and in her statement, she has clearly implicated the accused with the offence alleged in the FIR and the same could not be rebutted in cross-examination by the appellant and the same finds support from her statement, recorded under Section 164 of CrPC. Mr. Gogoi further pointed out that, though medical evidence has not supported the version of the victim, yet it was conducted after 11 days of the occurrence and as the victim was a growing child, after 11 days of occurrence, no sign of rape could be found on her person and that the learned Court below has rightly relied upon the evidence of the victim and convicted the appellant and the same warrants no interference of this Court and therefore, it is contended to maintain the same.

9. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and documents placed on record and also perused the record of the learned Court below.

10. It appears that the occurrence took place on 10.09.2009, though it is stated in the FIR dated 21.09.2009, that the occurrence took place on 12.09.2009, the informant in her subsequent application dated 22.09.2009, to the Officer-in-Charge of the Amguri P.S., has clarified that out of mistake, she has wrongly mentioned the date in the FIR. The explanation so offered for the aforesaid discrepancy is not disputed by the defence side. It is a fact that while the occurrence took place on 10.09.2009, the FIR was lodged on 21.09.2009, after eleven days. Admittedly no explanation has been offered by the complainant in the FIR but in her evidence before the Court, she has stated that she had reported the matter to the Mohila Somity, at the first instance and as the Secretary of the Mohila Somity was not present, the

FIR could not be filed in time. The explanation, so offered by the complainant, is not disputed by the defence side, and the same appears to be natural and relevant to the facts and circumstances on the record and as such, the same would not spell any inveracity to the prosecution version. Reference in this context may be made of a decision of Hon'ble Supreme Court in **State of Punjab vs. Gurmit Singh**, reported in **(1996) 2 SCC 384**, wherein it has been held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration.

11. Further, the evidence of the complainant reveals that at the relevant point of time, she went to take bath in the evening. Then returning home, she found the accused in her house and found her daughter lying on the bed and on being asked, she told her that the accused caught hold of her. However, it is elicited in her cross-examination that on being instigated by the persons of her locality, she has filed the FIR and she went to the Police Station that out of mis-understanding the case has been filed and then she was told by police that as the case has already been registered, it cannot be withdrawn.

12. However, the evidence of the victim, PW.4, reveals that on the relevant date, her mother went to take bath and her father went to the house of another person and she and her brother was in her house. Then the accused came to her house and caught hold of her hand and laid her on the bed and thereafter opened her pent and also opened the zip of his pent and thereafter, inserts the organ of generation into her private part and thereafter, her mother arrived at there and the accused fled away. The statement of the victim girl, recorded under Section 164 of CrPC., Exhibit-3 also consistent with her version on material parts and her cross-examination could illicit nothing tangible to discredit her version and she successfully withstand the test of cross-examination.

13. It is a fact that the medical evidence has not supported her version. The prosecution side has cross-examined Dr. Lohit Bora as PW.6 and he testified that age of the victim girl is below 9 years and there is no sign of recent sexual intercourse or injury to her private part

and he submitted the report, Exhibit-4, which is found to be consistent with his evidence before the learned Court below. It is a fact that while the occurrence took place on 10.09.2009, the victim was examined on 22.09.2009, after eleven days of the occurrence and as submitted by Mr. Gogoi, learned Addl. P.P., Assam, it is difficult to find the sign of recent sexual intercourse after eleven days of the occurrence, while the victim is a growing child of nine years old. There appears to be substance in the submission of Mr. Gogoi and this Court is inclined to record concurrence of the same. Though Mr. Borbhuyan, the learned counsel for the appellant has submitted that the medical evidence has belied the version of the victim, yet such a submission left this court unimpressed. The finding of the Doctor based on non-rupture of the hymen nor the absence of injuries on the private parts of the prosecutrix, which cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. In holding so this court derived its strength from the following decisions of Hon'ble Supreme Court.

14. In the case of [Sheikh Zakir vs. State of Bihar](#), (1983) 4 SCC 10, it has been held by the Hon'ble Supreme Court as under:-

"Insofar as non-production of a medical examination report and the clothes which contained semen, the trial court has observed that the complainant being a woman who had given birth to four children it was likely that there would not have been any injuries on her private parts. The complainant and her husband being persons belonging to a backward community like the Santhal tribe living a remote area could not be expected to know that they should rush to a doctor. In fact the complainant has deposed that she had taken bath and washed her clothes after the incident. The absence of any injuries on the person of the complainant may not by itself discredit the statement of the complainant. Merely because the complainant was a helpless victim who was by force prevented from offering serious physical resistance she cannot be disbelieved. In this situation the non-production of a medical report would not be of much consequence if the other evidence on record is believable. It is, however, nobody's case that there was such a report and it had been withheld."

15. In the case of [Ranjit Hazarika vs. State of Assam](#) reported in (1998) 8 SCC 635, Hon'ble Supreme Court has held as under:-

"The argument of the learned counsel for the appellant that the medical evidence belies that testimony of the prosecutrix and her parents does not impress us. The mere fact that no injury was found on the private parts of the prosecutrix or her hymen was found to be intact does not belie the statement of the prosecutrix as she nowhere stated that she bled per vagina as a result of the penetration of the penis in her vagina. She was subjected to sexual intercourse in a standing posture and that itself indicates the absence of any injury on her private parts. To constitute the offence of rape, penetration, however slight, is sufficient. The prosecutrix deposed about the performance of sexual intercourse by the appellant and her statement has remained unchallenged in the cross-examination. Neither the non-rupture of the hymen nor the absence of injuries on her private parts, therefore, belies the testimony of the prosecutrix particularly when we find that in the cross-examination of the prosecutrix, nothing has been brought out to doubt her veracity or to suggest as to why she would falsely implicate the appellant and put her own reputation at stake. The opinion of the doctor that no rape appeared to have been committed was based only on the absence of rupture of the hymen and injuries on the private parts of the prosecutrix. This opinion cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix. Besides, the opinion of the doctor appears to be based on "no reasons".

16. In the case of *The State of M.P. vs. Dayal Sahu*, reported in (2005) 8 SCC 122, Hon'ble Supreme Court has held that

"A plethora of decisions by this Court as referred to above would show that once the statement of prosecutrix inspires confidence and accepted by the courts as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration would be required unless there are compelling reasons which necessitate the courts for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. It is also noticed that minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case. Non-examination of doctor and non-production of doctor's report would not cause fatal

to the prosecution case, if the statements of the prosecutrix and other prosecution witnesses inspire confidence.

17. The other prosecution witnesses have not seen the occurrence and as such the same are not so important to advance the case of the prosecution. However, having gone through the evidence of PW.2, Sri Robin Sarma, I find that he is the father of the victim girl and at the relevant point of time, he went to some other places and at about 5:30 P.M., he returned home and found some persons in his house and then he was told that the accused committed bed act with his daughter. Then the matter was reported to Mohila Samitee and as the Mohila Samitee has not tried the matter, then case was lodged with the police.

18. PW.3 is Smti Niru Gogoi, who was hostile by the prosecution side and thereafter, cross-examines her and confirmed her statement through the I.O. (PW.8) that she stated before him that when she came out of the house of the victim, she had seen Paresh Kakoti.

19. PW.5 is Smti Hiramai Gogoi and she testified that when the occurrence took place, she was not in her house. She has gone to Guwahati and the mother of the victim Smti. Purabi Devi, told her that while the victim went to the house of the accused, then she was raped by the accused and as she was part of the Mohila Somity, they asked for our help and then they enquired the matter from the victim who said that what has been reported by her mother is true.

20. PW.7, Sri Jyoti Prasad Gogoi testified that he heard that the accused misbehaved with the victim girl and he was not present in the meeting. Thereafter, the prosecution side declared him hostile and brought on record the statement given by him before the I.O. and the I.O. (PW.8) has confirmed that, "Jyoti Prasad Gogoi told him that a meeting was called and that Paresh has confessed about committing the offence and had given a written undertaking that he will not repeat the same in future".

21. Thus, it appears that the victim/PW.4 is the star witness of the prosecution and she is categorical in stating that in absence of her mother, while she was in her house with her brother, then the accused came to her house and committed rape upon her. Having appreciated, analyzed and assessed her evidence by the yardstick of probabilities, its intrinsic worth and the animus of witness, I find no ground to disbelieve the same. Her statement under Section 164 of Cr.P.C. is also consistent with her evidence. The evidence of PW.1 and

the FIR also lend corroboration to her evidence. Though the PW.1/the complainant, in her cross-examination stated that out of misunderstanding, she lodged the FIR, yet the same caused no dent to the version of the victim.

22. It is well settled by catena of decisions of the Hon'ble Supreme Court that the evidence of a single witness, if found trustworthy, can be acted and relied upon. The test is whether the evidence has a ring of truth, is cogent, credible and trust worthy. Reference in this context can be made to a decision of the Hon'ble Supreme Court in **Vahala Bhushan vs. State of Tamil Nadu** reported in **AIR 1989 SC 236**, where it has been held that -

“The testimony of a single witness if it is straight-forward, cogent and if believed is sufficient to prove the prosecution case, the conviction can be made on the testimony of such a single witness.”

23. A co-ordinate bench of this court in **Abdul Kalam vs. State of Tripura** reported in **(1996) 2 GLR 251** held that –

“Section 134 of the Evidence Act provides that no particular number of witnesses shall in any case be required for proof of any fact. Court is therefore, concerned only with quality, not with the quantity of evidence. If the evidence of a solitary witness appears to be trustworthy and credible, same can be foundation of conviction.”

24. Here in this case, the evidence of the victim is consistent with her statement recorded under Section 164 of CrPC, and consistent with the FIR, Exhibit-1 also and with the evidence of PW.1/her mother. There is no material contradiction in her version and she had withstood the test of cross-examination. She is the victim of crime. There appears to be no animus between the victim and the appellant and the same ruled out false implication. Therefore, her evidence able to inspire confidence of this court and this court inclined to accept the same. In holding so, this court derived authority from the decision of Hon'ble Supreme Court in the case of **Gurmit Singh, (supra)** wherein Hon'ble Supreme Court has been held as under: -

"The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour

such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge leveled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial

tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable".

25. In Bharwada Bhoginbhai Hirjibhai v. State of Gujarat (1983) 3 SCC 217, Hon'ble Supreme Court has observed that refusal to act on the testimony of a victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. This Court deprecated viewing evidence of such victim with the aid of spectacles fitted with lenses tinted with doubt, disbelief or suspicion."

26. I have considered the submission of Mr. J.I. Barbhuiya, learned counsel for the appellant and I find no substance in the same. Though it is contended that the case has been filed on instigation of the villagers with whom the accused has enmity, the same could not be established by adducing any cogent evidence. It may be mentioned here that the victim, while withstanding the rigors of cross-examination, has clearly ruled out any false implication. Further it appears that from the evidence of the victim a clear case under section 376 (f) appears to be made out. And as such there is no substance in the submission of Mr. Borbhuyan and therefore, the same stands repelled.

27. In the result, I find no merit in this appeal and accordingly, the same is stands dismissed. Send down the record of the learned court below immediately with a copy of this judgment and order. The parties have to bear their own costs.

JUDGE

Comparing Assistant