

GAHC010211912019



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

CRL.A(J) No. 58 of 2019

Sri Biru Chetry,
Karbi Anglong, Diphu, Assam.

.....Appellant

-Versus-

The State of Assam

.....Respondent

:: BEFORE ::
HON'BLE MR. JUSTICE MRIDUL KUMAR KALITA

For the Appellant : Ms. B Sarma, Amicus Curiae

For the Respondent : Ms. S. Jahan,
Additional Public Prosecutor

Date of Judgment : 11.09.2023

JUDGMENT & ORDER

1. This criminal appeal (Jail) has been preferred under Section 374(2) of the Code of Criminal Procedure, 1973 on the basis of a petition of appeal filed by the appellant, namely, *Sri Biru Chetry*, which was forwarded to this Court by the Superintendent, District Jail, Diphu, impugning the Judgment dated 19.01.2019, passed by the Court of learned Additional Sessions Judge (FTC), Karbi Anglong, Diphu, whereby the present appellant has been convicted under Section 376 of the Indian Penal Code and has been sentenced to undergo rigorous imprisonment for ten years and to pay fine of Rs.10,000/- only and in default of payment of fine to undergo further simple imprisonment for 60 days. The appellant is presently detained in District Jail, Diphu.

2. The facts relevant for consideration of this jail appeal, in brief, are as follows:-

(i) That on 06.04.2015, one Prem Sunar lodged an FIR before the Officer-in-Charge of Dillai Police Station, *inter alia*, alleging that on 04.04.2015 at about 8.00 p.m., the first informant came to his residence, he saw the present appellant committing sexual intercourse with the wife of the first informant and after seeing the first informant, the appellant fled away from there taking advantage of darkness. Later on, the appellant was apprehended by the villagers and he was handed over to Police. It was also stated in the

FIR that when the first informant scolded his wife about the incident, she went away from her residence and did not return back till the lodging of the FIR.

(ii) On receipt of the said FIR, the Dillai P.S. Case No. 13/2015 was registered under Section 376 of the Indian Penal Code and investigation was initiated. Ultimately, after completion of the investigation, charge-sheet was laid against the present appellant under Section 376 of the Indian Penal Code. The appellant was arrested during the course of the investigation and he faced the trial remaining in custody.

(iii) On 25th September, 2017, the learned Additional Sessions Judge (FTC), Karbi Anglong, Diphu, after considering the materials on record and after hearing both sides, framed charge under Section 376 of the Indian Penal Code against the present appellant. When the said charge was read over and explained to the present appellant, he pleaded not guilty to the said charge and claimed to be tried. The prosecution side examined nine prosecution witnesses including the victim woman. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 during which, though, he admitted that he was present at the place of occurrence at the time when the said offence is alleged to have been

committed, however, he has pleaded his innocence and has denied that he had committed the offence which is alleged against him by the prosecution witnesses. After completion of the trial, by the Judgment, which is impugned in this appeal, learned Additional Sessions Judge (FTC), Karbi Anglong, Diphu convicted and sentenced the present appellant in the manner as has already been described in paragraph No. 2 herein before.

3. Before considering the rival submissions of learned counsel for both sides, let me go through the evidence which is available on record.

4. PW-1, Sri Nima Tamang, has stated in his deposition that about three years before his deposing in the Court as witness, at night, on hearing shouts, he along with the members of the Village Defence Party went to the house of the victim and there they came to know that the present appellant had raped the victim. PW-1 has stated that they found the appellant in the house of the complainant who was apprehended while he was trying to flee away and thereafter they handed over the appellant to the Police on the advice of Gaonbura.

4.1 During his cross-examination, PW-1 has stated that his house is about one kilometer away from the house of the complainant and the appellant belongs to another village,

namely, Sukanjan Village which is about 40 kilometers away from their village and on the day of the alleged incident, the appellant was in the house of the complainant as he worked there. PW-1 has stated that he is ignorant about the fact that if any relationship was there between the appellant and the victim.

5. PW-2, Sri Naren Duwara, has deposed that on hearing shouting, he along with the villagers came to the house of the victim and there he came to know that the present appellant had raped the victim and fled away. He has also stated that the villagers managed to apprehend the appellant when he was fleeing away at the jungle and thereafter he was taken to the house of the Gaonbura and, on instruction, he was handed over to the Police.

5.1 During cross-examination, PW-2, has stated that his house is about one kilometer away from the house of the complainant and he was requested by one Prem Kumar to come to the house of the complainant. He has also deposed that on coming to the house of the complainant, he did not find the appellant there.

6. PW-3, Sri Rajkumar Pradhan, has also deposed that his house is about one kilometer away from the house of the informant and on the night of the occurrence, the informant came to his house and informed him that in his absence the

appellant entered into his house and committed rape on his wife. PW-3 has also stated that the victim (wife of the informant) told them that the appellant had raped her and thereafter villagers started searching the appellant and later on found him hiding in jungle from where he apprehended. Thereafter, the appellant was handed over to the Police.

6.1. During cross-examination, PW-3 has stated that the house of the appellant is about 30 kilometers away from their village and he was working as a labourer in their village. It is also stated that the appellant generally use to spend nights in the house where he worked.

7. PW-4, Sri Suklal Sunar, has deposed that on the night of the occurrence, the informant came to his house and informed him that in his absence, the appellant entered into his house and committed rape on his wife. He had also stated that the informant also informed him that on seeing the informant, the appellant fled away from their and later on he was apprehended by the villagers where he was found hiding in a jungle. It is also stated by the PW-4 that on the following day of the incident, the appellant was handed over to the Police.

7.1. During cross-examination, he has also stated that the house of the appellant is about 30 kilometers away from their

village and the appellant used to spend night in the house where he worked.

8. PW-5, Dr. Karik Kropi, has deposed that on 07.04.2015, he was attached to Diphu Civil Hospital as Senior Medical and Health Officer and on that day he examined the victim in reference with Dillai Police Station Case No. 30/2015. PW-5 has deposed that as per the history given by the woman on 05.04.2015, in absence of her husband, one person came and made attempt to have for sexual intercourse. PW- 5 has further deposed that the victim informed him that at that time all the village people came and caught the accused person. PW-5 has further deposed that on examination multiple bruises were found on her right arm, left thigh, wrist, leg and buttock and the victim told him that she was assaulted by the villagers and not by the accused. PW- 5 has further deposed that on local examination, he found no mark of injury on the genital area. PW- 5 has further deposed that in his opinion, age of the victim woman is above 18 years. He has also stated that though there was history of sexual intercourse but spermatozoa were not seen on the vaginal slide and no sign of recent sexual intercourse was found.

He exhibited the injury report as Exhibit-1. His cross-examination was declined by the defence side.

9. PW-6, Sri Prem Sunar, who is the informant of this case, has deposed that on the day of occurrence, when he came back to his home at about 7.30 p.m., he found his wife on the bed in disorderly condition and the present appellant in the bedroom and seeing the PW-6, the present appellant fled away from room. PW- 6 has further deposed that when he enquired his wife she informed him that the present appellant had sexual intercourse with her forcibly and thereafter, PW-6 informed the villagers about the said incident and, thereafter, the villagers managed to apprehend the present appellant from a jungle. The PW- 6 has further deposed that the present appellant was handed over to the Village Defence Party and later on, the defence party handed over the present appellant to the Police. PW-6 has also stated that later on, he lodged a written *ejahar* regarding the incident.

9.1. During cross-examination, the PW-6 has deposed that one Police Personnel wrote the *ejahar* on his instructions. He has also stated that at the time of occurrence his wife was in the house with baby. He has also stated that at the time of entering into the house he did not hear any hue and cry coming from the house. He has also stated that he saw the appellant committed sexual intercourse with his wife when he entered into the house.

10. PW-7, who is the victim in this case (*real name did not disclose*), has stated that she knows the appellant, who used to work in their village and on the day of occurrence, at about 7.00 p.m., when she was breast feeding her baby, keeping the room dark, she suddenly found that one man entered into the house by opening the door and came to her bed and after coming to her bed that man warned her that he would kill her, if she raised any hue and cry. PW-7 has deposed that she could recognize from the voice of the said man that it was the present appellant. She has further stated that out of fear, she remained silent and the appellant committed sexual inter-course with her against her will. She has further stated that, in the meanwhile, her husband entered into the house and seeing him, the appellant managed to flee away from there and her husband raised hue and cry. On hearing his shouts, the villagers came to his house and they were informed about the matter. Thereafter, the villagers searched and managed to apprehend the appellant and, thereafter, the husband of the PW-7 lodged an FIR. It is also stated by PW-7 that Police got her statement recorded in the Court.

10.1. During cross-examination, PW-7 has stated that at the time of occurrence, she was mother of five children and all her children were with her in her house. She has also stated that when the appellant was entering into the house, she did

not raise any alarm after sensing the door being opened. She has also stated that at the time of occurrence, her rest of the children was sleeping. She had also stated that she did not see any weapon with the appellant. She has denied the suggestion given to her that she had stated before the Magistrate that on the night of the occurrence, her husband went to the house of his elder brother Mon Bahadur Sunar. She has also denied the suggestion that the appellant had sexually intercourse with her with her consent and that she had love affairs with him.

11. PW-8, Sri Til Bahadur Sunar, had stated in his deposition that on the day of incident, when he returned to his home, he heard hue and cry in the house of the first informant and after hearing hue and cry, he came to the house of the first informant and came to know from the villagers that the appellant had forcible sexual intercourse with the wife of the informant and thereafter fled away from there. Later on, he was apprehended by the villagers.

11.1 During cross-examination, PW-8 has deposed that he was informed by his wife that the appellant had forcible intercourse with the victim. He has also stated that, one day he found, the appellant had come to the house of the informant during day time.

12. PW-9, Sri Pradip Goswami, has deposed that on 06.04.2015 he was posted as ASI of Police at Dillai Police Station and on that day a person, namely, Prem Sunar came to the Police Station and lodged an FIR, *inter alia*, alleging that on 04.04.2015, the appellant taking advantage of his husband's absence committed rape of his wife and thereafter fled away from there. It is also stated by PW-9 that later on the appellant was apprehended by the villagers and was handed over to the Police. He has also stated that, on 06.04.2015, after receipt of the FIR, he went to the place of occurrence, however, he could not find the victim there and he came to know that out of shame the victim has taken shelter in the house of some other person and, on 07.04.2015, the victim herself came to the Police Station and, thereafter, her statement was recorded. PW-9 has also stated that the victim had stated that the present appellant had committed forcible sexual intercourse taking advantage of the absence of her husband. After completion of the investigation, PW-9 had laid the charge-sheet against the present appellant under Section 376 of the Indian Penal Code. The said charge-sheet is exhibited as Exhibit- 5.

12.1. During cross-examination, PW-9 has stated that the incident occurred on 04.04.2015, at about 8.30 p.m., and the appellant had fled away after the incident and later on 07.04.2015, he was handed over to the Police and the FIR

was lodged on 06th of April, 2015. He has also stated that, in the FIR it was stated by the first informant that as he has scolded his wife, she went out of her residence and had not returned till the lodging of the FIR. PW-9 has also stated that the victim did not state that she raised hue and cry at the time of the alleged offence.

13. The appellant was examined by the learned Trial Court under Section 313 of the Code of Criminal Procedure, 1973, during which though he has pleaded his innocence and has denied the allegations leveled against him in the FIR as well as by the prosecution witnesses, however, while answering the Question No. 2 as well as Question No. 6, he had stated that he had not done anything as alleged, he was just sitting near the wife of the complainant. The appellant declined to adduce any evidence in his defence.

14. Ms. B. Sarma, learned Amicus Curiae has submitted that, in the instant case, the FIR has been lodged after a delay of 2(two) days without giving any explanation for the said delay. It is also submitted by learned Amicus Curiae that the first informant (PW- 6) had mentioned in the FIR that he had seen the appellant committing bad act with his wife. However, in his testimony as PW-6, he has stated during his examination-in-chief that he found that his wife on the bed in disorderly condition and the accused (appellant) was found in the bedroom. Learned Amicus Curiae has also stated that out

of nine witnesses who were examined as prosecution witnesses only the victim i.e. PW-7 and the informant who is the husband of the victim (PW-6) were stated to be the eye-witnesses. Learned Amicus Curiae has also submitted that from the testimony of PW-5 who is the doctor, who examined the victim, it appears that the victim had stated before him, when she was examined, that she had been assaulted by the villagers and the doctor found multiple bruises injuries on the victim which were not caused by the present appellant. It is also submitted by learned Amicus Curiae that it was only due to fear of facing social stigma that the victim woman made false statement implicating the present appellant. Learned Amicus Curiae has also submitted that the victim i.e. PW-7 has herself stated that she did not made any hue and cry which falsifies her testimony that she was subjected to forcible sexual intercourse. It was also submitted by learned Amicus Curiae that five children of the victim were in her residence and had she been subjected to sexual intercourse forcibly by the appellant, she could have easily alerted her children, which was not done in this case. Hence, it is submitted by learned Amicus Curiae that her testimony should not be relied upon.

15. Learned Amicus Curiae has also submitted that all the other witnesses except the husband of the victim i.e. PW-6 were staying far away from the place of occurrence and they

were only reported witnesses, who were allegedly told about the incident by the husband of the victim. Learned Amicus Curiae has also submitted that the medical evidence of PW-5 does not show any injuries on her genital area or any spermatozoa on the vaginal slide, hence, it does not support the allegations of forcible sexual intercourse against the present appellant. Learned Amicus Curiae has also submitted that the testimony of the victim also shows that she was sitting in the dark, inside her room, on the day of alleged incident and, therefore, it is submitted by learned Amicus Curiae that she had not seen the person who had committed sexual intercourse with her and it is only on the basis of assumption that she has implicated the present appellant.

16. On the other hand, learned Additional Public Prosecutor has submitted that the testimony of the victim woman, if found reliable, is sufficient to convict the present appellant even without any corroborative evidence and she submits that there is nothing in the testimony of the victim woman to disbelieve her as her statement, which she gave before the Magistrate under Section 164 of the Code of Criminal Procedure, 1973, and during the investigation under Section 161 of the Code of Criminal Procedure, 1973 as well as before the Trial Court were consistent as regards to the material particulars i.e., she was forcibly raped by the present appellant in absence of her husband.

17. Learned Additional Public Prosecutor also submitted that the presence of the appellant inside the bedroom of the victim is admitted by the appellant himself while answering to the Question Nos. 2 and 5 put to him by learned Trial Court during his examination under Section 313 of the Code of Criminal Procedure, 1973 when he stated that he was only sitting beside the victim.

18. Learned Additional Public Prosecutor has also submitted that the appellant was apprehended by the villagers from the jungle when he was hiding in the said place, his conduct of fleeing away from the place of occurrence on seeing the husband of the victim as well as hiding himself in the jungle itself shows that he was guilty. Learned Additional Public Prosecutor has also submitted that the testimony of the other witnesses who gathered at the residence of the victim on hearing hue and cry of her husband is relevant as *res gestae* witnesses under Section 6 of the Indian Evidence Act and their testimony may not be discarded merely because it was hearsay as the victim herself stated to those witness that she was subjected to forcible sexual intercourse by the present appellant immediately after the incident.

19. Learned Additional Public Prosecutor has also submitted that when the victim herself has stated that she was subjected to forcible sexual intercourse by the appellant,

there is no reason for not believing her testimony and further the testimony of PW-6 also corroborates her (PW-7) testimony wherein he has stated that he had seen the appellant committing sexual intercourse with his wife when he entered into room.

20. I have considered the submissions made by learned counsel for both sides and have gone through the materials on record meticulously.

21. The victim, in the instant case, is an adult woman and she was of 27 years of age when the alleged incident occurred. She was also the mother of five children at that time and all her children were also there with her in the said house when the alleged incident occurred. The testimony of PW-5 i.e., the doctor, who examined the victim shows that though he found injuries on her person, he was reported by the victim herself that she was assaulted by the villagers and not by the accused (*appellant*) and he found no injuries on the genital area. It also appears that though the incident occurred on 04.04.2015, the victim was medically examined on 07.04.2015, hence, not finding injuries, after three days of the alleged incident, on the genital area of the victim may not, in itself, be a reason to come to a finding that nothing as alleged had happened. The victim i.e. PW-7 has stated that she was subjected to forcible sexual intercourse. During cross-examination, the PW-6 (*husband of the victim*) has also

stated that he had seen the appellant committing sexual intercourse with his wife. Now, even if we believe that the appellant had committed sexual intercourse with the victim on the fateful evening at about 7.30 p.m., the question arises as to whether such an act was with or without the consent of the victim and as to whether the testimony of PW- 7 (*victim*) to the effect that the sexual intercourse was without her consent is reliable or not.

22. Though, in view of the statutory presumption under Section 114A of the Indian Evidence Act, the testimony of the victim to the effect that there was no consent for the sexual intercourse should be relied upon, however, if the statement of the victim has inherent infirmities, which cast doubt about its veracity, same may not be acted upon. In the instant case, the appellant has been able to raise such a doubt while cross-examining the victim i.e. PW-7, wherein she has stated that she did not raise any hue and cry when the appellant entered into her residence in absence of her husband and though all the five children were with her at that time, they were also not alerted by her. The evidence of PW-6, who is the informant, also shows that he heard no hue and cry coming from the house when he entered into his house when he found his wife on the bed in disorderly condition. It is also to be noted that though PW-7 had stated that the appellant threatened her to kill her if she raises any hue and cry,

however, during her cross-examination, she has stated that she had not seen the appellant carrying any weapon with him. Thus, it appears that it was not a normal conduct on her part not to have raised any alarm and even not alerting any of her children who were with her at that time in the house when the alleged offence occurred. Moreover, the prosecution side has not explained the injuries which were found on the victim i.e. PW-7. It appears from the testimony of the doctor who medically examined the victim that said injuries were reported to be caused by the villagers when the victim was assaulted by them. Therefore, the evidence on record suggest that the victim was subjected to assault by the villagers after the incident and it is not unnatural under such circumstances for the victim to falsely implicate the present appellant though otherwise the evidence on record suggest that the victim may be a consenting party to the act of sexual intercourse and her testimony that she was not consenting does not inspire confidence as it is only when her husband noticed the present appellant and the victim together, the appellant was implicated in this instant case. Before that neither any hue and cry was made nor the children of the victim were alerted by her. Further, there is no evidence to suggest that the appellant was carrying any weapon with him which caused the victim to get frightened and surrender herself to the appellant. Thus, from the testimony of the victim, it appears that there are inherent

infirmities which creates doubt about its veracity and thus the same is not safe to be relied upon for arriving at a finding of guilt of the present appellant solely on the basis of her uncorroborated testimony.

23. In view of the discussions made in foregoing paragraphs and reasons mentioned hereinabove, the prosecution version becomes doubtful and under such circumstances, this Court is constrained to give benefit of doubt to the present appellant and accordingly, the conviction and sentence under Section 376 of the Indian Penal Code of the present appellant is hereby set aside and he is acquitted of the said charges on benefit of doubt. The appellant be set at liberty forthwith if he is not required to be detained in connection with any other case.

24. Let the case record of Sessions Case No. 39/2016 along with all the connected files be sent back along with a copy of this Judgment to the Court of learned Additional Sessions Judge (FTC), Karbi Anglong, Diphu.

25. This appeal is accordingly disposed of.

JUDGE

Comparing Assistant