

GAHC010219552012



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

Case No. : Crl.A./122/2012

DIGANTA MEDHI
S/O- LATE UDOI MEDHI, R/O- VILLAGE-1 NO GUNAMARA, PO- AZARBARI,
PS - DHARAMTUL, DIST- MORIGAON, ASSAM

VERSUS

THE STATE OF ASSAM

Advocate for the Petitioner : MR.D K DAS

Advocate for the Respondent :

BEFORE
HONOURABLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

JUDGMENT

Date : 14-11-2023

1. Heard Mr. D.K. Das, learned counsel for the appellant as well as Mr. B. Sarma, learned Addl. P.P. appearing for the State respondent.

2. This present appeal arises out of the judgment and order dated 24.04.2012, passed by the Sessions Judge Morigaon in connection with Sessions Case No. 44/2007 convicting Sri Diganta Medhi (hereinafter the appellant), under section 312/511 of the Indian Penal Code (IPC for short) and sentencing him to undergo rigorous imprisonment for 3(three) years, under section 417 of the IPC and sentencing him to undergo rigorous imprisonment for 1(one) year and under section 376 IPC to undergo rigorous imprisonment for 5(five) years. The sentences were directed to run concurrently.

3. Brief facts unfolded from the FIR is that on 24.08.2005, when the victim 'X' (name withheld) was alone at home, the appellant trespassed into her house and committed rape on the victim. The victim was dissuaded from raising alarm, as the appellant promised to marry her, as he sympathized with the victim because she lost her mother. The appellant, however, failed to keep his promise. The appellant learnt that the victim was pregnant and administered contraceptive pills to the victim for the purpose of abortion but failed to terminate her pregnancy. Victim was carrying for six months, when the appellant disagreed to marry her. The victim then lodged the complaint before the Chief Judicial Magistrate at Morigaon. It is apt to mention that the victim was a minor at the time of the incident. The complaint lodged by the victim was forwarded to the O/C of Dharamtul P.S. to register a case and investigate the

same.

4. The Investigating Officer (I/O in short) registered a Dharamtul P.S. Case No. 04/2006, under Sections 376/312/511/417 IPC and embarked upon the investigation. The victim was forwarded to the Magistrate for recording her statement under Section 164 of the Code of Criminal Procedure (Cr.P.C. for short). The statements of the witnesses were recorded. The victim was also forwarded to the Medical Officer for examination. On completion of investigation, charge-sheet was laid against the appellant.

5. On appearance of the appellant copies were furnished and this case was committed for trial.

6. At the commencement of trial charge was framed under sections 376/417/312/511 IPC, and read over and explained to the appellant who abjured his guilt and claimed to be tried.

7. To connect the appellant to the crime, the prosecution adduced the evidence of 5(five) witnesses including the Medical Officer (M.O. in short) and the Investigating Officer (I/O in short). Two court witnesses were examined and the defence adduced the evidence of 3(three) witnesses to refute the charges. To the incriminating circumstances against the appellant, several questions were asked under section 313 Cr.P.C to the appellant and his responses were recorded.

8. The learned counsel for the appellant Mr. D.K. Das, laid stress in his argument that the learned trial court has ignored the fact that the prosecution failed to prove this case beyond reasonable doubt. It is submitted that the victim was pregnant prior to the offence, which allegedly occurred on 24.08.2005 and, thus, the appellant was erroneously held guilty of offence under sections 376/417/312/511 IPC. Serious infirmities in the evidence were ignored by the learned trial court. The victim had alleged that she was sexually assaulted on 24.08.2005 and according to the medical report, the victim was pregnant for 190 days which is contradictory to her complaint. It is submitted that if we go by the complaint petition, then the incident allegedly occurred on 24.08.2005 and the victim ought to have been pregnant for 163 days and not 190 days (FIR lodged on 01.02.2006). The appellant also applied for DNA test, but the victim did not come forward for DNA profiling, and thus appellant

deserves the benefit of doubt and adverse inference can withdrawn under section 114 of the Indian Evidence Act 1872 (the Evidence Act for short). It is also intriguing that the victim's father did not implicate the accused. The learned counsel for the appellant has vehemently and fervently submitted that the appellant deserves acquittal.

9. Per contra, the learned Additional Public Prosecutor Mr. B. Sarma, laid stress in his argument that the victim was examined after six months and the exact date when the victim was impregnated cannot be ascertained in this manner. The conduct of the appellant after the incident is relevant. The appellant was also declared an absconder. He did not appear in the village meeting. He sexually assaulted the victim by inducing her with false promises of marriage and on misconception of facts the victim gave her consent and this act of the appellant tantamounts to sexual assault.

10. The learned Addl. P.P. has also submitted that the appellant was dealt with leniently by the learned trial court. On the anvil of these submissions, the questions that falls for consideration is whether the learned trial court erred in convicting the appellant under sections 312/511 IPC as well as section 417 IPC and section 376 IPC.

11. To decide this case in its proper perspective, the evidence is once more reappraised.

There is not even an iota of doubt that the victim was pregnant at the time when the FIR was lodged. The complaint was lodged on 01.02.2006 and the victim was examined by the M.O. on 02.02.2006. M.O. Dr. G.K. Borah deposed as PW-1 that on 02.02.2006 while working as Senior Medical and Health Officer at Morigaon Civil Hospital, he examined the victim on police requisition in connection with this case and found the following :-

“On examination :

Identification mark - Mole on right cheek.

Teeth U-13

L-13

Secondary sexual character - developed.

Hymen absent, no recent tear detected.

Uterus - 28 weeks size.

Cephalic present. F.H.S. positive.

Vaginal smear examination:

: No spermatozoa detected.

(Slide No.6/06) X-ray (No.118, 119, 120 - and reported by Radiologist Dr. R.P. Bora). -

Epiphysis at the lower end of radius and ulna have fused.

Epiphysis at the upper end of tibia and lower end of humerus have fused.

-Epiphysis at the iliac crest has fused.

Age Above 18(eighteen) years.

Opinion:

(1) No conclusive evidence of recent sexual intercourse was found but

xxxxxxxxxxxxxxxxxxxxxxxxxxxx.

(2) Clinically age of the victim girl is below 18 (eighteen) years. Radiological age above 18 (eighteen) years.

(3) About 28 weeks (7 months) pregnancy was detected at the time of examination.

(4) No injury detected in the body."

He proved the medico legal report and Ext.-1 and his signature as Ext.-1(1).

12. The medico legal report depicts that the victim was an adult at the time of the incident. The victim 'X' deposed as PW-3 that about 1 ½ years back, the appellant used to visit them and during his visits, he promised to marry her and he had sexual intercourse with her for two three days, during the day time. When, she missed her monthly menstrual periods, she informed the appellant and he brought one tablet for abortion. Thereafter, the appellant stopped visiting her and he did not keep his promise and he did not marry her. When,

she asked the appellant to marry her, he stopped visiting her. Then, she informed the matter to her uncle Bhogeswar Doloi. Her uncle assured her that he would call the appellant and settle the matter. Her father contemplated to arrange a 'village Bichar' but the family members of the appellant refused to attend any such meeting. This impelled her to lodge the FIR. She proved the FIR, as Exhibit-2 and her signatures as Exhibit-2(1) up to 2(3). She proved her statement under Section 164 Cr.P.C, as Exhibit-3 and Exhibit-3(1) and 3(2) as her signatures.

13. The PW-3 further deposed that she gave birth to a girl. PW-3 also deposed that as the appellant promised to marry her, she consented to having sexual relationship with the appellant. The cross-examination of PW-2 vis-a- vis, the cross-examination of the I/O, Sri Kulendra Bharali, PW-5 depicts that PW-3 (victim) did not mention before the I/O in her initial statement that the accused had sexual intercourse with her on two or three occasions. This is a major contradiction because in her FIR, the victim stated that the appellant committed rape on her on 24.08.2005 at about 11:00 a.m., in the absence of her family members whereas, she deposed in the Court that the appellant committed rape on her on two or three occasions. On the contrary PW-3 did not mention in her initial statement before the IO that the appellant had sexual intercourse with her on two or three occasions.

14. The victim's father 'Y' deposed as PW-2 that his wife died about six years back (from 08.06.2007). The appellant's house was nearby and he used to visit them frequently and he impregnated his daughter. He learnt from Bhogeswar Doloï that his daughter was pregnant for the last three months. When, he confronted his daughter, she informed him that the appellant impregnated her. He then called for a bichar in the village 'and the village headman Jadu Doloï, and another person Kamala Saikia arrived at the 'Than' for bichar on two occasions but the appellant did not turn up in the meeting and the village headman advised him to approach the Court. Then his daughter lodged a case. His daughter gave birth to a girl. The appellant promised to marry his daughter but he did not marry her. He was not aware that the appellant had sexual intercourse with his daughter. His daughter may have been 16 years old at the time of the incident.

15. In his cross-examination, he (PW-2) admitted that his daughter filed this case when she was pregnant for three months. He also deposed in his cross-examination that Bhogeswar Doloï is not related to him and Bhogeswar Doloï is a neighbour. Both, PW-2 and PW-3 have denied that the appellant had not impregnated the victim (PW-2).

16. The other apparent contradiction in this case is that PW-3 mentioned in

her statement under section 161 Cr.P.C that she was in love with the appellant, whereas, in her complaint petition, she stated that the appellant committed rape on her on 24.08.2005, and thereafter, he assured and reassured her that he would marry her as her mother is no more.

17. The victim, through her statements, tried to project that she did not divulge about the incident of rape because the appellant promised to marry her. Initially in her FIR, she stated that the appellant committed rape on her implying absence of her consent. But later, in her deposition and her statement under section 164 Cr.P.C, she stated that she was induced by the appellant to consent to physical relationship with him as he promised to marry her. In her deposition, the victim did not implicate that the appellant forcefully committed sexual intercourse with her, which is contrary to the contents of the complaint petition-FIR. At the time of recording her statement in the Court, the victim changed her version and vacillated from her earlier statement. Whether, the evidence of the victim is worthy of credence? The appellant vehemently denied that he impregnated the victim and sired the victim's daughter.

18. The argument of the learned counsel for the appellant that no paternity test was conducted to ascertain the paternity of the child is also relevant in this case. The other important witness is Bhogeswar Doloi, who testified as CW-2,

that there is only one house between his house and the victim's house and the accused person's house is at a distance of one kilometer from his house. He heard that the victim's father had called the village bichar. He heard in the village that the victim was pregnant, but he did not know, who had impregnated the victim. The victim gave birth to a girl child. In his cross-examination also he deposed that, when he met the victim, he asked her about her pregnancy, but the victim did not answer to his queries and she was in tears.

19. This evidence of the CW-2 is contradictory to the evidence of the victim, who stated that she informed about her pregnancy to her uncle Bhogeswar Doloj and he in turn informed her father about the incident. The evidence of Bhogeswar Doloj, CW-1, also rebuts the evidence of PW-2, who deposed that he (PW-2) was informed by Bogeswar Doley (CW-1) about his daughter's pregnancy and then, he PW-2 confronted his daughter about her pregnancy.

20. Sri Bipra Hira deposed as PW-4 that the victim is his niece as her father is his cousin. He used to meet the appellant in his cousin's house and later he learnt that his cousin's daughter, 'X' was impregnated by the appellant. The victim, 'X' (PW-3) informed him that the appellant impregnated her by promising to marry her and so, she consented into having sexual relationship with the appellant, but, when, the appellant was asked to marry her, he refused to marry

the victim (PW-3). In his cross-examination, this witness stated that the police did not record his statement.

21. The I/O Sri Kulendra Bharali deposed PW-5 that on 02.02.2006, he was posted at Dharamtul PS as Second Officer. On that day, the OC received an FIR from 'X' and registered the Dhraramtul P.S. Case No. 4/2006 and endorsed him with the investigation. He recorded the statement of the victim and forwarded her for medical examination and also for recording her statement under 164. Cr.P.C. He visited the place of occurrence (P.O.). He recorded the statements of the witnesses and collected the medico legal report. He could not trace out the appellant and he submitted charge-sheet against him showing him as absconder. He proved the charge-sheet as Exhibit-4 and his signature on the charge-sheet as Exhibit-4(1). This witness admitted in his cross-examination that he did not record the statement of Bogeswar Doloi, CW-2 and Donati Medhi, whose names were cited as witnesses in the complaint petition. He stated in his cross-examination that the appellant was serving in a company at Guwahati and he had not mentioned why he could not trace out the appellant.

Although Bhogeswar Doloi's (CW-2's) statement was not recorded by the I/O, he was summoned as Court witness and his statement was recorded.

22. The evidence of village Gaonbura, Jadu Kanta Doloi was also recorded as

Court witness No.1. He deposed that about two years back (from 26.06.2007), the victim's father went to his house and informed him that his daughter was impregnated by the appellant. He (CW-1) then advised for a 'bichar' in the village. Accordingly, people gathered for the 'bichar' (meeting) in the village but the appellant and his family did not respond and then, he advised the aggrieved to approach the court. Thereafter, he learnt that the victim gave birth to a child.

The evidence of CW-1 relating to a bichar has been contradicted by the evidence of PW-2 as well as the evidence of PW-3. PW-3 deposed that her father was contemplating to hold a meeting (bichar), but the family members of the appellant did not respond and so, she lodged the FIR. CW-1 stated that there were 40 or 45 odd people gathered at the bichar, but, PW-2 stated that CW-1 advised him for a bichar and he (CW-1) arrived with Kamini Saikia for the Bichar on two occasions, but the appellant's family members did not respond and as such, the village headman (CW-1) advised him to approach the Court. The I.O, PW-5 also stated in his cross-examination that PW-2 did not mention in his initial statement about a village bichar relating to this matter and that Kamala Saikia was the president of the village bichar. The prosecution failed to examine Kamala Sakia as a witness. The contradictions in the evidence of PW-2, PW-3 and CW-1, relating to the village bichar thwarts the evidence.

23. The defence witness, Bipin Medhi deposed as DW-1 that the victim is his next door neighbor, whereas, the appellant's house is about a kilometer away from his house. He learnt about the incident, when the appellant was arrested by the police. He never saw the appellant visiting the victim. The police also did not record his statement during investigation. The appellant works under a company at Guwahati. He stated he had no knowledge about any village bichar relating to this incident.

24. The I/O, PW-5 admitted in his cross-examination that he did not record the statement of the next door neighbour Bipin Medhi as well as the statements of the other neighbours of the victim. In his cross examination by the prosecution, DW-1 deposed that the appellant and the victim's family were embroiled in a land dispute.

25. Sri Anulakhya Medhi, deposed as DW-2 that the appellant is his next door neighbour and he was working at Guwahati at the time of the incident. He learnt about the incident when the victim gave birth to a child. He never saw the appellant visiting the victim's house. There was no village bichar relating to this case. The appellant and the victim's family were embroiled in a land dispute.

26. The DW-3, Sri Subash Dubey deposed that in the year 2005, the appellant

Diganta Medhi was working as a Security Guard in their office i.e. Bombay Security Service. The conduct and character of the appellant was found to be good at that time. On 24.08.2005, the appellant was also working as Security Guard at their office at Khatowala Rolling Mill, Lakhara. This alibi introduced by the appellant could not be affirmed, as in his cross examination, DW-3 deposed that he had no personal knowledge, if the appellant was on duty on 24.08.2005.

27. The prosecution of this case was sought to be established through the evidence of the prosecutrix, her father, PW-2 and her uncle CW-2. In a case involving a charge of rape, the evidence of the prosecutrix is most vital, but when the evidence of the prosecution is not found worthy of credence, Court may look into other evidence. A victim of rape is given a high pedestal at par with the evidence of an injured victim, as the prosecutrix cannot be treated as an accomplice.

28. In this case at hand, the prosecutrix however vacillated from her contentions in the FIR, vis-à-vis her deposition in the Court. Through her FIR the allegation of rape has been levelled against the appellant whereas the evidence of the prosecutrix (PW-3) depicts that she was induced into a consensual relationship with false promises of marriage. She has not deposed that the appellant forcefully committed rape on her.

29. The appellant was erroneously convicted u/s 312/511 IPC. It could be deciphered from the evidence of PW-3 that she was not compelled or induced to consume tablets for miscarriage. She has categorically stated that when she informed the appellant that she was pregnant, he bought her tablets for abortion. She did not mention that she consumed the tablets for abortion. Other witnesses did not incriminate that the appellant voluntarily caused miscarriage of a woman with child. A person cannot be held guilty of offence of attempt to cause miscarriage on the basis of such unconfirmed evidence. A pertinent contradiction is that, PW-3 did not mention before the IO, PW-5 that the appellant had sexual intercourse with her for two or three days. Thus the prosecutrix, PW-3 contradicted herself on a vital aspect. When the statement of PW-3 was recorded by the Magistrate on 20.02.2006, she gave her age as 15 years and when after one year when she deposed in Court as PW-3 on 08.06.2007, she gave her age as 17 years instead of 16 years. The Medical Officer, PW-1 however opined that the victim/prosecutrix was an adult and above 18 years. Due to the infirmities and inconsistencies in the evidence of the prosecutrix, the conviction on the basis of her evidence is not sustainable.

30. The Supreme Court in ***Rai Sandeep @ Deepu vs. State of NCT of Delhi***, reported in ***(2012) 8 SCC 2021***, the Supreme Court while considering which witness is qualified as sterling witness held as follows:-

“In our considered opinion, the ‘sterling witness’ should be of a very high quality and calibre whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a ‘sterling witness’ whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

31. Reverting back to this case, it would be apt to reiterate that the victim kept changing her version from time to time. The contents of her FIR is not similar to her testimony in the Court. Major contradictions surfaced through her cross-examination vis-a-vis the cross-examination of PW-5, IO. Another key witness was the victim's father 'Y' whose evidence also did not support the evidence of his daughter (X), owing to the contradictions which surfaced through his cross-examination and the cross-examination of the IO. The IO has affirmed that PW-2 (Y) failed to mention in his initial statement that a village bichar (meeting) relating to this incident was held. It has already been held in my foregoing discussions that the evidence of PW-3 is not corroborated by the evidence of her uncle CW-2. The explanation for the inexplicable delay in lodging the FIR was not convincing. The victim, PW-3 testified that she lodged the FIR after the appellant started avoiding her. She was six months pregnant when she lodged the FIR. There is not even an iota of doubt that the victim gave birth to her daughter, but can the appellant be held liable for offence u/s 376 IPC or u/s 417 IPC. The victim has not denied consensual relationship with the appellant but her evidence that the appellant cheated her and procured her consent under misconception of facts is not held to be credible. Due to the contradictory statements of the victim, a benefit of doubt has to be extended to the appellant. The consent of the victim was not given under fear and the

prosecution failed to establish that the consent of the victim was procured by the appellant on 'misconception of facts'. Thus the prosecution failed to prove beyond reasonable doubt that the appellant, by deceiving the victim, fraudulently and dishonestly procured her consent and thereby cheated her and committed an offence u/s 417 IPC.

32. The offence of rape is described u/s 375 IPC which reads as follows:-

“Rape.-A man is said to commit "rape" if he –

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or**
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or**
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or**
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions :-**
 - First – Against her will**
 - Second – without her consent XXXX.....XXXX”**

33. Consent is not a consent if the consent is obtained by misconception of facts. As per Section 90 of the IPC – A consent is not such a consent as it intended by any section of this Code, if the consent is given by a person under fear of injury, or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception.

34. In this case at hand, as the prosecution failed to prove beyond

reasonable doubt that the victim's consent was procured by the appellant and the victim was induced into having sexual relationship with the appellant. The conviction of the appellant u/s 376/417 IPC is not sustainable. The evidence of the victim was not found to be worthy of credence.

35. In the wake of the foregoing discussions it is thereby held that the prosecution failed to prove beyond reasonable doubt that the appellant has committed any offence u/s 312/511, Section 376 and u/s 417 IPC.

36. The benefit of doubt is extended to the appellant. It is held that judgment and order of conviction and sentence u/s 312/511 IPC, 376 IPC and u/s 417 IPC is not sustainable. The judgment and order dated 24.04.2012 passed by the learned Sessions Judge, Morigaon in connection with Sessions Case No. 44/2007 is hereby set aside. The appellant Diganta Medhi is set at liberty forthwith. Fine if any deposited by the appellant in terms of the impugned order and sentence be reimbursed to him.

37. However, keeping in view the provisions of Section 437-A Cr.PC, the appellant Diganta Medhi is directed to furnish a personal bond in the sum of Rs. 50,000/- (Rupees Thirty Thousand) and a surety bond in the like amount before the learned trial Court, which shall be effective for a period of 6 (six) months.

The victim is recommended for compensation as per the Assam Victims Compensation Scheme.

Send back the LCR.

JUDGE

Comparing Assistant