

GAHC010202262023



2024:GAU-AS:11575

THE GAUHATI HIGH COURT AT GUWAHATI
(The High Court of Assam, Nagaland, Mizoram and Arunachal Pradesh)

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL 332/2023

Sri Bindeswar Tiwari, aged about 47 years,
S/o Late Ramnaresh Tiwari,
R/o Amguri Town, Ward No. 4,
P.S. & P.O.-Amguri, PIN- 785683,
District- Sivasagar, Assam

.....Appellant.

-Versus-

State of Assam,
Represented by its Public Prosecutor.

.....Respondent.

Advocates for the appellant: Mr K Das, *Amicus Curiae*,

Advocate for the respondent: Mr B B Gogoi, Addl. P. P, Assam

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 26.07.2024.

Date of judgment : 25.11.2024

JUDGEMENT AND ORDER (CAV)

1. Sri Bindeswar Tiwari is the appellant, who has preferred this appeal under Section 374(2) of the Code of Criminal Procedure, 1973, (CrPC, for short) as he is aggrieved by the Judgment and order dated 26.07.2023, passed by the learned Additional Sessions Judge, Sivasagar, in Sessions Case No. 08(s-s)/2021, corresponding to GR Case No. 2066/2020, convicting him under Section 376 (2) (k)/511 of the Indian Penal Code, 1860 (IPC, for short), to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 10,000/-, with default stipulation. Bindeswar Tiwari (hereinafter will be referred to as the appellant or the accused).

2. The genesis of the case was that the victim-'X' has been working in the shop of the appellant since 17.11.2020. She could sense the appellant's lustful gaze upon her, but she ignored him and concentrated on her work. On 25.11.2020, when the shop was empty, the appellant called her inside his

house and asked her to prepare tea. The appellant then closed the door of the room and dragged her to his bed and attempted to commit rape on her. The victim raised alarm and then the appellant gagged her, but she somehow managed to escape and reach home. An FIR regarding this incident was lodged on 27.11.2020, which was registered as Amguri PS Case No. 179/2020, under Sections 352/354/376/511 of the IPC and the investigation commenced. On completion of investigation, the Investigating Officer (IO, in short) laid charge sheet against the appellant. This case was committed for trial. At the commencement of trial, a formal charge under Sections 376/511 IPC, read with Section 354 IPC was framed and read over and explained to the appellant. The appellant abjured his guilt and claimed innocence.

3. To substantiate its stance, the prosecution adduced the evidence of 7 (seven) witnesses and the defence cross-examined the witnesses *in extenso*.

4. Against the incriminating evidence projected by the prosecution through its witnesses, several questions were asked to the appellant and the tone and tenor of the answers of the appellant depicts a plea of total denial. The appellant stated that that he is innocent. He has admitted that the victim-'X' used to work in his garment shop for about 4/5 days. She demanded Rs.

5,000/- from him, which he refused to pay. She informed the matter to her brother and her brother in return, demanded Rs. 5 lacs from him. The appellant did not tender any evidence in defence.

5. Learned counsel for the appellant laid stress in his argument that this case is fraught with discrepancies. The victim was sent for medical examination even before the FIR was lodged. The medical report is dated 26.11.2020, whereas the FIR was lodged on the following day, i.e., on 27.11.2020. The GD Entry reflected on the medico legal report is not similar. Thus, it is apparent that the Police swung into action even before the FIR was lodged. It is submitted that the Medical Officer was not examined by the prosecution. The statement of the victim under Section 164 CrPC does not substantiate the FIR and the victim's deposition is not consistent to her statement under Section 164 CrPC. Her deposition is contradictory to her cross-examination. The family members of the appellant were not examined as witnesses. It has surfaced through the evidence that different versions were projected by the prosecution witnesses. It has to be borne in mind that an incident of rape cannot be easily forgotten which gets imprinted in the victim's mind. The delay in lodgment of the FIR was not properly explained. Moreover, PW-3 is the cousin and not the brother as stated by PW-1. The

learned trial Court relied squarely on the evidence of PW-1 and thus, the Judgment and Order is not sustainable. The investigation was conducted in a perfunctory manner. The incident occurred at about 04:00 pm in a busy area, but not a single witness was examined from the area where the incident took place.

6. It is submitted that the shop is located in a busy business area with many shops in the locality, but the neighbours were not examined.

7. On the contrary, learned Additional Public Prosecutor laid stress in his argument that the deposition of the victim is consistent to her statement under Section 164 CrPC. It is not possible to obtain eye-witnesses by the investigating agency in a case of this nature. There is no error apparent and interference is not required as the Judgment was correctly passed. This appeal is devoid of merits and is fit to be dismissed.

8. The remaining part of the arguments placed by both the sides will be discussed at the appropriate stage.

9. Now, the question that arises for consideration is that whether the learned trial Court, erroneously convicted the appellant under Sections 376 (2) (k)/511 of the IPC.

10. To decide this case in its proper perspective, it is necessary to re-appreciate the evidence.

11. The victim-X deposed as PW-1 that at the time of the incident, she was an unmarried woman. She used to work in the garment shop belonging to the appellant. The incident occurred on 25.11.2020. She had completed only 11 days in the appellant's shop. On the fateful day, at about 04:00 pm as she was about to finish her day's work, the appellant asked her to prepare tea for him and she went to the kitchen to prepare tea.

12. PW-1 has described the shop of the appellant stating that the shop of the appellant consists of two parts. Behind the shop, the appellant has his godown, where the garments are kept and behind the godown, is the bedroom of the appellant with the kitchen behind the bedroom. PW-1 further deposed that she was wearing a full-sleeved sporting and a pair of jeans at that time. The appellant pulled her sporting from behind and held her hand and waist and started pulling her towards his bedroom. She sustained injuries in the process, and there was a tear in her sporting as he pulled her by her right hand. He pinned her to the bed and groped her breasts and other parts of her body and pulled down her jeans. One button of the jeans was torn off

as the appellant forcibly pulled down her jeans. The appellant who was donning a pair of pants, started undressing. He was straddled over her body with one leg and with the other leg he was undressing himself. She then pushed him and the appellant fell down below the bed. He got up and asked as to why she had pushed him. The victim again pushed the appellant and he got tossed off and landed near the door of the kitchen. In her undressed condition, she ran away from the room leaving her bag in the shop and reached home.

13. PW-1 further testified that two days after she started her work, the appellant told her that his wife is not with him and he is very fond of her ('X'). The victim then made it clear to the appellant that if he has such feelings, she would not work with him. The victim never anticipated that the appellant would stoop so low. As soon as she reached home, she divulged about the incident to her sister-in-law, Mira Das Neog, who pacified and consoled her. Meanwhile, when her brother reached home, her sister-in-law informed her husband (X's brother) about the incident. On the following day, she told her brother that she would not go for work but she would lodge a case. She then went to Amguri Police Station and lodged the FIR. The Police interrogated her and took her to the hospital for medical examination and

forwarded her to the Court for recording her statement under Section 164 CrPC. This witness has proved her FIR as Exhibit-1 and her signature as Exhibit-1 (1). She has proved her statement under Section 164 CrPC as Exhibit-2 and her signatures as Exhibits-2 (1) to 2 (4). As she was perturbed after the incident, there was a delay in lodgment of the FIR. She lost her appetite and she had to suffer from low pressure after the incident. The cross-examination of this witness will be discussed at the appropriate stage.

14. The victim's sister-in-law, Smt Mira Das Neog, deposed as PW-2 that the appellant is known to her. The incident occurred on 25.11.2020. She reached home at about 03:00 pm from work. The victim had informed her that the appellant asked her to prepare tea while she was in the shop and when she went to prepare tea, he grabbed her from behind and pulled her towards the bed, but somehow she managed to escape. She (PW-2) further deposed that the informant used to work in the appellant's shop and at the time of the incident she was staying in their house for about 7 months, prior to the incident. When her husband returned home at night, she informed him about the incident and thereafter, they informed the Police about the incident.

15. In her cross-examination, PW-2 has admitted that the informant's sons reside with the informant and the informant's house is located at a distance of 4 kilometres away from their house. At times, the informant's sons used to reside in their (PW-2's) house also.

16. The victim's brother, Sri Rituraj Neog, deposed as PW-3 that the victim is his cousin. The appellant is also known to him and he used to visit the appellant's shop. The incident occurred on 25.11.2020. On the fateful night, he returned home at about 08:00 pm from work and his wife had informed him about the incident. The victim/informant was perturbed and was contemplating to lodge an FIR. On 27.11.2021, they went to the Police Station and the FIR was lodged. On the following day, he called the appellant over phone and confronted him about the incident, but there was no response from the appellant. The victim used to go to the appellant's shop from his house as she was staying with them since 6/7 months.

17. It is pertinent to note that PW-3 mentioned in her cross-examination that she was not aware if the appellant has married again, whereas PW-4 has stated that the appellant was married at that time. He provided accommodation to the victim as she was attending her computer classes and

she was trying to secure employment. Through the cross-examination of this witness, the defence tried to project that the victim was earlier married to some other person and PW-3 has denied in his cross-examination, the suggestion by the defence that the victim was staying in his house because of an earlier incident with her husband. He has also admitted in his cross-examination that he has lodged the FIR after a discussion with an Advocate. He has denied that he had demanded Rs. 5 lacs from the appellant and as the appellant failed to meet his demand, they have foisted a case against the appellant. Although the appellant in his answers under Section 313 CrPC, tried to take the plea that, a false case has been foisted against him as he has failed to meet the demand of Rs. 5 lacs from PW-3, this plea was not affirmed, more so, when PW-2 was not cross-examined in this aspect.

18. Smt Jyoti Das deposed as PW-4 that she used to work in the garment shop of the appellant. The incident occurred about a year ago. She was working in the appellant's shop for the last 4 years. Around the time of the incident, she met the appellant's daughter who was in tears and on being asked, the appellant's daughter informed her that the victim has filed a case against her father and her father had to go to the Police Station. She denied any knowledge about the incident.

20. In her cross-examination, she (PW-4) has testified that there are four employees in the shop, including the victim. The appellant's family consists of his wife and three children. There is a godown adjacent to appellant's shop. She met the victim in the appellant's shop for the last time. Her duty hours are from 08:30 am to 07:00 pm. She was present in the shop on the date of the incident. The victim used to return home from the shop at around 04:00 pm. The appellant's son was also present on the last day of victim's tenure. On leaving the shop for the last time, the victim distributed sweets and she told them that she would not come to the shop anymore.

21. The learned counsel for the appellant has relied heavily on the testimony of PW-4. He has submitted that the independent witness did not at all support the prosecution case. She is also an employee of the shop and her evidence exonerates the appellant. She was present in the shop and so was the appellant's son at the time of the incident and thus, it was not at all possible that the appellant would be able to commit sexual assault or even make an attempt to commit sexual assault on the victim, in presence of four employees and his family in the shop. The victim's co-workers did not support her evidence.

22. Another co-worker, Smt Anita Paul, also did not at all implicate the appellant. She deposed as PW-5 that she also used to work in the appellant's shop. She worked in his shop for 8 years, till December 2021, and then she left her work, after her marriage. The appellant has two shops within a distance of about 300 meters. She used to work in the shop named as 'Ma Kamakhya'. On the last day of her work, the victim distributed sweets to the employees and she stated that she would not come henceforth. PW-5 also deposed that around the time of the incident, when she met the appellant's daughter in the shop she noticed that she was in tears and the appellant's daughter informed her that the victim has brought up a case against her father and her father had to go to the Police Station. This witness was declared as a hostile witness and on the prayer of the prosecution, this witness was allowed to be cross-examined by the prosecution.

23. The IO, ASI Jayanta Das has affirmed as PW-7 that PW-5, Anita Paul has stated before him that-*"On 25.11.2020, I went home early. In the morning after I came to the shop, I came to know from the employees of the shop that on that day, our friend namely, 'X' was preparing tea kitchen adjacent to the shop, when our owner Bindeswar Tiwari (appellant) caught hold of her hair and with ill motive touched her and thereafter, tried to*

commit rape on her by throwing her on the bed.”

24. It appears that this witness has already stopped working in the appellant's shop and thus taking the appellant's side will serve no purpose. She has also admitted in her cross-examination that she never prepared tea in the kitchen while she was working in the appellant's shop, but at times, the appellant's wife used to prepare tea for them. The appellant's family used to stay in a room adjacent to the shop. When she left the shop along with the informant, the appellant's son and daughter were also present. The informant/victim used to come to the shop at 08:00 am and thereafter, she used to go for computer classes and again return at about 2:30 pm and after lunch she used to leave. This witness has denied the initial statement projected by the prosecution, through her cross-examination.

25. Another co-worker of the victim, Sri Anand Panday deposed as PW-6 that he used to work in the appellant's shop and the victim worked in the same shop for about 4/5 days. He denied any knowledge about the incident. He has stated that at present, he is working at Lahoti Petrol Pump. This witness was also declared a hostile witness and the learned trial Court allowed the prosecution to cross-examine its own witness, but this witness

has denied that he stated before the IO that-*"on 25.11.2020, he was working in the godown. He saw the victim at about 04:30 pm, scurrying out of the kitchen. He did not notice the incident of attempt to commit rape on the victim. Later he heard that the victim was asked to prepare tea in the kitchen and then, the appellant groped her and attempted to commit rape on her by pinning the victim to the bed."*

26. Although this witness has denied his initial statement before the IO, the IO, PW-7, however has affirmed that he has stated that he heard that the appellant attempted to commit rape on the victim and he saw the victim running away from the appellant's kitchen.

27. Thus, in the instant case, the evidence of PW-5 does not at all implicate the appellant. Her cross-examination depicts that she heard about the incident from her colleagues on the following day of the incident. It is true that the evidence of a hostile witness cannot be effaced from the record, but the evidence of this witness cannot be taken into consideration, least of fall, the initial statement of the witness.

28. I would like to reiterate that at present, PW-7 is also not working with the appellant and there appears to be no reason for this witness to take the

appellant's side and try to exonerate him by giving false evidence. I believe that a benefit of doubt has to be extended to the appellant as the initial statement of the victim is not consistent to her testimony. The other reason for extending a benefit of doubt is that there was a delay in lodgment of the FIR. The victim has assigned reasons in her testimony that the delay was because she was perturbed by the incident and she was contemplating to lodge an FIR. I find force in the argument of the learned counsel for the appellant that the victim was forwarded for medical examination before the lodgment of the FIR.

29. The Medical Officer was also not produced as a witness, but the Medico-Legal Report has been identified by the IO, PW-7. The Medico-Legal Report marked as Exhibit-3, reveals that the victim was forwarded for medical examination on 26.11.2020, whereas format of the FIR marked as Exhibit-5 and the FIR marked as Exhibit-1, reveals that the FIR was lodged on 27.11.2020. However, the Medico-Legal Report also reveals that the victim was forwarded for medical treatment vide GD Entry No. 551, dated 27.11.2020. The Medical Officer was not examined as a witness and the Medico-Legal Report depicts that no injuries were detected on the victim and the learned counsel for the appellant laid emphasis through his argument

that the victim has stated that the appellant twisted her arm and gagged her by her mouth, yet no injuries were detected.

30. It is further argued that the victim, PW-1 has stated that there was a tear on her sleeve as a result of the assault, but her sporting was not exhibited in the Court. To this, the learned Additional Public Prosecutor has submitted that the victim's deposition clearly reveals that the victim has deposed as PW-1 that she did not hand over her sporting to the Police as the Police had never asked for her torn sporting.

31. Further, the learned counsel for the appellant has submitted that the victim has clearly stated under Section 164 CrPC that her sporting was torn and it was the duty of the Police to seize the torn sporting or the T-Shirt.

32. Learned Additional Public Prosecutor has emphasized through his argument that the deposition of the victim is consistent to her statement under Section 164 CrPC. Although there is consistent evidence that the victim's T-Shirt was torn, yet the victim's torn T-Shirt was not seized by the Police. The appellant deserves a benefit of doubt due to the perfunctory investigation.

33. Learned counsel for the appellant has also drawn the attention of this

Court towards the major discrepancies elicited through the cross-examination of the PW-1, vis-à-vis the cross-examination of IO.

34. Learned counsel for the appellant has laid stress in his argument that the FIR and the statement of the victim is not similar. She has not mentioned in the FIR as deposed in her evidence that she was hesitant to lodge an FIR and then she was contemplating to lodge an FIR. On the contrary, it has been mentioned in the FIR that she informed her sister-in-law about the incident, on 27.11.2020, whereas in her deposition she has stated that after reaching her home, she informed her sister-in-law about the incident. She was also silent in her evidence regarding the allegations in the FIR that she could sense lustful looks from the appellant.

35. It is true that several contradictions could be elicited through the cross-examination of PW-1 under Section 145 of the Indian Evidence Act, 1872 (The Evidence Act, for short), qua Section 162 CrPC. The IO, PW-7 has affirmed that the victim, PW-1 has not mentioned in her initial statement that two days after she started working in the appellant's shop, the appellant told her that his wife was not present and he was fond of her and then the victim apprised the appellant that if he ever behaves in that manner, she would not

work with him and then the appellant assured that he would not misbehave, but she never apprehended that the appellant would stoop so low and behave in such a manner. The IO has also affirmed that PW-1, victim has not stated in her initial statement that as she was perturbed and angsty, there was a delay in lodgment of the FIR and she had suffered from low pressure and she lost her appetite.

36. The IO, PW-7 has also affirmed that PW-1, victim has not mentioned in her initial statement that the appellant groped her and pulled down her jeans and one button got torned off in the tussle, and the appellant who was wearing three-quarter pants at that time, started undressing.

37. The IO, PW-7 has also affirmed that the victim, PW-1 has not mentioned in her initial statement that at the time of undressing, the appellant was straddled over her body and he was lowering his pants with one leg and the other leg was straddled over her body and at that time, she pushed the appellant who fell down below the bed and then, the appellant got up and asked her as to why she had pushed him and then she again pushed the appellant and she then ran away from the place of occurrence.

38. I find substance in the argument of the learned counsel for the

appellant. There are too many contradictions and these contradictions being noteworthy cannot be ignored. It is true that there is corroborating evidence that the appellant attempted to commit rape on the victim, but at the same time, the evidence of PW-1, 2 and 3 has not been corroborated and substantiated by the evidence of the victim's co-workers. The major contradictions elicited through the cross-examination of the victim, PW-1, vis-à-vis, the cross-examination of the IO, causes a dent in the evidence and thus, the appellant deserves a benefit of doubt. Moreover, after a scrutiny of the evidence, I am constrained to hold that the testimony of the victim is not consistent to her statement under Section 164 CrPC. Her statement has been marked as Exhibit-2 and she has elaborately described the entire incident when her statement was recorded, but when her deposition was recorded, she chose to skip some material facts which she had mentioned under Section 164 CrPC. There is also a deviation of her statement from the contents of the FIR. The prosecution and the investigation was conducted in a lackadaisical manner and the appellant deserves a benefit of doubt.

39. In the wake of the foregoing discussions, it is held that although in a case of rape or attempt to commit rape, the sole testimony of the victim can be relied upon to hold the accused guilty of the offence of rape, yet in the

instant case, due to the contradictions in the testimony of the key witnesses, a benefit of doubt is extended to the appellant.

40. It is trite law that when two views are possible, the view favouring the appellant has to be taken into consideration. The decision of the learned trial Court convicting the appellant under Section 376 (2) (k) of the IPC is hereby set aside. The appellant be set at liberty forthwith, if he is not wanted in any other case.

41. However, keeping in view the provisions of Section 437-A Cr.P.C./481 BNSS, the accused appellant is directed to furnish a personal bond in the sum of Rs. 40,000/- and a surety bond in the like amount before the learned trial court, which shall be effective for a period of six months.

42. Send back the Trial Court Record.

JUDGE

Comparing Assistant