

GAHC010227222022



2024:GAU-AS:9623

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

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL NO. 292/2022

Sri Pani Ram Tokbi,
Aged about 26 years,
Son of Sri Sikari Tokbi, resident of
Village-Upper Okeihai Sikari Tokbi Gaon,
P.O. & P.S.- Dillai, in the district of Karbi Anglong,
Pin-782462

.....Appellant.

-Versus-

1. State of Assam,
Represented by the P.P., Government of Assam,
Gauhati High Court, Guwahati.
2. Miss Leela Sonar,
D/o Sri Ratna Bahadur Sonar,
R/o Gang Jang Hira Basti (Koilajan),
P.O. & P.S.- Dillai, in the district of Karbi Anglong,

Assam, Pin-782462.

.....Respondents.

Advocates for the appellant : Mr A Ahmed,
Advocate for the respondent : Mr R R Kaushik, Addl. P. P, Assam
Ms S Medhi, LAC, R-2

BEFORE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 11.06.2024
Date of judgment : 25.09.2024

JUDGEMENT AND ORDER (CAV)

Heard Mr A Ahmed, learned counsel for the appellant, Mr R R Kaushik, learned counsel for the respondent No. 1 and Ms S Medhi, learned Legal Aid Counsel, for the respondent No. 2.

2. Sri Pani Ram Tokbi has filed this application under Section 374(2) of the Code of Criminal Procedure, 1973 (CrPC, for short), challenging the Judgment and Order dated 07.09.2022, whereby and whereunder the learned Assistant Sessions Judge, Karbi Anglong, convicted him under Section 376 of the Indian Penal Code, 1860 (IPC, for short) and sentenced him to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs. 10,000/- (Rupees Ten Thousand Only), with default stipulation.

3. The genesis of the case is that an FIR dated 05.05.2016 was lodged by 'X' (name

withheld and will also hereinafter be referred to as the victim), contending *inter alia*, that on 02.05.2016, at about 03:30 pm, when she was alone at home, as her parents went to the nearby hills for ginger cultivation, Paniram Tokbi (hereinafter referred to as the appellant), entered into her house and committed rape on her at gunpoint. She immediately went to the hills to inform her parents and her elder brother about the incident. When her parents enquired about the miscreant, they learnt that the appellant committed the offence.

4. The FIR was lodged by the victim, which was registered as Dillai PS Case No. 11/2016, under Section 376 IPC, read with Section 25 (1-a) of the Arms Act. The Investigating Officer embarked upon the investigation. He recorded the statements of the witnesses and prepared the sketch map of the place of occurrence. On finding sufficient materials, charge sheet was laid against the appellant, under Section 376 IPC, read with Section 25 (1-a) of the Arms Act. Subsequently, after commitment, this case was transferred for disposal to the learned Assistant Sessions Judge, Karbi Anglong and after commencement of trial, charges under Section 376 IPC, read with Section 25 (1-a) of the Arms Act, was framed and read over and explained to the appellant. The appellant abjured his guilt and claimed innocence. To substantiate its stance, the prosecution adduced the evidence of 12 (twelve) witnesses, including the Medical Officer (MO, in short), the Investigating Officer (IO, in short) and APSI Robin Saikia. The defence cross-examined the witnesses to refute the charges. However, the accused did not tender any evidence in defence. On the incriminating materials projected by the prosecution, several questions were asked to the appellant under Section 313 CrPC. The tone and tenor of his answers to questions under Section 313 CrPC, depicts that the appellant took the plea of total denial. He has, however, admitted through his answer to Question No. 6, that he was taken to the Police Station, but he is innocent. To Question No., 7, he has

answered that he was taken to the Gaonburah, but he did not commit the alleged offence.

5. The following points were delineated by the learned trial Court to decide this case:-

1. Whether the accused on 02.05.2016, at 03:30 pm, in the house of the informant-prosecutrix situated at Gangjang Hira Basti under Dillai PS in the district of Karbi Anglong committed sexual intercourse with the informant-prosecutrix without her consent and against her will at

gunpoint and thereby committed an offence punishable under Section 376 IPC?

2. Whether the accused on 02.05.2016 at 03:30 PM possessed and carried a SBML gun to the house of the informant-prosecutrix in contravention of Section 3 of the Arms Act and thereby committed an offence punishable under Section 25 (1B) (a) of the Arms Act?

6. It has been submitted by the learned counsel for the appellant that the FIR was lodged after 3 days, i.e., on 05.05.2016, whereas the incident occurred on 02.05.2016, leaving sufficient scope for fabrication of the FIR. It is apparent from the evidence of the victim and the FIR that the victim did not know the name of the appellant, but without properly identifying the appellant by holding TIP, the appellant was held guilty of the alleged offence.

7. It further submitted that there is not even a scintilla of evidence leading to the identification of the appellant by the villagers. This case is replete with contradictions. The

history recorded by the MO depicts that the victim had mentioned before the MO that the appellant attempted to commit rape, whereas on the contrary, it has been alleged by the victim in the FIR as well as through her evidence that the appellant had already committed rape on her. The FIR was lodged later as she was not disclosing the identity of the appellant. It is further submitted that there was probably a relationship between the victim and the appellant and this is the reason why she did not disclose the identity of the appellant.

8. PW-9, i.e, the father of the victim had categorically stated that Birkha Bahadur Thapa (since deceased) while passing through the road, saw the appellant.

9. There is glaring contradiction in the FIR and the evidence of the victim. In the FIR, she has stated that after the incident, she immediately went to meet her parents, who were in the field, to inform them about the incident, while on the contrary, she has stated as PW-1 that when her mother and her brother returned home, she informed them about the incident, which occurred in their absence.

10. The evidence of PW-6 and PW-9 is also contradictory in this aspect.

11. The evidence of PW-2 and PW-3, being hearsay evidence, cannot be accepted.

12. It is further contended that PW-9 has deposed that the accused came to the Gaonburah after 3/4 days, contrary to the deposition of other witnesses, who stated that the appellant was caught by the villagers.

13. No TIP was conducted and thus, the identity of the appellant could not be proved. The extra-judicial confession of the appellant cannot be taken into consideration because the extra-judicial confession was made in the presence of the IO, who stated that the accused

confessed to the villagers in his presence.

14. The remaining part of the arguments will be discussed at the appropriate stage.

15. The learned counsel for the appellant has relied on the decisions of Hon'ble the Supreme Court in the following cases:-

1) ***Prahlad Singh v. State of Madhya Pradesh***; reported in **AIR 1997 Supreme Court 3442**,

2) ***State of Himachal Pradesh v. Lekh Raj & Anr.***; reported in **AIR 1999 Supreme Court 3916**, and

3) ***Narender Kumar v. State (NCT of Delhi)***; reported in **AIR 2012 Supreme Court 2281**.

15.1. So stating the learned counsel for the appellant has prayed to allow the appeal and set aside the impugned Judgment and Order of conviction.

16. The learned counsel for the respondent No. 2 and the learned Additional Public Prosecutor laid stress in their arguments that the medico-legal report clearly reveals that the opinion of the doctor reveals presence of alleged history of attempt to commit sexual intercourse and hymen was torn.

17. It is also submitted by the learned counsel for the respondent No. 2 that the deposition of the victim is consistent to her statement under Section 164 CrPC. There is overwhelming evidence against the appellant and appeal may be dismissed.

18. Now, the question that falls for consideration is that whether the learned trial Court erred in holding the appellant guilty of offence under Section 376 IPC. To decide this case in its proper perspective, the evidence is re-appreciated.

19. The victim-X deposed as PW-1 that the appellant is known to her. About 3 years ago, at about 1:00 pm, while she was alone at home, the appellant trespassed into her house and committed rape on her at gunpoint and fled. She raised alarm but nobody came to her rescue. Then at about 02:00 pm, her mother and brother returned home from the paddy field and she informed them about the incident. At about 06:00 pm, she along with her parents went to the police station and lodged the FIR. On the next day, the Police produced her before the Magistrate, who recorded her statement under Section 164 CrPC. She has proved the FIR as Exhibit-1 and her signature on the FIR as Exhibit-1 (1). She has proved her statement as Exhibit-2 and her signatures as Exhibits-2 (1), 2(2), 2(3), 2(4), 2(5) and 2(6).

19.1. In her cross-examination, she stated that she could not recall the date of occurrence and the date of lodging the FIR.

19.2. Contrary to her evidence-in-chief, she has stated that the appellant was not known to her prior to the incident. She has further testified in her cross-examination that the villagers saw the appellant in the village on the day of the incident.

20. Sri Nelson Tokbi and Sri Khoya Singh Teron deposed as PW-2 and PW-3 respectively, that both the appellant and the victim are known to them. They have heard about the incident about 2 years ago. They have heard that the appellant had committed rape on the victim.

21. The learned counsel for the appellant laid stress in his argument that the evidence of both these witnesses is hearsay evidence and this evidence cannot be accepted.

22. Smt Sanju Thapa deposed as PW-4 that the incident occurred about 2 (two) years back. The victim's parents came to her house and informed her that the appellant committed rape on their daughter at gunpoint. She then informed the Gaonburah and the other villagers about the incident and the Gaonburah informed the matter to the Police.

23. The Gaonburah, Sri Raju Tamang deposed as PW-7 that the incident occurred about 3 years ago. At the time of the incident, he was the Sarkari Gaonburah of the Village-Koilajan. One day, the villagers brought the victim and the appellant before him. He was informed that the appellant committed rape on the victim. He immediately informed the OC of Dillai Police Station over phone. The Police came and took the appellant and the victim to the Police Station.

24. In his cross-examination, the Gaonburah deposed that the appellant confessed before them that he committed rape on the victim, but he could not recall the date when the villagers produced the appellant and the victim before him.

25. Another witness, Sri Biren Singh Engti deposed as PW-5 that the appellant is known to him, but the complainant is not known to him. About 2 years ago, in a village meeting he learnt that the appellant committed rape on a girl. This witness was not cross-examined.

26. The victim's mother deposed as PW-6 that the informant is her daughter. The appellant is known to her. About 3/4 years ago, at about 10 am, the appellant trespassed into their house and committed rape on her daughter at gunpoint. When she returned home, her

daughter informed her about the incident.

26.1. The learned counsel for the appellant laid stress in his argument that the FIR depicts that the victim came to the field and informed her about the incident, whereas on the contrary, her (PW-6's) husband stated as PW-9 that their daughter went to the field where they were working and informed them about the incident. These contradictions cast a shadow of doubt over the veracity of their evidence, moreso when the FIR was lodged after a gap of 3 or 4 days. It has to be borne in mind that the victim testified that the FIR was lodged on the same date at about 6 PM.

26.2. It is further argued that the victim's mother PW-6 testified in her cross-examination that her daughter did not reveal the name of the appellant. It is argued that when the victim did not reveal the name of the appellant, how could the villagers apprehend the appellant without there being proper identification.

26.3. I find force in the argument of the learned counsel for the appellant. The myriad of contradictory statements of the witnesses thwarts the evidence. The FIR, Exhibit-1 clearly reflects that it was lodged after 3 days. The victim cannot be termed as a sterling witness as the paradoxes play. Contrary to Exhibit-1 she stated that Exhibit-1 was lodged on the same evening. Moreover, for a considerable time she did not disclose the name of her aggressor. It has surfaced in the evidence that the appellant is a local resident and he is known to the villagers.

26.4. On the contrary PW-1, victim identified the appellant in her evidence-in-chief and in her cross-examination, she has stated that she did not know the appellant prior to the incident.

Then how was the appellant identified?

27. The learned counsel for the appellant relied on the decision of Hon'ble the Supreme Court in ***Prahlad Singh v. State of Madhya Pradesh***; reported in **AIR 1997 Supreme Court 3442**, wherein it has been held and observed that-

“4. It may be stated that though the prosecution had sought to establish a case that the accused had been identified even prior to the test identification-parade before one Major Raizada but no evidence was laid in that regard and even Major Raizada was not examined as a witness. The identification was supposed to have been made also in the presence of one Subedar Harphool Singh but said Harphool Singh also was not examined by the prosecution. In the aforesaid circumstances, our opinion no credence can be given to the identification said to have been made before the test identification-parade on 23.7.1984.

5. The learned counsel for the appellant further urged that the only other item of evidence to prove the complicity of the appellant with the offence is the substantive evidence of the prosecutrix in the Court as inasmuch as she identified the appellant to be the person who committed the sexual assault on her on the date of occurrence. But that evidence is also wholly unacceptable in view of the statement of the prosecutrix in the cross-examination wherein she stated :

"Today, I have come alongwith my father. The Police uncle was also with me outside. Now when the accused entered into the court, then the Policewala and my father had told me that he is the accused and that is why that I have stated that he is the accused. The Policewala uncle had tutored my statement outside today and accordingly I am deposing my same tutored statement."

In view of the aforesaid evidence of the prosecutrix, in our opinion the learned counsel for the appellant is wholly justified in making his submission that the substantive evidence of the prosecutrix in court identifying the accused is absolutely of no relevance and is wholly unacceptable and no conviction can be based on the same. Mr. Shukla, the learned senior counsel appearing for the respondent, however, submitted that the accused being an army jawan and a colleague of the father of the prosecutrix and prosecutrix having been sexually assaulted by the accused, there is no reason for the prosecutrix to unnecessarily involve an innocent man and since the fact of rape on the prosecutrix has been established beyond reasonable doubt the High Court rightly convicted the appellant. We are, however unable to accept this contention since until and unless there is reliable and acceptable evidence to come to a conclusion that it is accused - appellant who committed rape he cannot be convicted even if the factum of rape on the prosecutrix is established beyond reasonable doubt. In our considered opinion, therefore, the High Court interfered with an order of acquittal on mere surmises and conjectures without having an iota of acceptable evidence bringing complicity of the accused and as such the said conviction and sentence cannot be sustained in law. Accordingly we set aside the conviction and sentence passed by the High Court of Madhya Pradesh and acquit the appellant of the charges leveled against him. The criminal appeal is allowed. The bail bond furnished by the appellant shall stand discharged.”

28. Likewise, it is submitted that in the instant case too, the appellant deserves acquittal as identification of the appellant is in the dark. The victim's father, Ratna Bahadur Sonar deposed as PW-9 that the appellant is known to him. About 4 years ago, at about 04:00 pm, during their absence and when their daughter was alone at home, the appellant went inside their house and committed rape on her at gunpoint. Thereafter, their daughter went to the field where they were working and informed them about the incident. Then they informed the

Gaonburah and the other villagers about the incident and searched for the appellant. After 3/4 days, the appellant came to the Gaonburah's house. He requested the Gaonburah to organize a village mel or bichar, but the Gaonburah advised them to go the Police Station. Then his daughter lodged the FIR.

29. In his cross-examination, he stated that his daughter did not initially disclose the name of the person who committed rape on her.

30. It is submitted that if the victim did not disclose the name of the person, who committed rape on her immediately after the incident, then how could the appellant be identified as the person, who had assaulted the victim. The benefit of doubt has to be extended to the appellant when the evidence reveals that the victim kept on concealing the name of the appellant, till the time the FIR was lodged, i.e., after 3 (three) days in this case.

31. Sri Arjun Tamang deposed as PW-8 that the appellant is known to him. The incident occurred about 3 years ago. The victim told him and the other villagers that the appellant committed rape on her. Initially, the appellant did not confess his guilt, but when the victim divulged about the incident to the villagers, the appellant admitted that he committed rape on the victim. Thereafter, they handed the appellant to the Police.

32. It is apt to mention at this juncture that the learned counsel for the respondent has stated that no contradictions could be elicited through the cross-examination relating to the initial statement of victim under Section 164 CrPC vis-à-vis the evidence of the victim.

33. The deposition of PW-8 substantiates the statement of the victim under Section 164

CrPC, wherein the victim has stated that initially the appellant did not admit about the incident, but later when she divulged about the incident, the appellant finally admitted that he had committed rape on the victim. However, this extra judicial confession was made in the presence of the Investigating Officer (IO for short).

34. The IO, Shri Kulendra Kumar Hujuri deposed as PW-12 that on 05.05.2015 he was posted at Dillai PS as second officer. At about 1.30 PM, he received an information over phone from the O/C of Dillai PS who was at that time in Bokajan informing him about a meeting in a community hall at Koylajan between Karbi community and Nepali community in connection with an incident of rape. He registered a GD Entry No. 111 dated 05.05.2016 and opened a miscellaneous case diary and went to the community hall at Koylajan. The appellant in his presence confessed in the meeting that he committed rape on the victim. The appellant also admitted that he committed rape on the victim at gunpoint. Thereafter, he brought both the appellant and the victim to Dillai PS for interrogation. At about 3.45 PM, the victim lodged the FIR. He was entrusted by the O/C to investigate the case. He went to the appellant's house and recovered an SBML gun from his house which was kept under the 'Alna' in his bedroom. He seized the gun in presence of seizure witnesses. He has proved the seizure list as Exhibit-3 and Exhibit-3(2) as his signature. On the following day, the victim was forwarded for medical examination and, then she was produced before the Magistrate, who recorded her statement under Section 164 of CrPC. The appellant was forwarded to judicial custody. He recorded the statements of victim's parents and went to the place of occurrence (PO for short) and recorded the statements of the other witnesses. He prepared the sketch map. He has proved the sketch map as Exhibit-8 and his signature on the sketch map as Exhibit-8(1).

On completion of investigation, he submitted charge sheet against the appellant. He has proved his signature on the charge sheet as Exhibit-9(1). His cross-examination is not noteworthy.

35. It is true that the victim has stated that the appellant committed rape on her at gunpoint. This evidence of the victim, PW-1 is substantiated by the evidence of PW-4 and the evidence of victim's mother/PW-6 as well as the evidence of victim's father PW-9. However, the evidence of PW-1, PW-6 and PW-9 are not similar as has already been discussed in my foregoing discussions.

36. APSI Robin Saikia deposed as PW-11 that on 22.09.2016, he was posted at 9th APBN Barhampur as Armourer. Additional SP, Karbi Anglong, Diphu sent one SBML (Single Barrel Muzzle Gun) for examination in connection with Dillai PS Case No. 11/2016, which was received by the Commandant of 9th APBN. He received the gun in a wooden box. He marked the gun as 'A' and examined the gun as per rule and prepared the report of the examination. As per his report, Exhibit-A i.e. the gun was made from iron pipe, SBML gun. It was a firearm and was serviceable at the time of examination. He has proved Exhibit-5 as his report regarding the examination of arms and Exhibit-5(1) as his signature. Exhibit-6 as the forwarding report and Exhibit-6(1) has been identified by him as the signature of Commandant of 9th APBN Barhampur, namely B.R. Hazarika.

37. In his cross-examination, he stated that the gun which was examined by him was not loaded.

38. At this juncture, it is pertinent to mention that not a single witness has proved or identified the gun. The gun was not produced in the Court to be proved by any of the witnesses including the seizure witnesses. There is no disclosure statement relating to recovery of the gun. Although a gun has been seized in connection with this case and although the evidence of PW-1, PW-4, PW-6 and PW-9 reveals that gun was used in connection with this case yet due to the discrepancies in the evidence and the discrepancies in the prosecution, the appellant deserves a benefit of doubt. The gun was not produced before PW-1, PW-4, PW-6 and PW-9 to be identified by them to affirm that the same gun was used by the appellant. The gun was not recovered as per Section 27 of the Indian Evidence Act, 1872 (the Evidence Act for short). Thus, it can be safely held that the evidence of PW-11 could not help to improve the prosecution case.

39. Another witness Sri Arjun Tamang deposed as PW-8 that the victim told him and the other villagers that the appellant committed rape on her. Initially the appellant did not confess his guilt but when the victim divulged upon the incident, then the appellant admitted that he had committed rape on the victim. Then they handed over the appellant to the police.

40. It is pertinent to mention at this juncture that the extra judicial confession was made in presence of the police, i.e. the IO. The IO went to the community hall at Koylajan where the meeting was held and there in presence of the witnesses and the IO, the appellant has admitted that he committed rape on the victim. An extra judicial confession can be relied upon but this confession is no confession at all when the confession is made in presence of the police/IO. It is also pertinent to mention at this juncture that the victim admitted in his cross examination that the appellant was not known to her prior to the incident but it has not

surfaced through the evidence as to how, finally the victim managed to identify the appellant. PW-1's parents (PW-6 and PW-9) admitted in their cross-examination that the victim did not disclose the name of the appellant after the incident. She (PW-1) did not mention before them who committed rape on her after the incident.

41. I would like to reiterate that PW-2 Sri Nelson Tokbi, PW-3 Sri Khoya Singh Teron and PW-5 Sri Birensing Engti, did not at all support the prosecution case. PW-2's and PW-5's evidences are hearsay evidences as they stated that they heard about the incident but they did not mention who informed them about the incident. PW-3 stated that his signature was taken on a blank paper but he has identified his signature as Exhibit-3(1).

42. Exhibit-1 clearly reveals that the incident occurred on 02.05.2016 and the FIR was lodged after three days i.e. on 05.05.2016. The reasons relating to delay mentioned in the FIR reveals that while searching for the address and identification of the appellant, there was a delay in lodgment of the FIR. However, contrary to the FIR, the evidence of PW-4 Smt. Sanju Thapa reveals that the complainant's parents went and informed her that the appellant committed rape on the victim at gunpoint and then she informed the Gaonburah (PW-7) and the other villagers about the incident. The victim was taken to the Medical Officer after four days and thus, no injuries could be detected by the Medical Officer and no evidence of sexual assault was detected on examination of the victim except the fact that hymen of the victim was found to be ruptured.

43. In the cross-examination of Dr. Karik Kropi (Medical Officer), deposed as PW-10 that sometimes hymen gets ruptured without sexual intercourse.

44. The learned counsel for the appellant has relied on the decision of Hon'ble the Supreme Court in **Narender Kumar –Vs- State (NCT of Delhi)**; reported in **AIR 2012 SC 2281**, wherein it has been held that –

“23. The courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: Tukaram & Anr. v. The State of Maharashtra, AIR 1979 SC 185; and Uday v. State of Karnataka, AIR 2003 SC 1639).

24. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance of her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecutrix case becomes liable to be rejected.”

45. Reverting back to this case, it is held that as discussed in the foregoing discussions,

the tear of the hymen also cannot be directly attributed to the petitioner. There are too many discrepancies in the evidence. The evidence of the witnesses are not similar to each other. The identification of the appellant by the victim is still under cloud. This is not a case where rape of the victim has been established beyond reasonable doubt.

46. In the wake of the foregoing discussions, this Court is constrained to hold that the prosecution could not prove this case beyond reasonable doubt against the appellant. Therefore, the Judgment and Order dated 07.09.2022, passed by the learned Assistant Sessions Judge, Karbi Anglong, Diphu, in Sessions Case No. 149/2017, is hereby set aside and the appellant is acquitted from the charges under Section 376 IPC, on benefit of doubt. The appellant is set at liberty forthwith, if he is not required in any other case.

47. 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.

48. Send back the Trial Court Record.

JUDGE

Comparing Assistant