

GAHC010233342022



2024:GAU-AS:12865

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

PRINCIPAL SEAT AT GUWAHATI

CRIMINAL APPEAL NO. 316/2022

1. Aktar Ali (A-1),
S/o Sekan Ali,
R/o Village – Mayerchar, Part-I,
P.S.- Bilasipara, Dhubri.
2. Moynal Hoque (A-2)
S/o Sekan Ali,
R/o Village – Mayerchar, Part-I,
P.S.- Bilasipara, Dhubri.
3. Fajlul Hoque (A-3)
S/o Samsul Hoque,
R/o Village – Mayerchar, Part-I,
P.S.- Bilasipara, Dhubri.

.....Appellants (In Jail).

-Versus-

1. State of Assam,
Represented by the P.P., Government of Assam,
Gauhati High Court, Guwahati.

2. Abdul Malek,
S/o Late Bellal Hussain,
R/o Village – Mayerchar, Part-I,
P.S.- Bilasipara, Dhubri.

.....Respondents.

Advocates for the appellant: Mr M U Mondal

Advocate for the respondent: Mr B Gogoi, Addl. P. P, Assam
Mr A Hussain, LAC, R-2

BEFORE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

Date of hearing : 12.08.2024

Date of judgment : 16.12.2024

JUDGEMENT AND ORDER (CAV)

Heard Mr M U Mondal, learned counsel for the appellant, Mr B B Gogoi, learned Additional Public Prosecutor for the respondent State and Mr A Hussain, learned counsel for the informant/respondent No. 2

2. This appeal is preferred against the Judgment and Order dated 17.09.2022, passed by the learned Additional Sessions Judge, Bilasipara, District-Dhubri, in connection with Sessions Case No. 118/2012, convicting Aktar Ali (also referred to as the appellant, or accused or A-1), under Section 376 of the Indian Penal Code, 1860 (IPC, for short) and sentencing him to

undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs. 20,000/-, with default stipulation, convicting Moynal Hoque (also referred to as the appellant, or accused or A-2) and Fajlul Hoque (also referred to as the appellant, or accused or A-3), under Section 366 IPC, read with Section 34 of the IPC, and sentencing them to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs. 5,000/- each, with default stipulation, and convicting them under Section 506 IPC, read with Section 34 of the IPC and sentencing them to undergo Simple Imprisonment for 1 year and to pay a fine of Rs. 1,000/- each, with default stipulation. The sentences are ordered to run concurrently and the period of detention already undergone by the appellants is to be set off with the custodial sentence.

3. The genesis of the case was that on 19.08.2006, at about 11:00 pm, the appellants trespassed into the informant, 'Y's house and kidnapped his married daughter-'X'. The name of the informant is withheld and he will be referred to as-'Y' and his wife, i.e., the victim's mother will be referred to as- 'Z'.

4. It is further alleged that when the informant's wife tried to resist, the appellants threatened her with dire consequences by pointing a pistol towards her chest. An FIR regarding this incident was lodged with the Police at Bilasipara Police Station and Bilasipara PS Case No. 228/2006 under Section 366/506 IPC was registered and the ASI JU Sk. was entrusted with the investigation.

5. The Investigating Officer (IO, in short) embarked upon the investigation. He went to the place of occurrence (PO, for short), and prepared the sketch map and examined the witnesses. He forwarded the victim for medical examination and also for recording her statement under Section 164 of the Code of Criminal Procedure, 1973 (CrPC, for short). On

finding *prima facie* case against the appellants, charge sheet was laid against them under Sections 366/506 of the IPC. Charge sheet was also laid against the accused Sultan Ali Ahmed. On appearance of the appellants, including the accused Sultan Ali Ahmed, a formal charge under Sections 366/506/376 IPC, was framed and read over and explained to them. The accused pleaded not guilty and claimed to be tried. During the pendency of the trial, the accused Sultan Ali Ahmed remained absent and this case against him was split up and separated and trial proceeded against the present appellants.

6. To connect the appellants to the crime, the prosecution adduced the evidence of 8 (eight) witnesses, including the IO and the Medical Officer (MO, for short). The witnesses were cross-examined *in extenso*. On the incriminating materials arising against them through the evidence of the prosecution witnesses, several questions were asked to the appellants. The tenor and trend of the answers of the appellants to questions under Section 313 CrPC, depicts a plea of total denial. The answers were evasive in nature. They preferred to answer in short sentences like, "this is not true," "I am innocent," "it is false", and so on and so forth. The appellants did not tender any evidence in defence.

7. It is submitted on behalf of the appellants that the accused persons named in the FIR are father and sons, and three of the accused are cousins. It is not plausible that cousins along with father and son will commit an offence of rape. The scribe of the FIR was not examined as a witness. This causes a dent in the evidence as the scribe is a material witness. The informant was out in the market at the time of the incident. It is not possible that at 11:00 pm, midnight any person will be in the market. The incident occurred allegedly on 19.08.2006, whereas the FIR was formally lodged on 23.08.2006, leaving enough scope for

fabrication and embellishments.

8. It is further submitted that this is not a case of rape, but abduction simpliciter. The delay in lodgment of the FIR is fatal to this case as the explanation justifying the delay in lodgment of the FIR, appears to be vague.

9. PW-1 has contradicted his own FIR, stating that the FIR was lodged on the following day, whereas the FIR was lodged on 23.08.2006 and the incident occurred on 19.08.2006. It is submitted that as all the witnesses are related, they are interested witnesses. The evidence of PW-3 also does not inspire confidence as according to PW-3, the FIR was lodged on the following morning. PW-5 also stated that the FIR was lodged on the following day and, thus, it is apparent that PW-5 and interested witnesses tried to corroborate the evidence of the other witnesses, and so, did PW-6. No weapons like pistol, dagger, etc. were recovered. The other elderly accused were exonerated and not even sent up for trial and no reasons were assigned why the other elderly accused named in the FIR were not sent up for trial.

10. The learned Additional Public Prosecutor and learned counsel for the respondent No. 2, have raised serious objection stating that the order was properly passed by the learned trial Court and warrants no interference. The victim herself has incriminated the appellants and the victim in a case of rape is a reliable witness and her evidence requires no corroboration. In a case of rape, there will seldom be any eye-witness and the evidence of the victim can be relied upon to bring home the charges against the appellants. The learned trial Court has rightly relied on the decision of the Hon'ble Supreme Court in ***State of Punjab –Vs- Gurmeet Singh and Others;*** reported in **(1996) 2 SCC 384**, wherein it has been observed that-

“A rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The Courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

11. The remaining part of the arguments will be discussed at the appropriate stage.
12. Now, the question that falls for consideration is that whether the learned trial Court has erred by convicting the appellant as described above.
13. To decide this case in its proper perspective, the evidence is reappreciated.
14. The informant-'Y' deposed as PW-1 that the incident occurred about 8/9 years ago. His house is situated at Ghunimari Village. On the day of the incident, he was at Bilasipara market. When he returned home at night, he found that his wife was weeping and she informed him that the appellants broke into their house and forcefully kidnapped his daughter-'X' by brandishing sharp weapons. They also threatened his wife with dire consequences. When his cousins learnt about the incident, they came to their house and he along with his cousins set out on a frantic search of his daughter. When they could not find her till late at night, he lodged the FIR against the appellants. He has affixed his thumb impression on the FIR. After 11 days, his daughter was recovered by his brother at Goalpara. His brother brought her back. When he confronted his daughter (X), she informed him that on the date of the incident, the appellants entered into their house at night and threatened

her and his wife with dire consequences by displaying dagger and thereafter, they took her to some unknown place. The appellant, Aktar committed rape on her. After the recovery of his daughter, the Police was informed and the Police took his daughter for medical examination. His daughter was already a married woman at the time of the incident, but her husband was not present at that time. She was more than 18 years old at the time of the incident. The FIR was lodged according to his narration. The FIR was read over to him.

15. At this juncture, it is apt to mention that the learned counsel for the appellant has stated that according to PW-2, the incident occurred at about 11:00 pm, which implies that her father was in the market at 11:00 pm, which is not possible. It is apparent that the informant's house is at Ghunimari village and no market remains open at about 11:00 pm.

16. It is further submitted that in the cross-examination, the informant has stated that he lodged the FIR on the following day, whereas in reality, he lodged the FIR on 22.08.2006 and the FIR was registered on 23.08.2006, while the incident allegedly occurred on 19.08.2006.

17. It is further submitted that what prevented the informant from promptly lodging the FIR and what took him 4 days to lodge the FIR. The delay in lodgment of the FIR casts a shadow of doubt over the veracity of his evidence. If his daughter was kidnapped at gunpoint, why was he not worried at all?

18. Learned counsel for the appellants further laid stress in his argument that the informant testified in his cross-examination that he informed his son-in-law about the incident, but his son-in-law did not lodge any FIR and his daughter remained untraced for 11 days, which clearly reflects that his daughter was not kidnapped, but she went away with the accused on

her own volition and this is the reason why she remained untraced for 11 days. However, he has denied that his daughter had a love relation with the appellant, Aktar Ali.

19. The victim deposed as PW-2 that the informant is her father. The appellants are known to her. The incident occurred about 9 years ago. She further stated that the incident took place after a year of her marriage. On the date of the incident, she was present in her parental home and was sleeping along with her mother and her father was not at home. At about 11:00 pm, the appellants came and knocked at their door and kicked the door in order to open the door. Then they broke into their house and forcefully entered into the room where she was sleeping and threatened her with dire consequences, by displaying weapons. They gagged her by her mouth and prevented her from screaming and lifted her from her bed. The appellants then took her to some unknown place. Her mother was helpless as she was also threatened with dire consequences. They crossed a river and reached Goalpara district on that very night. She was kept in a deserted house. During her stay, the appellant Aktar forcefully committed rape on her, against her will. On the 11th day, the appellants were taking her to another place, when her uncle noticed her. She shouted for help and her uncle rescued her from the appellant's custody. When the appellants saw her uncle, they fled. Her uncle brought her back to her house and she was produced before the Police. She was sent for medical examination and she was also produced before the Magistrate, who recorded her statement. She has proved her statement as Exhibit-1 and Exhibit 1(1) and Exhibit-1(2) as her signatures. She has stated that the appellant, Aktar committed rape on her on several occasions, whereas the other appellants threatened her with dire consequences.

20. In her cross-examination, PW-2 has deposed that her father went to the Bilasipara

market on the day of the incident, but he did not go to her aunt's house at Chaitanmari. She has admitted in her cross-examination that her husband did not lodge the FIR, but she has vehemently denied that she had a love affair with the appellant, Aktar and went with him on her own volition.

21. It is pertinent to mention at this juncture that the learned counsel for the appellant laid stress in his argument that the victim stayed with the appellants for 11 days. It could not be deciphered from her evidence whether the victim was alone with the appellant, Aktar or whether the other appellants were also present at the place of occurrence. She could not disclose the place of occurrence. It is submitted that it is not believable that 4 (four) aggressive accused who have kidnapped the victim at gunpoint would flee on noticing the victim's uncle.

22. The FIR reflects that the victim was kidnapped at gunpoint, whereas the victim did not depose that she was kidnapped at gunpoint. As this is a false allegation against the appellants, thus, the victim has forgotten to mention that she was kidnapped at gunpoint. The victim has mentioned in her cross-examination that she urinated inside the room, which is not believable. The victim had several opportunities to escape from the place of occurrence when she went out to answer nature's call, but she did not escape, which clearly reveals that the victim was voluntarily staying with the appellant, Aktar Ali.

23. I find force in the argument on behalf of the appellant, Aktar Ali. Indeed, it is not clear from the evidence of the victim how she was confined inside one room, whether she was confined by all the four accused or whether she was confined by the appellant, Aktar Ali alone. Her flawed evidence clearly casts a shadow of doubt over her credibility. She has

stated in a blanket manner that she was threatened by all the accused, which also implies that she was threatened by the other accused named in the FIR. Her evidence that while A-1 committed rape, all the other accused threatened her, is not found to be plausible. The FIR clearly reveals that Accused No. 1 and 6, named in the FIR, are father and sons, whereas all the other remaining accused are cousins. No *mens rea* has been ascribed as to why father and son along with cousins will barge into a house wielding weapons and kidnap a married victim at gunpoint, and confine her for 11 days and abet one particular accused to commit rape on a married woman.

24. The evidence of PW-2, victim was not found to be credible. She deposed that she was taken to an unknown place, but at the same time, she stated that she crossed the river and she was taken to Goalpara District. She has stated that she was kept in a deserted house, but at the same time, she has also incriminated all the accused persons named in the FIR, in a blanket manner. She has stated that she shouted for help, when she saw her uncle, but her uncle's evidence is contrary to her statement. Her uncle deposed as PW-5 that he found PW-2, standing near the bus-stand.

25. The victim's uncle, Kabel Sk. deposed as PW-5 that the incident occurred about 9/10 years ago. The accused are known to him. He resides in the same precincts as the victim. On the date of the incident, he and his brother (informant-PW-1) were not at home. At about 11:00 pm, they returned home and learnt that the accused kidnapped the victim. He heard that the accused including the appellants came to their house during their absence and kidnapped the victim. They set out on a frantic search. On the following morning, his brother lodged the FIR against the accused persons. His sister-in-law witnessed the incident and she

informed them about the incident in detail. He recovered the victim at Goalpara. The victim informed them that the accused kidnapped her and committed rape on her and took her to Goalpara. At Goalpara, the appellant Aktar Hussain committed rape on the victim.

26. This evidence of PW-5 is not similar to the evidence of the victim. Unlike victim, PW-2, this witness has not stated that as soon as his niece saw him, she screamed and the accused persons fled. On the contrary, PW-5 stated that he met his niece (victim) near the bus-stand at Goalpara and after recovering her, they took her to Bilasipara Police Station, unlike the evidence of PW-3 that during their frantic search, the victim fortunately saw her uncle, Kabel Sk. and then she screamed.

27. PW-3 (name withheld) is the victim's husband and he deposed that the accused are known to him. The incident occurred about 9 years ago, after his marriage. The victim was leading her marital life in his house. Once, his father-in-law took his wife to her parental home. On the date of the incident, at about 11:00 pm, the accused persons (named in the FIR), came to his father-in-law's house and kidnapped his wife. He learnt about the incident on the following morning. He went to the accused persons' house along with the Police, but the accused were not present in their house. He set out on a frantic search for his wife along with her family members at all possible places, but could not trace her out. He searched for his wife for many days. After, about 10 days, he received an information that the victim was taken to Goalpara. He along with his father-in-law and uncle-in-law went to Goalpara and searched for the victim. They set out in different directions looking for the victim and then the victim fortunately saw his uncle-in-law, Kabel Sk. and started screaming. Thereafter, his uncle-in-law and father-in-law brought back the victim to Bilasipara Police Station. By this

time, a case was already lodged by his father-in-law against the accused persons. His wife informed him that on the fateful night, at about 11:00 pm, the accused persons came to her father's house, armed with sharp weapons and kidnapped her by displaying a dagger and took her across the river. The accused persons also took her to Goalpara and kept her in an abandoned house in a hilly area at Goalpara. The appellant/accused Aktar, committed rape on his wife, during her stay. His wife informed him that she had no relation with the appellant and she did not go with him voluntarily, but was kidnapped by the accused. This witness has only implicated the appellant specifically, whereas he described all the other accused in a bald manner. It is also apt to mention that all the accused were implicated in a bald manner. Not a single witness has named the accused except A-1 Aktar. It has to be borne in mind that two accused were not sent up for trial and one accused Sultan Ali is an absconder. Role has to be attributed against each accused to prove this case beyond a reasonable doubt.

28. Both the victim and her husband vehemently denied the suggestion by the defence that the victim had a love relationship with the appellant, Aktar Ali. Paradoxes play, as the victim stated in her examination-in-chief that she was taken to an unknown place, whereas she has mentioned in her cross-examination that she was compelled to stay with the appellant, Aktar Ali as his wife and she was compelled to urinate inside the house by the appellant. Moreover, the victim's husband testified in his cross-examination that his wife was recovered from a public road, and it has not been specifically described whether his wife was under any type of confinement while she was on the public road. He has stated that his wife screamed for help, whereas, Kabel Sk., who recovered her, did not depose that the victim screamed for help. He mentioned that he met the victim near the bus-stand at Goalpara. He did not even mention in his deposition that the accused persons were near the victim and they fled when the victim

raised alarm for help.

29. It is apparent from the evidence of Kabel Sk., PW-5 and the evidence of PWs-1, 2 and 3 that the victim was not under any sort of compulsion or confinement when she was recovered by Kabel Sk. She was found on a public road near the bus-stand, which clearly implies that the victim was not under any duress or compulsion, but was walking freely with the appellant, casting a shadow of doubt over the veracity of her evidence.

30. The learned trial Court has relied on the decision of Hon'ble the Supreme Court in ***Gurmeet Singh's case (supra)*** and has held the appellant guilty of the offence of rape. It has also been held in ***Gurmeet Singh's case (supra)*** that Court should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in a statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

31. In the instant case, the evidence of the prosecutrix was not found to be credible. Her evidence has not been supported and corroborated by the evidence of other witnesses. There are too many dissimilarities and discrepancies between the evidence of the witnesses, which renders the prosecution case unbelievable. The prosecution case is found to be unreliable. The allegation is of a serious nature. The more serious an offence, the stricter the evidence ought to be. This case, as has been discussed in my foregoing discussions, is found to be fraught with discrepancies and the appellants deserve a benefit of doubt. It is thereby held that this is not a case where the victim was kidnapped and threatened and sexually assaulted by the appellants. The prosecution has failed to prove beyond a reasonable doubt that the appellants are guilty of offence under Section 366/376/34 of the IPC. It is held that the

prosecution has failed to prove beyond a reasonable doubt that the appellants, Moynal Hoque, A-2, and Fajlul Hoque, A-3, in furtherance of common intention, criminally intimidated the victim and abducted her to coerce her into marrying or coerce her into having illicit relationship with the appellant No 1, Aktar Ali. It is also held that the prosecution has failed to prove beyond a reasonable doubt that the appellant, Aktar Ali, A-1, committed rape on the victim-'X', by forcefully having sexual intercourse with her, against her will and without consent, after abducting her by criminally intimidating her. The appellants, Aktar Ali, Moynal Hoque and Fajlul Hoque, are hereby acquitted from the charges under Sections 376/366/506/34 of IPC, on benefit of doubt and are set at liberty forthwith, if not required in any other case.

32. The Criminal Appeal stands allowed.

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

34. Send back the Trial Court Record.

JUDGE

Comparing Assistant