



GAHC010054482017

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

PRINCIPAL SEAT AT GUWAHATI

Crl. Appeal No. 114 (J) of 2017

SRI TRIDIP BURAGOHAIN,
S/O LATE PABITRA GURAGOHAIN,
R/O – DELIHI GOHAIN GAON,
DISTRICT – SIVASAGAR, ASSAM

VERSUS

THE STATE OF ASSAM
REPRESENTED. BY THE PUBLIC PROSECUTOR, ASSAM.

Advocate for the Appellant : Mr U Choudhury, *Amicus Curiae*
Advocate for the Respondent : Mr M P Goswami, AddL. P.P.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Hearing : 09.05.2023

Date of Judgment : 22.05.2023

JUDGEMENT AND ORDER (CAV)

Heard Mr U Choudhury learned *Amicus Curiae* appearing on behalf of the appellant. Also heard Mr M P Goswami, learned Additional Public Prosecutor appearing on behalf of the State of Assam.

2. This appeal has been preferred by the appellant, Sri Tridip Buragohain, against the Judgment and Order dated 26.09.2017, passed by the learned Assistant Sessions Judge, Jorhat in connection with Sessions Case No. 48 (JJ)/2017, whereby the accused was convicted under Section 366 and 376 IPC, and sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs. 5,000/-, in default, imprisonment for four months, for the offence under Section 376 (1) IPC. The accused was also sentenced to undergo Rigorous Imprisonment for 3 years and to pay a fine of Rs. 3,000/-, in default, Simple Imprisonment for two months for the offence under Section 366 IPC. Both the sentences were directed to run concurrently.

3. The prosecution case in brief is that the informant, Ajit Bordoloi, who is the father of the victim, lodged an FIR on 31.01.2017 before the In-Charge, Lahdoigarh Police Outpost under Teok Police Station, stating inter alia that on 28.01.2017, his daughter went to beauty parlour at Lahdoigarh Chariali but did not return back home. Though they were in search of the victim, but could not trace her out. Subsequently, it has been confessed to them over a mobile phone number being 90856-12898, that one Tridip Buragohain of Sivasagar had kidnapped his daughter from Lahdoigarh Chariali.

4. On receipt of the complaint, a case was registered vide Teok PS Case No. 32/2017,

under Sections 366 IPC and started investigation. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, including the victim on her recovery from Guwahati. The victim was also forwarded to the Court for recording her statement under Section 164 CrPC by the Magistrate. She was also medically examined and after completion of investigation, charge sheet has been laid before the Court of learned SDJM, Jorhat, under Section 366 IPC. As the offence under Section 366 IPC is exclusively triable by the Court of Sessions, the case was committed accordingly.

5. During trial, on appearance of the accused appellant, charge was framed under Sections 366/376 IPC, which was read over and explained to the accused appellant, to which he pleaded not guilty and claimed to be tried. To prove the guilt of the accused appellant, the prosecution examined 7 (seven) witnesses and exhibited five documents. On the other hand, the accused appellant did not choose to adduce any evidence in support of his defence. After completion of the trial, the statement of the accused appellant was recorded under Section 313 CrPC, wherein he denied the evidence of the witnesses made against him and pleaded his innocence. However, the accused also stated in his statement recorded under Section 313 CrPC that he was introduced to the victim through Facebook and thereafter, both of them fell in love. On 20.01.2017, at about 03:00 pm, in the afternoon, the victim called him over phone. At that time, he was along with his vehicle (Night Super) at Namtola at Sivasagar district, due to which he told her that she should not come to Sivasagar. Thereafter, he took the Night Super to Namtola. When he reached the bus counter, he had seen the victim in the counter. Thereafter, he asked the victim to go to her parental home, to which she refused and under such circumstance, he had taken her to Guwahati. Thereafter, when the Night Super reached at Ladoigarh, he again asked her to get down, but again she refused to do so, due to

which he had taken her to Guwahati to his rented house near ISBT. But later on, when the victim came to know that the petitioner was a married person, she went to the Police Station and he also accompanied her and told the matter to the Police Officer.

6. After hearing the arguments of the learned counsel for the parties, the learned trial Court has delivered the Judgment, convicting the accused appellant as aforesaid. Hence, this appeal.

7. Learned *Amicus Curiae*, Mr U Choudhury, has argued that the victim was a major girl at the relevant time of incident. As such, she was a consenting party to have sexual intercourse with the accused appellant. Hence, no offence is committed under Section 376 IPC. As the victim was a major girl, there was no question of kidnapping, which falls under Section 366 IPC. However, the accused has been in jail since the date of Judgment, 26.09.2017, i.e., for more than 5(five) years. The maximum punishment here in this case is 7(seven) years. Under such backdrop, the accused be acquitted or be released for the period undergone for the offence on conviction.

8. It is further submitted by the Learned *Amicus Curiae* that the incident took place on 28.01.2017, but the ejahar was lodged on 31.01.2017, after three days of the incident. There is no explanation in the FIR, regarding delay of lodging the same, which is fatal to the prosecution case.

9. It is further stated by the learned counsel for the appellant that on examination of the victim, the Medical Officer did not find any injury on the private parts of the victim, which shows that the victim was not sexually assaulted by the accused appellant. Therefore, Section 376 is not attracted here in this case.

10. Learned *Amicus Curiae* also argued that though the victim stated that she became unconscious, after she was taken in the vehicle, but the victim is totally silent as to whether the appellant had administered any type of substance, for which she became unconscious. Learned counsel for the appellant also pointed out that when the victim came to know that the appellant was a married person, she immediately went to the Police Station, alleging offence of kidnapping and rape.

11. Per contra, Mr M P Goswami, learned Additional Public Prosecutor has vehemently opposed the contentions of the learned counsel for the appellant and submitted that though the victim was a major girl at the relevant time of incident, however, the injury report of the victim shows that she sustained injury on different parts of her body. The victim was recovered from the rented house of the accused appellant at Guwahati. If the victim was a consenting party, there could not be any injury mark on the body of the victim. It is also submitted that the statement of the victim was consistent while deposing before the Court or while statement was recorded by the Magistrate or by the Police Officer during investigation. In view of the above, it cannot be stated that the victim was a consenting party to have sexual activity with the accused appellant. As such, the Judgment of conviction passed by the learned trial Court does not call for any interference by this Court.

12. I have heard the submissions made by the learned counsel appearing for both the parties. I have also perused the record as well as the Judgment of the learned trial Court.

13. The questions arising for consideration before me are:-

- i) Whether the prosecution story as alleged inspires confidence of this Court on the evidence adduced!

ii) Whether the prosecutrix is a witness worthy of reliance?

iii) Whether the testimony of the prosecutrix who has been a victim of rape, stands in need of corroboration and if so, whether such corroboration is available in the facts of the present case and whether the victim was a consenting party to the crime!

14. The victim was examined in the case as PW-1, who deposed in her evidence that she knew the accused appellant through Facebook. The accused introduced himself as Deep Buragohain and that he was an employee of BSF. The accused appellant used to talk to her over phone. On 28.01.2017, the accused called her to Lahdoigarh over phone to see her. Thereafter, she went to Lahdoigarh and met with the accused. Other four boys were with the accused. When she went close to the accused, he with the assistance of his friends gagged her mouth and put her in a van. The place was a little away from the Police Station and the time was about 11:00 am. She was carried by the vehicle for about an hour and the vehicle was facing towards Jorhat. She fell unconscious after she was put into the vehicle and regained her consciousness at Bhangagarh, Guwahati. She found herself in a room at Guwahati. The room was dark with no window. She found herself nude and the accused had sex with her by applying force and when she resisted him, he assaulted her and thus caused injury to her. She sustained injury on her head, back, chest and waist and the accused also used obscene languages towards her. When she tried to scream, the accused pressed her neck to the extent that she could not scream. The accused also threatened her that he would sell her at Cooch Behar. One day, the accused made a plan to take her to Cooch Bihar and was talking to someone else over phone and when the accused came out of room, she escaped. After coming out of room, she met a Security officer,. When she told him about the incident, he took her to Police Station. Thereafter, the Police informed her parents and

subsequently, Police along with her parents came to Gorchuk Police Station. On being asked, she made a statement before Police and her statement was recorded by the Magistrate. She was medically examined. It is also alleged by the victim that the accused kidnapped her by giving false identity.

14.1 In her cross-examination, PW-1 replied that till the date of incident, it was 22 days of acquaintance with the accused on Facebook. There had been conversation between them in these 22 days and the love affair grew between them. She did not know that the accused was a bus driver. There were 1/2 persons at the place of occurrence and the vehicles were plying there on the road. The companions of the accused also touched her body. She did not know who had made sexual relation during the time she remained unconscious. But the accused had committed sex with her by applying force after she regained her sense.

15. PW-2 is the informant, father of the victim. From his deposition, it reveals that on the date of incident, his daughter went to a beauty parlour, located at Ladoigarh. When he reached home in the evening, he came to know that his daughter did not return home. Then he made phone calls to her friends and from them he came to know that his daughter did not visit their houses. Unable to trace his daughter, he lodged the FIR before Lahdoigarh Outpost. After 6/7 days he received a phone call that she was in Gorchuk Police Station. They informed the matter to Police and went to Guwahati with police personnel and recovered his daughter. Thereafter, his daughter was medically examined, and her statement was recorded. On being asked by her father, she stated that one boy named Deep with the help of other boys, gagged her and took her in a vehicle and she became unconscious. After two days, his daughter discovered herself in a room at Guwahati. The accused assaulted her and PW-2 noticed injuries on various parts of her body. His daughter did not tell him that the accused

had committed bad act with her. But she stated so to her mother.

15.1. In his cross-examination, PW-2 replied that he lodged the ejahar on 31.01.2017. He did not know if the accused and his daughter had love affair. Their residence are at some distance from the place of occurrence. Since the road has been widened, the vehicles ply on that road. He did not say to the Police that the accused and his friends had taken away his daughter by covering her face with a black cloth.

16. PW-3, Manjit Bordoloi, is the elder brother of the victim. According to him, on the date of incident, his sister went to a beauty parlour at Lahdoigarh. When his sister did not return home till the evening, they searched for her but she could not be traced. Then their father lodged an ejahar at the Police Station. Around 9 pm a phone call was made from his sister's mobile phone, wherein the caller introduced himself as Tridip Borgohain and said that he took his sister and then he switched off the mobile. One week after missing of his sister a phone call was made through his sister's mobile phone stating that Police recovered her sister and kept her at the Police Station. Then he along with Police and his relatives went to Guwahati. He met his sister at Gorchuk Police Station and Police brought his sister to Jorhat. His sister told him that Tridip Borgohain had taken her away in a van from Lahdoigarh. She said that the appellant was the main culprit and that she had been kept confined in a dark room at Garchuk area. When his sister wanted to return home, the appellant assaulted her causing injury on her entire body. He had also noticed injuries on the body of his sister. She was given treatment for those injuries.

16.1. In his cross-examination, PW-3 stated that he did not know if his sister developed any relationship with the accused through Facebook.

17. PW-4 is the mother of the victim. She deposed before the Court that on the date of incident, her daughter went to a beauty parlour at Lahdoigarh and did not return home till evening. Though they were searching for their daughter, they could not find her, so her husband lodged an FIR in the Police Station. Later on, they came to know from Garchuk Police Station that they recovered their daughter and kept her at the Police Station. When she met her daughter she told her that the accused took her in a van to Guwahati. The accused forcefully established physical relationship with her daughter. When her daughter resisted the accused appellant, he assaulted her. She had seen the injuries on her body as well as on her head. She was given treatment for her injuries.

18. Another witness, PW-5 is the neighbour of the informant. He did not say anything regarding the incident. He came to know from the informant that the accused had kidnapped his daughter.

19. PW-6 is the doctor who examined the victim after her recovery. She deposed before the Court that on 04.02.2017, while she was posted as Medical Officer, Department of Forensic Medicine at JMCH, she examined the victim and she found the following injuries:-

Genital examination:

- a) Hymen-old tear at 6 o' clock position.
- b) Vagina – no evidence of injury detected.

Injuries on the body-

- 1) Blue-green colour bruise on left thigh three (03) numbers 1 cm 1 sq in size with tenderness.
- 2) Tenderness on anterior chest-difuse area.

3) Tenderness on both fore arms and scalp (parietal) area.

19.1. Doctor opined that the victim was above 18 years old and no evidence of recent sexual intercourse detected.

But in her cross-examination, the Medical Officer replied that the injuries sustained by the victim cannot be caused by falling.

20. PW-7 is the Investigating Officer. From his deposition, it discloses that on 31.01.2017, he was working at Lahdoigarh Outpost. On that day, on receipt of an FIR, the In-charge of the Outpost made an Entry vide GD Entry No. 561 dated 31.01.2017 and forwarded the same to Teok Police Station for registration of the case. He was entrusted with the task of investigation of the case. During investigation, he recorded the statement of the informant at the Police Station and also recorded the statement of other witnesses. Thereafter, he visited the place of occurrence and drew a sketch map, vide Exhibit-4. On recovery of the victim, he received a wireless message that the victim and the accused were detained at Garchuk Police Station, Guwahati. Then he along with other Police personnel went to Guwahati and brought the victim and accused to Lahdoigarh. He recorded the statement of the victim and got her medically examined. Her statement was also recorded under Section 164 CrPC. He arrested the accused and forwarded him to Court and after completion of investigation submitted chargesheet against the accused/appellant, under Section 366 IPC, vide Exhibit-5.

21. In his cross-examination, PW- 7 replied that except the said accused, he was not aware of any other accused person during investigation. Though he went to examine the witnesses at the shops near the place of occurrence at Lahdoigarh, but everybody stated that they knew nothing about the incident. The witnesses are the family members of the victim.

22. Admittedly, the victim was a major girl when the incident took place. According to the victim, she made acquaintance with the accused through Facebook. On being called by the accused, she came to Lahdoigarh and she was kidnapped by gagging her mouth in a vehicle to Guwahati. It is alleged that the accused had committed rape upon her and the other persons who accompanied the accused at the relevant time had touched her body, but she could not say whether they had made any sexual relationship with her, when she was unconscious.

23. It was argued by the learned *Amicus Curiae* that the prosecutrix was a major at the relevant time of incident, who had willingly gone with the appellant and lived in his house at Guwahati and if they had any sexual intercourse, it was with her consent. Therefore, the prosecution has failed to establish the offence against the accused appellant, under Sections 366/376 IPC. The learned trial Court had wrongly appreciated the evidence on record and has erred in concluding that the victim girl was not a consenting party. But the facts and circumstances of the case amply shows that the victim was a consenting party. Learned trial Court had wrongly convicted the accused under Section 366 and 376 IPC and he is entitled to be acquitted.

24. For the offence of rape as defined in Section 375 of the Indian Penal Code, the sexual intercourse should have been against the will of the woman or without her consent. If she be of 16 years of age or above, her consent cannot be presumed; an inference as to consent can be drawn if only based on evidence or probabilities of the case. The victim of rape stating on oath that she was forcibly subjected to sexual intercourse or that the act was done without her consent, has to be believed and accepted like any other testimony unless there is material available to draw an inference as to her consent or else the testimony of prosecutrix is such

as would be inherently improbable. It may be recalled in that in view of section 114-A, Evidence Act inserted by Criminal Laws (Amendment), Act, 1983, there has been effected radical change in law relating to rape so far as the evidence relating to rape is concerned. The law is now in view of Section 114-A, Evidence Act that if the fact of sexual intercourse is proved and the victim says that she did not consent to that act, the onus shifts to the accused to show that the victim was a consenting party.

25. In the case of ***State of U P vs. Chhotey Lal***; reported in **(2011) 2 SCC 550**, the Hon'ble Supreme Court observed that-

“ “Consenting” means consent of the will and submission under the influence of fear or terror cannot amount to real consent.

.....It is further stated that consent supposes three things, a physical power, a mental power and a free and serious use of them and if the consent be obtained by intimidation, force, meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of mind.

“Consent” within Penal Law defining rape requires exercise of intelligence based on knowledge of its significance and moral quality and there must be a choice between resistance and assent.”

26. In the case in hand, the victim before me was 20 years of age. She has clearly stated that she was subjected to sexual intercourse by the accused and she was not a consenting party. I have found the testimony of the prosecutrix trustworthy and unembellished. The prosecutrix has been subjected to cross-examination, but nothing has come out to discredit her evidence. The trial Court has found the prosecutrix reliable. This Court also finds no

reason to disbelieve her testimony. A father would not ordinarily subscribe to a false story of sexual assault, involving his own daughter and thereby putting at stake, the reputation of the family and jeopardizing the married life of the daughter.

27. It is pertinent to mention here that the victim is still unmarried staying in the house of her parents. From the evidence of PW-s 3 and 4, i.e., brother and mother of the victim, it reveals that at the time of occurrence the victim had been pursuing her studies, but after the incident she has abandoned her studies as she stated that the incident has ruined her life. PW-4 also added that they are facing trouble to solemnize the marriage of their daughter because of the incident.

28. It would be apt here to remind one of the observations of the Hon'ble Supreme Court in a case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat; (1983) 3 SCC 217***, where the Supreme Court said-

“A girl or a woman in the tradition bound non permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society or being looked down by the society, including by her own family members, relatives, friends and neighbours. She would face the risk of losing the love and respect of her own husband and near relatives, and of her matrimonial home and happiness being shattered. If she is unmarried, she would apprehend that it would be difficult to secure an alliance with a suitable match from a reasonable or an acceptable family. In view of these similar factors the victims and their relatives are not too keen to bring the culprit to book. And when in the face of these factors the crime is brought

essential for a conviction of the offence of rape. The totality of the circumstances appearing on the record of the case discloses that the victim does not have a motive to falsely implicate the accused appellant to be involved in the present case.

33. Regarding delay of lodging the FIR, it is no doubt true that the incident occurred on 28.01.2017 and the FIR was lodged on 31.01.2017, but hardly anyone can lose sight of the fact that in such kidnapping and sexual abuse cases, the delay in lodging the FIR can be due to variety of reasons, particularly the reluctance of the family members of the prosecutrix to go to the Police and complaint about the incident, which concerns the reputation and honour of the family members in general and of the prosecutrix in particular. It is only after coming to a cool thought the complaint of sexual offence is generally lodged. Such delay has got no direct bearing on the prosecution version, which is otherwise proved by cogent, ocular and medical evidence.

34. Similarly, there is no legal requirement to search for any corroboration to the statement of the prosecutrix. Her statement about the manner, in which she was abducted, forcibly dragged into a vehicle from Lahdoigarh Chariali and straightway, she was taken to Guwahati and illegally confined in a rented house of the accused appellant near ISBT, has a ring of truth in it. It is not a matter of dispute that such girl in a tradition bound non-permissive society in this North-Eastern part of the country, would be extremely reluctant even to admit that any such incident, which is likely to reflect upon her chastity, had occurred, being conscious of the danger of being ostracized by the society. In the normal course of human conduct, such unmarried girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to openly narrate such incident. On the other hand, minor discrepancies here and there with regard to

the statement of the victim or her parents or her brother regarding the date of recovery of the victim girl at Guwahati or subsequently, bringing her to Jorhat, had no direct bearing on the fact of actual kidnapping and commission of rape of the victim girl by the accused appellant.

35. An identical question came to be decided by Hon'ble Apex Court in a celebrated judgment in case ***State of Maharashtra v. Chandraprakash Kewalchand Jain***; reported in **(1990) (1) SCC 550**, which was subsequently followed in various judgments. Considering the evidentiary value of prosecutrix in sex abuse cases, it was ruled as under:-

"A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attracted to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more.

What is necessary is that the Court must be alive to and conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (B) to Section 114 which requires it to look for corroboration. If for some reasons the Court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her

testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

37. Coming to the case in hand, this Court finds no force in the contention of the learned counsel for the appellant that the victim was a willing party to the sexual assault made by the accused. Upon an evaluation of evidence available on record, I am satisfied to hold that the victim is a witness of truth. Her testimony inspires confidence. Other evidence available on records lends assurance to her testimony. As per medical report the victim sustained bruise injuries on her left thigh and other parts of her body i.e., chest area, forearms and skull. The hymen was found torn at 6'o clock position. The Medical Officer also stated that the injuries sustained by the victim cannot be possible by falling. The trial Court had rightly held that sexual assault amounting to rape was committed towards victim by the accused appellant. The trial Court was justified in holding her to be not a consenting party to the sexual assault on her.

38. As far as conviction under Section 366 IPC is concerned, it is seen that the evidence of the victim does not indicate that the appellant had kidnapped the victim girl with the intention to marry her against her will or in order that she may be forced to illicit intercourse. These



two vital ingredients for upholding conviction under Section 366 IPC are not proved and therefore, the conviction of the appellant under Section 366 IPC cannot be sustainable. But the accused is found guilty under Section 363 IPC and convicted accordingly, under Section 363 IPC, instead of Section 366 IPC and the sentence would remain as same, passed by the learned trial Court.

39. In the result, the appeal is dismissed. The Judgment and Order dated 26.09.2017, passed by the learned Assistant Sessions Judge, Jorhat, in connection with Sessions Case No. 48 (JJ)/2017, is hereby affirmed to the extent as aforesaid. The period which the appellant detained in custody shall be set off from the period of imprisonment imposed on him.

40. Send back the LCR.

41. With the aforesaid observations, this appeal stands disposed of.

42. Before parting with the record, this Court extends the appreciation to the services rendered by Mr U Choudhury, learned *Amicus Curiae* and recommend that the Registry may make arrangement for payment of necessary remuneration to the learned *Amicus Curiae* as per the existing norms.

JUDGE

Comparing Assistant