



GAHC010094112018

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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. 49 (J) of 2018

GOLAP BHUYAN

**S/O. THANESWAR BHUYAN, VILL. SISSIBORGAON CHOWKHAMTING, P.S.
SILAPATHAR, DIST. DHEMAJI.**

VERSUS

THE STATE OF ASSAM

REPRESENTED. BY THE PUBLIC PROSECUTOR, ASSAM.

Advocate for the Petitioner : MS. B SARMA, AMICUS CURIAE

Advocate for the Respondent : MR B SARMA, ADDL. P.P.

BEFORE
HON'BLE MRS. JUSTICE MALASRI NANDI

Date of Hearing : 09.05.2023

Date of Judgment : 11.05.2023

JUDGEMENT AND ORDER (CAV)

Heard Ms Bijita Sarma, learned *Amicus Curiae* appearing on behalf of the appellant. Also heard Mr B Sarma, learned Additional Public Prosecutor appearing on behalf of the State of Assam.

2. This appeal has been preferred by the appellant, Golap Bhuyan, against the Judgment and Order dated 02.02.2018, passed by the learned Sessions Judge, Dhemaji in connection with Sessions Case No. 111 (DH)/2012, whereby the accused was convicted under Section 366 and 376 (1) IPC and sentenced to undergo Rigorous Imprisonment for 5 years and to pay a fine of Rs. 1,000/-, in default, Rigorous Imprisonment for one month, for the offence under Section 366 IPC. The accused was also sentenced to undergo Rigorous Imprisonment for 7 years and to pay a fine of Rs. 1,000/-, in default, Rigorous Imprisonment for another 1 (one) month for the offence under Section 376 (1) IPC. Both the sentences were directed to run concurrently.

3. The prosecution case in brief is that the informant, Smt Rangili Chutia lodged an FIR before the Officer-In-Charge, Dhemaji Police Station, stating inter alia that her daughter used to stay in the house of her uncle, Pradip Chutia, at Dhemaji Chariali, for the purpose of studying in the school, prior to three months of the incident. On 05.03.2012, at about 12:30 am (at night), the accused knocked the door and when her daughter opened the door, the accused gagged the mouth of her daughter and kidnapped her and took her to the paddy field and committed rape on her. Subsequently, her daughter was also taken to Samarajan, wherein she was kept in the house of one person where the accused also committed rape on her. Subsequently, the informant, mother of the victim, received a phone call from her



daughter that she was in Samarajan. Thereafter, on receipt of the information, the victim was recovered from Samarajan with the help of Police.

4. On receipt of the complaint, a case was registered vide Dhemaji PS Case No. 58/2012, under Sections 366/376 IPC and investigation has been commenced. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses. The victim was also sent to the Court for recording her statement under Section 164 CrPC by the Magistrate. She was also medically examined. The wearing apparels of the victim and the accused were seized during investigation and sent to Forensic Science Laboratory, Guwahati, for chemical examination. On receipt of the medical report as well as the report from FSL, charge sheet was submitted against the appellant under Sections 366/376 IPC.

5. During trial, on appearance of the accused appellant, charge was framed under Sections 366/376 (1) IPC, which was read over and explained to the accused, to which he pleaded not guilty and claimed to be tried. To prove the guilt of the accused person, the prosecution examined 12 witnesses and exhibited some 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 the victim called him over phone and asked him to come to some place in front of Dhemaji Veterinary Hospital. He also stated that he met with the victim. At that time, she was wearing a skirt with sporting and a stole. He repeatedly asked the victim to return back to her house, but she refused to do so. He also stated that he was a married person having a daughter. In spite of that, she did not leave the place and stayed in the house of his friend at

night. On the next day morning, at about 09:30 am, they came to Jethamari Eco-Tourism spot and subsequently to the house of a person at Samarajan, from where, Police recovered them and brought them to the Police Station. After hearing the arguments of the learned counsel for the parties, the trial Court has delivered the Judgment convicting the accused as aforesaid. Hence, this appeal.

6. Learned *Amicus Curiae*, Ms B Sarma, has argued that the victim was a major girl at the relevant time of incident. As per medical report, she was above 18 years of age. As such, she was a consenting party to have sexual intercourse with the accused appellant. Hence, no offence is committed by the accused under Section 376 IPC. As the victim was a major girl, there is no question of kidnapping which falls under Section 366 IPC. However, the accused has been in jail since the date of Judgment, for last 6 (six) 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.

7. Learned *Amicus Curiae* for the appellant also submitted that the case was not proved by the prosecution beyond all reasonable doubt. Though the factum of accused appellant having committed sexual intercourse with the victim was proved, but the absence of injuries on the person of the victim was a material fact, not excluding the possibility of the victim having been a consenting party.

8. Per contra, Mr B Sarma, learned Additional Public Prosecutor has vehemently opposed the contentions of the learned counsel for the appellant and submitted that the victim was a minor girl at the relevant time of incident. When her statement was recorded by the Magistrate under Section 164 CrPC, she stated her age as 15 years. While she deposed

before the Court, she stated her age as 16 years. The parents of the victim also stated that she was below the age of 18 years at the time of incident. As such, it can be presumed that the victim was minor at the time of occurrence. Hence, her consent is no consent to have sexual intercourse with the accused appellant. Under the facts and circumstances of the case, the conviction of the accused appellant is liable to be confirmed.

9. 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.

10. 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 what was the age of the prosecutrix and whether she was consenting party to the crime!

10. The victim was examined in the case as PW-2. From her deposition, it reveals that at the time of incident, she was studying in Class-X, by staying in the house of her uncle Pradip Chutia. The accused came, knocked the door of the house and she opened the door. The accused immediately gagged her mouth and dragged her by holding the victim towards a vehicle which was standing on the road. She noticed one driver in the vehicle, but she could not identify him. She was taken to Bhadrapara. On the way, in the paddy-field, the accused committed bad act with her by using force. She was kept in the house of the friend of the

accused, which was located near the paddy field. She informed the people in the house of the accused's friend, narrating the incident that accused had committed bad act with her by using force, but they did not say anything to the accused. Thereafter, she was taken to a house of a person at Samarajan. In the said house, the accused also committed bad act towards her at day time. She was carrying a mobile phone at that time. On the next day morning, she informed her mother over phone. Then, Police came along with her mother and recovered her and the accused and brought them to the Police Station. She was sent for medical examination. Her statement was also recorded by the Magistrate, vide Exhibit-3.

11. In her cross-examination, PW-2 replied that she and the accused were staying in the house of the accused's friend at night. Though she disclosed the matter before the persons in the house that she was kidnapped by the accused by using force, but they did not say anything to the accused. It was suggested that at the relevant time of incident, the victim was above 18 years of age and she called the accused over phone and accompanied him according to her own will.

12. PW-1 is the informant, who is the father of the victim and PW-3 is the mother of the victim. According to PW-1, her daughter informed him over phone that she was in Samarajan and requested him to bring her back home. According to PW- 1 and 2, they informed the Police and they went to Samarajan, from where, Police recovered their daughter and brought them to Dhemaji Police Station.

13. PWs-4, 5, 6, 7 and 8 did not say anything about the incident.

14. PW-9 is Mausumi Chutia. She deposed in her evidence that in the year 2012, accused Golp Bhuyan along with a girl came to their house and stayed for half an hour. The accused

told her that he would get married with the said girl. The girl was minor. Knowing about the incident, some persons of their village informed the matter to the family members of the girl and, thereafter, Police and family members of the girl took her from their house.

15. PW-10 is the Medical Officer, who examined the victim, after the incident. Dr Rupnath Pegu, PW-10, who deposed in his evidence that on 06.03.2012, he was working as the Medical and Health Officer No. 1 at Dhemaji Civil Hospital. On that day, he examined the victim on police requisition and on examination, his findings were as follows-

On external examination, no signs of injury seen. On examination of vaginal introitus, lacerations and abrasions are seen around the vaginal wall, which is the sign of sexual intercourse. Tenderness found on physical examination.

15.1. Doctor opined that there was evidence of sexual intercourse of the victim as evident from her person and physical examination and also from her laceration of the vagina. The victim was above 18 years of age, as per the X-Ray report.

16. PW-11 is the Investigating Officer. He deposed in his evidence that on 06.03.2012, he was working as Attached Officer at Dhemaji Police Station. On that day, on receipt of an ejahar from one Rangili Chutia, the Officer-In-Charge, Lalit Buragohain, registered the case as Dhemaji PS Case No. 58/2012, under Sections 366/376 IPC. Thereafter, he was entrusted with the investigation of the case. During investigation, he visited the place of occurrence and drew the sketch map, vide Exhibit-6. He recorded the statement of witnesses. The victim was recovered from Samarajan, along with the accused Golap Bhuyan. They were caught hold by the crowd. He also seized a black colour sporting and skirt and underwear in presence of witnesses, vide Exhibit-3.



17. PW-12 is another Investigating Officer, Nilotpal Mishra, who only submitted charge sheet against the accused appellant, under Sections 366/376 IPC, vide Exhibit-7.

18. Apart from medical report, the IO also collected FSL Report. On examination of the seized garments, the Scientific Officer found positive test for human semen.

19. Before holding a person guilty under Section 376 IPC, it is important to determine the age of the victim at the relevant time. In the instant case, the prosecution came up with a case in the FIR that the victim was 15 years of age. The victim stated her age to be 15 years when her statement was recorded by the learned Magistrate. While deposing before the Court after one year of the incident, the victim disclosed her age as 16 years. PW-1, who is the father of the victim, stated that his daughter was born in the year 1987. They got married in the year 1986. Subsequently, PW-1 stated that their marriage was held in the year 1996 and his daughter was born in the year 1997. He handed over one Xerox copy of birth certificate to Police. The original copy was at home. PW-3, mother of the victim also stated that her daughter, i.e., the victim was born in the year 1997. One Xerox copy of birth certificate of the victim is available in the record which shows that the date of birth of the victim is 07.04.1997, and the date of registration of the birth certificate was on 30.11.2000, prior to the date of incident. But the report of radiologist, vide Exhibit-5, shows that the victim was examined by the radiologist on 07.03.2012 and on her examination, he found the age of the victim as above 18 years.

20. According to the medical evidence, the age of the victim was above 18 years at the relevant time of incident. It is true that though the Xerox copy of birth certificate of the victim is available on record, but it was not exhibited and proved before the learned trial Court. The

prosecution having failed to produce any documentary evidence regarding age of the victim, then the reliance has been placed on medical evidence to determine the age of the victim. Regarding the medical assessment, based on the radiological examination, the victim was above 18 years at the relevant time of incident.

21. It is argued by the learned counsel for the accused that the prosecutrix was major at the relevant time of incident, who had willingly gone with the accused and lived with him in the house of a friend of the accused 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. The learned trial Court had wrongly appreciated the evidence on record and has erred in concluding that the girl was not a consenting party and the accused committed the offence under Section 376 IPC. 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.

22. 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.

23. In the case of ***State of U P vs. Chhotey Lal***; reported in **(2011) 2 SCC 550**, the 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.”

24. In the case in hand, the victim before me was 18 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.

25. 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 to light there is a built-in assurance that the charge is genuine rather than fabricated.”

25.1. In this case, no reason has been proved, not even suggested during cross-examination of the witness why the victim or any member of her family would falsely implicate the accused roping him in false charge of rape.

26. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted without corroboration in material particulars. Her testimony has to be appreciated on the principle of probabilities just as the testimony of any other witness; a high degree of probability having been shown to exist in view of the subject matter being a criminal charge.

Assurance, short of corroboration as understood in the context of an accomplice would do. Reference may be had to a long chain of decisions, some of which are- ***State of Maharashtra vs. Chandra Prakash Kewal Chand Jain; 1990 1 SCC 550, Madan Gopal Kaddad –vs- Naval Dubey & Anr.; (1992) 3 SCC 204; Karnail Singh vs- State of MP; (1995) 5 SCC 518.***

27. It is also argued by the learned counsel for the accused that there were contradictions in the statement of the victim when recorded by the Magistrate, under Section 164 CrPC and when deposed before the trial Court. The conviction was based on such evidence, which is not sustainable. The contradictions in the statement of the father of the victim regarding her age and the victim herself created doubt about the correctness of the prosecution version. There was sole testimony of the victim.

28. I do not agree with the submissions of the learned counsel for the appellant. The alleged contradictions regarding age of the victim, what I have already discussed and as there was no document except the medical opinion regarding age of the victim, which is acceptable that the victim was around 18 years of age at the relevant time of incident. However, the evidence of a victim of a sexual offence is entitled to great weight, but corroboration is not 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.

29. 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. The trial Court had rightly held that sexual assault amounting to rape was committed to her by the accused appellant. The trial Court was justified in holding her to be not a consenting party to the sexual assault on her.

30. In the result, the appeal is dismissed. The Judgment and Order dated 02.02.2018, passed by the learned Sessions Judge, Dhemaji, in connection with Sessions Case No. 111 (DH)/2012, is hereby affirmed. The period which he detained in custody shall be set off from the period of imprisonment imposed on him.

31. Send back the LCR.

32. With the aforesaid directions, this appeals stands disposed of.

33. Before parting with the record, this Court extends the appreciation to the services rendered by Ms Bijita Sarma, 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