

(2017) 09 GAU CK 0004
In the Gauhati High Court
Case No : 75 of 2014

Ajay Bardhan & Anr

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 04-09-2017

Acts Referred:

[Indian Penal Code, 1860](#), [Section 34](#), [Section 448](#), [Section 376 \(2\) \(g\)](#) - Acts done by several persons in furtherance of common intention - Punishment for house-trespass - Pu

Citation : (2017) 09 GAU CK 0004

Hon'ble Judges : Rumi Kumari Phukan

Bench : SINGLE BENCH

Advocate : H.R.A.Choudhury, Bidyut Sarma

Final Decision : Dismissed

Judgement

1. Heard Mr. HRA Choudhury, learned sr. counsel appearing for the appellants as well as Mr. Bidyut Sarma, learned Addl. Public Prosecutor, Assam, for the Respondent State.

2. This appeal has been preferred by the appellants against the judgment and order dated 25.11.2013 passed by the learned Assistant Sessions Judge, Karimganj in Sessions Case No. 37 of 2010 convicting the accused appellants U/ Ss 448/376(2)(g) IPC and sentencing them to undergo rigorous imprisonment for one years under Section 448 of the India Penal Code, 1860 and further sentencing them to undergo rigorous imprisonment for 10 (ten) years each under Section 376 (2)(g) IPC and fine of Rs.5000/- each in default to undergo further rigorous impressments for two years. Both the sentences will run concurrently.

3. The prosecution case in brief is that on 7.9.2008 during evening time at about 6.00 pm, accused Ajay Bardhan and Mukul Bardhan in absence of informant Nidhu Nath and his wife of village Goalpur abruptly trespassed into their house

and they forcibly dragged out the daughter of the informant after gagging her mouth with cloth and showing dagger to her, while she was refilling kerosene oil in the hurricane lamp. They dragged her to the jungle situated in the backside of the house of the informant, and thereafter, accused Ajay Bardhan having removed wearing "saloar pant" of the victim girl forcibly committed sexual intercourse with her. He also caused bite injury on her right breast after removing her top cloth. During that time accused Mukul Bardhan was guarding with a dao on his hand. As soon as PW 2 Runubala Nath being the mother of the victim girl heard alarm raised by her minor child, she immediately rushed from the rivulet down their tilla homestead. The moment she arrived at the place of occurrence both the accused persons run away. At night when the father of the victim Nidhu Nath/informant (PW 1) returned home, the occurrence was reported to him by his wife Runubala Nath. Thereafter the informant lodged an ejahar against the accused at Patherkandi Police Station on 9.9.2008.

4. After receiving the ejahar the Officer-in-Charge of the Patherkandi Police Station registered a case being Patherkandi Police Station Case No.138/2008 U/S 448/376/34 IPC. Thereafter the wheel of criminal investigation put into motion and after completion of the investigation the investigating officer of the Patherkandi Police Station case no. 138/08 submitted charge-sheet under Section 448/376 IPC against the accused persons.

5. The case was committed by the learned Judicial Magistrate, 1st Class, Karimganj to the Court of learned Sessions Judge, Karimganj who in turn transferred the records of the G.R. Case No.783/08 to the Court of learned Assistant Sessions Judge, Karimganj for trial. Both the accused persons stood the trial before the Court of Assistant Sessions Judge, Karimganj in Sessions Case Noi.37/2010 U/S 448/376 IPC.

6. Thereafter the learned Assistant Sessions Judge, Karimganj framed charge against both the accused persons U/S 448/376/34 IPC after hearing learned counsel for both sides. The charges having been read and explained to the accused persons both of them pleaded not guilty and claimed to be tried.

7. The prosecution examined as many as 8 (eight) witnesses and exhibited altogether six documents. The defence examined 3(three) witnesses. Upon closure of evidence of prosecution side both the accused persons/ appellants were examined U/S 313 CrPC.

8. At the conclusion of trial the accused persons were held guilty and convicted them U/S 448/376/34 IPC as aforesaid. Being aggrieved with the aforesaid judgment, the present appeal has been preferred.

9. The learned senior counsel Mr. HRA Choudhury in his argument has urged before this Court that the prosecution case is under the shadow of doubt due to variety of reasons such as there was earlier enmity between the parties as the informant has filed theft (of goat)case as against the petitioner and the evidence of mother of the victim that she immediately appeared at the place of occurrence

is not at all true as she was taking bath at rivulet which is at a distance from their house. Further it contends that the allegation about the involvement of both the accused petitioners is highly improbable as accused Mukul Bardhan is brother in law of the accused Ajay Bardhan and no person will indulge in such matter of sexual assault along with his own brother in law. Further it is submitted that the evidence of PW 3 (being the sister of victim) and PW 5 (being the relative) is not at all reliable. Referring to the evidence of the medical officer it has been canvassed that there being no finding of sexual intercourse upon the victim it also belies the allegation of rape and the accused appellants are entitled to get benefit of all lapse in the prosecution story.

10. Per contra, the learned Addl. P.P.Mr. B.Sarma has vehemently submitted that the evidence of each and every witness is more than convincing so as to prove the guilt of the accused to the heel and the authenticity of the witnesses remained unshaken throughout the cross examination at length. Examination of immediate available witness, which may be the relative to the victim is the necessity of prosecution case, instead of counting the number of witnesses that could have been examined by the prosecution who might have arrived much after the incident. Furthermore it has also been contended that the evidence of MO in totality is sufficient to infer the sexual assault upon the victim girl, even though no specific opinion has been rendered by the M O about sexual intercourse. The fact that the victim girl is, a minor one is another vital aspect deserves consideration, as to the necessity for false implication of a person by the victim by relieving the actual assailant, while she has suffered sufficient physical injury in the incident. Thus according to the learned Addl.

P.P. the learned Court has properly appreciated all the evidence on record and rightly held the accused petitioner guilty under the law.

11. Having regard to the submission made above, let us appreciate the evidence on record. Parents of the victim have deposed their evidence as PW 1, PW 2 and PW 3 is the victim, PW 4 is the younger sister of the victim and PW 5 is the independent witness and others are medical officer and investigating officer.

12. Let us first appreciate the evidence of PW 3 (victim) who has deposed in her evidence that on the day of occurrence when she was filling kerosene oil in the lamp in the evening hours at their house and at that time her father was at market and her mother also went to take bath at the back side of their house at chara (rivulet). At that time accused Ajay Verdhhan trespassed into their house and dragged her to the jungle situated towards back side of their house and accused Mukul Bardhan was standing at the Verandha of their house armed with a dao in his hand. She further stated that in the jungle accused Mukul Bardhan was guarding her and accused Ajay Bardhan did intercourse with her inserting his penis into her vagina after removing her wearing cloth (chaloar pant). Accused Ajay Bardhan also removed her top (upper portion of the cloth) caused injury on her right breast by biting and as a result she sustained severe injury with bleeding. While Ajay Bardhan dragged her towards the jungle, her younger

sister raised alarm and her mother arrived with a lathi and noticing arrival of her mother at the place of occurrence, both the accused fled away. She was then taken to home back by her mother and applied certain pan juice on the injured portion of her right breast. At around 8.00 PM when her father returned home then her mother disclosed him the entire matter. Her father then informed the matter to his neighbours and she was taken to Patherkandi Police Station on the next morning by her father. Police then sent them to Karimganj Civil Hospital for her medical examination and treatment.

In cross examination, she stated that accused appellant Ajay Bardhan and Mukul Bardhan took her away by holding her hands and legs at the relevant time to the place of occurrence then her brother and sister were raising alarm. The rivulet where her mother was taking bath was situated at a distance of 150 meters (approx) toward east down their till homestead and the place of occurrence is about 5/6 Nal away from their house. She stated that accused Mukul Bardhan is the brother-in-law of accused Ajay Bardhan. She further explained that as soon as the accused persons were lifting her from the house, her brother and sister instantly ran to her mother (PW 2) at rivulet and inform the matter. It is stated that for around 10 minutes the accused committed the sexual intercourse. She did not know if her father lodged any theft case against Mukul Bardhan.

13. Mother of the victim, Runu Bala Nath/PW 2 has testified that four years back on the day of occurrence while she was taking bath at rivulet, hearing hue and cry raised by her younger daughter (PW 4), she arrived at her homestead. PW 4 reported her about dragging of the victim (P W 3) by the accused appellants towards back side of their homestead, then she immediately rushed to the backside jungle and witnessed that accused Mukul Bardhan was standing with dao on his hand and accused Ajay Bardhan was lying on the body of the victim and she noticed that pant/blouse/skirt of her daughter were removed. Seeing her both the accused ran away and she brought back PW 3 to home. She narrated the incident to her husband on his return home at night and then her husband informed the matter to the neighbour and then to police and next morning victim was taken to Patharkandi police Station. In her cross examination she has reaffirmed what she deposed in her examination-in-chief and narrated more details of the occurrence, that she found the pantry of her daughter lying on the ground, top of the girl also blood strained.

14. PW 1, father of victim /informant deposed that on the day of occurrence when he returned home from the market at about 9/9.30 pm his wife and his daughter PW 3 narrated the incident of rape by the accused appellant Ajay Barman and duly guarded by accused Mukul Barman. At the relevant time his 9 years daughter Anit (PW 4) was present at his house and his wife was bathing at rivulet. Thereafter he informed the matter to Gunomoi Nath (PW 5), Monoi Natha, Bimal Suklabaidya. On the next day he lodged Ejahar before the Patharkandi Police Station and the police forwarded his daughter (PW 3) to Karimganj Civil Hospital for medical examination. During cross examination this

witness stated that police having witnessed the oozing of bleeding injury from her right breast and sent her to Karimganj Civil Hospital for medical examination. He replied that at first his wife narrated the incident and thereafter his daughter to him. He also narrated that place of occurrence is a jungle covered by grass, trees and bushes and is situated 7/8 nals from his house. He also replied that prior to the occurrence both the accused appellants had stolen his goat and killed it for flesh for which he filed an FIR against them.

15. PW 4, Smti Ami Nat (aged 13 years) deposed on 10.4.2013 that she knew accused appellants who were their neighbours. The occurrence took place about 4/5 years back and on a certain day of evening when she was at home and her elder sister Suparna Nath was also present, however her parents were not at home then accused appellants Ajay Bardhan and Mukul Bardhan went to their house and forcibly dragged her elder sister when she was pouring kerosene oil at a hurricane. She immediately raised alarm and ran to her mother who was taking bath at rivulet informed the matter and then her mother immediately arrived home and went to the place of occurrence and brought back the victim.

16. PW 5 Sri Gunomoni Nath is a neighbour, in his examination in chief he deposed that about 5 years back, on certain night, Nidhu Nath (PW 1) father of the victim informed him over telephone stating that accused appellants dragged his daughter (victim) from his house and did bad works with her. PW 1 requested him to visit his house but as it was night so expressed his inability to go their house. Then the PW 1 along with one Monuj Nath (since expired) came to his house and informed the matter in details and requested him to hold a village bichar and he advised them to approach the elderly villagers. He replied in cross examination that his house is about - Km away from the house of the informant and he is a distant relative of the informant.

17. The victim was examined by the PW 6 Dr. Sibnath Paul as on 8.9.2008 and on physical examination he found circular type of teeth bite 1 ?" x ?" on the right breast above the right axial with tenderness in the vaginal area and hymen was absent. However, no spermatozoa were found in vaginal swab. Her age is below 18 years, Vide Ext. 3 is medical report, vide Ext.4 is the vaginal swab report, Ext. 5 is X-ray Plat. It transpires that PW 6 has exhibited the report for and on behalf of the doctor Swapan Kr. Sen as said doctor was transferred, but subsequently said doctor Swapan Kr. Sen was also examined as PW 8 and hence the evidence of PW 6 and PW 8 are exactly same. Moreover the PW 8 in cross examination has clarified after verifying the radiological photograph/X-ray report of the victim, he wrote the report to the certificate.

18. Lastly, PW 7 Abdur Rahman Laskar has testified all about the investigation that has been conducted by the earlier I.O.(since expired) and has stated that about collection of the medical report and recording of witnesses as well as filing of charge-sheet. No any serious contradiction of any witness has been proved through the IO DEFENCE EVIDNCE

19. In support of plea of denial defence examined three witness those are DW 1 Nirajan Malakar, DW 2 Dhiraj Deb and DW 3 Smti Junu Deb. It is to be noted that in their casual statement DW 1 simply stated that he went to the house of Mukul Bardhan in the evening at 7.30 PM to attend "Baishnab Sewa" on the occasion of shradha ceremony of the mother of Mukul Bardhan and there was Kirtan from 7.30 PM to 10.30 PM in his house but in the answer to the Court he has replied that he did not know what happened prior to 6.30 PM in the house Nidhu (informant). DW 3 also stated to have attended in the said Kirtan in the House of Mukul Bardhan in the evening, while the DW 2 has stated that he did not know anything about the occurrence.

20. Obviously such type of vague evidence is of no help to the defence as the witnesses were not at all specific that for the reason of such shradha ceremony in the house of Mukul Bardhan it was not possible on the part of Mukul Bardhan as well as Ajay Bardhan (his brother in law) to involve in the incident. It is also admitted that they cannot say about any incident prior to 6.30 PM and such evidence bears no value.

21. In the present case the incident happened at about 6 PM which is not even fully dark evening in the month of September (date of occurrence 7.9.2008) as stated by the witnesses. Looking into statement of the victim /PW 3 it can be safely held that she has been ravished sexually by force against her wishes and her testimony got support of the medical report. That being so, the argument of the appellants' side, regarding false implication of the accused appellants is not found maintainable. It is not a case of consensus sexual affairs between the parties and the proof of age of prosecutrix is irrelevant. Nothing emerges to discredit the evidence of the victim girl as well as other evidence on record.

22. The law is more or less settled on the proposition that relying on the sole testimony of prosecutrix in an offence of rape U/S 376 IPC conviction can be sustained if it inspire confidence. It is settled that the testimony of a victim in cases of sexual offence is vital and unless there is compelling reasons which necessitating looking for corroboration of a statement, the Court should not find difficulty to act on the testimony of victim alone on sexual assault to convict the accused. The deposition of the prosecutrix thus to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestral than an injured witness thus. In the case of State of Himachal Pradesh Vs Raghubir Singh, reported in (1993) 2 SCC 622, the Hon"ble Apex Court held that there is no legal compulsion to look for any other evidence to corroborate the evidence of the prosecutrix before recording an order of conviction. Evidence has to be weighed and not counted. Conviction can be recorded on the sole testimony of the prosecutrix, if her evidence inspire confidence and there is absence of circumstances which mitigate her veracity. Thus, the law that emerges on the issue is to the effect that statement of prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The Court may convict the

accused on the sole testimony of the prosecutrix. Further the Hon"ble Supreme Court in the case of Wahid Khan Vs- State of Madhya Pradesh reported in AIR 2010 SC 1, observed in paragraphs 21 and 22 as follows:

" 21. It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions following therefrom. If she is found to be false, she would be looked by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really be committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracized by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward looking as the western countries are.

22. Thus, in a case of rape, testimony of a prosecutrix stands at par with that of an injured witness. It is really not necessary to insist for corroboration if the evidence of the prosecutrix inspires confidence and appears to be credible."

23. From the sequence of the evidence discussed above it reflect that as at the time of occurrence the victim was alone in her house and at that time her younger sister (PW 4) (aged 9 years) at that time was in the house and their mother was taking bath at the back side of the house and father was absent who was in the market. In such event the PW 4 was the best available witness in the occurrence and her mother/PW 2 was the next available witness. PW 4 has clearly described the incident that it was the two appellants who drag away her elder sister/ PW 3 from inside the house towards the jungle then she made hue and cry and informed her mother who was bathing at the rivulet backside the house. Sensing the foul play, PW 2 immediately went to the back side of the house and found the accused appellants at the place of occurrence as has been stated above. In such chain of events there appears no any possibility of fabrication of any story on the part any of these witnesses. PW 4 who is of very tender age of 9 years had no occasion for false implication of the accused appellants. The father of the victim/PW 1 was also apprised immediately after the occurrence by his wife and in turn PW 1 informed the matter over phone to PW 5 without any delay. The fact that the PW 5 was informed also appears to be quite normal because such matter of sexual assault generally informed to relatives rather than to outsiders. Although all the witnesses cross-examined at length but nothing divulged so as to discredit the evidence of the witnesses.

24. The victim girl on the other hand is found to be minor one (below 18 years) at the relevant point of time and she has sufficient maturity and explained all about the matter. Her evidence does not suffer from any sort of infirmities to raise doubt about the authenticity of her testimony. Nothing suggest about the consent of the victim towards the affairs nor the credibility of her evidence is at stake, however she has implicated the accused Ajay Bardhan as regards the rape, while initially both the accused appellants dragged her outside the house

towards the jungle. Accused appellant Mukul Bardhan is stated to be of her father's age. It is stated that she has no knowledge if her father filed a case against Mukul Bardhan. In her detailed cross examination she has specifically stated that there are severe pain on her right breast for biting and doctor gave her treatment. The medical evidence also supported about the finding of injury on her breast and private parts while it is said that there was tenderness at the vagina and hymen was absent, along with injury on her breast. That apart, she was minor at the relevant time. The type of injury found on the victim indicative of sexual assault upon her at the time of incident and suggestive of sexual intercourse as revealed by the victim girl. The plea of the appellants about enmity does not sound well as the same has not been proved. Mere filing of a theft case cannot be termed as an enmity between the parties and no father will file a false case at the risk of his minor daughter as in the context of Indian Society, rape upon a woman is always regarded as stigma.

25. In *State of Punjab Vs. Gurmit Singh & Ors* reported in AIR 1996 SC 1393, the Hon'ble Supreme Court held that in cases involving sexual harassment, molestation etc. the court is duty bound to deal with such cases with utmost sensitivity. Minor contradictions or insignificant discrepancies in the statement of a prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case. Evidence of the victim of sexual assault is enough for conviction and it does not require any corroboration unless there are compelling reasons for seeking corroboration. The court may look for some assurances of her statement to satisfy judicial conscience. The statement of the prosecutrix is more reliable than that of an injured witness as she is not an accomplice. "In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. Seeking corroboration of her statement before relying upon the same as a rule, in such cases, amounts to adding insult to injury. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances.

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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. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire

case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

26. In *State of Orissa Vs. Thakara Besra & Anr.* AIR 2002 SC 1963, it is held that rape is not mere a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of offence.

27. In the instant case as is evident from the matters on record both the accused persons acted in concert by sharing a common intention while committing the offence. The forceful entry in the house of the informant by both the accused appellants and dragging the victim towards the back side of the house and another accused Mukul Bardhan guarding the area with a dao in his hand while the other accused was committing rape upon the victim, all these facets indicates that by a pre-arranged plan the offence was committed. The conduct of the co-accused Mukul Bardhan comes within the purview of section gang rape. Although the learned counsel for the appellants has submitted that section 376 (2)(g) IPC refers to a different provisions i.e. "committing rape during communal and sectarian violence" which is not applicable to the present case but it can be noted that the said provision is made under the amended Act with effect from 3.2.2013 but having regard to the fact that the offence committed prior to the amendment, the offence U/S 376 (2)(g) IPC "gang rape" will come into play and the learned trial Court has dealt accordingly.

28. The Hon''ble Supreme Court in *Priya Patel vs State of M.P.* and another reported in AIR 2006 (SC) 2639 while dealing with the provision of Section 376 (2) (g) IPC held as below: "376. Punishment for rape (1) Whoever, except in the cases provided for by sub-section (1), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,--

xx xx xx xx xx

(g) commits gang rape, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be

liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years,

Explanation I.- Where a woman is raped by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within the meaning of this sub-section.

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A bare reading of Section 375 makes the position clear that rape can be committed only by a man. The section itself provides as to when a man can be said to have committed rape. Section 376(2) makes certain categories of serious cases of rape as enumerated therein attract more severe punishment. One of them relates to "gang rape". The language of sub-section (2)(g) provides that "whoever commits "gang rape" shall be punished etc. The Explanation only clarifies that when a woman is raped by one or more in a group of persons acting in furtherance of their common intention each such person shall be deemed to have committed gang rape within this sub-section (2). That cannot make a woman guilty of committing rape. This is conceptually inconceivable. The Explanation only indicates that when one or more persons act in furtherance of their common intention to rape a woman, each person of the group shall be deemed to have committed gang rape. By operation of the deeming provision, a person who has not actually committed rape is deemed to have committed rape even if only one of the group in furtherance of the common intention has committed rape. "Common intention" is dealt with in Section 34 IPC and provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it was done by him alone. "Common intention" denotes action in concert and necessarily postulates a pre-arranged plan, a prior meeting of minds and an element of participation in action. The acts may be different and vary in character, but must be actuated by the same common intention, which is different from same intention or similar intention. The sine qua non for bringing in application of Section 34 IPC that the act must be done in furtherance of the common intention to do a criminal act. The expression "in furtherance of their common intention" as appearing in the Explanation to Section 376(2) relates to intention to commit rape."

29. As per the legal provision as well as the legal pronouncement discussed above even though the co-accused Mukul Bardhan has not committed rape but by virtue of such deeming provisions he is also guilty of the offence as he accompanied the other accused in furtherance of common intention, knowing fully well what has been committed by the other accused. Section 34 IPC provides that- when a criminal act is done by several persons in furtherance of common intention of all, each of such person is liable for the act in the same

manner as if it was done by him alone. The Section lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention animating the accused leading to the doing of a criminal act in furtherance of such common intention. Once it is found that a criminal act was done in furtherance of the common intention of all, each of such person shall be liable for the criminal act as if it was done by him alone. The learned trial Court has duly appreciated all matters on record in proper perspective and calls for no interference. In view of the findings and discussion above, the appeal is devoid of merit, hence dismissed. Return the LCR.