

(2004) 01 GAU CK 0035
In the Gauhati High Court
Case No : Criminal Appeal No. 61 of 2001

Hifjur Rahman @ Siju and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 07-01-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164
Penal Code, 1860 (IPC) — Section 323, 34, 376, 376(2), 395

Citation : (2004) GLT 686 Supp

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : J.M. Choudhury, H.R.A. Choudhury, F.H. Laskar and M.U. Mandal, for the Appellant; P.C. Gayan, Public Prosecutor, for the Respondent

Final Decision : Dismissed

Judgement

P.G. Agarwal, J.—This appeal is directed against the judgment and order dated 22.2.2001 passed by the learned Sessions Judge, Karimganj in Sessions Case No. 30/97.

2. In Sessions Case No. 30/97, as many as, 10 persons were tried for the offence u/s 397/395/323/34 IPC and u/s 376(2)(g) IPC. During trial prosecution examined 10 witnesses and on conclusion of the trial, vide impugned judgment and order, the trial Court convicted and sentenced the seven accused Appellants for the offence u/s 397 IPC and recorded separate conviction u/s 376 IPC against Hifjur Rahman @ Siju and Abdul Jalil. The remaining accused have absconded during trial and the matter was kept pending against them.

3. Prosecution allegation, in brief, is that in between the night of 1.8.92 and 2.8.92 some miscreants armed with weapons etc. entered into the house of Durga Pada Chakrabarty by opening door. Thereafter the accused persons committed dacoity after assaulting the inmates and keeping them confined. The trunks lying in the house were broken and the ornaments were forcibly taken. Two of the accused Appellants thereafter committed rape on the two young inmates,

namely, Rupali Chakrabarty, P.W. 3 and Jhilmil Chakrabarty, P.W. 4. Thereafter on FIR being lodged police registered a case and after usual investigation submitted charge-sheet against the accused Appellants along with others.

4. P.W. 1 is the son of the informant D.P. Chakrabarty, who expired during the pendency of the case and, as such, could not be examined. Sima Chakrabarty, P.W. 2 is the mother of P.W. 1 and wife of the deceased informant. P.W. 3 and P.W. 4 are the sisters of R.W. 1. swapan Kumar Paul, P.W. 5 is a neighbouring witness. P.W. 8 and P.W. 9 are the two Judicial magistrates who had conducted the Test Identification Parade (for short TIP). P.W. 10 is the Investigating Police Officer whereas P.W. 6 and P.W. 7 are the two Doctors. So far the incident of dacoity and rape is concerned, there is evidence of the 4 (four) inmates, namely, P.W. 1, P.W. 2, P.W. 3 and P.W. 4 and the evidence of the neighboring witness P.W. 5. All these witnesses have categorically deposed that on the night of the incident some 10/12 dacoits had entered into the house of P.W. 1 and looted away cash, gold ornaments etc. and in the above incident two of the dacoits had committed rape on P.W. 3 and P.W. 4, P.W. 5 is the independent witness who resides near the house of P.W. 1 along with other neighbors came to the place of occurrence on hearing shouts for help and they have also supported the prosecution version regarding the incident.

5. P.W. 3 and P.W. 4 were students of Class-XII of Nilambazar Higher Secondary School at the relevant time. They have deposed that while they were sleeping, they woke up on hearing shouts in the house and saw the dacoits assaulting their mother and thereafter tied them and they were all taken in one room. Thereafter, one of the dacoits cut and remove the dress worn by her sister and one of the dacoits undressed her by cutting her dress, and raped them on the floor in presence of their parents, brothers etc. The two victims became unconscious and subsequently they regained senses at the medical college where they were under treatment for about a month or so.

6. Learned Counsel for the Appellant has fairly submitted that in view of the evidence on record the Appellants are not challenging the incident as such but the conviction and sentence is question mainly on the ground of identification/ involvement of the accused persons, the defence plea is that the accused persons did not participate in the above incident and they were nowhere involved in the matter.

7. However, before considering the question of identification etc., let us examine the medical evidence on record. P.W. 7 is Dr. B.C. Biswas, who examined the two victims of rape and the other inmates and found as follows:

Jhilmil Chakrabarty-

(4) Marks of violence on the body

(a) teeth mark on right side of face just below the mescillary area

(b) no external injury to the breasts was detected.

(c) Few abrasions linear and spread over area (2x3 cm) on the mid back of right forearm.

(d) Few abrasions-Linear spread over an area of 5 cmx2 cm on the left lower back of chest. (e) Few abrasions - On the proximal part of extension aspect of left upper arm.

The Genitals

(a) Active bleeding per vagina was present

(b) 1/4 " central perineal tear, (c) 2/2" tear of vaginal mucosa extending from the side of perineal tear, (d) White material were present in vaginal canal near the cervix and fornix. Hymen was absent. Vaginal swabs from the post fornix and around the cervix were taken for examination of sperms at Nilambazar P.H.C. Microscopic examination of collected material revealed intact sperms. In the afternoon second test of vaginal swabs were taken and smear on slide prepared (glass slide). For a second opinion from another laboratory outside this P.H.C. the result of which was same as was determined in our P.H.C."

Rupali Chakraborty

Marks of violence (a) one abrasion on the outside of the middle of the left leg 5cmx0.5 cm. One abrasion 3 cmx0.5 cm on the extensor aspect of right upper forearm.

Single vertical linear abrasion 3" long on the right antelateral side of neck.

Tenderness of left hip joint on active and passive movements.

(5) The Genitals- Seminal fluid like stain found on the vulva is collected for examination. There is redness and swelling of vulva. Hymen is absent swabs (vaginal) from the posterior fornix and the front of the cervix are taken for examination of sperms done at P.H.C. Microscopic examination of the collected materials revealed the presence of sperms. Smear on slide and vaginal swabs are taken again in the afternoon for a second opinion from outside laboratory the result of which also was same as we determined in an P.H.C.

8. In the opinion of the Doctor both the girls were raped recently. They complained about severe pain and uneasiness in head, chest and also limbs. Both the victims were mainly upset and not able to stand or sit properly or give detail accounts of the incidents. Both the girls were referred to Silchar Medical College Hospital for further treatment. P.W. 7 had also examined Debashis Chakraborty and Deepak Chakraborty and found as follows:

Debashis Chakraborty- Tenderness of both shoulders joint on active and passive movement. 3"x 1" swelling in left forearm.

Injuries were simple and found to be caused by blunt object. Dipak Chakraborty-1. Tenderness on the back of left parietal area. 2. Tenderness on both shoulder joint. Injuries were found simple and caused by blunt weapon.

The Medical Evidence was not challenged as the defence declined to cross examine the witness.

9. In this case, the shawl, undergarments were sent for chemical examination and the reports of the Forensic Science Laboratory were proved and exhibited as Ext. 15 and 16. The shawl and undergarments gave positive result for human sperm and human blood, and marked as Material Ext. 1, 1(1), 1(2), 1(3) and 1(4).

10. All the inmates of the house where the incident took place and the nonbearing witness also deposed that at the relevant time there was electric light in the house and the witnesses claimed that they recognized the. accused persons in the said light. The fact that there was electric light and the same was lit at the relevant time is not seriously challenged by the defence. The trial Court was satisfied that there was ample opportunity for the witnesses to identify the culprits with the help of the electric light burning in the house. We find evidence in support of the above finding, in this case we find that the accused persons who had entered into the house had moved from one room to another room, assaulted the inmates, tied their hands and even blind-folded one or two persons. They also looted the valuables and after taking keys from the inmates opened the lock and boxes and removed the valuables. These things could not have been done in darkness and hence the light which was sufficient for the accused persons to commit their misdeeds cannot be held to be insufficient for the purpose of identification or recognition. Further, this is not a case where the accused persons were in the house for a very short period or the inmates had a mere glimpse. The accused persons remained in the house for a pretty long time and even two of them committed rape of P.W. 3 and P.W. 4 while the others were watching and molesting the girls.

11. In the present case the test identification parade was held in presence of the Magistrate. The first TIP was held on 20.2.93 wherein the accused Abdul Matin was put up for identification and the two witnesses were called to identify Abdul Matin. In the test identification parade which was held on 29.1.93 accused Atabuddin stood for identification and out of the 5 (five) witnesses, (four) witnesses, namely, Dipankar Chakraborty, P.W. 1, Rupali Chakraborty P.W. 3, Jhilmil Chakraborty, P.W. 4 and Durga Pada Chakraborty (since deceased) were the witnesses and all the four witnesses except Durga Pada Chakraborty identified the accused Md. Atabuddin. The Identification made in the TIP was again confirmed by the witnesses when they could properly identify the above two accused persons in the Court during trial. It is however submitted that the accused persons were not sent up for TIP and as the FIR does not contain the name of the accused persons, subsequent identification before the Court cannot be relied upon and the accused persons are entitled to benefit of doubt. In the FIR, Ext. 3, it is stated that there were about 10/12 persons out of which 6 (six) persons entered into the house and the informant (Since deceased) had categorically stated that they will be able to identify the persons who had

entered into the house.

12. P.W. 3 has stated in her deposition that she knew the accused Basist, Munim, Malik, Enam, Nagam from before as they were her classmates in the school. She also knew Siju and Rob from before. Likewise Jhilmil Chakrabarty, P.W. 4 has deposed that she knows the accused Siju from before and the other two persons who were identified by her in TIP, namely, Atab and Jalil and she identified these accused persons during the trial. She identified Siju, the person who had committed rape on her and accused Abdul Jalil the accused person who committed rap on her sister, P.W. 3 she also knew the accused Inam, Nijam, Malik, Munim and Rob, as they were her classmates too. It may be mentioned here that these two sisters were studying in the same class, i.e. Class-XII in the Nilambazar Higher Secondary School. Although the two witnesses do not know the name of the father of the accused persons and their residences but they knew the accused persons as they were classmates. In a rural society of Cachar where girls belong to different religious communities, it cannot be expected that the girls will be knowing the residential address or the father's name of all these boys studying in their classes. So far the accused Siju is concerned, he used to hunt birds in their village and as such his face was known to them from before and even P.W. 2 has deposed about that. From the evidence of P.W. 4 we find that the accused persons were in the house of the informant for about 45 minutes during which they looted their goods and committed rape on these two girls.

13. The question that arises is as to why the name of these accused persons were not mentioned in the FIR if they were known to P.W. 3 and P.W. 4. The evidence on record shows that both P.W. 3 and P.W. 4 became unconscious when their persons were violated in the above incident and they claimed to have regained consciousness after three/four days in hospital. This is supported by P.W. 7 as stated above. Hence, the informant who could not be examined during the trial because of his death had no occasion to know about the names of the accused persons from therein and mention in the FIR. Under the above circumstance, non-mentioning of the name of the accused persons in the FIR is not at all fatal to prosecution.

14. The two victims P.W. 3 and P.W. 4 were produced before the Court for recording their statement u/s 164 Code of Criminal Procedure and the said statement was recorded by the Magistrate on 1.9.92, i.e. after a month or so when they recovered from the shock of their life as these teenaged girls were violated in presence of their parents and brothers. The two witnesses have named the accused persons in their statement u/s 164 Code Crrminal Procedure. The order-sheet shows that accused Abdul Jalil and the other accused were arrested after 1.9.92. In the case of Mehtab Singh and Others Vs. The State of Madhya Pradesh, it was held by the Apex Court that the necessity for holding atest identification can arise only where the accused are not previously know to the witnesses. Hence, so far the accused persons who were named by P.W. 3 and

P.W. 4 are concerned, there was no necessity of holding a TIP. In the case of *Girja Shankar Misra and Nathu Singh Vs. State of U.P.*, it was held by the Apex Court:

It is true that the test identification parade is a step in investigation, but it is the identification in the Court that is an evidence. The test identification parade assumes importance particularly if held within a reasonable time after the commission of the offence. It loses its significance when there is enormous delay in holding it.

15. In the present case, we find that the culprits absconded soon after the incident and they were arrested after considerable delay. The first arrest was made on 8.8.92 and the last arrest was made on 1.3.93. Further, the ordersheet shows that although the Investigating Police Officer has prayed for holding of the TIP on earlier occasion but this could not be held due to the absence of the accused persons on the date fixed. Further we find that two of the eye witnesses, P.W.3 and P.W. 4 were undergoing treatment and they were produced before the Court after one month only.

16. As stated above, the accused persons were identified by the witnesses before the trial Court and the learned Counsel for the Appellants have submitted that the identification for the first time before the Court has got no evidentiary value. In the case of *Laxmi Raj Shetty and Another Vs. State of Tamil Nadu*, the Apex Court held:

It is wrong to say that the identification of the accused before the court of Session for the first time without any test identification parade was of no value.

In the present case, we find that some of the accused persons were known to P.W. 3 and P.W. 4 from before and under such circumstances the question of identification parade is not of much consequences as observed by the Apex Court in the case of *Narendra Singh Vs. State of U. P.*, So far the identification of Abdul Jalil and Siju is concerned, the two victims had ample opportunity to recognize them and as a matter of fact they had pleaded for mercy but the said two accused persons satisfied their lust by committing rape on these girls in presence of the family members of the victims and the co-accused. The name of Siju was disclosed on 1.9.92, whereas Siju was arrested on 1.3.93. Hence, under the above circumstances there was no requirement of holding TIP in respect of Siju or the other accused persons whose names have been disclosed by P.W. 3 and P.W. 4. So far the accused Hifjur @ Siju is concerned even P.W. 2 had identified him as she had seen him earlier in the village moving with a gun and hunting birds.

17. We have perused the oral testimony of the prosecution witnesses and find that although they were cross-examined at length the defence has failed to dislodge or discredit their testimony. The witnesses had no animus with the accused persons and there was absolutely no reason on their part to falsely implicate the accused persons. The participation of the accused persons in the

above incident has been established beyond all reasonable doubt the conviction of all the Appellant accused persons u/s 397 IPC needs no interference. Likewise, the allegation against Hifjur Rahman @ Siju and Abdul Jalil u/s 376 IPC stands well established in view of the oral and medical evidence on record and they were rightly convicted under the above Sections of law. The nature of the offence was definitely barbaric and heinous and as such the sentences imposed by the trial Court does not warrant interference. We find no merit in this appeal and accordingly the appeal stands dismissed.

18. Out of the 7 (seven) Appellants before us, 6 (six) of them are in jail custody. Accused Appellant Abdul Munim was released on bail. He is directed to surrender forthwith before the Chief Judicial Magistrate, Karimganj to serve out the sentence. The Chief Judicial Magistrate, Karimganj is further directed to procure the attendance of the said accused person and send him to jail custody for serving out the sentence.