

(2023) 09 GAU CK 0045
In the Gauhati High Court
Case No : Criminal Appeal No. 149 Of 2022

Mehebul Islam

APPELLANT

Vs

State Of Assam And Anr.

RESPONDENT

Date of Decision : 26-09-2023

Acts Referred:

Protection of Children from Sexual Offences Act, 2012 — Section 4, 6
Indian Penal Code, 1860 — Section 376, 448
Code Of Criminal Procedure, 1973 — Section 164, 313, 374(2)

Citation : (2023) 09 GAU CK 0045

Hon'ble Judges : Susmita Phukan Khaund, J

Bench : Single Bench

Advocate : R Ali, P S Lahkar

Judgement

1. Heard Mr. A. Roshid, learned counsel for the appellant and Mr. P.S. Lahkar, learned Addl. P.P. for respondent No. 1 and Mr. T. Deuri, learned counsel for respondent No. 2.

2. This appeal is preferred u/s 374(2) of the Code of Criminal Procedure, 1973 (Cr.PC for short) challenging the judgment and order dated 29.06.2022 passed by the learned Sessions Judge, Goalpara in Sessions Case No. 110/2017 convicting the appellant u/s 448/376 of the Indian Penal Code (IPC for short) and sentencing him to suffer Simple Imprisonment for 6 months for offence u/s 448 IPC and Rigorous Imprisonment for 10 years and to pay fine of Rs. 10,000/-with default stipulation for offence u/s 376 IPC.

3. The brief facts leading to this case are that on 19.07.2017 Mehebul Islam (hereinafter the appellant) trespassed into the informant's house in absence of the other family members and committed rape on the informant's daughter (hereinafter referred to as 'X' or victim). The informant lodged an FIR which was registered as Krishnai P.S. Case No. 187/2017 u/s 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act for short). The Investigating Officer (IO in short) embarked upon the investigation. He forwarded the victim for

medical examination and for recording her statement u/s 164 Cr.PC. He recorded the statement of the witnesses and on completion of trial he submitted the charge-sheet against the appellant u/s 448/376 IPC read with Section 6 of the POCSO Act. On appearance of the appellant, the case was committed for trial. At the commencement of trial, a formal charge u/s 448/376 IPC was framed and read over and explained to the appellant who adjured his guilt and claimed innocence. To connect the appellant to crime the prosecution adduced the evidence of eight (8) witnesses including the Medical Officer (MO for short) and the IO whereas the appellant did not tender any evidence in defence. To the incriminating circumstances arising against him, the statement of the appellant was recorded u/s 313 Cr.PC and his responses were recorded. The learned trial Court relied on the sole testimony of the victim and convicted the appellant.

4. It was held by the learned trial Court that law has been laid down by the Hon'ble Apex Court in respect to the test of testimonies of victim of sexual offence. It was held that the evidence of the victim from the inception was consistent and the defence failed to rebut her evidence. The victim's evidence was also corroborated by the evidence of the other witnesses and the defence therefore did not cross-examine the witnesses. The unrebutted evidence of the victim was found to be reliable.

5. The learned counsel for the appellant laid stress in his argument that the evidence of the victim's mother and the evidence of the victim is contradictory. The victim's mother stated that when the victim raised alarm, the neighbourers came to the place of occurrence whereas the victim stated that the neighbourers did not come to the place of occurrence. The investigation was defective and the victim's garments were not seized after the offence. It is submitted that this case is replete with contradictions. It is also contended that the incident occurred on 19.07.2017 and the FIR was lodged 20.07.2017 allowing enough opportunity for fabrication of the FIR. The victim stated that the appellant's house is adjacent to the house whereas the IO stated that the appellant's house is 2 kms away from the victim's house. The appellant was convicted on presumption. The victim's birth certificate also was not exhibited.

6. The learned Addl. P.P. laid stress in his argument that in a case of sexual assault, the evidence of eye-witnesses will not be available. The evidence of the victim is consistent to her statement u/s 164 Cr.PC. No contradiction could be elicited through the cross-examination of the victim. The learned Addl. P.P. has relied on the decision of Hon'ble the Supreme Court in Phool Singh vs. State of Madhya Pradesh, reported in (2022) 2 SCC 74. The learned counsel for the respondent No. 2 laid stress in his argument that at this appellate stage, the defence cannot raise the question of truthfulness of the incident because the witnesses were not cross-examined relating to the truthfulness of the incident.

7. On the anvil of the submissions the question that falls for consideration is that whether the learned trial Court erred in relying on the evidence of the victim to convict the appellant. To decide this case in its proper perspective the evidence is

reappraised.

8. The victim testified as PW-2 that on the day of the incident at about 10 AM, while she was alone at home and was sleeping, the appellant entered into her room and forcefully committed rape on her. She raised alarm and the appellant fled away. Thereafter her parents arrived. Her mother lodged the case and the police came to their house and interrogated her. The police forwarded her for medical examination and for recording her statement.

9. In her cross-examination the victim stated that the appellant's house is adjacent to their house with a bamboo wall partition between their houses. Her family had a cordial relationship with the appellant prior to the incident and they used to visit each other's house. The appellant is married with a wife and three children. At the time of the incident, her parents were at a distance of one furlong from their house as they went to Paikan. She has denied the suggestion of the defence that she omitted to state before the Magistrate or police that when she raised alarm the accused escaped and thereafter her parents came. She also stated that the police did not seize her garments.

10. The Magistrate who recorded the statement of the victim was not examined as a witness. The IO, PW-8 identified the statement of the victim u/s 164 Cr.PC as Ext.-5. The defence failed to affirm any contradiction or omission of the victim to state before the IO, PW-8, that when she (victim) raised alarm the accused fled and her parents came. Although the IO had identified the statement of the victim u/s 164 Cr.PC as Ext.-5, the prosecution ought to have produced the Magistrate who recorded the statement of the victim as witness as the victim had affixed her thumb impression on the statement and the victim could not prove her statement u/s 164 Cr.PC. Therefore, the prosecution failed to affirm that the victim's statement u/s 164 Cr.PC is consistent to her testimony in the Court. Moreover no questions were asked to the appellant regarding the victim's statement u/s 164 Cr.PC to the prejudice of the appellant.

11. The learned counsel for the appellant laid stress in his argument that the appellant is a married person and as his house is adjacent to the informant's house, it is not possible to commit rape on the victim in board day light as his wife along with his children were present in the adjacent house.

12. The victim's mother testified as PW-1 that about 5/6 months ago, one day at about 10 AM her daughter 'X' was alone at home. While 'X' was sleeping, the appellant went to their house and forcefully committed rape on her daughter. He gagged 'X' and forcefully committed rape on her. The appellant also assaulted 'X' and fled. As she was at her place of work, her daughter came and informed her about the incident. The police came and recorded her statement and her daughter was forwarded for medical examination. The defence however surprisingly did not cross-examine this witness.

13. It is argued on behalf of the appellant that the testimony of PW-1 is contradictory to the testimony of the victim. The victim testified as PW-2 that

after the incident she raised alarm and the accused fled and thereafter her parents came whereas her mother testified as PW-1 that the victim came to her place of work and informed her about the incident. This contradiction is taken note of. The FIR marked as Ext.-1 reveals that the incident occurred on 19.07.2017 at about 10 AM and the FIR was lodged on 20.07.2017. It was also alleged through the FIR that the appellant tried to strangle the victim after the incident whereas the victim was mum about such an act. She did not allege that the accused tried to strangle her when she deposed in the Court. On the contrary, the PW-1 stated that after the incident the accused pressed the victim's neck. After comparing the depositions of PW-1 and PW-2, it is held that the evidence of the witnesses does not inspire confidence. An act of strangulation is a serious act and the victim has failed to mention that the appellant tried to strangle her whereas her mother PW-1 stated that the appellant tried to strangle her daughter. Thus doubt creeps into one's mind regarding the veracity of the evidence of PW-1 as well as the evidence of PW-2. There was indeed a delay of one day in lodgment of the FIR and it cannot be ignored that the allegation of strangulation may have been an afterthought, more so when the victim's father failed to mention about any act of strangulation.

14. The victim's father testified as PW-3 that at the time of the incident he was with his wife in their place of work, and their daughter was alone at home. His daughter who was in tears went to their place of work and informed that the appellant entered into their house and forcefully committed rape on her and then his wife lodged the FIR. This witness was also not cross-examined by the defence. The irony of this case is that the victim was examined by the doctor after three days.

15. The Medical Officer Dr. Moni Kuntola Choudhury deposed as PW-6 that on 22.07.2017, at about 11 AM she examined the victim 'X' and found the following:-

"Age of the victim between 18 to 20 years;

pregnancy test was negative;

vaginal swab was negative;

there was no sign of violence or definite sign of rape."

She proved the Medico Legal Report as Ext.-2 and her signature on the report as Ext.-2(1).

16. The victim has given her age on the date of deposition (16.07.2018) as 16 years whereas the Medical Officer who examined the victim on 22.07.2017 i.e. about a year back, stated that the victim was 18 to 20 years old. It is true that as the victim was examined after 3 days so no injury or evidence of rape could be detected. Considering the contradictions between the statement of the victim and the statement of her parents, it is held that the evidence of PWs-1, 2 and 3 does not appear to be worthy of credence.

17. The victim's mother stated that the appellant tried to strangle her daughter whereas the victim and her father did not depose that the appellant tried to strangle her. The other contradiction which has surfaced is that it was also mentioned in the FIR that when the victim raised alarm, the neighbours came to the place of occurrence but not a single neighbour has testified that they heard any commotion and they immediately went to the place of occurrence. On the contrary the victim stated that she went to her parent's place of work and informed them about the incident. Contrary to her FIR, the PW-1 has also not deposed that when her daughter raised alarm, the neighbours came to the place of occurrence. The victim's father has also not stated that when his daughter raised alarm the neighbours came to the place of occurrence. The victim has stated that Soleman, Jahangir, Ajahar, Amzad, Habibar are their neighbours and Jalekha Bibi's house is adjacent to the accused-person's house.

18. One neighbour Habibar Rahman was examined as a witness but he deposed as PW-5 that one day at about 9/10 AM, the police went to the informant's house and he also went there and at that time the informant disclosed that the appellant committed rape on her daughter and then the police noted down his name and his address. Thus the evidence of one neighbor reveals that he went to the place of occurrence after the police arrived at the place of occurrence. Thus the deposition of the victim that when she raised alarm, the neighbours came to their house is not substantiated by the evidence of the neighbour, examined as a witness.

19. Another witness Moynal Hoque did not support the prosecution case. He stated as PW-7 that on the day of the incident the police of Krishnai Thana called him and took his signature on a seizure-list. He identified the seizure-list as Ext.-3 and his signature as Ext-1. He denied any knowledge about the incident.

20. Another witness Ena Marak testified as PW-4 that the informant who is her friend called her over phone and informed her that her daughter was sexually assaulted by the appellant and she was being taken to the hospital. The evidence of these witnesses cannot be considered as corroborative evidence. PW-1 went to the extent of calling her friend PW-4, over phone and informing her about the incident. It is true that an accused can be held guilty of offence of sexual assault on the evidence of the prosecutrix, but the prosecutrix has to be a witness of sterling quality.

21. I do not find the prosecutrix to be a witness of sterling quality. Although PW-1 and PW-3 have not been cross-examined yet their evidence-in-chief cannot be considered as corroborative evidence. Recapitulating the entire evidence I would like to reiterate that the FIR was lodged after one day without any explanation relating to the delay in lodgment of the FIR. The testimony of PW-2 is not similar to the testimony of PW-1 and PW-3, apart from the allegation of rape against the appellant. PW-1's deposition is not similar to her FIR. She mentioned in the FIR that when her daughter raised alarm their neighbours arrived and the accused fled whereas in her deposition she failed to mention that

when her daughter raised alarm their neighbours arrived at the place of occurrence. On the contrary she stated that her daughter came to their place of work and informed her about the incident. PW-3 stated that his daughter was in tears and she came to their place of work and informed them about the incident. The police failed to examine any of the neighbours who heard the commotion raised by the victim after the incident. One neighbour who was examined was silent about any commotion emanating from the place of occurrence. It is held that this case is fraught with contradictions and discrepancies and the appellant deserves the benefit of doubt.

22. Another discrepancy is that the victim's garments were not seized or forwarded for forensic examination. The evidence of the prosecutrix and her parents are not worthy of credence. Their evidence is bristled with contradictions. The other contradiction which surfaced is that the victim stated that the appellant is a next door neighbour whereas the IO Sri Sukumar Nath stated that the appellant's house is about 2 kms away from the victim's house. Initially this case was also registered under the POCSO Act and finally when charge was framed, the appellant was not charged with any offence under the POCSO Act.

23. The prosecution has relied on the decision of Hon'ble the Supreme Court in Phool Singh vs. State of Madhya Pradesh wherein it has been observed that:-

"5.2 In the case of Ganesan (supra), this court has observed and held that there can be a conviction on the sole testimony of the victim/prosecutrix when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality."

In the instant case, due to the contradictions galore, the evidence of the prosecutrix was not found to be of sterling quality.

24. The learned counsel for the appellant has relied on the decision of Hon'ble the Supreme Court in Sham Singh vs. State of Haryana, reported in (2018) 18 SCC 34 wherein it has been held and observed that :-

"23. The evidence of the victim/prosecutrix and the Aunt PW10 are unreliable, untrustworthy inasmuch as they are not credible witnesses. Their evidence bristles with contradictions and is full of improbabilities. We cannot resist ourselves to place on record that the prosecution has tried to rope in the appellant merely on assumptions, surmises and conjectures. The story of the prosecution is built on the materials placed on record, which seems to be neither the truth, nor wholly the truth. The findings of the court below, though concurrent, do not desire the merit of acceptance or approval in our hands with regard to the glaring infirmities and illegalities vitiating them, and the patent errors apparent on the face of record resulting in serious and grave miscarriage of justice to the appellant."

25. In the instant case too the evidence of the prosecutrix and her parents are not found to be credit worthy. The victim's garments were not sent for forensic

examination. The discrepancies and the contradictions lend a benefit of doubt to the appellant. Although the witnesses were not cross-examined, the contradictions surfaced through the evidence on record and the evidence adduced by the prosecution. It is thereby held that due to the discrepancies in the evidence, the prosecution failed to prove beyond reasonable doubt that on 19.07.2017, at about 10 AM the appellant committed house trespass and thereafter entered into the room where the victim was alone and forcefully committed rape on her by sexually assaulting her without her consent and against her will.

26. The conviction is unsustainable. Thereby the appellant is acquitted from the charges u/s 376/448 of the IPC on benefit of doubt. He is to be released forthwith if not wanted in any other case.

27. The judgment and order of the learned trial Court in Sessions Case No. 110/2017 is hereby set aside.

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