

(2000) 12 GAU CK 0011
In the Gauhati High Court
Case No : Criminal Appeal No. 150 of 2000

Moinul Haque and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 05-12-2000

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164
Penal Code, 1860 (IPC) — Section 376, 379

Citation : (2005) 3 GLT 36

Hon'ble Judges : B. Biswas, J

Bench : Single Bench

Advocate : Mr. H.R.A. Choudhury, Mr. A.S. Choudhury, Mr. N.H. Mazarbhuiyan and Ms. A. Begum, for the Appellant; Mr. D.R. Saikia, PP, for the Respondent

Final Decision : Allowed

Judgement

B. Biswas, J.—This appeal is directed against the Judgment and order dated 16.6.2000 passed by the Learned Sessions Judge, Nagaon in Sessions Case No. 97(N)97. The Learned Sessions Judge convicted the appellants u/s 376(ii)(g) of Indian Penal Code and sentenced each of them to rigorous imprisonment for a period of 10 years and to pay a fine of Rs. 5000 each, in default to further rigorous imprisonment for a period of six months. Aggrieved thereby, the appellants have preferred this appeal controverting the legality and validity of the impugned judgment on various grounds incorporated in the Memo of Appeal.

2. P.W. 2 Mustt. Halima Khatoon lodged the F.I.R., Exhibit-2, on 11.11.1996 alleging that on the previous evening at about 8 P.M., on her way back from Jamunamukh Bazar near Sarlock village, the appellant Moinul Haque along with two other unknown persons overpowered her and committed rape on her in the nearby bushes. On alarm being raised by her, the accused persons fled away snatching 4 silver bangles, a pair of golden earrings and an amount of Rs. 500 in cash.

3. The police registered a case and in due course submitted charge sheet against

the appellant Moinul Haque under Sections 341/376 IPC. The other two appellants, namely Nazir and Ismail were not sent up for trial for want of evidence. They were summoned to face trial by the learned Sessions Judge vide order dated 9.7.1997. Charges were framed against all the three accused-appellants u/s 376(ii)(g) and 379 IPC.

4. During the course of trial altogether 5(five) P.Ws. have been examined by the prosecution. The defence also examined three witnesses.

5. I have heard Mr. H.B.A. Choudhury, learned counsel for the appellants and Mr. D.R. Saikia, Learned Public Prosecutor, Assam, in details. The judgment has been assailed by Shri Choudhury mainly on the following grounds:-

(i) The complainant and her husband have deep seated enmity with the accused Moinul Haque which resulted into court cases between them;

(ii) The complainant Mustt. Halima Khatoon is a woman of doubtful integrity and her uncorroborated testimony cannot be relied upon for sustaining a conviction u/s 376 IPC.

(iii) The complainant could not identify the other two appellants, namely, Nazir and Ismail and they have been falsely implicated at a subsequent stage.

(iv) The medical evidence does not give positive opinion about rape. The opinion is suggestive only.

6. P.W. 2 is the prosecutrix. In her deposition, she stated that on the day of occurrence she came to Nagaon because her husband was in jail. From there she went to Jamunamukh and took a sum of Rs. 500 from her sister's son. On her way back in the evening, when she reached Sarlock Pathar gaon, the accused Moinul suddenly accosted her from behind, put a gamocha around her neck and gagged her mouth. Nazir caught her right hand and threatened her with a small gun and asked her not to raise any alarm. Ismail caught her left hand and focused a torch on her. She was dragged to a nearby paddy field where she was forcibly raped by all of them. Upon hearing the song from a transistor carried by a passer-by, the accused persons fled away taking the bangles, gold earrings and the sum of Rs. 500. The man passing with the transistor came near and on being asked she told what had happened. The man, named, Sarif, brought her to a nearby house owned by Badrish. About 4/5 members of village defence party arrived there and she was given shelter for the night in the house of Badrish. One Ahmed Ali of Village Defence Party took her to Jamunamukh Police Station on the next day where she lodged the ejahar. The police recorded her statement and sent her to a hospital where she was examined by a Doctor. She was also produced before a Magistrate where her statement was recorded.

7. P.W. 1 is Habibur Rahman. According to him, at about 9/10 O'clock in the evening, Sarifuddin came to his house with P.W. 2 who disclosed her identity and told him that on her way from Jamunamukh, she was dragged by three persons to a paddy field and raped. He also told that she could only identify Moinul Haque

and not the other two accused persons. By that time, Ahmed Ali and Abdul Hamid, members of Village Defence Party also came and all of them requested this witness to give shelter to the prosecutrix for the night.

8. P.W. 3 Sri Hardip Singh is the Learned Magistrate. He had recorded the statement of the prosecutrix u/s 164 Cr.P.C. P.W. 4 Sri Sishu Ram Saikia is the Investigating Officer and P.W. 5 Dr. Abdul Awal is the Doctor. Except the prosecutrix and Habibur (P.W. 1) none else other than official witnesses have been examined by the prosecution. Sarifuddin, who had brought her to the house of P.W. 1 has not been examined in this case. Ahmed Ali, the member of the Village Defence Party who came to the house of P.W. 1 and on the next day accompanied the victim to the Police Station has also not been examined in this case.

9. A comparative evaluation of the evidence of P.W. 1 and P.W. 2 would show that P.W. 2 did not name any other accused person to P.W. 1 except Moinul Haque when she was brought to his house. That apart, according to P.W. 2 she was taken to the house of Badrish. But P.W. 1 Habibur Rahman claimed that she was taken to his house where she spent the night. Badrish has also not been examined by the prosecution to dispel this confusion.

10. Exhibit-1, the statement of the prosecutrix recorded by P.W. 3 u/s 164 Cr.P.C. also shows that the prosecutrix at the initial stage of her statement clearly stated that she was raped by Moinul Haque and two other unknown persons. But in the later course of her statement, she named the other two accused persons. In Exhibit-2, the First Information Report, it is only Moinul Haque who has been named and it is clearly mentioned that she could not identify the other two persons. That apart, P.W. 3 the I.O. stated that the prosecutrix did not state him that three persons covered her mouth with a cloth and dragged her to the "biranga" (Bushes) and that Nazir and Ismail grabbed her hands and dragged her to the paddy field. The I.O. also clearly stated that she did not mention of any torch focused by one of the accused persons, the inconsistencies as pointed out above, particularly that she named only Moinul Haque to P.W. 1 create a reasonable doubt as to whether she could really identify the accused Nazir and Ismail Ali. Non-examination of Md. Ahad Ali and Md. Abdul Hamid by the prosecution also create a strong doubt as to the veracity of the prosecutrix. Their statement recorded u/s 161 Cr.P.C. available on record though not relevant indicate otherwise.

11. Therefore, the question would naturally arise whether the statement of the prosecutrix that she could identify Moinul Haque without being corroborated by any independent person could be relied upon to sustain the conviction, especially when her allegation against other two accused persons appear to be untrustworthy because of the infirmities as pointed out above. During the course of cross-examination, she had denied the suggestions given by the defence to show that there is deep seated enmity between the parties. But she admitted that her husband Nur Hussain was lodged in jail at the time of occurrence in

connection with a case relating to land dispute he had with the family of a accused Moinul Haque. That apart, she also admitted that it was accused Moinul who had got her husband arrested in the said case. This admission indicates that the relationship between them is strained because of existing land dispute and pending court cases.

12. The prosecutrix also admitted that she was earlier married with Abdul Rasid and had four children through him and presently she is the wife of Nur Hussain. The defence witnesses proved a complaint petition filed by her against her present husband in the year 1995 alleging that her present husband Nur Hussain along with four others dragged her by gagging her voice to a nearby field and raped her and robbed her of her golden necklace , earrings etc. This complaint petition marked as Exhibit-Ka clearly shows that the prosecutrix had in fact filed a case on similar allegations against her present husband and others and subsequently the complaint was withdrawn without being pursued. It is also admitted that the prosecutrix had thereafter married Nur Hussain. The prosecutrix also admitted that she was divorced by her former husband Abdul Rashid because of a quarrel between them over a plot of land. All the three defence witnesses also deposed that she had married Nur Hussain before she was divorced by her previous husband. The antecedents of the prosecutrix being highly suggestive of perversion makes it difficult to rely upon her solitary statement to sustain the conviction of three appellants.

13. Let me now deal with the evidence of the Medical Officer who had examined her on 11.11.1996. The findings of the doctor are as follows:-

- (1) Marks of teeth bite on both breasts. It is fresh.
- (2) Abrasion on the inner part of the left thigh caused by violence. It is fresh.
- (3) There is a abrasion over the lower part of the abdomen.
- (4) Strains of seminal fluid seen in either part of libia majora.

The doctor also stated that the findings are suggestive of rape on her person.

14. The learned counsel for the appellants argued that the features noted by the doctor are subsequent concoction because the doctor himself during his cross-examination explained that by the word "fresh", he means injuries caused within eight hours. According to Shri Choudhury, learned counsel, the occurrence took place at about 8/9 P.M. on 10.11.1996 and the ejahar was filed before the police station at about 4.30 P.M. on the next day. The police, thereafter, sent her to the doctor for examination. Therefore, she could not have been examined by the doctor atleast before 20 hours. Hence, the injuries noted by the doctor as "fresh" must have been caused within eight hours before medical examination. This means that the injuries were inflicted on 11th November, 1996 and not prior to that. This statement of doctor belies the prosecution story that the injuries noted during medical examination are relatable to the alleged offence of rape committed on 10th November, 1996. The doctor being an expert, I find no

reason but to agree with Shri Choudhury that the charge of rape has been foisted with the ultimate object of feeding fat the grudge she bears against the appellant Moinul Haque.

15. The prosecution suffers from the following infirmities apart from the shady antecedents of the prosecutrix :-

(i) Important witnesses, namely Badrish, Sharif, Hamid and Ahad Ali have not been examined by the prosecution to prove the crucial circumstances relatable to immediate before and after the alleged occurrence;

(ii) The evidence of the prosecutrix with regard to the complicity of appellants Nazir Uddin and Ismail Ali are not at all acceptable for reasons already indicated hereinbefore;

(iii) There is deep seated enmity between the husband of the prosecutrix and the appellant Moinul Haque;

(iv) The evidence of the doctor that the injuries noted by him were caused within eight hours devalues the credibility of the prosecutrix as a witness;

(v) During the time of occurrence, the husband of the prosecutrix was in jail at the behest of the appellant Moinul Haque;

(vi) That the prosecutrix has married a person against whom and others she levelled a charge of gang-rape which was not pursued; and (vii) Prosecution could not establish that after the occurrence she was taken to the house of P.W. 1 Habibur Rahman and not Badrish (not examined) as claimed by the prosecutrix.

16. It is true that a court has to take seriously the cases relating to violence against women. Simultaneously, the court has a duty to guard itself against false charges of rape. The narration of the prosecution case is full of vital omissions and contradictions and it raises a strong doubt which over-shadows the genesis of the prosecution case. In my opinion, it would be unsafe to sustain the conviction in this case relying upon the testimony of the prosecutrix alone. Dignity of women will have to be protected, but without the aid of emotion. This is undoubtedly not a case where the prosecutrix has the last "say".

17. In the result, the appeal is allowed. The judgment of conviction and sentence is hereby set-aside. The accused appellants are acquitted. They are also discharged from the liability of bail bonds.