
(2012) 06 GAU CK 0082
In the Gauhati High Court
Case No : Criminal A. No. 48 of 2010

Shri Jhunu Das

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 06-06-2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 164, 164(5), 222, 374(2)
Penal Code, 1860 (IPC) — Section 354, 376, 376(1), 457, 511

Citation : (2012) 3 GLD 633

Hon'ble Judges : Subhasis Talapatra, J

Bench : Single Bench

Advocate : B. Deb, for the Appellant; A. Ghosh, Additional P.P., for the Respondent

Judgement

S. Talapatra

1. By this appeal u/s 374(2) of the Code of Criminal Procedure, 1973 (Cr.P.C, in short) the judgment of conviction and order of sentence dated 14.06.2010 as passed by the learned Additional Sessions Judge, North Tripura, Kamalpur in S.T.No. 01(NT/KMP)/2008 has been challenged. The prosecution case, as transpires from the record, can briefly be noticed as under:

On 25.05.2008 the prosecutrix (name concealed) lodged one written complaint to the officer-in-charge of Ambassa police station stating that on the previous night i.e. 24.05.2008 at about 9 pm after taking dinner she was sleeping with her mother in their house and at about 1 am in the night of 25.05.2008 when her mother went out to attend nature's call, the appellant entered into the hut and raped her by pressing her mouth taking the advantage of her being alone at that point of time. Thereafter, the appellant fled by pushing her mother away, who came to the hut after attending nature's call.

On the basis of the said complaint, Ambassa P.S. Case No. 30/2008 under Sections 457/376 of the IPC against the appellant was registered and the

investigation was directed. On completion of the investigation, the Investigating Officer finding prima facie materials against the appellant submitted the charge sheet. On taking cognizance, the Sub-Divisional Judicial Magistrate, Kamalpur, committed the case for trial since the offence was exclusively triable by the Court of Sessions.

2. On receipt of the record, learned Court of the Additional Sessions Judge, Kamalpur framed the charge against the appellant as under:

That you on 25.05.2008 at about 01 A.M. at TRTC Para in the house of victim girl (name withheld) under the Ambassa P.S. committed rape upon said victim girl (name withheld) and that you thereby committed an offence punishable u/s 376 of the Indian Penal Code and within my cognizance.

And I hereby direct that you be tried on the said charge.

The appellant pleaded not guilty and claimed to be tried. In order to prove the charge, the prosecution had examined 12 witnesses and admitted in the evidence some documents and materials including the seizure list, medical examination report, forensic report, seized wearing apparels of the prosecutrix and other seized materials.

3. For appreciation of this challenge, it is required that the evidence as led by the prosecution is revisited inasmuch as the defence did not adduce any evidence whatsoever.

4. The complaint filed by the prosecutrix revealed that on 24.05.2008 at about 9 O'clock night she along with her mother after taking meal was sleeping in a room situated at their TRTC Para. On 25.05.2008 at about 01.00 hours her mother came out of the room to attend nature's call. On getting the scope of her being alone, Jhunu Das, S/O. Late Gopal Das, appellant herein, of their adjacent house had entered into her room and committed rape upon her forcibly by pressing her mouth. After attending nature's call when her mother just was entering into the room, the appellant fled away by dashing her mother apart.

5. The prosecutrix was examined u/s 164(5) of the Cr.P.C, where she stated that she used to live along with her mother and brother at TRTC Para and do private tuition. On 24.05.2008 at about 21-00 hours after taking boiled rice/meal she together with her mother was asleep. While her mother had gone out by opening the door for attending the nature's call at night then Jhunu Das, S/O. Late Gopal Das of their locality taking the said scope had entered into her room and started assaulting her on tearing her wearing apparels. As a result she became unconscious for a short time. Thereafter said Jhunu Das had raped her against her will. She had bite in her shoulder. She was brutally tortured on different parts of her body. Blood was oozing out from her vagina. By this time while her mother came back, then he had caused her mother fallen on the ground by dashing.

6. The prosecutrix was also examined by the prosecution as P.W.11, where she stated that she lodged the complaint in the Ambassa Police Station against the

appellant and she identified the appellant in the dock. The prosecutrix admitted that she herself had written the ejahar and submitted the same by putting her signature thereon. She admitted the said ejahar as Exbt.P/1. She deposed in the Court that on 25.05.2008 the appellant entered into their hut and raped her. At that relevant time of night her mother went out for attending nature's call. At that time the appellant entered into the hut and forcibly raped her on their khat, torn her wearing apparels and also bite on her neck. The appellant raped her against her will. She continued to depose that she tried to resist the appellant but denying her resistance he forcibly raped her. The appellant fled from their hut on seeing her mother when she came into their hut. Her mother called neighbours and mother of the appellant in their house on that night. They also found the appellant in their house and in their presence the appellant fled away by pushing her mother. She further deposed that her brother, Bijoy Dhar informed the incident over telephone to Ambassa P.S. Thereafter Darogababu and police came to their house at late hours of night and brought her to Kulai hospital. Doctor of Kulai hospital examined her and after that they referred her to Kamalpur hospital. She stated that she was admitted in the Kamalpur hospital and undergone treatment for one day. Thereafter, on the next day, when she was discharged from the hospital, she was brought to Ambassa P.S. and there she submitted the written ejahar. She further stated that in course of investigation, Darogababu seized her wearing apparels by preparing seizure list, which was identified by the prosecutrix as Exbt.-M.O.1 series. She admitted that she was produced before the Magistrate at Kamalpur, where she made a statement before the Magistrate and after writing the statement the same was read over to her and then she put her signature on it. The said signature was also admitted in evidence as Exbt.-P- 1/1.

In her cross examination she stated that the appellant raped her for about 10 minutes. Her mother called her brother Bijoy, his wife Tulsi, Naresh Sarkar and other persons. When they came the appellant was on the "Khat" (cot) covering by "lap" (blanket). The mother of the appellant came to their house when she was called, but she told nothing. Marriage of the accused was fixed on Saturday, i.e. after few days of the occurrence. She wrote the ejahar on arrival of Darogababu in their house. She also during cross-examination stated that she could not recollect whether Darogababu interrogated her about the occurrence and whether she made any statement to the Darogababu. She admitted that she did not mention in the ejahar that the appellant had bite her on the neck and did also not mention that her mother called her brother and others including the mother of the accused to their house. When she confronted whether she made any statement as to that the accused had bite on her neck and immediate after the incident her mother called the neighbours and others to their house, but no such statement was found in the previous statement of witness recorded u/s 161 of the Cr.P.C by the I.O. However, she categorically denied the suggestion that no such incident had occurred as alleged. She however admitted that she did not mention in the ejahar that the appellant raped her on their "Khat".

7. The prosecution examined the brother of the prosecutrix, namely, Sri Bijoy Dhar as P.W.1, who stated that the prosecutrix is his younger sister. He stated that on 24.05.2008 in the dead hours of night his mother went out to attend nature's call and when his mother came back into the room she saw scuffling in the "khat" of her younger sister. Then she raised alarm and called him. He stated that he saw the appellant and his sister in the same bed. He also noticed some injury marks on her sister. He caught the appellant and called the neighbours. The neighbours came and confined the appellant. Thereafter the police was informed over phone. But before arrival of the police appellant pushed his mother and fled away. The police brought his sister to the police station and then to the Kulai hospital. From Kulai hospital the prosecutrix was referred to Kamalpur hospital. The doctor of Kulai hospital collected vaginal swab and darogababu seized the same in his presence by preparing seizure list. He also admitted his signature marked as Exbt.P-2/1. He further stated that in the Kamalpur hospital also vaginal swab was collected by the doctor and darogababu seized the same in his presence by preparing seizure list to which he stood as witness. In the court he identified his signature as Exbt.P-2/2. He also stood witness to the seizure of wearing apparels of the prosecutrix and he signed on it. He identified his signature before the Court marked as Exbt.P-2/3 and the wearing apparels marked as Exbt.-M.O. 1 series. He identified the appellant in the dock.

In the cross-examination he stated that he saw blood stain in the body of his sister. He confirmed the statement that he told the darogababu that he entered along with neighbours and saw the accused Jhunu Das sleeping in the bed with "lap"(blanket). He also confirmed that the prosecutrix told that she was raped by accused Jhunu Das, the appellant. He denied the suggestion that there was no occurrence of rape.

8. One Sajal Modak, who was examined as P.W.2, did not support the prosecution story and thus he was declared hostile and he did not say anything of material consequence.

9. P.W.3, Smt. Sushama Dhar, is one of the vital witnesses since she is the mother of the prosecutrix and was in the place of occurrence. She stated that the prosecutrix and she were sleeping in the same hut and at about 01-00 hrs, 25.05.2008 she went out of the room to attend nature's call. On return to the hut she heard scuffling in the "khat" of the prosecutrix and she raised alarm. Other villagers came and her son Bijoy also came. She called the mother of appellant, Jhunu Das and mother of the appellant also came there. She further stated that the appellant was in the room and suddenly he pushed her and fled away. She could not catch him. Her daughter told her that appellant Jhunu torn her wearing apparels and raped on her. Now they are living in a Government home at Agartala out of fear after leaving the place. She identified the appellant in the dock.

In her cross-examination P.W.3 stated that the appellant Jhunu Das was

absconding for four months after the incident. The place of urination is at a distance of 6/7 cubits from her hut. Their house is on the western side of the road. She confirmed that she told darogababu that the door was not closed and her daughter was crying inside, she along with her son and daughter-in-law opened the door and saw the prosecutrix in her "khat" and the appellant, Jhunu were sleeping in the said "khat". She denied the suggestion of the defence that no such occurrence had occurred.

10. One Smt. Tulshi Dhar was examined by the prosecution as P.W.4, who stated that the prosecutrix was her sister-in-law. On 24.05.2008 at about 12 pm/1 am they got up on call of her mother-in-law. Other villagers also came. She along with her husband and others saw appellant Jhunu Das, our neighbour, sitting in the "khat" of her mother-in-law and sister-in-law. The appellant was then retiring under the "lap" (blanket) and the villagers caught him. Her husband called the police, but before arrival of police the appellant Jhunu fled away. Her sister-in-law told her that appellant Jhunu had raped her. She stated that she saw the prosecutrix with torn clothes. She denied the suggestion that there was no occurrence of rape at the alleged time and place.

11. One Santosh Pal was examined as P.W.5 and declared hostile by the prosecution and he did not reveal anything of material consequence. Whereas P.W.6, Sri Naresh Sarkar, stated that when the P.W.3, the mother of the prosecutrix, called him, he went to their house and when he entered inside the room he saw both the accused Jhunu and the prosecutrix on the "khat" under the "lap"(blanket) and they were sleeping. When they asked, the appellant fled away. The prosecution declared the said witness hostile, but he did not disclose anything to destroy the prosecution case.

12. Be that as it may, one Ananta Sarkar was examined by the prosecution as P.W.7 and declared hostile and he did not reveal anything of material consequence.

13. Dr. Sujit Chakraborty, who examined the prosecutrix on 25.05.2008, was examined as P.W.8. He stated that on that day he examined the prosecutrix as referred from Ambassa P.S. in connection with Case No. 30/2008 and found no clinical evidence of any sexual activity on her person, violence mark found on the neck and no stain found in her dresses. Vaginal swab was collected and the history of the case was rape case. He admitted the examination report which was exhibited and marked as Exbt.P-3. He also confirmed that the prosecutrix was examined at Kulai hospital, where vaginal swab was also collected. He further stated that if she passed urine, spermatozoa may not be available after one hour. In his cross-examination he stated that "in case of violence and forceful rape generally injuries may be found in forearms, breast, chest and lower part of abdomen of the victim."

14. Sri Paritosh Das, the Investigating Officer, was examined by the prosecution as P.W.9. He stated briefly how he conducted the investigation including

preparation of the hand sketch map, collection of medical report and arranging for recording the statement of the prosecutrix u/s 164 of Cr.P.C. He stated that he examined the witnesses and recorded the statement u/s 161 of Cr.P.C.

15. One Dr. Subhankar Nath from the State Forensic Science Laboratory was examined as P.W.10, who admitted the examination report, which was exhibited and marked as Exbt.P-4 series.

16. Shri K. S. Choudhury, who was the officer-in-charge of Ambassa police station on the relevant day, was examined as P.W.12. He only stated that he filled up the FIR form and endorsed the case for investigation to Sri Paritosh Das.

17. From the report of the Forensic Science Laboratory it appears that the vaginal swab did not contain seminal stain/spermatozoa of human origin. Another sample of vaginal swab also did not contain seminal stain/spermatozoa of human origin. Even in the samples "C" though contained vaginal swab did not carry seminal stain/spermatozoa of human origin. The wearing apparels (sample "D") did not carry seminal stain/spermatozoa of human origin. The sample "E" also did not contain the seminal stain/spermatozoa of human origin. The blood sample available in samples-"A", "B", "C", "D" & "E", all belonging to blood group-"A" and those were definitely of the prosecutrix as Sample "C" was exclusively collected by a stick, one end of it wrapped with cotton, from the vagina of the prosecutrix contained blood stain which was proved to be of Group-"A". In the medical report it has been categorically stated that "she wears a Shalwar and Kamij cloths are old, clean and intact. There is no stain on them. Only one mark of violence was available over anterior aspect of neck in the midline. The following observations after examination is pertinent for arriving at a just finding:

1. Genitals, pubic hairs and breasts are adult type.
2. Pubic hairs are trimmed. No loose pubic hair found.
3. There is dried blood stain on upper part of thigh and labia majora.
4. There is no matting of pubic hair.
5. There is blood stained discharge from vagina(minimal).
6. Hymen is absent; There is no tear/trauma in the vagina.
7. Anal orifice is normal.
8. Breasts are healthy.
9. A vaginal swab from posterior fornix was collected and duly handed over to police for forensic analysis.

The doctor categorically opined that there is no clinical evidence of any recent sexual activity in her person. It is clear from the record that after the occurrence the prosecutrix was examined by the doctor of Kulai hospital and thereafter at

Kamalpur hospital and as such the findings definitely question the testimony of the prosecutrix.

18. Mr. B. Deb, learned counsel appearing for the appellant quite emphatically submitted that there is no evidence of rape. The prosecutrix's testimony as such, therefore, cannot be believed on the face of it unless it is corroborated by further evidence. In support of his contention, Mr. Deb, learned counsel referred to a decision of the Apex Court as rendered in *Lalliram and Another Vs. State of M.P.*, where the Apex Court held as under:-

11. It is true that injury is not a sine qua non for deciding whether rape has been committed. But it has to be decided on the factual matrix of each case. As was observed by this Court in *Pratap Misra and Others Vs. State of Orissa*, where allegation is of rape by many persons and several times but no injury is noticed that certainly is an important factor if the prosecutrix's version is credible, then no corroboration is necessary. But if the prosecutrix's version is not credible then there would be need for corroboration. (See *Aman Kumar and Another Vs. State of Haryana*,).

12. As rightly contended by learned Counsel for the appellants a decision has to be considered in the background of the factual scenario. In criminal cases the question of a precedent particularly relating to appreciation of evidence is really of no consequence. In *Aman Kumar's case (supra)* it was observed that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than the injured witness. In the latter case there is injury in the physical form while in the former both physical as well as psychological and emotional. However, if the court finds it difficult to accept the version of a prosecutrix on the face value it may search for evidence direct or circumstantial.

19. Mr. Deb, learned counsel referred another decision as reported in *Bibhishan Vs. State of Maharashtra*, where the Apex Court held that :

6. We have gone through the judgment of both the Courts below and also perused the necessary record. As per the evidence of the doctor, there was no injury on the body of the prosecutrix Anita. There was no sign of semen on the private part of the body. Neither her clothes were torn nor there was any presence of hair of the accused on the private part of the prosecutrix. The doctor after examining the prosecutrix deposed that the girl was habituated to sexual intercourse. In view of this evidence, we are of the opinion that the High Court as well as the Trial Court has not correctly appreciated the evidence and has wrongly convicted the accused-appellant. The accused who has been charged u/s 376 read with Section 511 IPC is entitled to benefit of doubt.

7. In the facts and circumstances of the case, we give the benefit of doubt to the appellant- accused as the charges framed against him are not proved beyond reasonable doubt.

20. Learned counsel for the appellant further relied on Bhagwan Charan Mate Vs. State of Maharashtra, , where the Bombay High Court held that:

9. The medical evidence is saying that there are no injuries on her private part as well the doctor opined that the sexual intercourse has not taken place much less whether it was in the nature of forcible act of sexual assault.

10. It is also seen that the Chemical Analyser's report is not supporting and corroborating the story brought by the prosecutrix.

11. The collective effect of what is found from the evidence is that the conviction and sentence is not based on facts positively proved. The quality of evidence that has come on record creates a grave doubt about involvement of the accused in the offence and entire story becomes doubtful instead of positively proving facts whatsoever in support of prosecution. The accused is, therefore, entitled to the benefit of doubt.

21. In Naresh Mahto Vs. The State of Jharkhand, , it has been held by Jharkhand High Court that since no evidence was available by the medical examination and where the doctor who examined the prosecutrix stated that as he could not find any injury on the private parts or spermatozoa etc., there cannot be any definite opinion about the rape.

22. This High Court also in Chandan Muhuri and Another Vs. State of Tripura, held that:

38. In Dinesh Jaiswal (supra) as referred to by Mr. Sarkar, the Apex Court after considering the case of Motilal (supra) noted that there can be no quarrel with this proposition that a prosecutrix must be believed irrespective of the improbabilities in her story is an argument that can never be accepted. The test always is as to whether the given story, prima facie, inspires confidence. We are of the opinion that the present matter is indeed an exceptional one. In Rajoo and Ors. (supra) the Apex Court after taking note of Ranjit Hazarika Vs. State of Assam, and considering all the facts of that case held that it cannot be lost sight of that rape causes the greatest distress and humiliation to the victim, but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly, where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis of assuming that the statement of such witness is always correct or without any embellishment or exaggeration. In that case the Apex Court also held that insofar as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable, but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally, her statement can, at best, be judged on the principle that ordinarily no injured

witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined.

23. In similar line in Pallab Das Vs. State of Tripura, , it has been held that when the medical evidence does not support the prosecution case, it is unsafe to believe the prosecutrix's testimony for returning the judgment of conviction.

24. On the other hand, Mr. A. Ghosh, learned Additional P.P. for the State vehemently opposed the propositions led by Mr. Deb, learned counsel for the appellant. He stated that though a clear evidence of complete vaginal penetration with discharge is not available on record but it is apparent on record that the accused forcibly attempted to commit rape on the victim with a result of partial penetration causing the aforesaid injuries to her. Mr. Ghosh further stated that the minor discrepancies in the evidence cannot vitiate the testimony of the prosecutrix. Mr. Ghosh relied on a decision as rendered by the Delhi High Court in Hari Om Vs. State (N.C.T), , where it has been held that:

16. The contradiction, if any, on the question as to what the father of the prosecutrix was doing in the house, cannot at all be said to be material considering the fact that reply to such questions related to peripheral aspects of the case are given only by whatever one is able to recollect at the time when he is examined in court. Everyone cannot recollect minor details of a past incident with complete accuracy and he, while replying to such questions, gives an answer based upon his recollection of the event at that point of time. Therefore, minor contractions on such peripheral issues which do not constitute the core of the matter, cannot be said to be material and not much importance can be attached to these minor discrepancies which are otherwise bound to come in the case of truthful witnesses. Since everyone does not have equal power of observation, retention and reproduction, which varies from individual to individual, there is bound to be some difference while giving details unrelated to the main incident. The approach of the court while evaluating the testimony of a witness should be to see whether his/her evidence, when examined as a whole, appears to be true, or not. If the impression formed by the court is that the witness appears to be truthful and trustworthy, his/her evidence needs to be scrutinized taking into consideration the discrepancies and infirmities pointed out in his/her evidence and the court should then evaluate the testimony of the witness, to decide whether the evidence given by him/his in the court stands impeached or shaken, rendering him/her unworthy of reliance, in the light of the discrepancies or infirmities pointed out in his/her testimony. This is more so, when the witness comes from a lower strata of the society and, therefore, does not have the temperament or the capacity to match the skills and training of an experienced lawyer who cross-examined him/her in the court. Minor discrepancies in the testimony of such witness, which are not related to the core issue involved in the case, need not be given much importance and the testimony of such witnesses should not be discarded on account of such minor discrepancies or infirmities.

25. On assessment of the rival contentions as well as the evidences laid by the prosecution, it appears before this Court that there is no reliable evidence to hold that the prosecutrix was raped, rather it appears that the prosecutrix embellished her statement step by step. Even M.O.1 series did not demonstrate that her apparels were torn as alleged to have been done by the appellant. The medical evidence and the forensic report did not support the case of the prosecution even though the prosecutrix was examined in the earliest may be within one hour from the time of occurrence. As such, the medical evidence has not been visited by any deterrent. Except P.W.1, P.W.3 and P.W.4, no prosecution witness supported the P.W.11, the prosecutrix. P.W.1 is the brother of the prosecutrix, P.W.3 is the mother of the prosecutrix and the P.W.4 is the sister-in-law of the prosecutrix. They are being highly interested person being closely related to the prosecutrix. This Court is bound to take a very cautious approach to rely those witnesses. This Court on such approach finds that by the circumstantial evidence it has been proved that the appellant had entered into the room of the prosecutrix and slept with her taking the advantage of her mother's temporary absence from that hut. On her mother's call when the P.W.6, Naresh Sarkar, came and entered into the hut, he also found that the appellant was sleeping with the prosecutrix. Though there are some minor discrepancies in the oral testimony of the said witnesses, but as a whole it appears believable to this Court from appreciation of the evidence that the appellant committed outrage of modesty of the prosecutrix and as such he is liable to be convicted u/s 354 of the IPC.

26. For the reasons as stated above, the conviction as returned by the Learned Additional Sessions Judge, Kamalpur, North Tripura u/s 376(1) of the IPC is hereby set aside. In view of this and in exercise of powers conferred upon this Court u/s 222 of the Cr.P.C, the appellant is convicted u/s 354 of the IPC without framing any formal charge but on the quality of evidence as adequately conspicuous in this case. The appellant is therefore sentenced to suffer R.I. for two years and to pay a fine of Rs. 2,000/-, in default of payment of fine to suffer further S.I. for two months. It is needless to say that the imprisonment the appellant has already undergone be set off from the said period of sentence. With the above observations, this appeal stands partly allowed.

Send down the lower court records forthwith.