

GAHC010285432019



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CrI.A./450/2019

SRI RAJIB BORDOLOI
S/O- LATE MAHENDRA BORDOLOI, R/O- VILL.- PURANI GUDAM
KURUAJAN, P.S. SAMAGURI, DIST.- NAGAON, ASSAM, PIN- 782141.

VERSUS

THE STATE OF ASSAM AND ANR
REP. BY P.P., ASSAM.

2:JAFAT KAWA
S/O- LATE MARKASH KAWA
R/O- VILL.- BORDOL
P.O. AND P.S. SAMAGURI
DIST.- NAGAON
ASSAM
PIN- 782140

Advocate for the Petitioner : MR. B C DAS

Advocate for the Respondent : MR. B B GOGOI, Addl. PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE MIR ALFAZ ALI

JUDGMENT

JUDGMENT & ORDER

This appeal is directed against the judgment and order dated 01.11.2019 passed by the learned Additional District & Sessions Judge, FTC, Nagaon, in Sessions (T2) Case No. 129/2009. By the said judgment, the accused appellant was convicted under Section 366/376 (1)/323 IPC and sentenced to rigorous imprisonment for seven years and fine of Rs. 2,000/- with default stipulation under Section 366 IPC, rigorous imprisonment for 10 years and fine of Rs. 5,000/- with default stipulation under Section 376 (1) IPC and rigorous imprisonment for 6 months under Section 323 IPC.

2. As per the prosecution case, on 23.10.2008, at about 10 PM at night, the accused appellant accompanied by three others came to the house of the victim and forcibly kidnapped the victim, who was aged about 17 years at the time of occurrence. The appellant and his companion ravished the victim repeatedly and they also assaulted the victim causing multiple injuries. Thereafter on 26.10.2008, at about 4 AM in the morning, they have left the victim at Bharaguri, where after she came home and the FIR (Ext.1) was lodged by the father of the victim, on the basis of which, police registered a case being Samaguri P.S. Case No. 191/2008 under Section 366(A)/376(g)/325 IPC. During investigation, statement of the victim was recorded by Magistrate under Section 164 CrPC. She was also subjected to medical examination and on completion of investigation charge sheet was laid against the present appellant.

3. In course of trial, charges were framed against the accused appellant under Section 366/376/323 IPC, to which he pleaded not guilty. Nine witnesses were examined by the prosecution to establish the charges and on appreciation of evidence, learned Trial Court convicted the present appellant and awarded sentence as indicated above.

4. Aggrieved by conviction and sentence, the accused/appellant, has preferred the instant appeal.

5. Learned counsel Mr. B.C. Das appearing for the appellant and learned Addl. P.P., Mr. B.B. Gogoi for the State were heard.

6. Learned counsel for the appellant, Mr. Das submitted that the entire prosecution case was based on the solitary testimony of the victim, which was not at all reliable, in view of the material contradiction in her evidence as well as the other attending facts and circumstances. It was also submitted by Mr. Das that the FIR was lodged after 7 days without any proper explanation. Further contention of the learned counsel was that the prosecution sought to suppress the real facts and lodged the FIR by making a concocted allegation and as such, the conviction and sentence of the appellant warrants interference.

7. Learned Addl. P.P. however, submitted that the testimony of the victim cannot be disbelieved and the conviction can be based on the sole testimony of the victim in an offence of sexual assault.

8. I have perused the evidence brought on record and considered the submissions made by the learned counsel. On assessment of the prosecution evidence, it is found that the prosecution case is basically banking on the testimony of the prosecutrix as submitted by the learned counsel for the appellant, inasmuch as, the other witnesses, who were examined did not have any personal knowledge and they were more or less reported and post occurrence witnesses.

9. The informant, PW-2 is the father of the victim. He stated to have lodged the FIR on the basis of the narration of the occurrence by the victim. According to him, the accused visited their house in the morning on the date of the occurrence and at night when all the members of the family were in sleep, the victim was missing from the house. After three days, she returned home with multiple injuries on her body and thereafter she was initially taken to Samaguri PHC for treatment, wherefrom she was shifted to Nagaon Civil Hospital and on the next day the FIR was lodged. He also stated that the victim told him that four persons including the accused appellant committed rape on her. He also stated to have noticed fresh injuries with oozing of blood on the body of the victim. During cross examination, it was elicited that he did not know how the victim was missing at night and on the next morning i.e. on 24.10.2008, they came to know that the victim was missing. He also stated that the doors were not broken, rather it was open. It was also elicited in the cross examination that on 26.10.2008, the victim came on her own by walking and he met her on the road.

10. The victim in her examination-in-chief deposed that on being asked by the accused to go with him in order to marriage, she came out from the house and went with the accused in his motorcycle. She further stated that when she was going with the accused with a view to marry him, the accused administered some intoxicated substance along with '*pan*' and took her to a nearby jungle and ravished her there. She also stated that the accused assaulted her with a '*kotary*' (knife) on various parts of her body and receiving such assault, she became senseless and was lying in the jungle for three days. She further stated that after three days, when she regained her sense, she came back home and narrated the story to her father. During cross examination she stated that at the time of the occurrence, her age was 20 years and upon promise of the accused to marry her, she went with him out of her own will without informing her parents. She also stated that she went with the accused alone in his motorcycle. She also stated that she became senseless when the accused inflicted cut injuries to her. It is also in her evidence that initially the accused committed rape on her and thereafter inflicted injuries. Again she stated that she was ravished by the accused appellant and three other persons and she became fainted because of repeated forceful sexual intercourse by the accused and his companion. It is also in her statement that when she came back home, initially she did not state about the occurrence to the village people and only after coming from the hospital she narrated about the occurrence.

11. PW-4, mother of the victim stated that she did not know the accused. According to her, the accused came to their house at about 6 PM on the date of occurrence and they went to sleep at 10 PM. However, on the next day morning they discovered that her daughter was missing. She also stated that when her husband (PW-2) was going to graze the cattle he noticed the victim coming towards home. According to her also the victim stated that the accused along with three others ravished her and attempted to kill her.

12. PW-5 was declared hostile. However, nothing material could be elicited during the cross examination of this witness which could be any help to the prosecution. PW-7 stated that he came to know about the occurrence later on. PW-6 was the doctor, who examined the victim on 31.10.2008 and the found the following injuries.

“Body injuries:-

1. *Old lacerated wound in the scalp right parietal region 1”X1/4”cm unhealthy granulation tissue.*
2. *Old lacerated wound in the back of neck, left lateral aspect, 1/2”X1/4” cm unhealthy granulation tissue.*
3. *Old lacerated wound in the post aspect of neck, lawn part, literally, 1/3”X1/4” cm unhealthy granulation tissue.*
4. *Abrasion post aspect of both elbow joints.*
5. *Multiple abrasion in the back.*
6. *Lacerated wound upper lip unhealthy granulation tissue.*

Private parts:

1. *Hymen is torn.*
2. *No redness/tenderness found in introits.*
3. *LMP?*
4. *No semen stain found in her private parts and under garments.*

Examination of breast:-Milk could be squeezed at the breast.

Examination of abdomen:-Lower synoptic region with muscle grand.

Radiological age: Vide X-ray no. 11406+07+08, dated 31/10/08 as reported by radiologist her age is (twenty) 20 years or above.

Inference:

1. *Hymen is torn. No redness/tenderness seen.*
2. *Milk could be squeezed at the breast.*
3. *.....*
4. *.....*
5. *.....”*

13. According to the doctor, the age of the victim was 20 years or above, at the relevant time and all the injuries were old, but he could not say the actual age of the injuries. The doctor also stated referring to his opinion as regards presence of milk at her breast that the victim might have given birth to a child or there was forcible abortion, inasmuch as, according to the doctor, the tear of hymen or pain of lower abdomen and presence of infection was suggestive of forceful abortion. It is also in the evidence of the doctor, that she was for the first time treated by him and before him the victim was not treated by any doctor for the

injuries.

14. A dispassionate scrutiny of the oral evidence adduced by the prosecution would show that the prosecution story as sought to be projected in the FIR as well as deposed by the victim were inconsistent and contradictory on material facts. Though, initially it was stated that the accused and three others forcibly kidnapped the victim (PW-1) and subjected her to forcible sexual assault, during evidence, the victim stated that she had relationship with the accused and she went with the accused out of her own will with a view to marry him without informing her parents and the appellant alone committed rape on her and there after inflicted injuries with knife and consequently she became senseless and regained her sense after three days. Again she tried to say that she was ravished by all the four persons including the accused appellant repeatedly because of which she became senseless. Though, it was stated in the FIR, that four persons ravished her repeatedly after she was abducted and after three days she was left at Bharaguri, during evidence she stated that she remained at the alleged place of occurrence for three days, where she was ravished.

15. From the medical evidence, it appears that all the injuries sustained by the victim were more or less superficial or simple in nature, which were old and already healed injuries when the victim was examined by the doctor. Evidently no injury was detected at her private part, rather doctor opined that the victim conceived and there was symptom of delivery or forcible abortion. PW-2 stated that after three days, the victim regained her sense and came back home, whereas, PW-4 stated that after three days when PW-2 went to graze the cattle, he met the victim on the road coming towards home. PW-3 also stated that after three days she came home and she did not state that while she was coming home she met her father on road, who was proceeded to graze the cattle.

16. The evidence of the PW-1 that she remained senseless for three days and was lying in the jungle for such injuries does not appear to be worthy of inspiring confidence in view of the nature of injuries sustained by her. Though, in one version the victim stated that she was repeatedly ravished by four persons including the accused appellant, the medical evidence does not support such statement of the victim being subjected to forceful sexual assault by

four persons repeatedly. Another important aspect revealed from the evidence of the doctor, that most likely the victim was pregnant at the time of the occurrence or she might have given birth to a child or there was forceful abortion. All these attending facts and circumstances, including the medical evidence and inconsistency in the evidence of the victim as well as other prosecution witnesses left a mark of reasonable doubt in the prosecution story as sought to be projected by the prosecution. It is also apparent from the medical evidence and testimony of the prosecution witnesses that there might be suppression of real genesis of the occurrence, inasmuch as, prosecution has departed from the initial narration of the story reflected in the FIR that the victim was forcibly kidnapped by four persons and subjected her to sexual assault. Though, PW-4 stated that she did not know the accused appellant, from the evidence of PW-4 & PW-2, it is apparent that the accused appellant was known to them as he used to visit the house of the victim and even used to take meal.

17. It is no doubt true that there is no bar in basing conviction on the sole testimony of the prosecutrix in a case of sexual assault provided the testimony of the victim is worthy of inspiring confidence in the mind of the court or the testimony of the victim must be free from any doubt or the witnesses must be of startling quality so as to inspire confidence of the court. In the instant case as indicated above, apparently there are inherent inconsistencies in the story of the prosecution as revealed from the evidence of the victim. The medical evidence as indicated above also raises doubt about the veracity of the prosecution story as sought to be projected in the instant case. Therefore, for the inconsistency and material contradiction in the prosecution story as deposed by the victim, in view of the attending circumstances as indicated above, it is difficult to say that the testimony of the victim is free from doubt and worthy of inspiring confidence of the court.

18. The Apex Court in ***Sadashiv Ramrao Habde Vs. State of Maharashtra & Anr.*** reported in **(2006) 10 SCC 92** observed as under:

“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring of confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the

solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

19. Apparently, the FIR was lodged after a delay of 7 days. However, learned trial court held that such delay of 7 days has been satisfactorily explained. True it is, that delay in lodging FIR per se is not fatal. What is fatal is the delay without proper explanation. In the instant case, the delay in lodging the FIR was sought to be explained in the FIR by stating that as the informant/father was busy in treatment of the victim, there was delay in lodging the FIR. Admittedly, the victim came in the morning of 26.10.2008 and the FIR was lodged on 30.10.2008 and after lodging the FIR, the victim was taken to doctor on 31.10.2008 for treatment. It is also in the evidence that before 31.10.2008, the victim was not treated or examined by any other doctor. Though, the PW-2 sought to say that initially the victim was taken to Samaguri PHE, there is no other material to support such version. What is therefore apparent is that even the victim came with the alleged injury on her body, she was neither taken to doctor till 31.10.2008 nor the FIR was lodged till 30.10.2008. Therefore, the explanation given in the FIR that the delay was caused because of the informant being busy with the treatment of the victim appears to be false, inasmuch as, the victim was taken for treatment only on 31.10.2008 after lodging the FIR. Though, admittedly the victim was missing from the night of 23.10.2008 even a missing entry was not made, which seems to be extremely unusual. Therefore, the inordinate delay of 8 days in the above facts and circumstances without any proper explanation also cast a doubt on the veracity of the prosecution case.

20. Thus, unreliability of the testimony of the solitary witness being the prosecutrix, the medical evidence which is apparently not supporting the prosecution, coupled with the inordinate delay of 7 days in lodging the FIR, raises serious doubt on the veracity of the prosecution case and as such, the accused appellant at least ought to have been given the benefit of doubt. In a serious offence like rape, one cannot be convicted in a light manner unless prosecution succeeds in proving the case beyond reasonable doubt.

21. In view of the above facts and circumstances, this court is of the considered opinion

that the prosecution evidence is inadequate to bring home the guilt of the accused appellant beyond reasonable doubt and as such, the conviction and sentence of the accused appellant cannot be sustained. Accordingly, the conviction and sentence of the accused appellant is set aside and the appeal is allowed. The accused appellant be released and set at liberty forthwith, if not required in any other case.

22. Send down the LCR.

JUDGE

Comparing Assistant