(2023) 08 GAU CK 0038

Gauhati High Court

Case No: Criminal Appeal No. 129 Of 2022

Raham Ali		APPELLANT
	Vs	
State Of Assam And Anr		RESPONDENT

Date of Decision: Aug. 8, 2023

Acts Referred:

- Indian Penal Code, 1860 - Section 376, 448
- Code Of Criminal Procedure, 1973 - Section 164, 313

Hon'ble Judges: Arun Dev Choudhury, J

Bench: Single Bench

Advocate: M K Hussain, K K Parashar

Final Decision: Allowed

Judgement

1. Heard Mr. B Baruah, learned counsel for the appellant and Mr. K.K. Parashar, learned Addl. PP, appearing for the State of Assam.

2. The present appeal is directed against the impugned judgment and order dated 17.06.2022 passed by the learned Sessions Judge, Udalguri in

Sessions (II) Case No.49/2021, corresponding to GR Case No.1032/2019 arising out of Kalaigaon PS Case No.85/2019 under sections 448/376 IPC.

3. The prosecution was launched on the basis of an FIR lodged by the informant/victim by alleging that on 03.10.2019, while her husband was not at

home, then at about 11 am, the accused taking the advantage of absence of other family members entered into the residence of the informant and

made an attempt to outrage her modesty.

4. On receipt of the said FIR, Kalaigaon PS case No.85/2019 under sections 448/376 was registered. Accordingly, investigation was started and

thereafter charge sheet was filed under section 448/376 IPC against the accused appellant.

5. Thereafter the committal court committed the matter to the learned Sessions Judge, Udalguri to try the case. Charges were framed on 25.11.2021

against the appellant and the charge was read over and explained to the accused, to which the accused pleaded not guilty and claimed to be tried.

Accordingly, the trial was commenced.

6. To bring home the charges, the prosecution side examined as many as 5 witnesses including the victim as PW-1 and the Doctor who examined the

victim. The accused did not led any evidence, however, his statement under section 313 Cr.P.C was recorded and finally by the impugned judgment

and order, the appellant was convicted under section 448/376 IPC and was sentenced to undergo Rigorous Imprisonment for a period of 6 months for

the offence committed under section 448 IPC and Rigorous imprisonment for 10 years and to pay a fine of Rs.2,000/- in default for another 2 months

for the offence committed under section 376 IPC. Assailing such judgment of conviction and sentence, the present criminal appeal is filed before this

Court.

7. Before determining the legality and validity of the judgment impugned, let this court first analyse the deposition of the witnesses who were examined

to bring home the charges against the appellant.

I. PW-1, the victim in her deposition stated that on the fateful day at about 11.00 am, the accused entered into her residence and forcefully raped her.

On that point of time, her husband was away from the residence. She raised alarm and when the neighbouring people came, the accused fled away.

Accordingly, on the advice of the village people the FIR was lodged. She further deposed that she was produced before the Magistrate and got her

statement recorded under section 164 Cr.P.C. She also exhibited the FIR as Exhibit Ã¢â‚¬" 1 and her statement recorded by the Magistrate under section

164 Cr.P.C., as exhibit Ã¢â‚¬" 2. She also proved her signature. During her cross-examination she deposed that the house of the accused is situated

nearby her residence and the accused raped her for about half an hour. After hearing her alarm 10-15 persons including one Ainuddin and Abdullah

came to her residence, although they did not witness the occurrence. She admitted that the FIR was lodged after 6 days from the date of occurrence.

During her cross examination, she further deposed that on the day of occurrence her husband was in Guwahati.

II. PW-2 Maleka Khatun is another neighbour of the victim. In her examination-in-chief she deposed that at the relevant point of time she went to the

house of the victim and saw the incident. She deposed that the accused and the informant were committing illegal act inside the house of the

informant. According to her, after seeing the illegal act she returned back and her statement was also recorded. During cross examination she

deposed that she could not identify the male person who was committing the illegal act with the informant. She further deposed during her cross

examination that she did not restrain them.

III. PW-3 Kiran Gogoi is the Investigating Officer who initially investigated the case. According to him, he only visited the place of occurrence,

prepared the sketch map and interrogated one witness and got the statement of the victim recorded under section 164 Cr.P.C. Subsequently, he was

transferred and according to him, on transfer he entrusted the investigation to PW-5 who subsequently submitted the charge sheet. During cross-

examination he had stated that he had not recorded the statement of the accused or of the husband of the victim or her two children.

IV. PW-4 Dr. Chandan Kr. Saha is the doctor who examined the victim on 03.10.2019 on being produced by the Investigating Officer. He deposed

that he did not find any mark of violence and also had not seen any evidence of recent sexual intercourse. He was not cross examined by the defence.

He had proved the Medical Report as Ext-P3.

V. PW-5 Manoj Pathak is the Investigating Officer who concluded the investigation and laid the charge sheet. He deposed he did not record the

statement of any of the witnesses. He has proved the charge sheet as Ex-P4.

8. The learned Trial Court relying on the evidence of PW-1, the victim and PW-2 convicted the appellant.

9. By now it is well settled that on the basis of sole testimony of a victim of sexual offence, a person can be convicted without any further

corroboration, but such testimony must be of sterling quality.

10. Therefore, let this court first test the statement of the victim and analyze the same. If one looks into the FIR, the case projected by the appellant, is

that the accused attempted to rape her in absence of her family members. In her deposition before the court she testified that the accused forcefully

raped her. In her examination in chief, she further deposed that the accused raped her for about half an hour. The vital witnesses according to her are

Ainuddin and Abdullah, who came to the place of occurrence after hearing her hue and cry but for reasons best known to the investigating authority,

these two persons were neither listed as witnesses nor they were examined. This is a vital lacuna in the investigation.

11. Another point worth noting is that in her FIR she stated that her husband was absent and he went to the paddy field at the time of the alleged

incident, however, in her deposition she stated that her husband was in Guwahati.

12. Now coming to the deposition of PW-2, according to her she was the first person who saw the act. In a sense, she is the eye witness of the

alleged rape.

13. From her deposition, it is clear that she went to the house of the victim at around 11 am and saw the accused and the victim committing illegal act

and seeing them having been involved in an illegal act, she returned back. In her deposition she has not made a whisper of any resistance of the victim

as well raising of any hue and cry by the victim, whereas the PW-1 herself has deposed that she raised hue and cry and on her alarm Ainuddin and

Abdullah came to her residence. The victim has not taken the name of the PW-2.

14. The PW-2 further deposed during her cross examination that she could not identify the male person who was committing the act with the

informant and she also did not restrain them. The fact also remains that the FIR was lodged after six days of the incident without there being any

explanation of delay.

15. It is a settled proposition of law that in case of rape in an Indian society, delay in lodging an FIR in case of sexual offence by a woman cannot be

fatal to discard the prosecution story. However, in the case in hand, more particularly the deposition and testimony of PW-1 and PW-2, creates a

doubt whether this was a rape or a consenting act, inasmuch as, the PW-2 who witnessed the incident has not termed the incident as rape but an

illegal act being committed by both the accused and the victim. Further, she has not uttered any word that either the victim was struggling or raising

any hue and cry.

16. The medical report also discloses that there were no marks of violence. It is a fact that medical examination was done after 5 days and therefore,

the doctor might not have found any mark of violence, however, at the same time the fact also remains that according to PW-1, she was raped for

half an hour and she was resisting and raising hue and cry. Therefore, if such an act happens for half an hour and she was resisting, the same will

definitely indicate some minimal kind of evidence of injury or mark of violence. This fact has also created a doubt in the mind of this Court for the

reason that initial allegation was of attempt of rape, however, in the deposition it was a specific case of rape, that too for a period of half an hour.

Therefore, in the considered opinion of this court, on the basis of the evidence available, the quality of evidence of the PW-1, the victim cannot be

treated as of sterling quality as to to convict the petitioner under section 376 IPC. Rather, the deposition of PW-2 as discussed hereinabove is

suggestive of not a rape but of a consenting relation as she has not deposed anything about any resistance or any force used by the accused, rather

she deposed that she saw both of them committing illegal act inasmuch as in the common parlance illegal act will definitely mean in the context of the

present case an illegal relation or sexual intercourse with a third party and not with the husband. No other witnesses are available to remotely suggest

that it was a case of rape, though it is well settled that there may not be any eye witness in a case of rape.

17. Therefore, it can safely be concluded and summarized that though law is well settled that there can be a conviction in a case of rape when the

victim/prosecutrix's deposition is deemed to be trustworthy, immaculate, and credible, and her evidence is of pristine quality, however, this court for the

reasons discussed herein above, don't find the deposition of victim having such starling quality, rather the deposition of PW-2, the eye witness along

with the factum of non examination of the two persons who allegedly reached the place after hearing the alarm raised by the victim and

inconsistencies in the deposition of the victim created not only serious doubt regarding the nature of the alleged sexual offence but also credibility of

the deposition of the victim herself.

18. In view of the above evidence, this Court of the considered opinion, that the prosecution evidence was grossly inadequate to bring home the guilt

of the accused beyond reasonable doubt and as such, the conviction recorded and sentence imposed on the appellant by the learned trial Court are not

sustainabl in law. Accordingly, the conviction and sentence of the appellant passed in Sessions (II) Case No.49/2021 by the learned Sessions Judge,

Udalguri is set aside. The appeal stands allowed. The appellant be set at liberty, if not in custody in any other case. Bail bond stands discharged.

19. A copy of this judgment be forwarded to the Superintendent of the District Jail, Udalguri.

20. Send down the LCR along with a copy of this judgment.