

(2008) 02 GAU CK 0003

Gauhati High Court

Case No: None

Diganta Mazumdar

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: Feb. 7, 2008

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313
- Evidence Act, 1872 - Section 114A
- Penal Code, 1860 (IPC) - Section 342, 366, 376

Citation: (2008) CriLJ 2856 : (2009) 3 GLR 371 : (2010) 1 GLT 731

Hon'ble Judges: Anima Hazarika, J

Bench: Single Bench

Judgement

Anima Hazarika, J.

Heard Mr. N. Chakravorty, learned Counsel for the appellant. Also heard Mr. D. Das, Additional Public Prosecutor, Assam.

2. The accused appellant has questioned the legality and validity of the judgment and order dated 30-4-2002 passed u/s 366/376(1) IPC in sessions case No. 46(D-M) 1998 by the learned Sessions Judge, Darrang, Mangaldoi, convicting the accused appellant u/s 366 IPC and sentencing him to suffer RI for 4 years and to pay a fine of Rs. 1,00/-, in default, further RI for 2 months. The appellant was further convicted u/s 376(1) IPC and sentenced to suffer RI for 7 years and to pay a fine of Rs. 3,000/- in default, further RI for 2 months.

3. The prosecution case In brief is that an FIR dated 5-1-98 has been lodged by one Smti Narmada Bhuyan, mother of the victim girl alleging that in the afternoon of 2-1-98 the victim girl was on the road at Tangla Town where she was intercepted by the accused. The accused appellant took her in his bicycle to his house and kept her there for the night. It is further alleged that the accused committed rape upon her. The following morning the victim came home and reported the incident to her

mother. Her mother then called the villagers and the accused was also called there. The accused did not deny the incident in presence of the villagers.

4. The said FIR was lodged with the Tangla Police Station whereupon, the police registered a case u/s 366/376 IPC and started investigation. The victim was examined by the doctor of Forensic Department of Gauhati Medical College Hospital. Police also recorded statement of victim girl as well as other witnesses and on completion of the investigation submitted charge sheet u/s 366/342/376 IPC.

5. The offence being exclusively triable by the Court of Sessions, the learned Judicial Magistrate, Mangaldoi committed the same to the Court of Sessions. The learned Sessions Judge, Darrang, Mangaldoi, on perusal of materials available on record framed charge under Sections 366/342/376 IPC. The charges were read over and explained to the accused to which he pleaded not guilty and claimed to be tried.

6. During the trial, prosecution examined 8 witnesses. The defence adduced none. The defence plea was of complete denial. On completion of the trial, the learned Sessions Judge found the accused guilty of the charges under Sections 366/376(1) IPC and convicted and sentenced him as indicated hereinabove. Hence, this appeal.

7. Mr. Chakravorty, learned Counsel appearing for the appellant has challenged the order of conviction on the following grounds:

1) (sic) PW-7, who examined the victim girl, had opined that the victim girl was aged between 18-19 years and no evidence of any struggle or sexual intercourse were seen in her body or private parts. The said opinion was given on the basis of physical examination of the Radiological Department upon the victim girl. Thus, the learned trial Court in absence of any reliable evidence as to the majority of the victim from the side of her parents ought to have relied on the evidence of the doctor that the victim girl was aged about 18 and 19 years.

2) The learned trial Court ought not to have relied on the evidence of PW 2, the mother of the alleged victim girl that she (PW-2) was married 17 years back and after one year of her marriage her daughter (victim girl) was born, inasmuch as, being the mother of the victim she could not have given the date of birth of her own child, the victim.

3) While passing the judgment of conviction, the learned trial Court has relied upon the date mentioned in the school certificate in absence of evidence as to the basis of information on which entry of the age of the victim was made at the time of admission. The learned trial Court therefore committed grave error in law by refusing to accept the medical evidence holding that the girl was a major one at the time of occurrence.

4) The learned trial Court having held that the victim girl accompanied the accused of her own free will and consent should not have passed the order of conviction u/s 366/376(1) IPC. The learned trial Court while appreciating the evidence on record did

not appreciate the evidence adduced by the victim girl. The victim girl during cross-examination has clearly stated that, she slept for the night with the mother of the accused and when police went to the house of the accused in search of SULFA, she did not, report to the police that she was forcibly kidnapped and raped by the accused and was compelled to stay at the house of the accused.

8. Refuting the arguments advanced by the Counsel appearing on behalf of the appellant, the learned Addl. Public Prosecutor, Assam has urged that the judgment under challenge do not require to be interfered with, since the learned trial Court has dealt with the matter extensively in the commission of crime on the day-light and the factum of rape having been proved, the Court would be slow to interfere with the judgment of conviction.

9. Taking into consideration the grounds urged on behalf of the appellant as well as the submission made by the learned Addl, P.P., let us now discuss the evidences adduced by the prosecution during the trial.

PW 1 is the victim girl. She has stated that she was about 16 years of age on the date of occurrence. The accused was known to her since before the incident. On the date of occurrence at about 5-30 P.M., she went to the road to see her mother who went to Paneri. She then saw the accused coming from southern side in a bicycle. He stopped near her and forced her to accompany him in his bicycle. The accused carried her for a kilometer and took her to a big locked house. After keeping her there the accused left and returned after half an hour and the accused then committed rape upon her. She further stated that she felt pain and there was blood at her vagina. After about one hour, police raided the said house in search of SULFA, but she did not report to the police about the accused keeping her forcibly in the house. She has further stated that she slept for the night with the mother of the accused and in the following morning she reported the incident to one Bhanu, her neighbour. Bhanu reported the incident to her mother and her mother called the villagers to her house. Her mother informed the police and she stated everything before the police.

During cross-examination, she stated that the accused was known to her for about 4 years but there was no love affair between them. She further stated that from Jalukbari to her house one has to proceed through Tangla Bazar. She also deposed that when she went to the road to see her mother, the accused came and compelled her to accompany him. She raised alarm. But she could not flee away as the accused caught her both hands from back side. While she was forcibly put in the bicycle she resisted and she sustained injury over her left hand. While she was taken down from the bicycle then also she raised alarm but none came for her rescue. She was dragged to the house from the road by the accused and the door was locked. She cried for help. She denied the defence suggestion that she was taken by the accused to his house forcibly then also she raised alarm but none came to rescue her. She had again stated that the house where she was taken by the accused was adjacent

to his house. She also stated that while the accused committed sexual intercourse by force with her she got pain, cried for help and sustained injuries from the nails of the accused. There was bleeding from her private parts and it took times to heal. She described about the injuries before the doctor but she did not produce the torn cloths to police. She also categorically stated that she has no knowledge regarding her date of birth.

10. PW-2, Narmada Bhuyan, mother of the victim girl stated that the victim girl was aged about 15 years on the date of occurrence. She has stated that the victim girl is her eldest child. The marriage of PW-2 took place 17 years ago and after one year of her marriage victim girl was born at Tangla. PW-2 further stated that the victim girl was reading at Class-VII on the date of occurrence. However, she has also categorically stated that no proof of birth in the nature of birth certificate or horoscope of the victim was available with her. She stated that she came to know about the occurrence from one Bhanu, then she enquired from her daughter, the victim girl. Her daughter reported her that the accused forcibly took her in his bicycle and kept in his house under lock, PW 2 then called Partha Pratim Das, Lokendra Roy and Dharma Kanta Barua to her house. She also called the accused, who came to her house and at the time of lodging the FIR she produced the accused at the police station.

There is no effective cross-examination of PW 2. Suggestions put to her by the defence have been denied by her.

11. PW 3 Sri Partha Pratim Das stated that after the incident, he was called to the house of the victim and there the victim reported him weeping that the accused Diganta had committed rape upon her, but he did not try to know the details of the incident. He stated that other villagers such as, Ramani Sarmah, Lokendra Mohan Roy were also called to the house of the victim as well as the accused. The accused came there accordingly. He was asked to seat in a chair, when PW-3, along with Ramani Sharma and Lokendra asked the accused about the incident, he did not say anything. Police then came and took the accused to the police station. FIR, Ext. 1 was written by PW-3.

12. PW 4 Lokendra Roy is another neighbour of the victim. He stated that PW2 Narmada reported the incident to his wife. He then enquired about the incident from the victim and the victim girl reported him that the accused committed rape upon her. He stated that age of the victim was about 15/16 years at the time of occurrence. However, he further stated that, that may be approximate age, as he was not aware about the correct age of the victim girl. He stated that the accused was called there and when they enquired about the incident, the accused did not say anything.

During cross examination, he had stated that the victim girl reported him that the accused had committed rape upon her.

13. PW 8 Dharma Kanta Barua is the Headmaster of B.A.V.M.E. School. He stated that victim was a student of his school and he had issued a transfer certificate (Ext. 2) to her.

During cross examination, he stated that the date of birth of victim was 31-2-1983 as per entry made in the school register but he had no personal knowledge regarding her date of birth.

14. PW 6 Smti Junu Deka is a neighbour of the victim girl. She stated that mother of the victim reported her that the accused had taken away her daughter. PW-6 came to know later on that the victim girl returned home from the house of the accused of her

15. PW 7 is Dr. Hemanta Kumar Mahanta who examined the victim at Medical College Hospital at Guwahati on 7-1-1998. While examining the victim girl he did not find any injury on the body and private parts of the victim. Dr. Mahanta opined as follows:

(1) Evidence of sexual intercourse not seen.

(2) Evidence of struggle not seen.

(3) Her age was between 18-19 years.

Ext. 4 is the medical report. Ext. 4(1), Ext. 4(2) and Ext. 4(3) are his signatures.

The defence declined to cross examine the doctor.

16. PW. 8 Troilokya Nath Sarmah is the S.I. of Police who after receipt of the FIR (Ext. 1) registered the case and took up investigation of the case, sent the victim for medical examination, recorded statement of witnesses and submitted the charge sheet after completion of investigation.

17. At the closure of the prosecution witnesses statement of the accused was recorded u/s 313 Cr.P.C. wherein he denied all the questions put to him.

18. From the evidence of PW-1, the victim girl, it is clear that on the date of occurrence, the accused was alone. As per his statement made u/s 313 Cr.P.C., he was aged about 18 years on the date of occurrence. An eighteen years old boy compelling a girl of 15-16 years (age of the victim as stated by PW-1 and PW-2) to accompany him in a bicycle and in spite of her resistance she was unable to come out from the clutches of the accused can hardly be believed. The victim has stated during examination in chief that she knew the accused since before. Moreover, the conduct of the victim with regard to the fact that when police raided the house of the accused on the night, though as per her own version she was wrongfully confined and forcibly raped by the accused before the arrival of the police, she did not report It to the police. She has also stated that she had slept with the mother of the accused on that night. It has been stated by the victim that the accused put her

in a room and he went out keeping her there and came back after half an hour. She could have fled away but she did not do so. Regarding her age also as per her version she was 16 years and as per the version of her mother, she was 15 years. But the mother could not produce any documentary evidence like birth certificate, horoscope etc. The victim girl also categorically stated that while going to the house of the accused she had to cross Tangla Bazar. In a bazaar area she was crying for help and none came to rescue her, which just cannot be believed. All the factors together go to show the conduct of the victim girl and as submitted by the learned Counsel appearing for the appellant, she was not kidnapped but she had eloped with the accused.

19. I have also perused the judgment under appeal. At para 27 of the judgment, the learned trial Court has observed- "I have carefully gone through the evidence of the victim and I find that while going through the busy road of Tangla town, definitely, she had cried for help. If she had cried for such help definitely people would have come for her rescue and the unfortunate incident could have been stopped. It was not a vehicle. It was a bicycle, definitely the victim volunteered to go with the accused in his bicycle. Therefore, I find and hold that the victim definitely accompanied the accused without any force applied by him."

20. While observing thus, the learned trial Court has convicted the accused u/s 366 IPC on the sole ground that the victim was a minor below 18 years. Regarding non-consideration of the age of the victim, while convicting the accused u/s 366 IPC, Mr. Chakravorty, learned Counsel appearing for the appellant has placed reliance upon a decision in *Samsul Haque @ Samsul Alam v. State of Assam* reported in (2005) 3 GLT 105. wherein this Court relying upon the decision of [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others](#), held at para 9 as thus.

In view of the above, the age of the victim becomes more relevant factor. From the oral evidence on record PW-6 was studying In Class -IX at the relevant time. As held by the Apex Court that birth certificate and the school certificate are the best evidence as regards age. But admittedly no birth certificate nor the school certificate or the school register has been produced to show the actual age of PW-6. PW-6 claimed to be 23 years of age when she deposed before the Court on 10-9-2002. The incident had taken place on 20-8-1997 i.e., about 5 years prior to her deposition before the Court and hence from the oral evidence we find that the victim was 18 years old at the time of the incident. Besides the other witnesses, prosecution also examined the Doctor who held the ossification test and opined that the age of the victim is above 16 years and below 18 years. In the case of [Jaya Mala Vs. Home Secretary, Government of Jammu and Kashmir and Others](#), the Apex Court has held that ossification test is no doubt a surer test but the margin of error is two years on either side. Hence, this being a case of voluntary elopement and not forcible kidnapping, the benefit of this must go to the accused and therefore, we hold that

PW-6 was not a minor and she voluntarily went with the accused and we find that no case for kidnapping or rape is made out.

21. Mr. Chakraborty further placed reliance upon a decision in [Dilip and Another Vs. State of M.P.](#), wherein Hon"ble Apex Court at paras 12, 13 and 14 held thus,

12. The law is well settled that the prosecutrix in a sexual offence is not an accomplice and there is no rule of law that her testimony cannot be acted upon and made the bases of conviction unless corroborated in material particulars. However, the rule about the admissibility of corroboration should be present to the mind of the Judge. In [State of Himichal Pradesh Vs. Gian Chand](#), on a review of decisions of this Court, it was held that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc., if the same is found to be natural, trustworthy and worth being relied on. This Court relied upon the following statement of law from State of Punjab v. Gurmit Singh SCC (Para 21) : 1966 Cri LJ 1728 Para 20:

If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the Court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial Court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations....

13. In Madan Gopal Kakkad v. Naval Dubey AIR 1992 SCW 1480 this Court has held (vide para 23) that lack of oral corroboration to that of a prosecutrix does not come in the way of a safe conviction being recorded provided the evidence of the victim does not suffer from any basic infirmity, and the "probabilities factor" does not render it unworthy of credence, and that as a general rule, corroboration cannot be insisted upon, except from the medical evidence, where, having regard to the circumstances of the case, medical evidence can be expected to be forthcoming.

14. The age of the prosecutrix was around 16 years, may be a little more. The fact remains that she was not just a child who would have surrendered herself to a forced sexual assault without offering any resistance whatsoever. Without going into testing the truthfulness of the explanation offered by the prosecutrix that because of being overawed by the two accused persons, she was not able to resist, the fact remains that the "probabilities factor" operates against the prosecutrix....

The presecutrix is said to have sustained injuries, also bled from her private parts staining her body as also the clothes which she was wearing. This part of the story, is not only not corroborated by the medical evidence, is rather belied thereby. The presence of blood stains is not confirmed by the Forensic Science Laboratory or

by the doctors who examined the prosecutrix. Her own maternal aunt to whom the story of sexual assault has been narrated by the prosecutrix gives a version which does not tally with the version of the prosecutrix as given in the Court. The learned Counsel for the State relied on Section 114-A of the Evidence Act, 1872 which provides that in a trial on a charge u/s 376(2)(g) IPC on the prosecutrix stating that she was not a consenting party, the Court shall presume absence of consent of the woman alleged to have been raped. Suffice it to observe that we should not be misunderstood as recording a finding that the prosecutrix was a willing party to the sexual intercourse by the accused persons. The Court is finding it difficult to accept the truthfulness of the version of the prosecutrix that any sexual assault as alleged was committed on her in view of the fact that her narration of the incident becomes basically infirm on account of being contradicted by the statement of her own aunt and medical evidence and the report of the Forensic Science Laboratory.

...We find it difficult to hold the prosecutrix in the case as one on whose testimony an implicit reliance can be placed.

22. In the present case in hand, the evidence of the victim does not inspire confidence of the Court for the fact as mentioned hereinabove. She herself stated that she knew the accused from before. She was forcibly taken by the accused in a bicycle through a busy bazaar area, but when she cried nobody came for rescue. In the night she slept with the mother of the accused, when police came she did not divulge anything to the police. In the next morning, instead of coming to her house she came to her neighbour's place and narrated the incident to one Bhanu. From the evidence of other prosecution witnesses we have also seen the accused when called upon by the mother of the victim, came to their house where from he was produced before the police and police arrested him which shows that they were known to each other quite well. The doctor also found no sign of rape, nor any injury on the external or internal parts of the body of the victim.

23. In [Pravakar Pati Vs. Ajaya Kumar Das and Another](#), the Court held that what is stated in the school Admission Register as to the age of a student cannot be treated to be correct since the guardians understate the age of their children than the real one at the time of admission in the school. Hence, the prosecution in the present case, ought to have led some more acceptable evidence to prove that the girl was minor at the relevant time.

24. In the present case at hand to prove the age of the victim girl the parents had neither produced horoscope nor birth certificate except the transfer certificate (Ext. 2) issued by the Headmaster (PW5) of the school where the victim girl was studying which cannot be accepted to be authentic age proof certificate confirming about the age of the victim girl as minor and that being the position, the prosecution in the present case ought to have placed some more acceptable evidence to prove the age of the victim girl to be a minor.

25. For the foregoing reasons the appeal is allowed. The conviction of the accused appellant as recorded by the trial Court is set aside. The accused appellant is acquitted of the charges framed against him.

It is submitted that the accused is on bail, his bail bond shall stand discharged.

26. Send down the records.