# Sri Robo Kanta Boro @ Hunu Boro Vs State of Assam

**Court:** Gauhati High Court

**Date of Decision:** May 18, 2012

**Acts Referred:** Criminal Procedure Code, 1973 (CrPC) â€" Section 313
Evidence Act, 1872 â€" Section 114A
Penal Code, 1860 (IPC) â€" Section 376

**Citation:** (2013) 1 GLD 28

**Hon'ble Judges:** I.A. Ansari, J; A.C. Upadhyay, J

**Bench:** Division Bench

**Advocate:** B. Prasad, Amicus Curiae, for the Appellant; D. Das, Addl. PP, Assam, for the Respondent

## Judgement

I.A. Ansari, J.
This is an appeal against the judgment and order, dated 13.04.2006, passed by the learned Sessions judge, Golaghat, in

Sessions Case No. 20/2003, convicting the accused-appellant, u/s 376, IPC and sentencing him to suffer imprisonment for life and pay fine Rs.

10,000/- and, in default of payment of fine, suffer rigorous imprisonment for a further period of 1 (one) year. The case against the accused-

appellant, as unfolded at the trial, may, in brief, be described thus: On 26.08.2003, at about 11-00 a.m. when the alleged victim, PW 1, was at

home, she was told by Labanya Mudi (PW 9), a co-villager of PW 1, that her (PW 1) elder sister was in her (PW 1"s) uncle"s house and she had

called her (PW 1) there. As PW 1 was proceeding towards her uncle"s house, the accused, who was standing on the road, dragged PW 1 inside

nearby jungle and forcibly had sexual intercourse with her by laying her on the ground. When PW 1 tried to raise hue and cry, the accused took

her deeper inside the jungle, threatened to beat her up. PW 1 had to, therefore, succumb to the will of the accused when they (PW 1 and the

accused) were coming out of the jungle, their co-villagers saw her and also the accused and PW 1 reported to her co-villagers that the accused

had subjected her to rape. Though co-villagers tried to apprehend the accused, the accused managed to flee away. PW 1 was, then, taken to

Barpathar Police station, where she lodged an ejahar, and, treating the same as the First Information. Report (in short, "FIR."), Barpathar Police

Station Case No. 62/2003 was registered against the accused u/s 376, IPC. During the course of investigation, the alleged victim (PW 1) was

medically examined and, on completion of investigation, police laid charge-sheet against the accused u/s 376, IPC.

2. To the charge, framed against him at the trial u/s 376, IPC, the accused pleaded not guilty.

3. In Support of their case, the prosecution examined altogether ten witnesses. The accused was then, examined u/s 313, Cr PC and, in his

examination aforementioned, the accused denied that he had committed the offence, which was alleged to have been committed by him, his

defence being contradictory in nature in the sense that, while cross-examining the witnesses, the accused sought to establish that he had have sexual

intercourse with PW 1 with her consent, the defence taken by the accused, at the time of his examination, u/s 313, Cr PC, was that he had a

dispute with the father of PW 1 and that he (accused) was beaten up by PW 1"s father (PW 2) and PW 4 he (accused) fled way and a false case

was lodged against him. No evidence was, however, adduced by the defence. Having found the accused guilty of the offence charged with, the

learned trial Court convicted him accordingly and passed sentence against him as mentioned above. Aggrieved by his conviction and the sentence

passed against him, the accused has preferred this appeal.

4. We have heard Mr. B. Prasad, learned amicus curiae, and Mr. D Das, learned Additional Public Prosecutor, Assam.

5. We may commence the determination of the merit of the present appeal from the evidence of the doctor (PW 5), who had, admittedly,

examined PW 1, on 27.08.2003. His evidence, which is not in dispute, reads as under:

Identification Mark: One black mole on right side neck. One inch below the angle of the wounds

Height: 150 cm

Weight: 46 kg

Teeth: 14 x 1 6 nos.

Auxiliary hair: Present

Breast: were developed

Valva: Were developed

Pubic Hair: Abundant

Hymen: Old Healed tear

Vagina: Accommodate two fingers

No injury is seen.

X-Ray report shows non-completion of ossification in lower end of radius and ulna. Vaginal (illegible) examination shows no spermatozoa.

6. The doctor (PW 5) has opined that the age of the girl was below 18 years and that there was no sign of rape or violence, Exhibit 3 being his

report.

7. What is imperative to note is that the defence declined to cross examine PW 5, meaning thereby that his findings remained undisputed by the

defence. This apart, in view of the doctor''s findings to the effect that ossification, in lower end of radeus and ulna, was not yet complete, his

opinion that the girl''s age was below 18 years, cannot be said to be wrong.

8. Though the doctor (PW 5) has deposed that there was no sign of rape or violence, the fact remains that the hymen of PW 1 was found torn, the

tear, according to the doctor (PW 5), being an old one. There is nothing to indicate from the evidence of PW 5 (doctor) as to how old the tear of

the hymen was. The possibility, therefore, of PW 1 having suffered the tear of her hymen on the previous day, i.e, on the day of the alleged

occurrence, cannot be ruled out. This apart, while describing the identification mark, the doctor (PW 5) has deposed that there was one black

mole on the side of PW 1''s neck, which was one inch below the angle of the wounds. There is also nothing to indicate as to whether the wounds

were old ones or not.

9. Bearing in mind what is indicated above, particularly, the fact that the age of PW 1 was below 18 years on the date of the occurrence, when we

turn to the evidence of PW 1, we notice that, according to her evidence, on 26.08.2003, Labanya Mudi (PW 9) came to her and told her that her

(PW 1''S) elder sister was in her uncle''s house and she (PW 1''s elder sister) had called her (PW 1) there, whereupon she (PW 1) proceeded

towards her'' uncle''s house, but the accused met her on the way to her uncle''s house, house, dragged her into the jungle and committed rape on

her:

10. Pausing here, for a moment, we may point out that PW 9 has given evidence to the effect that the accused had persuaded her to call PW 1 to

her uncle''s house and she (PW 9) did so accordingly. The evidence so given by PW 9, remained wholly unchallenged by the defence. Moreover,

the defence, while cross-examining PW 1, never even suggested to PW 1 that the accused had not asked PW 9 to call PW 1 to her uncle''s house

and/or that PW 9 had not gone to PW 1 and told her that the accused had called her to her uncle''s house.

11. We may also point out here that it is in the evidence of PW-9 that a little later of her informing PW 1 that her elder sister had called her, she

(PW 9) heard hue and cry and when she came out of her house, she saw the accused running away and PW 1 coming out of the jungle crying and,

on being asked by her, PW 1 told her that before she (PW 1) could reach her uncle"s house, the accused had dragged her into the jungle. With

regard to the evidence, so given by PW 9, the defence, it deserves to be noted, did not deny that a little later PW 9 had, as deposed to by PW 9,

heard hue and cry and when she came out, she saw the accused running away and PW 1 coming out of the jungle crying. This part of the evidence

of PW 9, too, thus, remained unchallenged and undisputed by the defence.

12. In the backdrop of what have been pointed out above, when we revert to the evidence of PW 1, we notice that her further evidence is that

when she was proceeding to her uncle"s house, the accused dragged her into jungle, the accused, then, undid her pants, laid her on the ground and

had sexual intercourse with her and when she raised hue and cry, the accused took her deeper into the jungle and had sexual intercourse with her.

PW 1 also deposed that the accused threatened to beat her up and asked her to make love to him and asked her to write, through PW 9, letters to

him stating that she (PW 1) loved the accused.

13. It is also in the evidence of PW 1 that it was only when she had agreed to do and act what the accused had demanded that the accused

allowed her to come out of the jungle and, on coming out of the jungle, she told her co-villagers about the occurrence, whereupon her co-villagers

tried to catch hold of the accused, but the accused managed to flee away. PW 1, then, according to her evidence, lodged an ejahar, which is Ext-

1. PW 1 has also proved Material Ext-1 as her pant, Material Ext-1 having smeared with earth.

14. From the cross-examination of PW 1, the defence could not elicit to show, nor did the defence even suggest to PW 1, that at the time of the

occurrence, she had completed 18 year of her age. We have to, therefore, consider the evidence of PW 1 as the evidence of a person, who was

minor at the time, when she had been allegedly subjected to rape.

15. What is, now, extremely important to note is that, while cross-examining PW 1, the accused did not deny that the accused had sexual

intercourse with PW 1. What was, rather, suggested to PW 1, while she was under cross-examination by the defence, that the accused did not

have sexual intercourse, with her against her will, reflecting thereby that the accused did have sexual intercourse with PW 1, but the sexual

intercourse, which he had with PW 1, was with PW 1"s will. In fact, the defence of the accused was that PW 1 had gone with the accused on her

own will and when the co-villagers came to know about the same, she filed a case.

16. It is also worth noticing that in her cross-examination, it was specifically deposed to by PW 1, in response to the query made by the defence,

that Ganesh Nayak (PW 10) had seen her being dragged into the jungle. This part of her assertion went unchallenged by the defence. In the light of

such unchallenged evidence of PW 1, when we consider the evidence of PW 10. We notice that PW 10 has deposed that, while he was cutting

firewood at the house of PW 4, the accused came there and, on being asked by him (PW 10), the accused told him (PW 10) that he (accused)

would go somewhere and, then, he saw PW 1 coming there and, thereafter, going towards her house with the accused and, later on hearing a

commotion, when he looked towards the place, where the commotion was taking place, he saw both, the accused and PW 1, coming out of the

jungle. When the Evidence of PW 1 is considered in the light of the evidence so given by PW 10, there remains no doubt in anyone''s mind that the

accused had gone with PW 1.

17. There are two aspects of the defence case, which need some consideration by this Court. One important aspect, which we have already

discussed above, is that it has been the case of the prosecution that PW 1 was a minor at the time of the alleged incident and the evidence of the

doctor, which has remained unchallenged by the defence, too, shows that PW 1 was a minor at the time of the alleged occurrence. Hence, from

the fact that the accused admits, though indirectly, that he had sexual intercourse with PW 1, but the sexual intercourse, which he had with PW 1,

was with her will. Considering the fact that PW 1 was a minor at the time of the alleged occurrence, the admission of the accused, that he had

sexual intercourse with PW 1 with her will, was to prove that the accused-appellant did have sexual intercourse with PW 1, when she was minor,

and this fact, in itself, is sufficient to constitute the offence of rape.

18. Secondly, one can also not ignore the fact that since the accused has claimed, as indicated hereinbefore, that he had sexual intercourse with

PW 1 with her free will, Section 114A of the Evidence Act comes into play, for, Section 114A lays down that in a prosecution for rape, when the

sexual intercourse by the accused is proved and the question is whether it was without the consent of the woman alleged to have been raped and

she states in her evidence before the Court that she did not consent, the Court shall presume that she did not consent. Section 114A makes it clear

that drawing of presumption, in a case of present nature, is a legal presumption, it is the duty of the Court to raise such a legal presumption.

Consequently, when such a presumption is raised, the burden would, obviously, fall on the accused to prove, by either examining the prosecution

witnesses or by adducing evidence, that the sexual intercourse, which he had with the alleged victim, was with her consent. In this regard, the

defence, in the present case, miserably failed inasmuch as the defence had not been able to elicit anything from the cross-examination of PW 1 to

show that the sexual intercourse, which the accused had with her, was with her consent or will.

19. Coming to the evidence of PW 3, we find that, according to him, on hearing hue and cry raised in the house of PW 4, when he went there in a

run, he found the accused coming out of the jungle with PW 1. PW 3 has also deposed that he tried to apprehend the accused, but the accused

managed to flee away and PW 1 reported to him that the accused had committed rape on her inside the jungle. We have already indicated above

that PW 1 has deposed that, on coming out of the jungle, she told her co-villagers about the occurrence. Though PW 1 did not name the persons

to whom she had reported about the occurrence, the evidence of PW 3, given to the effect that the accused had committed rape on her, cannot be

treated as hearsay or inadmissible in evidence or unbelievable, particularly, when it has not been denied by the defence, while cross-examining PW

1, that PW 1 had not, on coming out of the jungle, reported to her co-villagers, including PW 3 that she had been subjected to rape.

20. In fact, while cross-examining PW 3, the defence did not even deny that he had heard hue and cry being raised from the jungle near his house

and, on coming there, he found PW 1 coming out of the jungle along with the accused and that he tried to apprehend the accused, but the accused

managed to fee away.

21. Broadly in tune with the evidence of PW 3, PW 4 has deposed that he saw the accused and PW 1 coming out of the bamboo groves and,

while the accused fled away, PW 1 reported to him that the accused had committed rape on her. It is also in the evidence of PW 4 that, when he

had gone to the road, he saw the accused coming out of the jungle with PW 1. In fact, even while cross-examining PW 4, the defence suggested to

him that PW 1 had gone to the bamboo groves with the accused on her own, but this suggestion of the defence was denied by PW 4.

22. Coming to the evidence of PW 6, we note that, according to PW 6, she had been told by her son that the accused had taken PW 1 to the

jungle and, when she informed her husband about what she had been told, there was a search conducted for PW 1 and they saw PW 1 coming

out of the jungle with the accused and that PW 1''s frock was stained with earth and that, while some people tried to apprehend the accused, the

accused ran away. The description, so given by PW 6, has remained unshaken by the defence.

23. Even PW 7 has deposed that having seen the gathering of the people in the village, when he went there, he saw the accused fleeing away and

the people trying to apprehend the accused. The fact that the accused fled away and PW 1 was seen crying has, as a matter of fact, remained

undisputed by the defence, even while cross-examining PW 7.

24. Coming to the evidence of PW 9, we see that this witness has deposed that on hearing hue and cry, when he (PW 9) came out, he saw the

accused running away and PW 1 coming out of the jungle crying and, on being asked, PW 1 told him that before she could reach the house of her

uncle, the accused dragged her to the jungle. The evidence of PW 9, to the effect that he had heard hue and cry and, on coming out, he saw the

accused running away and PW 1 coming out of the jungle, crying, has remained wholly unshaken by the defence.

25. What emerges from the above discussion of the evidence on record, as a whole, is that the prosecution has successfully proved that PW 1 was

a minor at the time of the alleged occurrence. What has also successfully been proved by the prosecution is that the accused did have sexual

intercourse with PW 1. If the evidence, adduced by the prosecution, that PW 1 was a minor at the time of the occurrence, is believed to be true,

which we see no reason to disbelieve, the result will be that the sexual intercourse, which the accused, admittedly, had with PW 1, constitute the

offence of rape. For a moment, however, if we assume that PW 1 was major at the time of the alleged occurrence, the evidence, in the manner in

which it stands on record, leave no room for doubt that PW 1 was subjected to sexual intercourse by the accused forcibly, against her will, and

without her consent. In either case, therefore, the commission of the offence of rape by the accused-appellant on PW 1, stands proved beyond all

reasonable doubt.

26. Because of what have been discussed and pointed out above, we find that the findings of guilt reached by the learned trial Court, do not suffer

from any infirmity, legal or factual. However, so far as the sentence is concerned, the accused-appellant has been sentenced, as already mentioned

above, to suffer imprisonment for life and pay fine of Rs. 10,000/- and, in default thereof, suffer rigorous imprisonment for further period of one

year.

27. In the light of the finding of guilt, which we have arrived at against the accused-appellant, we are of the view that, in the facts and circumstances

of the present case, a minimum sentence of 7 (seven) years would have met the ends of justice.

28. In the circumstances, mentioned above, while we do not interfere with the conviction of the accused-appellant, we hereby set aside the

sentence, passed against him by the learned trial Court, by ordering that the accused-appellant stands sentenced to suffer rigorous imprisonment

for a period of 7 (seven) years and pay a fine of Rs. 1,000/- and, in default thereof, suffer rigorous imprisonment for a further period of 6 (six)

months. On completion of the period of imprisonment, as directed hereinbefore, which shall run concurrently the accused-appellant shall be set

liberty forthwith unless he is required to be detained in connection with any other case.

29. With the above observations and directions, this criminal appeal stands disposed of.

30. Send back the LCR alongwith a copy of this judgment. Let the amicus curie be paid a sum of Rs. 3,500/- (Rupees three thousand five

hundred) only, by the Registry for his able assistance provided to the Court in this appeal.