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**(1999) 02 GAU CK 0014**

**Gauhati High Court**

**Case No:** Criminal Appeal No. 235 of 1993

Haren Bora

APPELLANT

Vs

State of Assam

RESPONDENT

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**Date of Decision:** Feb. 2, 1999

**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Penal Code, 1860 (IPC) - Section 376, 448

**Citation:** (1999) 1 GLT 169

**Hon'ble Judges:** D. Biswas, J

**Bench:** Single Bench

**Advocate:** J.M. Choudhury and M. Pradhan, for the Appellant; P.P., for the Respondent

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### **Judgement**

D. Biswas, J.

Appellant Shri Haren Bora was tried and convicted u/s 448/376 IPC by the learned Sessions Judge, Nagaon in Sessions case No. 85 (-H) of 1989 and sentenced to undergo R.I. for 1 year u/s 448 IPC and to R.I. for 7 years with fine of Rs 1000/- in default of payment of fine, to undergo 1 months R.I. u/s 376 IPC. Being aggrieved, the Appellant has preferred this appeal on various grounds incorporated in the memorandum.

2. Prosecution story is that on 22.11.87 at about 9.30 p.m. Smti Nilima Bora was sleeping in her father's house along with her two-years old baby and her sister aged 18. The accused Haren Bora, a Home Guard attached to Kaki police station, knocked at the door. As the parents of Nilima Bora were away to neighbour's house to attend a "Nakhowa", she thought that it was her parents who had knocked the door. She lighted a "Chaki" and, the moment she opened the door the accused gagged her mouth, laid her down and raped her forcefully. The younger sister of the victim, hearing ruffling sound came to the front room and found her sister lying in a dishevelled condition. She however, did not see the accused as he had left the place

by that time. In the meantime, the parents also came back and Smti Nilima Bora narrated the occurrence to them by referring to the assailant as a member of Home Guard. Her father, Shri Purna Bora took her to the nearest Police Station and around 2 P.M. lodged the FIR depicting the above incident.

3. The police immediately registered a case and took up investigation. The accused who by that time appeared at the P.S. was arrested and forwarded to the court. The prosecutrix was also sent for medical examination. Her statement was also recorded on 24.11.97 u/s 164 Code of Criminal Procedure Eventually, on completion of investigation, the police submitted chargesheet against the Appellant u/s 448/376 IPC.

4. During the course of trial, prosecution examined 5 witnesses including the investigating officer. The learned Sessions Judge, mainly relying on the statement of the prosecutrix Smti Nilima Bora, convicted the accused as aforesaid.

5. The learned Counsel for the Appellant assailed the judgment on the ground that the prosecution utterly failed to established the identity of the accused. That apart, in view of negative medical report, the learned advocate pleaded that the conviction awarded by the Learned Sessions Judge cannot be sustained.

6. P.W. 1 Nilima Bora is the prosecutrix. In her statement she alleged of rape by force by a member of Home Guard on the night of 22nd November, 1997 at about 9.30 P.M. She identified the accused Haren Bora for the first time in the dock and deposed that at the time of occurrence, when her parents were away to attend a "Nakhowa" in the house of a co-villager, the accused knocked at the door calling "Bhonti, Bhonti". Thinking that her parents might have returned home, she lighted a Chaki and opened the door. The accused entered the house, gagged her mounth, threw her on the ground and raped her. After sometime, being attracted by ruffling sound, her younger sister aged 18 who was inside the house came and sprinkled water on her face. By that time her parents also arrived and she reported them about the incident. She further deposed that she could not recognise the accused and, as such, she could not name him to her parents. But she could recognise him when the police brought him under arrest. Thereafter, she identified the accused in the dock during the trial.

7. The prosecution story is solely depended on the testimony of the prosecutrix as reproduced above. The F.I.R. Exhibit -3 was lodged by Shri Purna Bora, father of the prosecutrix. In the ejahar we find that the accused Haren Bora has been specifically indicated as the assailant. We also find in it that his daugther told him that the aforesaid accused person entered the house forcibly opening the door and ravished her gagging her mouth.

8. There is an apparent gap between the statement made by the prosecutrix and the F.I.R. lodged so far the identity of the accused is concerned. It is, therefore, necessary to examine as to how Shri Purna Bora could name the accused specifically

in Exhibit-3. It is essential in view of the fact that no identification parade has been held by the police in the instant case.

9. P.W. 1 stated that she could recognise the accused after arrest. Her father Purna Bora supported this statement to the extent of presence of the accused. He deposed that the accused was apprehended by the police immediately and that the accused admitted his guilt. The investigating officer, Shri Diganta Bora, P.W.-5 in his deposition has stated that the accused Haren Bora was a Home Guard and was residing in the premises of the Police Station. He was interrogated when he appeared before him in the Police Station and after such interrogation he had arrested him. In his cross examination he had stated that P.W. 1 Smti Nilima Bora was present at the time of filing the ejahar and at that time the accused had also arrived there.

10. The evidence of P.W. 1, P.W. 2 and P.W. 5 read together point out that the prosecutrix had the opportunity to see the accused at the time of filing ejahar. In her house, a few hours before, she had seen the accused while committing the offence in the light of a Chaki. Therefore, her statement that she had identified the accused in the police Station cannot be disbelieved. It is pertinent to mention at this stage that the police had also seized the Chaki in the instant case. Although P.W. 5 did not depose in specific term that on identification of the accused by the prosecutrix, he had arrested the accused and forwarded him to Police station, but the evidence as above leads to the conclusion that the arrest of the accused was due to his indictment by the prosecutrix in the police Station. This explains as to how the name of the accused Haren Bora could be reflected in the F.I.R. lodged after the occurrence.

11. The learned Sessions Judge in his judgment pointed another relevant factor while accepting the identification of the accused by the prosecutrix for the first time in the court. According to him, the prosecutrix told her father immediately after the occurrence that a member of Home guard had ravished her. In the dock, she had identified the man, who is also a member of the Home Guard. This facet further lends support to the above observation about the identification of the accused.

12. In her statement u/s 164 Code of Criminal Procedure recorded on 24.11.87, she had indicted the accused by way of reference as a member of Home Guard and further submitted that she had seen him only once when he came for an investigation of a dispute relating to boundary. All these circumstances on consideration as a whole lead to established that the person identified in the dock was the aggressor. The argument that there has been no test identification is of no significance in view of the convincing evidence of P. W. 1 (Prosecutrix).

13. But identification of the accused is not enough. In order to establish a charge of rape, the prosecution has to show that it has been done against her will or without her consent or with her consent, when her consent has been obtained by putting

her in fear of death or of hurt etc. In this case there is no allegation on any attempt to put the prosecutrix in fear of death or of hurt. The evidence has been led to show that she was over-powered by the accused and raped. Therefore, it has to be seen whether it was done, as alleged, against her will or without her consent. Before we deal with this, it is necessary to have a look into the medical report.

14. Exhibit-4 is the medical report. It shows that the prosecutrix Smti Nilima Bora was examined on 23.11.87 at Nagaon Civil Hospital. The doctor examining her found no external mark or injury. Her hymen was found to have old tear. There was no presence of spermatozoa. The doctor's opinion is that no evidence of physical injury or rape could be noted.

15. Since she was a married woman having a child, it was likely that her hymen would have only old tear as found by the doctor. From this part of medical evidence, it cannot be said whether she was raped or not. Absence of any physical injury, however, may lead to a doubt whether the alleged rape was committed against her will or without her consent. In a case of rape, will or consent, if any, given by the prosecutrix must be voluntary. The mere act of helpless resignation in the face of inevitable compulsion, non-resistance or passive giving in, when volitional faculty was either clouded by fear or vitiated by duress, could not be deemed to be consent. Consent signifies voluntary participation of the woman after having fully exercised the choice between resistance and assent. A married woman having a child and hailing from a traditional Assamese family is not normally expected to foist a false charge of rape against a person with whom she had no enmity. In the instant case, evidence on records show that the prosecutrix had the opportunity to see the accused only once when he had visited their place in connection with a boundary dispute. There is no evidence whatsoever to suggest that her father who had lodged the *ejahar* had any enmity with the accused. A mere suggestion that the complainant had once proposed to give in marriage the prosecutrix with the accused is of no significance in view of the fact that the accused was a married man having children. Situated thus, it is not expected of a woman to foist a charge of rape at the risk of her reputation. Normally a woman in a tradition bound non-permissive society would be extremely reluctant even to admit any such incident having reflection on her character and chastity, and to face the danger of being looked down by the members of the Society including her near and dear ones. The only inclination on the part of a victim of rape would be to avoid giving publicity to the incident. But the prosecutrix immediately after arrival of her parents reported the matter. In this case we have no evidence even to presume that she was detected by any one in a compromising position with the accused. Even the younger sister who was in the other room was not aware of the happenings as the prosecutrix could not raise any alarm her mouth being gagged. The circumstances rule out the possibility of consent or wilful submission even by remote inference. From this it can be said that absence of marks of any injury on her person does not by itself devalue her credibility. She was a helpless victim prevented by force from offering serious

resistance. The learned Sessions Judge has also dealt with this matter in details and the conclusion arrived at by him, for reasons above, calls for no interference.

16. There can be no doubt that in an offence of rape eyewitness are rarely available. The offender selects his time and place depending on the surrounding circumstances. The accused who had also visited the house of the co-villager to attend the Nakhwa saw the parents of the prosecutrix and immediately left the place. He was absent from the function for sometime and, during this time, he has allegedly committed the offence. This temporary absence of the accused from the house of the co-villager alternately justifies the prosecution allegation that he had chosen that moment as appropriate for committing the offence.

17. There is obviously no independent corroborative evidence. In a case of rape the prosecutrix is the injured and her evidence cannot be straight-way rejected for want of corroboration. The learned Sessions Judge had drawn support from the decision in [Krishan Lal Vs. State of Haryana](#), and *Rafique v. State of Uttar Pradesh* AIR 1981 SC 559 in order to show that the absence of corroboration to the evidence of the prosecutrix is not fatal in a case of rape if the evidence of the prosecutrix does not suffer from any significant infirmity. Reliance has also been placed upon the decision of the Supreme Court in *B.B. Hijribhai v. State of Gujarat* AIR 1983 SC. The Supreme Court in *Hijribhai* (supra) observed as follows:

On principle the evidence of a victim of sexual assault stands on par with evidence of an injured witness. Just as a witness who has sustained an injury (which is not shown or believed to be self inflicted) is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of a sex-offence is entitled to great weight, absence of corroboration notwithstanding. And while corroboration in the form of eye witness account of an independent witness may often be forthcoming in physical assault cases, such evidence cannot be expected in sex offences, having regard to the very nature of the offence. It would therefore be adding insult to injury to insist on corroboration drawing inspiration from the Rules devised by the courts in the Western World. If the evidence of the victim does not suffer from any basis infirmity, and the "probabilities-factor" does not render it unworthy or credence, as a general Rule, there is no reason to insist on corroboration except from the medical evidence, where having regard to the circumstance of the case, medical evidence cannot be expected to be forthcoming subject to the following qualifications corroboration may be insisted upon would a woman having attained majority is found in a compromising position and there is a likelihood of her having levelled such an accusation on account of the instinct of self-preservation or "probabilities factor"s is found to be out of tune.

18. In the instant case. The prosecutrix or her father does not appear to have any deep seated grudge so that they should foist a charge of rape against an innocent person. Therefore, her evidence cannot be rejected for want of corroboration.

19. The prosecutrix reported about the incident immediately after arrival of her parents. She had the occasion to see the accused while lodging the ejahar in the police station and, after long 4 years she had identified the accused in the dock and indicated him as the assailant. Her allegation against the accaused has been clear and positive. It cannot be treated as devoid of credence, or embellished to substantiate a false charge of rape.

20. In the result, the appeal is dismissed being devoid of merit. The accused Appellant is directed to surrender before the Court of Learned Sessions Judge, Nagaon to serve the sentence.