

(2007) 04 GAU CK 0027

Gauhati High Court

Case No: Criminal Appeal No. 24 of 2004

Prabindas & Anr.

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: April 30, 2007**Acts Referred:**

- Penal Code, 1860 - Section 376(2)(g)
- Penal Code, 1860 (IPC) - Section 376(2)(g)

Citation: (2008) 3 GLT 956**Hon'ble Judges:** A.Hazarika, J and Aftab H.Saikia, J**Bench:** Division Bench**Advocate:** A.M.Mazumdar, D.Borah, K.C.Mahanta, Advocates appearing for Parties

Judgement

Aftab H. Saikia, J.

Heard Mr. A.M. Mazumdar, learned senior counsel assisted by Ms. B. Borgohain, learned counsel for the appellants as well as Mr. K.C. Mahanta, learned Public Prosecutor, Assam.

2. The conviction of the appellants under Section 376(2)(g), IPC and sentence to undergo imprisonment of life and also to pay fine of Rs. 2,000/ each, in default to suffer further 6 months simple imprisonment handed down to them vide judgment and order dated 14.11.2003 passed by the learned Adhoc Additional Sessions Judge, Kamrup, Guwahati in Sessions Case No. 98(K)/2000, has been assailed in this criminal appeal.

3. It would be essential to narrate in a short campus the factual matrix of the prosecution case for proper adjudication of this appeal.

4. An FIR was lodged on 12.11.95 by PW 1, the husband of the victim lady, PW 2 alleging that on 11.11.95 in the midnight at about 11.00 p.m., three persons namely, Prabin Das, Rinku Bahadur, the appellants herein along with one Bhim Bahadur @

Paswan came to his residence and forcibly dragged him out showing him dagger and raped his wife, PW 2 and fled away threatening them that they would be killed if this matter been informed to anybody. They also took 2 wrist watches (1 gent's and 1 lady's) and Rs. 400/ from them.

5. On the basis of the above allegation, police started investigation. During investigation, the appellants were arrested. However, the other accused, namely, Bhim Bahadur @ Paswan could not be traced out. On completion of such investigation, police submitted chargesheet against all the 3 accused persons including the said Bhim Bahadur @ Paswan under Section 457/376/380, IPC.

6. The learned trial Magistrate having considered the materials on record including the testimony of as many as 9 witnesses so examined on behalf of the prosecution also having considered the recorded statement of the victim lady, PW 2 under Section 313, Cr PC as well as having heard the learned counsel for the parties came to a finding vide judgment and order dated 5.5.2000 that the appellants committed the offence of rape upon PW 2. Accordingly, both the appellants were convicted and sentenced as already indicated above.

7. Assailing the impugned conviction and sentence, Mr. Mazumdar, learned senior counsel has strenuously argued that there was no convincing and compelling materials at all to rope the appellants to the offence under Section 376, IPC and such nonavailability of the materials are apparent on the face of record, particularly, from the deposition of the witnesses, namely, PW 1 and PW 2.

8. Drawing our attention to the deposition of PW 1 and PW 2, Mr. Mazumdar has pointed out that even the deposition of PW 2, the victim lady is totally unbelievable and the said evidence could not attract the conviction of the appellants under the aforesaid section. According to him, it is correct that the prosecutrix evidence alone is sufficient to convict the accused persons to the offence. But this witness i. e. P W 2, the victim lady did not even whisper anything requiring the conviction of the present appellants to such offence. Such evidence has also not been corroborated with the evidence of PW 1, the husband. According to the learned senior counsel, PW 2 depicted different story in contradiction to the evidence of PW 1.

9. For illustration, the learned senior counsel has taken us to the deposition of PW 1 and PW 2. It is mentioned that PW 2, the victim lady in her deposition categorically stated that the occurrence took place in the midnight at about 12.00 p.m. On that night while she was serving meal to her husband, the accused persons came to her house and asked her husband for match stick. When her husband gave the match stick, both the appellants, Rinku and Prabin took her husband out of the room and pointed dagger upon her husband and threatened her husband with dire consequence if he raised alarm. Then accused Prabin entered the room and forcibly took her to the bed and committed rape mounting on her for about 10 minutes. She raised outcries but Prabin kept her mouth closed with his hands. After committing

rape, Prabin went outside and Rinku entered the room. Rinku also committed rape mounting on her for ten minutes. Thereafter, another accused Bhim entered and committed rape on her. At the outcries raised by her husband, PW 1, Bhola Paswan came and saw Bhim going out of her room. The accused persons fled away from the place of occurrence after Bhola had reached there.

10. Citing the above testimony, Mr. Mazumdar has submitted that during commission of the offence of rape on her, it came on the evidence, as stated above by P W 2 that she got enough time to put resistance or to raise hue and cry. But she simply stated that when Prabin came first and committed rape on her she raised outcries but he grabbed her mouth with his hands. When Prabin went outside and Rinku entered and committed rape on her and thereafter Bhim entered and committed rape on her. This piece of evidence alone is sufficient to dislodge the prosecution case.

11. Drawing our attention to the deposition of PW1, the husband of the victim, it is argued that PW 1 in his evidence stated that while he was taking meal at 11.00 p.m. on the night of occurrence, the accused persons came and asked him for match stick and they insisted to give match stick by standing. When he gave match stick by that time the accused Prabin dragged him out of the room by clutching his vest. Accused persons Rinku and Bhim were waiting outside. At that moment, while Prabin was holding him, it were Bhim and Rinku, according to this witness entered the room and committed rape on his wife, PW 2. When Bhim and Rinku came out and Bhim held him and this time Prabin entered and committed rape on her wife. The room was kept opened. He saw the incident with his own eyes that the accused persons committing rape on his wife. This piece of evidence, according to Mr. Mazumdar, was not at all reliable for the fact that the victim lady, PW 2 in her deposition, categorically stated that she was raped firstly by Prabin for 10 minutes then by Rinku and lastly by Bhim. When Bhim was going out from inside her room, one Bhola Paswan came and saw the accused person. Amazingly, this Bhola Paswan was not examined. These contradictions and inconsistencies are at galore and hence, no conviction under Section 376(2)(g), IPC of the accused persons is sustainable.

12. On the other hand, Mr. K.C. Mahanta, learned Public Prosecutor argued that the evidence of PW 1 and PW 2 are sufficient to convict both the appellants and categorically stated that basically the deposition of the entire incident by PW 2, victim lady is there. Though there are some minor discrepancies that will not give away the conviction and sentence of the appellants.

13. We have given our anxious consideration to the submissions and arguments advanced by the rival parties. We have meticulously appreciated and evaluated the testimony of all the witnesses, particularly, PW 1 and PW 2 including PW 7, the Doctor, who examined the victim lady and Ext. 1 is the medical report so submitted by PW 7.

14. The Doctor, PW 7 on examination of PW 2 found the following:

"Height 147 cm. Weight 37 kg. Chest girth 85 cm. Abdominal girth 65 cm. Teeth: total teeth erupted 32 = 16/16 Breast: Both breast were large, loose flabby, General examination: Labia majora and minor were separated. Evidence of injury: Nil, Vagina swab was taken & on examination did not reveal spermatozoa."

15. In Ext. 1 the doctor in his opinion stated as under:

"(i) there is no evidence of recent sexual intercourse seen on her person, however the genital examination findings are consistent that she is a deflored woman.

(ii) no injuries found on her body and private parts,

(iii) she was mentally sound on the date and time of the examination,

(iv) her age is about 30 years (appx), however xray investigations are essential to ascertain the actual age."

It is seen from the medical report that no injury was found on the private part of the victim lady, PW 2 and there was no evidence of sexual intercourse and the victim lady was mentally sound on the date of examination.

16. Now coming to the testimony of PW 2, it is seen that the said testimony cannot be approved for conviction of the appellants outrightly. The deposition of the prosecutrix did not inspire our confidence as regards the commission of the said offence on her. In her deposition, she stated that the appellants, Rinku and Prabin took her husband out of the room and pointed dagger upon her husband and threatened her husband with dire consequence. Then accused Prabin entered the room and forcibly took her to the bed and committed rape mounting on her for about 10 minutes. She raised outcries but Prabin kept her mouth closed with his hands. After committed rape, Prabin went outside and Rinku entered the room. Then Rinku committed rape mounting on her for another ten minutes. Thereafter, another accused namely, Bhim entered and committed rape on her. Hearing the outcries raised by her husband PW 1, Bhola Paswan came and saw Bhim going out of the room. The accused persons fled away from the place of occurrence after Bhola had reached the place of occurrence. When Prabin entered inside and committed rape on her, she did admit that no resistance was made by her husband who was free outside her house. After committing rape by Prabin, next, Rinku entered the room and then Bhim entered and committed rape on her. Only after when Bhola came there, who saw the incident the accused persons fled away. The prosecution preferred not to examine Bhola in this case. When everybody fled away, as per this witness, her husband came inside the room, she told him everything about the incident of rape on her.

17. In cross, it is found that when question was made to her whether she was running any prostitution in her house, it was denied.

18. We have also meticulously examined the evidence of PW 1 which is full of contradiction and inconsistent to the testimony of PW 2. Because according to this witness, it was Prabin who was holding her husband and then another accused persons, namely, Rinku and Bhim entered inside the room and committed rape on PW 2 one by one. When they came out and Bhim held him, then Prabin entered the room and committed rape on his wife. He narrated that he saw the incident with his own eyes, as the room was kept open. When he raised outcries, one Bhola Paswan, Chakreswar and his wife Renu and neighbours arrived there and Bhola Paswan saw the accused persons. But surprisingly the said Bhola Paswan was not examined by the prosecution. This witness also testified that when accused persons left the place they found his wife, the victim lady lying on the ground with wearings and blouse torn. He lifted her, the victim lady and made her sit, poured oil and water and served her water. When he asked her, she told him that accused Prabin, Rinku and Bhim had committed rape on her. It is really unbelievable to accept the evidence of PW 1, who stated in chief that he saw the entire incident with his own eyes.

19. The evidence of PW 9, the Investigating Officer also critically analysed. This witness was silent as regards the accused Prabin's presence at the time of commission of offence. As stated by PW 1 and PW 2, rather he testified that the residence of Bhola Paswan, Chakreswar Paswan, Geeta Paswan and Dulari Paswan are near by. He also stated that PW 1 never told him that he himself saw his wife being raped. At the same breath this witness also depicts that PW 2, the victim lady did not state before him that the accused held her husband when he gave them match stick. She also did not state before him that the accused Prabin threatened her husband with dagger. According to this witness, PW 2 also did not state before him that Prabin gagged her with sari.

20. On over all considerations of evidence on record as discussed above, we are of the considered view that the deposition of the witnesses particularly, PW 2 i.e. the victim/prosecutrix and PW 1, husband of PW 2 can not be relied upon and the same do not inspire any confidence. Accordingly, we are of the view that the appellants are entitled to get the benefit of doubt.

21. In view of the above, this impugned conviction and sentence passed by the learned Adhoc Additional Sessions Judge, Kamrup, Guwahati vide judgment and order dated 14.11.2003 is hereby quashed and set aside.

22. The appellants be set at liberty forthwith, if they are not wanted in any other case.

23. In the result, the appeal succeeds and stands allowed.

24. Send down the LCR forthwith.