

Dharmendra Gogoi Vs. State of Assam

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Court : Guwahati

Decided On : Mar-03-2011

Judge : The Honourable Chief Justice Mr. Madan B. Lokur & Bd Agarwal

Appeal No. : Criminal Appeal (J) NO.14/2004

Appellant : Dharmendra Gogoi

Respondent : State of Assam

Judgement :

MADAN B. LOKUR, CJ.

(1.) There are two appellants before us, namely, Dharmendra Gogoi and Chakra Bora. They are aggrieved by the conviction and sentence dated 6.11.2003 awarded by the Addl. Sessions Judge (Ad-hoc), Jorhat (FTC) in Sessions Case No. 11(J-J) 2000.

(2.) A First Information Report was lodged by Tarun Borah on 20.2.1996 to the effect that on 19.2.1996 at about 11 PM, three unknown persons entered his house and took away gold ornaments and cash of '2500/-. The three unknown persons also raped his wife after he was tied up with a gamocha. He had opened the door of his house to these three persons when they showed him lethal weapons from outside the house.

(3.) The police acted on the FIR and after investigations, charged the two appellants and one Nirmal Gogoi (now absconding) with having raped the wife of Tarun Borah and thereby committing an offence punishable under Section 376(2)(g) of the Indian Penal Code and also committing theft of gold ornaments and household articles from the residence of Tarun Borah and thereby committing an offence under Section 392 of the Indian Penal Code.

(4.) The three accused were committed for trial by an order dated 8.2.2000 and when charged by the Addl. Sessions Judge, Jorhat, they pleaded not guilty on 15.3.2001 and claimed trial.

(5.) The prosecution examined as many as eleven witnesses and the defence did not produce any witness.

(6.) We have gone through the evidence on record and find that the testimony of PW-3, PW-4, PW-5 and PW-11 is of no significant value.

(7.) PW-1 is the Goan Burah (Village Head) and he turned hostile. In his examination in chief, he says that Tarun Borah told him that three persons had misbehaved with his wife and Chakra Bora (one of the appellants) had confessed his guilt before him. Chakra Bora had also taken the police to his house where he handed over some of the money stolen from the house of Tarun Borah. In his cross-examination, he reiterated that Chakra Bora has confessed his guilt but he named several other persons also who were present when the wife of Tarun Borah was raped. It is difficult to place reliance on the testimony of this witness since he has said much more than what was actually said even in the FIR and on the crucial aspect of the rape of Tarun Borah's wife, he really has nothing to say.

(8.) The most important witness of course is the prosecutrix who entered the witness box as PW-2. In her testimony, she says that she knows Chakra Bora and recognized the other two assailants but does not know their names. She identified Dharmendra Gogoi in Court during the course of her testimony, Nirmal Gogoi having been declared an absconder.

(9.) The prosecutrix says that on 19.2.1996 around 10 P.M., she was preparing to go to sleep after having dinner. At that time, someone flashed a torch and asked her and her husband to open the door and threatened to kill them if they did not do so. In the circumstances, her husband Tarun Borah opened the door of the house and the three accused persons entered the house and took her husband to a room and tied him up with a gamocha. They then opened the godrej almirah and took some household articles including jewellery and cash of about Rs.2500/-. The accused then dragged her to the office room of the house where they tied her up. Thereafter, Dharmendra Gogoi and Chakra Bora raped her and while Nirmal Gogoi was preparing to rape her, they heard some voices outside the house of people returning from a circus in the village and then the accused ran away. At that time, the prosecutrix was about three months pregnant and did not offer much resistance to the accused persons because she was afraid of the safety of the foetus in her womb and because the accused were armed with daggers. The accused were carrying torches and during the process, she saw and recognised Chakra Bora who even put off his jacket before raping her and he fled without taking his jacket, which was later seized.

(10.) The prosecutrix further says that the next morning her husband met the Secretary of the Village Defence Party (VDP) and told him of the incident. This Secretary then caught hold of Chakra Bora and brought him to the house of the prosecutrix where he confessed and also named the other accused persons.

(11.) The prosecutrix stated that she had given a statement under Section 164 of the Code of Criminal Procedure to the Magistrate and this was exhibited as Ext. 4.

(12.) The cross examination of the prosecutrix is rather strange and does not seem to touch upon the substance of the allegations against the appellants. The cross examination is full of suggestions which have all been denied by the prosecutrix. Considering the manner of cross- examination of the prosecutrix, there is nothing in her testimony to be disbelieved.

(13.) Tarun Borah, the husband of the prosecutrix, entered the witness box as PW-6 and confirmed the statement made by the prosecutrix. What is significant in the testimony of PW-6 Tarun Borah is that he says that after the incident, due to the

noise of the people returning home from a circus he raised a commotion and at that time Nilkanta Bezbaruah and Anil Saikia came to their house and they were told about the occurrence both by Tarun Borah as well as by the prosecutrix. But it is significant to note that neither of these two persons was called as a prosecution witness. We propose to deal with this a little later.

(14.) PW-6 Tarun Borah confirms that he met the Secretary of the VDP the next morning and that Chakra Bora confessed in the presence of the Secretary of the VDP to having committed the crime and that Dharmendra Gogoi and Nirmal Gogoi were also with him.

(15.) PW-7 is the doctor who examined the prosecutrix and according to him there was no external sign of struggle and he could not give any definite opinion regarding her being raped.

(16.) The Secretary of the VDP, Nirmal Borah, who entered the witness box as PW-8 confirms the extra-judicial confession made to him by Chakra Bora as well as the narration of events by Tarun Borah.

(17.) The Magistrate who recorded the statement of the prosecutrix under Section 164 of the Code of Criminal Procedure entered the witness box as PW-9 and confirmed having recorded the voluntary statement of the prosecutrix.

(18.) PW-10 is the Investigating Officer in the case and he confirmed the prosecution story.

(19.) In her statement under Section 164 of the Code of Criminal Procedure, the prosecutrix narrated the events of the night of 19.2.1996 which we have already noted and we do not see any reason to reiterate what she had stated in her statement.

(20.) On these broad facts, the Trial Judge found Dharmendra Gogoi and Chakra Bora guilty of having raped the wife of Tarun Bora and awarded them the sentence of imprisonment of life and to pay a fine of Rs.25,000/- each or in default to undergo a further period of five years rigorous imprisonment. They were also found guilty of committing theft and were awarded 5 years rigorous imprisonment

for that offence.

(21.) It was submitted before us by learned Amicus Curiae appearing for Dharmendra Gogoi and Chakra Bora that no Test Identification Parade (TIP) was conducted before the accused were charged with the offences alleged to have been committed by them. In our opinion, the failure on the part of the investigating authorities to conduct a TIP is not fatal to the case of the prosecution. The facts disclose that Chakra Bora (one of the accused) was residing in the same village and being a co-villager the prosecutrix could have easily recognised him. Under these circumstances, it was not necessary to have a TIP in respect of Chakra Bora. As far as Dharmendra Gogoi is concerned, the prosecutrix recognised him also but did not know his name. He too was seen by the prosecutrix in the light of the torch and in these circumstances we are of the opinion that it was not necessary to conduct a TIP in respect of Dharmendra Gogoi as well.

(22.) It was then submitted by learned Amicus Curiae that there was no sign of any external struggle by the prosecutrix and it is very unlikely that she was raped. We cannot accept the contention of learned Amicus Curiae in this regard. It must be borne in mind that the prosecutrix was three months pregnant at that time and as her testimony goes, she was afraid of the future of the foetus that she was carrying in her womb. She also stated that the accused were carrying daggers with them and under these circumstances, any violent resistance by her could have led to serious consequences not only for her but also for the foetus. The mere fact that she did not struggle with the accused persons does not mean that she voluntarily had sex with them and in our opinion, this singular fact cannot be held against the prosecutrix at all.

(23.) It was then submitted by learned Amicus Curiae that the FIR does not mention the names of any of the accused. It was contended that even if the prosecutrix recognised Chakra Bora, the least that we should expect is that Tarun Borah would have mentioned his name in the FIR. Even the next day, when Chakra Bora had confessed to his involvement along with Dharmendra Gogoi and Nirmal Gogoi (absconding), there is no mention about their names in the FIR. Under these circumstances, it is submitted that the accused were framed and had

not actually committed the crime.

(24.) In our opinion, it is rather surprising that the names of the accused were not mentioned in the FIR particularly that of Chakra Bora. However, in our opinion, that would not be fatal to the case of the prosecution. The FIR was lodged by the husband of the prosecutrix and it is difficult to surmise why he did not mention the names of the three accused. Ordinarily, we would have expected him to do so, but in the face of the unshaken testimony of the prosecutrix, we are of the view that the failure on the part of the Tarun Borah to mention the names of the accused persons in the FIR is not fatal to the case of the prosecution.

(25.) Finally, it was submitted by learned Amicus Curiae that two persons who came immediately after the occurrence of the incident that is Nilkanta Bezbaruah and Anil Saikia were not called to the witness box. No doubt, this is something that the prosecution had to explain, but there was no attempt to do so. But again, in our opinion, the case would really turn on the statement of the prosecutrix and not on any other material or absence of any other material.

(26.) What is the value of the statement of the prosecutrix? As we have observed above, the prosecutrix gave a detailed statement before the Magistrate under Section 164 of the Code of Criminal Procedure. When the prosecutrix entered the witness box, she was not effectively cross-examined on the contents of her statement except perhaps an odd question here or there. Even though the prosecutrix narrated the entire incident in considerable detail, the cross-examination was cursory and casual and had little or no relation to her examination in chief. Under these circumstances, we have no option but to completely accept the testimony of the prosecutrix.

(27.) We may also note that it has time and again been held by the Supreme Court that the sole testimony of a prosecutrix is sufficient to justify a conviction for rape if her testimony is credible and consistent. The latest decision in this line of cases is Ghisalal v. Dhapubai, (2011) 2 SCC 298 wherein the Supreme Court referred to and relied on State of Maharashtra v. Chandraprakash Kewalchand Jain, (1990) 1 SCC 550, State of U.P. v. Pappu, (2005) 3 SCC 594, State of Punjab v. Gurmit Singh, (1996) 2 SCC 384, State of Orissa v. Thakara Besra, (2002) 9 SCC 86,

State of H.P. v. Raghubir Singh, (1993) 2 SCC 622, Wahid Khan v. State of M.P., (2010) 2 SCC 9 and Rameshwar v. State of Rajasthan, AIR 1952 SC 54 and concluded in paragraph 14 of the Report:

"Thus, the law that emerges on the issue is to the effect that the statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

We have gone through the statement made by the prosecutrix under Section 164 of the Code of Criminal Procedure Code as well as her examination in chief when she entered the witness box and we find both the statements made by her are rather consistent with each other and as we have noted before that there was no effective cross- examination of the prosecutrix on any material aspect.

(28.) We may also note that the Supreme Court repeatedly said that in the context of the social situation in our country, it is unlikely that a lady would enter the witness box and admit to being raped if in fact no rape had taken place. Even as recently as in 2009, the Supreme Court said in Wahid Khan v. State of M.P., (2010) 2 SCC 9 (in paragraph 17 of the Report):

"It is also a matter of common law that in Indian society any girl or woman would not make such allegations against a person as she is fully aware of the repercussions flowing therefrom. If she is found to be false, she would be looked at by the society with contempt throughout her life. For an unmarried girl, it will be difficult to find a suitable groom. Therefore, unless an offence has really been committed, a girl or a woman would be extremely reluctant even to admit that any such incident had taken place which is likely to reflect on her chastity. She would also be conscious of the danger of being ostracised by the society. It would indeed be difficult for her to survive in Indian society which is, of course, not as forward-looking as the western countries are."

In the present case, the prosecutrix is not alleged to have put up a false case. Moreover, she testified to her rape not once but twice - first, before the Magistrate in her statement under Section 164 of the Code of Criminal Procedure and then

when she entered the witness box. Given these important and undisputed facts that we cannot ignore, we have no option but to believe the prosecutrix when she says that she was raped by the appellants.

(29.) Consequently, we uphold the conviction of both the appellants for having committed the rape of the prosecutrix, the wife of Tarun Borah.

(30.) Insofar as the charge of theft against the appellants is concerned, there has been absolutely no cross-examination in respect of any of the witnesses. There is a seizure of some currency notes from Chakra Bora but there is no seizure of any of the gold ornaments. In her statement recorded under Section 164 of the Code of Criminal Procedure, the prosecutrix does mention theft of some gold jewellery and cash and this is reiterated by her and her husband when they entered the witness box. There is no reason to disbelieve their testimony in this regard. We, therefore, uphold the conviction of the appellants under Section 392 of the Indian Penal Code.

(31.) On the question of sentence, we have heard learned counsel for the parties and are of the view that the award of life imprisonment against them is too harsh. What sentence should actually be awarded is always a matter of great debate. There is no hard and fast rule that can be laid down in this regard. While determining the question of award of sentence, we must consider the fact that the occurrence took place way back in 1996, almost 14 years ago. At that time, both the appellants were young men aged about 30 years. They have spent good part of their life in custody. However, we should bear in mind that the appellants have committed a very grave and serious crime, which needs to be deprecated, if not condemned. Having taken into consideration the factual matrix of the case, we are of the view that the appellants should be awarded vigorous imprisonment for a period of 12 years for committing rape of the prosecutrix, wife of Tarun Borah. The appellants should also pay a sum of ₹5000/- each and in default they should undergo imprisonment for a period of six months. The fine to be paid by the appellants should be handed over by the State to the prosecutrix. For the offence of having committed theft, we do not see any reason to interfere with the sentence awarded by the learned Trial Judge. However, we make it clear that both the

sentences will run concurrently. The appeal is partly allowed.

(32.) For the services rendered by learned Amicus Curiae, the Assam State Legal Services Authority is directed to remunerate him to the extent of Rs. 5000/-.

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