

Khireswar Bora Vs. State of Assam

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Court : Guwahati

Decided On : Apr-28-2004

Judge : I.A. Ansari, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 156(3), 164, 200, 202 and 202(1)

Appeal No. : Criminal Revision No. 600 of 1996

Appellant : Khireswar Bora

Respondent : State of Assam

Advocate for Def. : F.A. Laskar, Adv.

Advocate for Pet/Ap. : P.K. Barua, Adv.

Disposition : Revision dismissed

Prior history : I.A. Ansari, J. 1. This revision impugns the judgment and order, dated 4.9.1996, passed by the learned Sessions Judge, Golaghat, in Crl. Appeal No. 117 96, dismissing the appeal and maintaining the conviction of the accused-petitioner under Section 376 IPC as well as the sentence passed against him to suffer rigorous imprisonment for 7 years and pay a fine of Rs. 1000 and, in default of payment of fine, to undergo rigorous imprisonment for a further period of one month. 2. The case of the pro

Judgement :

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2. The case of the prosecution, as unfolded at the trial, may, in brief, be stated as follows: -

On account of financial necessity, the prosecutrix, namely, D, a minor girl, aged about 14 years, used to work as a maid servant at the house of the accused-petitioner on a monthly salary of Rs. 12.... On the night of 11.7.1993, while D was asleep at the house of her employer, i.e., the accused-petitioner, the accused came to the bed, where D was asleep, and despite resistance offered by D, the accused over-powered her, gagged her and threatened to kill her if she shouted and, then, committed rape on her. On the following day, early in the morning, D left the house of the accused, came to her house and reported the occurrence to her mother, Lohita, who noticed blood on D's wearing apparels. When D was crying at her house, their neighbours, namely, Smti Kanmani Chutia and Smti Umeswari Chutia came to D's house and, on query made by them, D reported to them about the occurrence. When D's father, Akan Chutia, arrived home, he too was reported by D about the occurrence. As D was passing through her period of menstruation, no complaint could be lodged immediately. However, after the occurrence was reported to them by D, the parents of D went to the nearby CRPF camp with their complaint, but as the said camp had no jurisdiction in the matter, the CRPF personnel asked D's parents to go to the Court. Eventually, on 14.7.03, a written complaint was made in the Court of the CJM, Golaghat, who, in turn, sent the complainant to Merapani Police Station for registering a case and for submitting a report in final form if warranted. Based on this complaint and treating the same as

the First Information Report, a case was registered by the police against the accused-petitioner. During the course of investigation, D was medically examined and the accused was arrested. The accused made a judicial confession, which was also recorded on 29.7.1993. On , completion of the investigation, police laid charge-sheet against the accused under Section 376 IPC.

3. During trial, the accused pleaded not guilty to the charge framed against him under Section 376 IPC. In all, prosecution examined 9 witnesses including the Medical and Investigation Officers. The accused-petitioner was, then, examined under Section 313 Cr.P.C. and in his examination aforementioned, the accused denied that he had committed the offence alleged to have been committed by him, the case of the defence being, in brief thus: The prosecutrix had left the house of the accused long before the alleged occurrence took place. The accused was innocent and he has been falsely implicated. The defence also adduced evidence by examining one witness, namely, the wife of the accused-petitioner. On conclusion of the trial, the trial Court found the accused guilty of the charge framed against him and convicted him accordingly. The sentence, as indicated hereinabove, was passed against the accused-petitioner. As the appeal preferred by the accused-petitioner against his conviction and sentence also failed to yield the desired result, he has, now, approached this Court with the present revision.

4. I have heard Mr. P K Barua, learned senior counsel appearing on behalf of the petitioner, and Mr. F H Laskar, learned Addl. P. P., for the State-respondent.

5. Drawing the attention of this Court to the provisions of Section 202 Cr.P.C., Mr. Baruah has submitted that under the proviso to Sub-clause (1) of Section 202, a Magistrate has no power to direct investigation by police if it appears to the Magistrate that the offence complained of is triable exclusively by the Court of Session. In the case at hand, points out Mr. Barua, the learned Judicial Magistrate sent the complaint of the prosecutrix to the police for registering a case and for investigating the same. The direction so given, contends Mr. Barua, was in contravention of the proviso to Sub-section (1) of Section 202 Cr.P.C. and the police, therefore, derived no jurisdiction to investigate the case. Thus, violation of Section 202(1) Cr.P.C. has, according to Mr. Barua, vitiated the whole trial held

against the accused.

6. While considering the above submission made on behalf of the accused-petitioner, it is imperative to note that Chapter XV of the Criminal Procedure Code deals with taking of cognisance of offences by Magistrates and issuance of processes. Section 202 Cr.P.C. deals with a stage, when a Magistrate, who is empowered to take cognisance of the offence made in the complaint, takes cognizance of the offence, but postpones the issuance of process against the accused and decides to hold enquiry into the complaint himself or direct an investigation to be made by police for the purpose of deciding whether or not there is sufficient ground for proceeding. Section 202 does not envisage those cases, wherein the Magistrate sends complaints, without taking cognisance at all, to the police for investigation. Such a power is really exercised under Section 156(3) Cr.P.C. According to Sub-section (3) of Section 156 Cr.P.C., a police officer has the power to investigate even a cognisable case if a Magistrate orders such an officer to do so.

7. The power given to Magistrates to order investigation by police under Section 156(3) is quite different from the power given by Section 202(1) to the Magistrate to direct investigation. These two powers are resorted to in distinctly different spheres at different stages. While Section 156(3) Cr PC deals with the Magistrate's power at pre-cognisance stage of the offence, Section 202 Cr.P.C. deals with such Magistrate's power at post-cognisance stage.

8. The above position of law has been succinctly described by the Apex Court Devarapalli Lakshminarayana Reddy and Ors. v. Narayana Reddy and Ors., (AIR 1976 SC 1672), wherein it has been observed and held as follows: -

'17. Section 156(3) occurs in Chapter XII, under the caption : 'Information to the police and their powers to investigate' ; while Section 202 is in Chapter XV which bears the heading 'Of complaints to Magistrate'. The power to order police investigation under Section 156(3) is different from the power to direct investigation conferred by Section 202(1). The two operate in distinct spheres at different stages. The first is exercisable at the pre-cognisance stage, the second at the post-cognisance stage, when the Magistrate is in seisin of the case. That is to

say, in the case of a complaint regarding the commission of a cognisable offence, the power under Section 156(3) can be invoked by the Magistrate before he takes cognisance of the offence under Section 190(1)(a). But if he once takes such cognisance and embarks upon the procedure embodied in Chapter XV, he is not competent to switch back to the pre-cognisance stage and avail of Section 156(3). It may be noted further that an order made under Sub-section (3) of Section 156, is in the nature of a peremptory reminder or intimation to the police to exercise their plenary powers of investigation under Section 156(1). Such an investigation embraces the entire continuous process, which begins with the collection of evidence under Section 156 and ends with a report or charge-sheet under Section 173. On the other hand, Section 202 comes in at a stage, when some evidence has been collected by the Magistrate in proceedings under Chapter XV, but the same is deemed insufficient to take a decision as to the next step in the prescribed procedure. In such a situation, the Magistrate is empowered under Section 202 to direct, within the limits circumscribed by that section, an investigation 'for the purpose of deciding whether or not there is sufficient ground for proceeding'. Thus, the object of an investigation under Section 202 is not to initiate a fresh case on police report, but to assist the Magistrate in completing proceedings already instituted upon a complaint before him.

'In the instance case, the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding ; but only for ordering an investigation under Section 156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses under Section 200 Cr.P.C., which is the first steps in the procedure prescribed under the Chapter. The question of taking the next step of that procedure envisaged in Section 202 did not arise. Instead of taking cognisance of the offence, he has, in the exercise of his discretion, sent the complaint for investigation by notice under Section 156.

This being the position, Section 202(1), 1st Proviso was not attracted. Indeed, it is not necessary for the decision of this case to express any final opinion on the ambit and scope of the 1st Proviso to Section 202(1) of the Code of 1973. Suffice it to say, the stage at which Section 202 could become operative was never

reached in this case. We have, therefore, in keeping with the well established practice of the Court, decided only that much which was essential for the disposal of this appeal, and no more.'

9. In the case at hand too, the Magistrate did not apply his mind to the complaint for deciding whether or not there is sufficient ground for proceeding ; he merely ordered an investigation by police in exercise of his powers under Section 156(3). He did not bring into motion the machinery of Chapter XV. He did not examine the complainant or his witnesses under Section 200 Cr.P.C., which is the first step in the procedure prescribed under Chapter XV. The question, therefore, of his taking the next step of that procedure envisaged in Section 202 did not arise at all. Instead of taking cognizance of the offence, he has, in the exercise of his discretion, directly sent the said complaint for investigation by police under Section 156(3). This being the position, 1st proviso to Section 202(1) Cr.P.C. was not attracted.

10. In the light of the law laid down in Devarapalli Lakshminarayana Reddy (supra) and applying the same to the factual matrix of the present case, it becomes clear that in the case at hand, no illegality was committed by the Magistrate in directly sending the complaint, in question, to the police for registering a case and for investigation of the same. As the Magistrate passed the direction aforementioned without taking cognizance, the investigation, which commenced and concluded in pursuance of the direction so given, cannot be said to be without jurisdiction.

11. What logically follows from the above discussion is that there was no infraction of Section 202(1) and, hence, the question of the trial held against the accused-petitioner having vitiated for non-compliance of the provisions contained in the proviso to Sub-section (1) of Section 202 Cr.P.C. does not arise at all.

12. Now, turning to the merit of this revision, it is important to bear in mind that in the case at hand, the accused, admittedly, made a judicial confession and in his confessional statement, the accused stated as follows:

'I know D. She lives in the same village. She calls me 'Peha' as village relationship. I kept her in my house for 4 months as 'Ruwani' at Rs. 400 from the

month of 'Jaith'. Since the month of 'Jaith'. D sleeps with my elder daughter in a separate room of the same house. It was raining on the night of 11.7.93 at about 10/11 pm and at that time, I stealthily went to the bed of D. I have pushed aside my elder daughter as rain water was falling on her. She was deep in sleep. Then I became naked, removed my underwear and 'gamocha'. I fell on D. She was sleeping with 'Mekchi' and pant. She woke up and I removed her pant and she too embraced me. I have entered my penis into her vagina fully.

This way I had sexual intercourse with D for 10/15 minutes. While I have intercourse with D my elder daughter was deep in sleep. I discharged inside D. Next day, D left for her own house. My wife did not know about the intercourse.'

13. The Magistrate, who recorded the judicial confession, was examined as PW 8. Nothing, in particular, was elicited from his cross-examination to show that the confession made by the accused was involuntary and/ or untrue. All material questions, which, in the facts and attending circumstances of the present case, were required to be put to the accused to test the voluntariness of the confession, sought to be made by the accused, were, indeed, put to the accused and all necessary precautions, which were required to be adopted, were, indeed, adopted in the present case. It was also made clear by PW 8 to the accused that even if he chooses not to make confession, he would not be sent back to the custody of the police. No infirmity in recording the confession could be pointed out before this Court at the time of hearing of the present revision.

14. Coupled with the above, the learned trial Court as well as the appellate Court had examined the evidence of judicial confession brought on record and, on finding the confession voluntary and true, relied upon the same. I see no reason to hold that the confession, in question, is involuntary and/or untrue.

15. If a confessional statement is found to be voluntary and true, there is no impediment in founding conviction of the accused on such confessional statement. Though there is no rule of law that judicial confession must receive corroboration from other evidence on record, the Court may, in a given facts and circumstances of the case, examine the evidence on record to ascertain if any corroboration has been received. If the evidence on record, generally, supports the catalogue of

events mentioned in the confessional statement, such a confession can be safely made foundation for conviction.

16. In the case at hand, the prosecutrix, namely, D (PW 1) has clearly stated that on the fateful night, while she was sleeping with the daughter of the accused in the house of the accused, she, suddenly, saw the accused bending over her, she tried to shout, but her mouth was gagged by the accused, the accused threatened her with death if she reported the matter to any one and, then, the accused removed her underwear and had intercourse with her. As a result, prosecutrix started bleeding. Early in the morning, she left for home and showed her mother her blood-stained wearing apparels and narrated the incident to her. PW 2, the mother of the prosecutrix, corroborated the testimony of PW 1 and claimed, in tune with the evidence of PW 1, that she saw blood stains on her cloths. PW 2 has also deposed that PW 3 and PW 5, both of whom are neighbours, arrived. In her evidence, PW 3 has deposed that she saw PW 1 weeping and was told by PW 1 that she was ravished by Khireswar (i.e., the accused). PW 5 claimed to have seen blood stained cloths of PW 1. PW 4, the father of the prosecutrix, came to know about the incident, according to the evidence on record, at about 12/1.00 pm and he was told about the entire incident by PW 1 herself.

17. Nothing could be elicited from the cross-examination of PW 1 to show that what she had deposed was untrue or false. As a matter of fact, her evidence received substantial corroboration from the testimony of not only her parents, namely, PWs 2 and 4, but also from the evidence of their two neighbours, namely, PW 3 and PW 5.

18. It is submitted, on behalf of the accused-petitioner, that except close relatives of the prosecutrix, no neighbouring witness has been examined and, hence, no independent evidence has been adduced to lend credibility to the evidence of PWs 1, 2 and 4. While dealing with the submission so made, it is necessary to bear in mind that if the Court believes the evidence of the prosecutrix, no further corroboration is necessary. In the case at hand, however, apart from the fact that PWs 2 and 4, namely, mother and father of PW 1, had corroborated the evidence of PW 1, PW 2 had even seen the blood stained cloths of PW 1. PWs 3 and 5 are

residing in the vicinity of the house of PW 1. Though they may be relatives of PW 1, the fact remains that both these witnesses, i.e., PWs 3 and 5, according to the evidence on record, did come to the house of PW 1 and PWs 3 and 5 found PW 1 weeping and were told by PW 1 that she had been ravished by Khargeswar (i.e., the accused-petitioner) and PW 5, in fact, saw the blood stained cloths of PW 1. Nothing could be elicited from the cross-examination of PWs 3 and 5 to show that what they had deposed was under the influence of PWs 1, 2 and 4 nor was there anything to show that what they had deposed were false or untrue.

19. Situated thus, there was no reason for the trial Court not to place reliance on the testimony of PW 1 and also on the evidence of the remaining witnesses.

20. It has been agitated, on behalf of the accused-petitioner, that Gaonburah (headman of the village), who had been reported about the occurrence, was not examined. The evidence of the prosecutrix and the other evidence on record coupled with the confessional statement made by the accused clearly show that the accused did commit rape on PW 1 and, hence, the mere fact that the Goanburah has not been examined, though he had been reported about the occurrence, cannot be made a ground for granting benefit of doubt to the accused.

21. It has also been agitated, on behalf of the accused-petitioner, that the delay in lodging of the FIR has not been convincingly explained. In the case at hand, the alleged occurrence took place at late hours of the night of 11.7.93 and the occurrence was reported by PW 1, on reaching her house, to her parents on 12.7.93. The complaint was lodged in the Court on 14.7.93. The reason assigned by PWs 1, 2 and 4 for this delay was that PW 1 was passing through her period of menstruation at the time, when the occurrence took place. Mr. Barua has pointed out that the evidence so given by PW 1 and 2 logically means that the FIR was lodged after PW 1 had already passed the period of menstruation and yet when PW 1 was medically examined on 2.7.93, the doctor found, as revealed from the evidence of PW 7, that PW 1 was undergoing the period of menstruation. While dealing with the aspect of the matter, it is imperative to bear in mind the cross-examination of PWs 1 and 2. I have carefully scrutinised their evidence and I do not find that any of these two witnesses gave any indication in their evidence that

when they had gone to lodge the FIR, PW 1 had ceased to bleed or her menstruation had ceased. Having elicited no such material from the cross-examination of PW 1, PW 2 and PW 4 despite the report of the medical examination being available with the defence, it cannot, now, be imported into the evidence of PW 1, PW 2 and/or PW 4 that at the time, when they lodged the complaint, PW 1 had already passed the period of menstruation. The possibility, therefore, that PW 1 had continued to pass through the period of menstruation cannot be ruled out; rather, the evidence of menstruation found by the doctor is an indication of the fact that what PW 1 and 2 had deposed was, indeed, true.

22. Because of what have been discussed above, I am firmly of the view that the delay in lodging the FIR stands convincingly explained.

23. Let me, now, advert to the case of the defence. In support of his case, the accused-petitioner examined his wife as DW1. In her evidence, DW 1 projected that the prosecution of the accused was a fall-out of the enmity existing between Tukheswar, the uncle of the prosecutrix, and the accused. While so projecting the defence plea, DW 1 admitted that DW 1 stayed, in their house, till the month of 'Bohag'. According to what DW 1 deposed, one day Tukheswar blocked their road by digging a nullah (drain) on the road. Due to this incident, dispute arose between the accused and Tukheswar. On the same day, the mother of PW 1 took away PW 1 from the house of the accused. In the month of 'Ashar', she (PW 1) heard that her husband was said to have misbehaved with PW 1, whereupon she (PW 1) along with Kanmai (PW 3) and Botahi went to the mother of the prosecutrix to enquire about the matter. PW 1 further stated that police arrested her husband on 4th of 'Sawan', police beat up her husband severely and on the next day, she saw her husband lying injured. PW 3, during her examination as a prosecution witness, never stated that she had gone to the house of the prosecutrix with DW 1 and Botahi. No question was put to PW 3 by the defence, in this regard, during her cross-examination. Botahi was also not examined by the defence. The learned trial Court, therefore, concluded that the defence had failed to prove that DW 1 along with PW 3 had gone to the house of the prosecutor. The conclusion, so reached by the learned trial Court, cannot be said to be devoid of reasons.

24. The learned trial Court took into consideration all the evidence on record and found no reason to disbelieve the evidence of PW 1. I see no reason to differ from the conclusion reached by the learned trial Court and affirmed by the learned appellate Court.

25. What, thus, crystallises from the above discussion is that the prosecution adduced ample evidence and the evidence, so adduced, convincingly proved that the accused had committed rapes on PW 1.

26. In view of the conclusions reached as indicated hereinabove, I see no reason to interfere with the conviction of the accused. So far as the sentence passed against the accused-petitioner is concerned, the same is, in fact, not at all unreasonable ; rather, the sentence is lenient. The sentence too does not, therefore, invite interference.

27. In the result and for the foregoing reasons, this revision fails and the same is accordingly dismissed.

28. The bail bond of the accused petitioner shall stand cancelled and the sureties shall stand discharged. The accused is hereby directed to, forthwith, surrender in the Court of learned CJM, Golaghat, so as to undergo the sentence of imprisonment passed against him.

29. Send back the LCRs.

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