

Dwarrika Bhuyan Vs. State of Assam

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Court : Guwahati

Decided On : May-10-2006

Judge : I.A. Ansari, J.

Appeal No. : Criminal Appeal No. 183 of 1999

Appellant : Dwarrika Bhuyan

Respondent : State of Assam

Disposition : Appeal allowed

Judgement :

I.A. Ansari, J.

1. By the judgment and order, dated 26.8.1999, passed, in Sessions Case No. 74(K)/1994, the learned Additional Sessions Judge, Kamrup, Guwahati, has convicted the accused-appellant under Section 376 IPC and sentenced him to undergo rigorous imprisonment for 3 (three) years and 3 (three) months with a fine of Rs. 1,000.00 (one thousand) and, In default of payment of fine, suffer rigorous imprisonment for a further period of 6 (six) months.

2. The case of the prosecution, as unfolded at the trial, may, in brief, be described, thus : The accused was the owner of a brickfield. The alleged victim (who is hereinafter referred to 'X') used to work as a labourer at the said brickfield. On the

day of the occurrence i.e., on 26.12.1992, the alleged victim, 'X' accompanied by PW 5, went, on finishing their work, to the office of the accused and while they were washing their hands and feet at the tube-well, in the courtyard, located at the back side of the said office, the accused asked 'X' (PW4), to find out if hot water was available in the kitchen-room. 'X' accordingly went to the kitchen-room and when she brought a glass of water to the accused, the accused kept the glass on the table, caught hold of the hands of the victim, 'X' (PW4), pushed her down to the bed and gagged her with a 'GAMOCHA' (a country towel) and forcibly had sexual intercourse with her. As the door as well as the windows of the said office were lying open, PW 5 peeped through windows to find out as to what was happening inside the said office and, on noticing, the accused having sexual intercourse with 'X' (PW 4), PW 5 went to their other co-labourers and informed them as to what was happening inside the office room and, on coming to know as to what was happening inside the office room, when the other labourers came there, the alleged victim, 'X', came out of the office room, but the accused remained inside the office-room. Three days thereafter, PW3 (i.e., the mother of victim, 'X'), lodged a written Ejahar with the police alleging to the effect, inter alia, that the accused had committed rape on her daughter, 'X' Based on this Ejahar and treating the same as the FIR, a case was registered against the accused under Section 376 IPC and, on completion of investigation, the police submitted accordingly a charge sheet against the accused.

3. To the charge framed under Section 376 IPC, at the trial, the accused pleaded not guilty.

4. In support of their case, the prosecution examined as many as eight witnesses. The accused was, then, examined under Section 313 Cr.P.C. and in his examination aforementioned, the accused denied that he had committed rape on 'X', the case of the defence being that of total denial. The defence also adduced evidence by examining three witnesses. Having found the accused guilty of the charge framed against him under Section 376 IPC, the learned trial court convicted him accordingly and passed sentence against him as mentioned hereinabove. Aggrieved by his conviction and the sentence passed against him, the accused has preferred the present appeal.

5. I have heard Mr. J.M. Choudhury, learned senior Counsel, appearing on behalf of the accused-appellant, and Mr. D. Das, learned Additional Public Prosecutor, Assam, appearing on behalf of the respondent.

6. While considering the present appeal, it may be noted, at the very outset, that according to PW 6, who is a doctor and who had examined the alleged victim, JT (PW 4), on 1.1.1993, he found as follows:

On genital examination : - pubic hairs, present, no foreign hairs noted.

Vulva - healthy,

Labia - apposed, healthy

Hymen - annular type, incomplete tear at 1 and 7 O' clock positions, healthy.

Vagina - healthy, admits little finger.

Cervix - healthy, retracted.

Discharge - nil.

A Swab from the vaginal forix taken and Smears are made on glass slides and examined in the laboratory, Smear does not show Spermatozoa and gonococci.

She is suggested to X-ray investigation 7.1.1993

Report of X-ray investigation received on 16.1.1993

Result: Iliac, Ischial tuberosity wrist joint.

Elbow joint, shoulder joint: Epiphyses of all the bones have united with the respective bones.

7. In the opinion of the doctor (PW 6), the physical, radiological and laboratory investigation indicated that the alleged victim 'X' was about 19 years old.

8. The findings of PW 6 and his opinion with regard to age of the alleged victim, 'X' (PW 4), were not disputed at the trial. This apart, in the face of the evidence on

record, as noted by PW 6, particularly, the fact that the epiphyses of all the bones stood already united with then respective parent bones, the opinion of PW 6 that PW 4 was, at the time of the alleged occurrence, above 18 years of age cannot be held incorrect. In fact, even 'X' (PW 4) has deposed, in her evidence, that her age was 18 years at the time of alleged occurrence.

9. Though there may be a marginal error of 2 (two) years in making assessment of age in medical science, the fact remains that the benefit of this uncertainty or possibility of error, if any, shall be extended to the defence.

10. Situated thus, this Court has to proceed on the premises that at the time of the alleged occurrence, PW 4 was not below the age of 18 years. Hence, the sexual intercourse, if any, with PW 4 with her consent would not have amounted to rape.

11. Bearing in mind the above predominant features of the present case, when I turn to the evidence of 'X' (PW 4), I notice that according to her evidence, on the day of the occurrence, at about 10.00/11.00 AM, on finishing work at the said brickfield, she, accompanied by PW 5, came to the office of the owner of the brickfield to take permission to go home and while she 'CX' and PW 5 were washing hands and feet at the tube-well in the courtyard, located at the back side of their office, the accused asked her (PW 4) to find out if there was warm water available inside the kitchen-room. It is in the evidence of PW 4 that when she went to the office, which consisted of 2 (two) rooms, 1 (one) of these rooms being used as a kitchen-room, and when she came out of the kitchen-room with a glass of water and went to the office-room, the accused took the glass of water from her hand, kept the same on the table, caught hold of her hand, gagged her (PW 4) with a 'GAMOCHA', (a country towel), threw her on the bed inside the said room and forcibly had sexual intercourse with her (PW 4). It is also in the evidence of PW 4 that as the accused had kept her mouth gagged with the help of a piece of 'GAMOCHA', she could not cry for help and though she tried to free herself, 1 he accused continued with his act of sexual intercourse with her (PW 4) for about half-an-hour and when PW 5 peeped through the windows, she (PW 5) witnessed the incident, PW 5 informed their co-labourers and when their co-labourers arrived at the office, she (PW 4) too came out of the office and informed her co-labourers

about the occurrence and after about 4 (four) days of the occurrence, her mother (PW 3) lodged an Ejahar with the police.

12. In her cross-examination, PW 4 has clarified that the said office room, where the alleged occurrence took place, had one door and two windows and that at the time, when the rape was committed on her, not only PW 5, but their other co-labourers were also present outside the said office room. It is also in the evidence of PW 4 that the accused removed her wearing apparels, made her completely naked and, then, had sexual intercourse with her. In fact, the further evidence of PW 4 is that the accused, after making her completely naked fondled with her body, kissed her and, then, got up on her and had sexual intercourse with her.

13. From the very description of the occurrence, which PW 4 has given, it is clear that the door as well as the windows of the office room were lying open at the time, when the alleged occurrence took place. PW 4 allegedly remained a victim of sexual assault for as long as half-an-hour and it was twice that the accused forcibly had sexual intercourse with her. Though it is the case of PW 4 that the accused had removed her under-wear, removed her clothes, fondled with her body and kissed her, she has not been able to explain as to why she did not raise any cry for help, when the accused was fondling with her breasts and kissing her, for, had PW 4 been struggling to get herself freed from the clutches of the accused, she would have been able to cry for help, when the accused was removing her clothes, fondling her body and kissing her all over her body. It is also significant to note that it is neither in the evidence of PW 4 nor in the evidence of any other witness that the wearing apparels of PW 4 were found torn or removed.

14. In the backdrop of what have been pointed out above, when I turn to the evidence of PW 5, I notice that according to the evidence of PW 5, she (PW 5) alongwith PW 4 ('X') came to the said office and when both of them were washing their hands and feet at the tube-well, accused asked PW 4 to get him a glass of warm water, PW 4 went to the kitchen-room to get a glass of warm water, the accused also followed her (PW 4) and when, for a long time, none of the said two persons, (i.e., the accused and PW 4) came out of the office room, she (PW 5) peeped through the open windows and found the accused having sexual

intercourse with PW 4.

15. A close scrutiny of the evidence of PW 5 reveals that when she peeped through the windows, she found that the wearing apparels of PW 4 had been pulled up, her breasts were open, the accused was on PW 4 and having sexual intercourse with her. It is in the evidence of PW 5 that on witnessing the occurrence, she went out and reported the occurrence to their other co-labourers, whereupon their co-labourers came to the office and, on their arrival there, PW 4 came out of the office, but the accused remained alone inside his office room. Contrary to the claim of PW 4 that on coming out of the office room, she complained to her co-labourers as to what the accused had done, PW 5 has, nowhere, deposed that PW 4 made any accusation that the accused forcibly had sexual intercourse with her or that PW 4 made any complaint against the accused anywhere. In fact, PW 4, as the evidence on record reflects, did not come out of the office room either crying or raising hallah. Though PW 4 alleged that the accused gagged her mouth with a piece of country towel so as to disable her (PW 4) from raising cries for help, there is absolut *y nothing in the evidence of PW 5, who is a witness to the alleged incident, to show that the accused had kept the mouth of PW 4 gagged, while having sexual intercourse with her. There is also no indication from the evidence of PW 5 that PW 4 was seen by her (PW 5) either struggling or offering resistance to the act of sexual intercourse, which the accused was seen having with PW 4.

16. In the face of the evidence given by PW 4 and PW 5, as analysed above, it is well neigh-impossible to infer that if the accused had sexual intercourse with PW 4, the said sexual intercourse was without her consent, particularly, when the windows and door of the office-room were, admittedly, lying open at the time, when the alleged occurrence took place and when PW 4 was not seen by PW 5 gagged or resisting the act of sexual intercourse or offering resistance thereto. The impression that the description of the occurrence given by PW 4 'CX' is unsafe to believe in or rely upon gets reinforced from the fact that according to PW 5 as well as PW 4 herself, she remained inside the said office room with the accused for about half-an-hour and though the windows and even the door of the office-room were lying open, no hue and cry was raised inside the office room.

17. Situated, thus, it is not possible, if I may reiterate, to hold, confidently and boldly, that the acts of sexual intercourse, which the accused allegedly had with PW 4, was against her will or without her consent.

18. While considering the present appeal, what needs to be borne in mind is that while it is true that a victim of sexual assault is not an accomplice and her evidence needs no corroboration from any kind of evidence, medical or otherwise, the fact remains that in order to enable a court to base, in a case of sexual assault, conviction of an accused on the sole testimony of the victim of assault, the court must, be satisfied that the victim testimony has withstood the test of cross-examination and inspires confidence of the court. If a victim's evidence is self-contradictory and/or inconsistent and when such a victim's evidence is also belied either by the medical evidence on record and/or surrounding circumstances and the court has no reason to disbelieve either the medical evidence or the surrounding circumstances, as reflected from the evidence on record, the shaken and bruised solitary testimony of an alleged victim of assault cannot be made the sole basis of conviction of the accused. In the case at hand, the evidence of the prosecutrix is full of self-contradictions and her evidence is belied by the evidence of her own companion, namely, PW 5 and also other evidence on record, as indicated hereinabove. In a situation, such as the present one, the conviction, which rests on the sole testimony of such a witness cannot be allowed to survive.

19. I have already pointed out above that according to the evidence on record, PW 4 was above the age of 18 years at the time of the alleged occurrence. Hence, the sexual intercourse, which the accused allegedly had with PW 4, having not been proved, convincingly and beyond doubt, to be without her consent or against her will, no case for sustaining a charge under Section 376 IPC can be said to have been made out against the accused-appellant.

20. Because of what have been discussed and pointed out above, I am of the firm view that the evidence on record was grossly inadequate to hold, confidently and beyond doubt, that the accused forcibly had sexual intercourse with the alleged victim 'X' (PW 4) and/or committed offence of rape on her. At any rate, in the facts and circumstances of the present case, the accused-appellant ought to have

accorded, at least, benefit of doubt.

21. In the result and for the forgoing reasons, this appeal is allowed. The impugned judgment and order, dated 26.8.1999, shall accordingly stand set aside. The accused-appellant is held not guilty of offence under Section 376 IPC and is hereby acquitted of the same under benefit of doubt.

22. The bail bond of the accused-appellant is hereby cancelled and his sureties are discharged.

23. With the above observations and directions, this appeal shall stand disposed of.

24. Send back the LCRs.

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