

IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE No. 2,
SONITPUR, TEZPUR

Criminal Appeal No. 6 (S-1) of 2014

"X" (name withheld)
W/O Late Tikaram Moinali
Ward No. 7, Dhekiajuli Town
PO and PS and Mouza: Dhekiajuli
Dist: Sonitpur
Assam

... Appellant/Victim

-vs-

Sri Basudev Moinali
S/O Late Bishnu Prasad Moinal
Ward No. 6, Dhekiajuli Town
PO and PS and Mouza: Dhekiajuli
Dist: Sonitpur Assam

... Respondent

Appearances

For the Appellant: Sri Krishna Sharma
Sri A.K.Mahanta
Smt A.Debi

For the Respondent: Smt Dulumoni Sinha
Sri Rupjyoti Baruah
... Advocates

Present
Ms. A. Ajitsaria, AJS,
Addl Sessions Judge-2, Sonitpur, Tezpur

Date of Hearing:- 6.1.2015, 20.4.2015

Date of Judgment: 5.5.2015

JUDGMENT

1. Aggrieved by the judgment of acquittal dated 30.7.2013, passed by the Learned Assistant Sessions Judge, Soniptur, Tezpur passed in Sessions Case No. 178/2012 arising out of GR Case No. 1029/2010, the appellant/victim (name withheld) has preferred the instant appeal [Crl Appeal No. 6 (S-1) of 2014].

2. Notice was issued to the Respondent No.1, Sri Basudev Moinali who was acquitted by the judgment under challenge. Pursuant to the same, the Respondent No.1 has entered appearance and participated in the proceeding.

3. Facts of the case, in brief is that on 5.6.2010, the Appellant lodged an ejahar before the O/C, Tezpur P.S. stating inter alia, that on 5-6-2010 at about 7.40 PM, the accused/Respondent entered into her house and forcibly tried to commit rape upon her. It was further stated that when she tried to save herself, the Respondent assaulted and injured her. The accused/Respondent took the kerosene bottle lying in her house and tried to pour the same on her and light fire. The Appellant stated that she escaped from there and informed Smt. Sushila Devi , who immediately came there and took her to the police station. The appellant stated that her husband had died 7 months prior to the occurrence and thereafter the Respondent was trying to commit rape on her and he had been threatening that he would take away her husband's property as she did not have any son. The said FIR was registered as Dhekiajuli PS Case No. 196 of 2010.

4. In the trial before the Learned Assistant Sessions Judge, Sonitpur, Tezpur charge u/s 488/376/511 of I.P.C was framed against the appellant, to which he pleaded not guilty.

5. During the course of trial, prosecution examined as many as seven witnesses whereas the accused/appellant adduced none. Upon conclusion of trial and hearing the parties, the Learned Assistant Sessions Judge, Sonitpur, Tezpur passed the judgment impugned in the present appeal.

6. The grounds, inter alia, on which the appellant has assailed the judgment dated 4.3.2014 passed by the Learned Chief Judicial Magistrate, Sonitpur, Tezpur are that the material contradictions in the prosecution evidence was not taken into consideration, that the cardinal principle of criminal jurisprudence that the burden is always on the prosecution and it never shifts was completely overlooked while passing the impugned conviction.

7. I have perused the records, the memorandum of appeal and heard the Learned Counsel for the appellant and the Learned Public Prosecutor. Whereas

the Learned Counsel for the Appellant reiterated the grounds urged in the Memorandum of appeal, the Learned Addl Public Prosecutor supported the judgment and submitted that the same does not call for any interference.

8. In order to appreciate the contentions raised, let us first discuss the evidences on record.

9. PW 1, "X" (Appellant/victim) deposed that the Respondent /Basudev Moinali was her brother-in-law. On 5-6-2010, in the evening at about 7.45 PM, the Respondent after consuming liquor came to her house when she was alone. PW 1 stated that first the Respondent/accused scolded her in foul language and made indecent advances at her. Then the Respondent/accused threw her on the bed and he tried to do 'beya kaam' with her. The Respondent opened his cloth, she tried to save herself and come out but the Respondent again caught her and again tried the same. PW 1 stated that when she created hue and cry, the accused Respondent beat her up/assaulted her. PW 1 stated that when she said that she would lodge a case, the accused Respondent took the kerosene bottle lying below the table and poured the same on her and she in order to save herself, came out and called Sushila Devi over phone. PW 1 stated that the accused Respondent then fled. She and Sushila went to the police station and lodged FIR (Ext 1). PW 1 stated that she was sent for medical examination and her statement was recorded by the Ld Magistrate (Ext 2).

10. During cross examination PW 1 stated that her in-laws had 19 children and her husband and the accused were born of the same mother. PW 1 stated that the house of the accused Respondent was situated on the opposite side of her house and Ghanshyam, Sreeram, Radheshyam and others resided near their house. PW 1 stated that she had three daughters, out of which two were married. PW 1 stated that her husband died about three years back. PW 1 stated that the accused Respondent was in service. House of Sushila Devi was about 1 mile away, when she shouted, none came and she had not seen her neighbours at the place of occurrence. PW 1 stated that she knew Surendra Borthakur, who worked in an NGO and she had money transactions with him. PW 1 stated that since Surendra Borthakur had visiting terms with her, her

family members did not like the same. PW 1 stated that her husband had served as "Mandal" and after his death she had received the pension amount of Rs.2—2 ½ lakh . Out of the said amount, she had given some amount to Surendra Borthakur but her daughter had not liked the same. PW 1 stated that she had given the clothes on which kerosene was poured. PW 1 stated that the doctor had seen her injuries and that there was no bleeding out of the injuries. PW 1 further stated that there are four rooms in her house, the accused tried to commit rape on her in the room which was situated in the middle. PW 1 stated that she had not seen whether any of the relatives had visited the house of the accused. PW 1 stated that police had the kerosene oil. PW 1 stated that her daughter Sunita Sarma had filed a case against her and Sushila for alleging assault by them. PW 1 stated that on the date of occurrence, her younger daughter was playing in the house of the accused Respondent. PW 1 stated that she knew one Nasir Hussain. PW 1 stated the accused threw her on the bed and had tried to commit rape upon her. PW 1 stated that he tore her nighty and she had stated the same before the IO. PW 1 stated that she had stated before the police that the accused Respondent had put his hand on her chest and had opened her clothes. PW 1 stated that at the time of occurrence, the elder son of the accused Respondent, namely, Bishal was about 13-14 years of age. PW 1 stated that she had not stated before the IO and the Ld Magistrate that the accused had come alone. PW 1 stated that the police did not visit her house. PW 1 stated that the accused was there for about 10 minutes and that she had not stated about the occurrence to the wife of the accused, who had gone to her house. PW 1 stated that she could not say whether any complaint was lodged by the Dhekiajuli Bihator Mahila Samity against her and Sushila. PW 1 stated that she did not know whether any case was filed by the family of Surendra Borthakur against her. PW 1 stated that she could not say whether any person had given a complaint against her in the police station. PW 1 denied that there was a meeting in her house on the date of occurrence with regard to land and money, that the accused Respondent did not enter her house, that Bishal was there with the accused at the relevant time, that since the accused Respondent had stopped her from beating her daughter Sunita, she had therefore lodged a false complaint against the accused Respondent.

11. PW 2, Sushila Devi deposed that occurrence was of 2 years back, at about 8 PM, "X" had called her to her house, where she went along with her husband. PW 2 stated that "X" informed her that the accused Respondent tried to commit rape on her and had assaulted her. Later they went to the police station and lodged FIR. PW 2 stated that she had seen injuries on the body of "X" including her head and back.

12. During cross-examination, PW 2 stated and that X was known to her since long. X's daughter had given a case against her and X. PW 2 stated that she had not seen anyone in the house of X. PW 2 stated that neighbours resided near the house of X. PW 2 stated that Nasir Hussain had gone with them, he had reached the place of occurrence before them. PW 2 further stated that she had not stated before the police that she had seen injuries on the body of X. PW 2 stated that police had come to the place of occurrence.

13. PW 3, Sunita Moinali, daughter of X stated that the accused Respondent was her uncle/ khura. Occurrence was of 8.5.2010, there was a discussion with regard to domestic matters in the house and no incident had taken place.

14. In cross examination PW 3 stated that aunt/khuri, uncle/khura and khuri's sister were there in the discussion. PW 3 stated that her mother scolded her and she went and called her uncle/the accused respondent. PW 3 stated that she was pregnant at that time. PW 3 stated that the accused respondent did not try to commit rape on her mother. PW 3 stated that they did not like her mother's relation with Surendra Borthakur. PW 3 stated that the accused respondent went away from the verandah. PW 3 stated that on being asked by her mother to leave, she too had left. PW 3 stated that she had given a case against her mother and Sushila and her mother too lodged a case against khura/uncle.

15. PW 4, Nasir Hussain deposed that both the accused and the complainant were known to him. PW 4 stated that occurrence was of the first week of June, 2010. At about 7.30 PM, X informed him over phone and she had been beaten up. PW 4 stated that he then went to the police station with X

and he wrote the FIR (Ext 1) as stated to him by X and while writing, he came to know about the occurrence.

16. In cross examination, PW 4 stated that he had known X since 3-4 years but he had not visited her house. PW 4 stated that he was in Dhekiajuli Town about 8 km from the house of X, when he received X's phone. PW 4 denied that he had not stated before the IO that the FIR was written by him on the same being narrated by X, that X did not inform him over phone and that since he had friendly relationship with X, he had deposed falsely.

17. PW 5, Tapu Paul deposed that occurrence was of 1-2 years back. One day when he had gone to roam about, he met X and she asked him to say that the accused Respondent had committed rape upon her. On hearing the same, he responded by saying that he could not say the same as he had not seen himself. In cross examination PW 5 stated that X had told him to say that he had seen the occurrence but he had declined as he had not witnessed the occurrence.

18. PW 6, Chittaranjan Paul deposed that on 5.6.2010 he was working as ASI in Dhekiajuli PS. On that day the informant filed an ejahar and the same was registered and endorsed to him for investigation. Accordingly, he went to the place of occurrence and prepared a sketch map (Ext 3). PW 6 stated that he recorded the statement of the complainant and of other witnesses in the police station. PW 6 stated that X was sent for medical examination and produced before the Magistrate for recording of her statement. PW 6 stated that he collected the medical report and after preliminary investigation, he handed over the case dairy. PW 6 stated that subsequently, charge sheet (Ext 4) was submitted by the OC Dhekiajuli PS, Sri Dharanidhar Deka against the accused u/s 448/376/511 IPC.

19. In cross-examination, PW 6 stated that date of occurrence was 5-6-2010 and on the same day, medical examination of the victim was conducted. On 7-6-2010 the victim was produced before the Court for recording of her statement. PW 6 stated that as per the sketch map, the residents of Ram

Narayan Prasad, Arun Bastow was situated near the place of occurrence and there was a rice mill of Hiralal and a high school nearby. PW 6 stated that he visited the place of occurrence on 5-6-2010 at about 9 PM. PW 6 stated that he did not record the statement of the neighbours. PW 6 stated that Sushila Devi resided in Ward No.5, X resided in Ward No.7 of Dhekiajuli and Nazir Hussain resided in No.2 Rangapara under Dhekiajuli PS. PW 6 stated that X had not stated before him that the accused had touched her chest and opened her clothes, that the accused had come alone in her house. PW 6 denied that he had not visited the place of occurrence there and then. PW 6 stated that Nazir's statement was recorded on the date of occurrence and that Nazir had not stated before him that on X having asked him to write the FIR, he wrote the same as stated by her. PW 6 stated that he had not seized any clothes in connection with the instant case.

20. PW 7, Dr. Jahanara Begum deposed that on 8-6-2010 she examined X in connection with Dhekiajuli PS Case No. 196 of 2010 and on such examination no mark of injury or violence was seen on the body or private parts. PW 7 stated that her inference was that the person under examination was of about 38 years of age and had no positive findings of sexual assault. PW 7 placed on record the medical examination report as Ext 1. In the Cross examination, P.W 7 stated that she had not seen any injury or violence on the body or the private parts.

21. On appreciation of evidence, as narrated herein above, the Ld Asstt Sessions Judge acquitted the accused Respondent by judgment dated 30-7-13 passed in Sessions Case No.178/12 (GR Case No. 1029/2010) holding that the prosecution had failed to prove the charge u/s 448/376/511 IPC beyond reasonable doubt.

22. The instant appeal has been preferred by the complainant/victim against the judgment of acquittal on amongst the grounds that the judgment was passed on materials which are not on record, that omissions of the prosecution rather than the evidence brought on record by the prosecution was given weightage, that the norm of pragmatic approach in cases against woman

was not followed while delivering the judgment, that testimony of the victim was discarded for want of corroboration which is not required in such cases, the accused did not make any attempt to justify as to why allegedly false case was filed against him by the victim, the sole testimony of the victim ought to have been accepted, that minor contradictions and omissions ought not to have been considered, that in cross examination of X it was not even suggested to her that the accused Respondent did not physically or sexually assaulted her, that the victim being a widow in distress deserved sympathetic approach.

23. Ld Counsel for the Appellant while pressing the grounds in the memo of appeal strenuously submitted that the impugned judgment is liable to be interfered with whereas the Ld Counsel for the accused Respondent has submitted that no interference is called for.

24. This Court has given its thoughtful consideration to the arguments advanced. Though in cases u/s 376 IPC no corroboration of the evidence of the victim is required, nevertheless, the Court has to ascertain whether the prosecutrix is trustworthy or not. Let us therefore re-analyse whether in the instant case X is trustworthy and her evidence was/is sufficient to bring home the charge against the accused Respondent.

24. It is the specific case of the prosecution that the accused Respondent committed trespass in the dwelling house of X on 5-6-2010 and thereafter attempted to commit rape upon X. The appellant/alleged victim in her evidence categorically stated that the accused Respondent came in an aberrated condition, threw her on the bed, opened his clothes and tried to commit rape on her. It has been further stated by X that when she created "hulla", the accused Respondent poured kerosene on her and she somehow saved herself and came out and called Sushila; the accused Respondent fled, Sushila came and they went to the police station and lodged FIR. X goes on to say that police had seen injuries on her body and her wearings were given. It is pertinent to mention herein that PW 2, Sushila also stated that she saw injuries on the body of the prosecutrix. However, the medical/injury report of the prosecutrix does not suggest any injuries be it on any part of the body, private

or otherwise. Again, although the prosecutrix deposed that kerosene was poured over her body by the accused Respondent, there is no evidence to support the same, neither kerosene nor clothes soaked in kerosene having been seized. The latter cannot be said to be minor omissions, as is sought to be made out by the defence.

25. Again, PW 3, daughter of PW 1 has categorically stated that the accused Respondent came to their house on being called by her as her mother /the prosecutrix scolded her. PW 3 further stated that only discussion with regard to land and money matters had been held and no incident as stated by her mother occurred. The said witness has therefore completely denied any occurrence.

26. Again it is seen that PW 1 stated that she raised hue and cry. However, it is on record that none of the neighbours residing nearby came on hearing her raise hulla. Instead PW 2, Sushila who resided in another Ward came, on being called by PW 1. Here too, the prosecutrix is totally silent about Sushila being accompanied by her husband to the place of occurrence and the police station, whereas PW 2 stated that they went to the police station, where Nazir/PW 4 was already present. Husband of PW 2, is conspicuously missing from the entire scene, so much so that, neither the IO has uttered a whisper with regard to the same.

27. It has come on record that there was animosity between the prosecutrix and her daughter PW 3, Sunita with regard to money and land matters. It is also on record that PW 3 called her uncle/the accused respondent when the prosecutrix scolded her. The latter had lodged a complaint against the prosecutrix and Sushila and the prosecutrix had lodged FIR against the accused respondent.

28. From a close scrutiny of the evidence of the prosecutrix it is seen that the prosecutrix at each step, from the FIR, to her statement under section 164 CrPC and then before the Ld trial Court had tried to improve her case, which led to exaggerations leading to material inconsistencies, affecting her veracity.

The inconsistencies as narrated in the forgoing paragraph cannot be termed as minor, in as much as, it affects the core of the case. The evidence of the prosecutrix clearly appears to be infirm and not trustworthy. The totality of the circumstances appearing on the record of the case discloses that the prosecutrix had a strong motive to falsely involve the accused respondent, in as much as, the accused respondent appeared to be supporting the daughter of the prosecutrix (in money matters) and hence the Trial Court rightly hesitated in accepting her evidence. The facts and circumstances of the case did not make it a fit case for pronouncement of verdict of guilty against the accused Respondent, solely on the basis of the evidence of the prosecutrix. On the other count too, there was no corroboration either of medical evidence or from any other independent witnesses.

29. Hence, in view of the same, this Court is of the considered view that the trial Court rightly disbelieved the evidence of the prosecutrix and declined to hold the accused Respondent guilty on the basis of the sole evidence of the prosecutrix. The prosecution not having been able to prove the essential ingredients of the charge against the accused respondent, as elaborately dealt with in the impugned judgment, the Ld trial Court rightly acquitted the accused respondent of the charge u/s 448/396/511 IPC. This Court finds no infirmity in the said acquittal.

30. In the result, this Court finds the appeal to be devoid of merit and accordingly, the appeal is dismissed.

31. Send back the case record to the Court of the Ld Asstt Sessions Judge, Sonitpur, Tezpur, along with a copy of this judgment.

Given under my hand and seal of the Court on this the 5th day of May, 2015.

Additional Sessions Judge No. 2,
Sonitpur, Tezpur.