

**IN THE COURT OF THE ADDITIONAL SESSIONS JUDGE,
SONITPUR AT TEZPUR**

PRESENT : **Sri S. Das**
Additional Sessions Judge
Sonitpur, Tezpur

JUDGMENT IN SESSIONS CASE NO. 230 OF 2009
(Arising out of G.R. Case No. 1801 of 2009)

State of Assam

– Versus –

1. Sri Bhagirath Karmakar
S/O- Late Gonesh Karmakar
Resident of – Udmari Barjargaon
P.S. Tezpur.
Dist- Sonitpur, Assam.

2. Sri Dipak Karmakar
S/O- Late Kanai Karmakar,
Resident of – Udmari Barjargaon
P.S. Tezpur.
Dist- Sonitpur, Assam.

A P P E A R A N C E

For the State : Smt. R. Chakravarty
Addl. Public Prosecutor
Sonitpur District

For the Accused : Sri Bipin Kotoki, Advocate.

Date of Evidence : 11-03-2010, 13-12-2010,
21-05-2011, 21-05-2011,
07-07-2011, 07-07-2011,
07-07-2011, 09-04-2012,
31-07-2013, 28-10-2014,

11/5/15
Additional Sessions Judge
Sonitpur, Assam

Date of Argument : 28-04-2015

Date of Judgment : 11-05-2015

J U D G E M E N T

Brief facts:

Prosecution case is brief is that on 29-09-09, complainant Manoj Karmakar lodged an FIR with Salonibari Police Out Post under Tezpur Police Station alleging interalea that on 26-09-2009 at about 8 p.m. while his wife was returning home from a nearby shop belonging to one Moina, accused Bhagirath Karmakar and Dipak Karmakar, lifted her bodily from the road and by gagging her mouth forcibly took her to Bhodmari L.P. School and also committed rape on her inside the Angadbadi Office of the said school.

On receipt of ejahar Salonibari police made G.D Entry, vide no. 575 dated 29-09-2009 and forwarded the ejahar to O.C. Tezpur to register a case. Accordingly Tezpur P.S. Case no. 926/09 u/s 376 (g) I.P.C was registered. Police started investigation and on completion of investigation submitted charge sheet against the above named two accused persons u/s 376 (g).

The corresponding G.R case no. 1801/09 came up before Ld. C.J.M Sonitpur. Accordingly process was issued and on appearance of the accused the Ld. C.J.M furnished necessary copies to the accused and committed the case to the court of Sessions Judge and then the case was transferred to this court for trial.

On receipt of the case record and on appearance of the accused persons this court considered the materials on record and upon hearing both the sides framed charge u/s 376 (2) (g) IPC and read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

Prosecution in order to bring home the charge against the accused persons examined ten witnesses in all. On conclusion of prosecution evidence the accused persons were examined u/s 313 Cr.P.C. The circumstances appearing in the

11/5/15
 Additional Sessions Judge
 Sonitpur, Assam

evidence against the accused were put to accused and necessary questions were also put to him. The accused totally denied the allegations against him. However, defence adduced no evidence.

POINT FOR DETERMINATION:

That, on 26-09-09 at about 8 p.m. you in furtherance of your common intention committed rape on Smti. Munni Karmakar and thereby committed an offence punishable U/S 376 (2) (g) of the Indian Penal Code.

I have gone through the evident on record and heard arguments of both sides.

DISCUSSION, DECISION AND REASONS THEREOF:

PW 1 is victim Smti. XY. Her evidence is that the accused Bhagairath Karmakar is her maternal uncle and accused Dipak Karmakar is her paternal uncle. According to PW 1 the occurrence took place during Astomi of Durga Puja in the year 2010 at about 7.30/ 8 p.m. On that day she had gone to one Moina's shop to buy match box. While returning from the shop on the road near a culvert few yards from the shop the accused persons lifted her bodily by gagging her mouth and took her to veranda of Angadbadi School. Then accused Dipak removed her clothes, closed her mouth with cloth and committed rape on her. Thereafter, Bhagirah Krmakar also committed rape on her. One Patali, aunt of the victim saw the occurrence and the accused persons fled away. Said Patali informed her husband about the incident. Her husband came and took her (victim) home. Her husband lodged FIR in the police station. Police came to the P.O. and got the victim medically examined. Police also produced her and she gave her statement before magistrate.

PW 2 is Manoj Karmakar, the complainant. His evidence is that the victim is his wife. On 26-09-09 at about 8 p.m. his wife had gone to buy match box from a nearby shop. While she was returning home the accused persons on the road lifted her bodily and took her to Angadbadi school and both of them committed rape on her. His wife became senseless and his mother took her home. Next day the victim was medically examined by doctor. On 29-09-09 he lodged FIR in police station. He has also deposed that as he was busy in the treatment of his wife the lodging of FIR was deleyd . Ext-1 is FIR, 1(1) is his signature.

f-115/115
 Addl. Sessions Judge
 Sonitpur, Assam

PW 3 is Smti Bohagi Karmakar, mother-in-law of the victim. Her evidence is that on the date of occurrence at about 8 p.m. the victim had gone to buy match box from the shop belonging to one Moina. She was at home and she got information from one Patali Digha that in the varena of Anganbadi school her daughter-in-law was lying in senseless condition. She along with Patali and one Rajib Digha took the victim home. In the morning the victim regained her senses. On being asked the victim told them that accused persons in the dock committed rape on her in the Anganbadi school premises. When her husband came to know about the occurrence he lodged ejarah in the police station.

PW 4 is Smti. Patali Bigha. She identified the accused persons in the dock. She has deposed that the occurrence took place one day during Durga Puja at about 8 p.m. She was at home. Some people were making noise that somebody was lying near her house. She came out and saw the victim and informed PW 2. Then PW 2 along with others took her home. On being asked the victim told them that accused persons in the dock committed rape on her.

PW 5, PW 6 and PW 7 turned hostile. However it reveals from the cross of these PWs by prosecution that there are not eye witnesses.

PW 8 is Dr(Mrs) Jahanara Begum. Her evidence is that on 30-09-2009, she was at Kanaklata Civil Hospital, Tezpur as M & H.O-1. On that day she has examined the victim Munnii Karmakar aged about 21 years, W/O Sri Monoj Karmakar of Udmari Borjhargaon under Tezpur Police Station on police requisition in connection with Tezpur Police Case No. 926/09, under Section 376(G) IPC on being escorted by C/170 Parbhawati Narzary. On examination she has found the following :

The woman of about 22/23 years of age has multiple bruise marks all over her body. On teeth bite mark on her left forearm. No injury mark on her private part. Teeth bite mark is 2' x 1/2' x 1/2". The maximum size of bruise of both arms are 4" x 4" x 4".

Vaginal smear is sent to the laboratory for determination of presence of spermatozoa. But, no report has been received till date.

8-11-15/15
 Addl. ...
 Samantapur ...

Report of X-ray:

Report is enclosed herewith. The age of the lady is above 18 years.

Inferences:

1. The lady I above 18 years of age has some positive findings of some kind of sexual or physical assault on her.

Ext 2 is the medical report and Ext- 2(1) is her signature. Ext- 3 is the X-ray report. Ext.3(1) is the signature of Dr. P.K. Barman, Radiologist, which she know.

PW 9 is Sri Kulendra Bharali. His evidence is that on 29-09-2009, he was posted as In-charge, Salonibari Police Out Post under Tezpur Police Station. On that day, he received a written ejahar from one Manoj Karmakar and he made a G.D entry and forwarded the ejahar for registering a case to the Sadar Police Station. In the meantime, he entrusted ASI L.P. Lahon to start investigation of the case.

Ext- 1 is the ejahar. Ext- 1(2) is his signature with note. Ext-1(3) is the signature of the O.C., Tezpur Police Station, Sri Mahendra Nath Saikia.

The Investigation Officer Lakshmi Prasad Lahon expired about one year back.

After completion of the investigation by L.P. Lahon, he handed over the case diary to him and he submitted the charge sheet. During investigation, S.I. Lahon visited the place of occurrence, recorded the evidence of the witnesses and also recorded the statement of the victim u/s 164 Cr.P.C. and he conducted her medical examination and also prepared the sketch map of the place of occurrence and during investigation of the I.O. Lahon, the accused was arrested.

Ext- 4 is the sketch map of occurrence. Ext- 4 (1) is the signature of L.P. Lahon, which he know.

Subsequently, finding sufficient materials in the case dairy, he submitted charge sheet against the accused Bhagirath Karmakar and Dipak Karmakar @ Lengtu u/s 376 (g) IPC.

Ext- 5 is the charge sheet where Ext-5 (1) is his signature.

PW 10 is Smt. Mousumi De. Her evidence is that on 30-09-2009, she was posted as S.D.J.M., Tezpur. On that day, on being endorsed by C.J.M. for recording of statement of witness Smt. Muni Karmakar u/s 164 Cr.P.C. She has recorded her statement u/s 164 Cr.P.C. She has been identified and escorted by constable Md. Idrish Ali, No. 197 of Tezpur P.S. After recording the statement she put

8/11/15
Sd/-
Sd/-

her signature and also obtained the thumb impression of Smt. Muni Karmakar and accordingly she was discharged. Smt. Muni Karmakar, aged 21 years and she is the wife of Sri Manoj Karmakar.

PW 1 also in her statement u/s 164 Cr.P.C. stated the accused persons committed rape on her.

APPRECIATION OF EVIDENCE:

From the discussion of the evidence on record it appears that PW 1, 2, 3 and 4 have in their examination in chief stated that the occurrence took place on a day during Durga Puja at about 8 p.m. From the FIR as well as evidence of PW, complainant it appears that the occurrence took place on 26-09-2009. All the aforesaid PWs have stated that on the date of occurrence at about 8 p.m while the victim was returning home a nearby shop the accused persons lifted her bodily and gagged her mouth and took her to nearby Anganbadi School and committed rape on the veranda of the said school.

PW 1 the victim in her evidence on oath before the court stated that the accused persons Bhagirath Karmakar and Dipak Karmakar committed rape on her one after another. She also stated that the accused persons removed her clothes before committing rape. Further she stated that they gagged her mouth with clothes. In cross examination she stated that she could not raise hue and cry as the accused persons tied/gagged her mouth with cloth. Further she stated that her clothes were stained due to ejaculation of semen from the penis of the accused person and was also stained with blood. She also stated that on the next day police visited her house and she showed the said clothes to police. Further she stated that on the very next day of the occurrence doctor examined her.

PW 1 the victim also stated that PW 4 Smti. Patali Digha came to the P.O. and on seeing her the accused fled away from the scene.

Let me now scrutinise the evidence of victim as well as PW 1, PW 2, PW 3 and PW 4. Because prosecution relies upon the evidence of these four PWs. So far as evidence of PW 2, the complainant is concerned we find that he lodged the ejahar two days after the occurrence and he explained that he could not promptly file ejahar as he was busy in the treatment of his wife. However, there is absolutely nothing on record

fms/115
1001-2009-10003
Sonit 2009/10003

near the shop and her house and such an occurrence would not be possible. It is further contended that the victim with intent to prove her point falsely stated that she produced/showed her blood/semen stained clothes to police. Further it is contended that the victim did speak that she received any teeth bite.

It is also submitted that the delay in lodging FIR has not been satisfactorily explained and this creates doubt regarding occurrence of the alleged incident.

I have given my anxious thought to all the material facts and evidence on record. I find that the prosecution evidence particularly the evidence of PW 1 does not inspire confidence. There is material contradictions as regards evidence of PW 1 and PW 4. The complainant though mentioned in the ejahar that he was busy in treatment of his wife, there is nothing on record to show that the victim was treated anywhere before 30-09-2009. I am very much conscious about the gravity of the case. However, in the absence of plausible explanation regarding delay in lodging F.I.R I am constrained to come to the conclusion that the prosecution evidence creates doubt as to the alleged offence.

Here in the instant case we find that the Hon'ble G.H.C. in the case of **JOHAN TIRKI Vs. STATE OF ASSAM 376 (2) (g)** Gang rape, in a similar nature of case disbelieve the prosecution version/ explanation given by prosecution witnesses regarding delay and other circumstances as follows :

S."376 (2) (g) – FIR lodged after three days of the incident – Delay explained by stating that the family of the victim approached the Father of the local Church who assured them that he would settle the matter by holding village meeting – Since nothing happened, FIR was lodged – Father of the local Church not produced as a witness – Victim medically examined after three days – No sign of any injury mark over any part of her body – Laboratory examination of the vaginal swab of the victim did not indicate presence of spermatozoa – No medical evidence of vaginal intercourse within three days of the medical examination – None of the accused were medically examined – Investigating Officer who completed the investigation and submitted the charge sheet not examined – Residential houses and market in the vicinity of the place of occurrence – Play day was there in the garden where the incident occurred – Highly improbable that there could have been a sexual assault by three persons on an adult women when persons would be present in the near vicinity in sizeable numbers – Charge against the accused persons not proved beyond reasonable doubt – Conviction and sentence set aside."

11-5-15
Addl. ...
Sonitpur, ...

In (Supra) in Para 42 the Hon'ble High Court also referred as follows :

42. The Hon'ble Supreme Court in the case of **Sadashiv Ramrao Hadbe V. State of Maharashtra and Another; (2006) 10 SCC 92** held as follows :

"It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The court shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen."

Here I may also refer to the observation made in the case of Chandan Muhuri & Anr V. State of Tripura reported in 2010 CRI.L.J. 4566 wherein it is held – 'In a criminal case, when the court has to appreciate the evidence of the witnesses, the Court is also duty bound to keep in mind the human psychology and behavioural probability of a witness. Particularly the conduct. If the evidence of the prosecutrix does not prima facia, inspire confidence of the court, then the court should not pass an order of conviction only on their ground that normally the prosecutrix does not implicate an innocent persons.'

In the case in hand I find that the evidence of prosecution does not inspire confidence in the facts and circumstances of the case. There is vital contradictions in the evidence of PWs. Moreover, prosecution has totally failed to explain the delay of 2 days.

It is not the case that the husband of the victim was away from home which is why there was delay in lodging FIR.

The failure to explain the delay in a satisfactory manner would lead us to come to conclusion that the story narrated by prosecution side is after thought. In my considered opinion though a doubt is created as to the occurrence it cannot take the place of proof.

8/11/15

In view of the above I find that prosecution has failed prove the charge U/S 376 (2) (g) IPC against the accused persons beyond all reasonable doubts.

I find the accused persons Bhagirath Karmakar and Dipak Karmakar not guilty U/S 376 (2) (g) IPC. Accordingly they are acquitted. Set them at liberty forthwith.

Given under my hand and seal this 11th day of May 2015.

(S. DAS) 11-5-15
Additional District & Sessions Judge,
Sonitpur, Tezpur