

ABBAS AHMAD CHOUDHARY
v.
STATE OF ASSAM
(Criminal Appeal No. 951 of 2004)

NOVEMBER 25, 2009

[HARJIT SINGH BEDI AND J.M. PANCHAL, JJ.]

Penal Code, 1860:

ss. 376/34 and 336/34 – Evidence of prosecutrix – Out of three accused two convicted and sentenced as the third remained absconding – Appeal of convicts dismissed by High Court – HELD: In a matter of rape, though statement of prosecutrix must be given primary consideration, but at the same time the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully – Prosecutrix in her earlier statement has not attributed the offences of rape and kidnapping to one of the appellants – Therefore, in the light of contradictions, some doubt is created with regard to his involvement – He is accordingly acquitted – As regards the other appellant, statements of the prosecutrix and other witnesses are categoric – Prosecutrix clearly stated that she had been kidnapped and raped by this accused and the absconding accused – His appeal is, therefore, dismissed – Evidence.

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.951 of 2004.

From the Judgment & Order dated 26.3.2004 of the High Court of Gauhati in Criminal Appeal No. 199 of 2003.

WITH

Crl. A. No. 477 of 2005.

* Judgment Recd. on 10.2.2010 869

A Shakeel Ahmed, Surya Kant and Ng. Jr. Luwang (for Corporate Law Group) for the appearing parties.

The following Order of the Court was delivered

ORDER

B 1. These two appeals by way of special leave arise out of the judgment of the High Court of Gauhati dated 26th March, 2004 whereby the two appellants have been convicted and sentenced to various terms of imprisonment and fine for offences punishable under Sections 376/34 and 336/34 of the Indian Penal Code.

2. The facts of the case are as under:-

D 2.1. At about 8:00p.m., on the 15th September, 1997, the accused-appellants Md. Mizazul Haq and Abbas Ahmad Choudhury and one Ranju Das (absconder) took up the prosecutrix and drove her in a Maruti vehicle to the Jalalpur Tea Estate after gagging her mouth. She was also raped by the three of them whereas the absconder also removed a sum of Rs. 40/- from her. An FIR was lodged at 10:30a.m. on 16th September, 1997, by P.W. 7 Safaruddin, the maternal uncle of the victim and a case was duly registered. On the completion of the investigation the appellants were charged fro the aforementioned offences and as they denied the charges, they were brought to trial. The trial court relying on the evidence of F P.W. 6 prosecutrix as also the medical evidence of P.W. 8 and the statements of P.W. 5 - Constable Ranjit Dutta who had apprehended the appellants and the prosecutrix on the evening of 15th September, 1997 and taken them to the police station as also the Investigating Officer Dhiresh Chadnra Nath - P.W. G 9 convicted the appellants as already indicated above. The argument raised on behalf of the appellants that the prosecutrix was about 16 years of age was repelled on the basis of the statement of P.W. 8 - Dr. Homeshwar Sharma who deposed that she was between 13 and 15 years of age on the date of H her medical examination i.e. 17th September, 1997. The

additional fact urged on behalf of the appellants that the medical examination had not revealed any trace of recent sexual intercourse to corroborate the allegation of rape was also repelled by observing that the said medical examination had been carried out after 48 hours or so of the rape and the signs thereof would have disappeared by the passage of time. The matter was thereafter taken in appeal before the High Court by the two appellants. The appeal too was dismissed as indicated above. It is in this situation that the matter is before us.

3. We have heard Mr. Shakeel Ahmed for the appellant - Abbas Ahmad Choudhary and Mr. Surya Kant, the learned Amicus Curiae for the co-accused Md. Mizazul Haq. We are of the opinion that the statements of the prosecutrix - P.W. 6, the constable - P.W. 5 and the Investigating Officer - P.W. 9 are categoric insofar as the presence of Md. Mizazul Haq is concerned. Even in her statement recorded under Section 164 of the Cr.P.C. by the Magistrate on 17th September, 1997, the prosecutrix had clearly stated that she had been kidnapped and then raped by Md. Mizazul Haq and the absconding accused Ranju Das, and it was while they were returning to the village from Jalalpur Tea Estate that they had been joined by Abbas Ahmad Choudhary and he had merely held her hand while she was raped second time as well by the other two.

4. Mr. Surya Kant's argument is that the prosecutrix had changed her story time and again and had substantially made her statement in Court which belied her truthfulness is not acceptable for the reason that as far as Mizazul Haq, appellant, is concerned she had been consistent in her statements that he along with Ranju Das had raped her. Equally, we are of the opinion that in the light of the fact that the prosecutrix was 13-15 years of age at the time of the incident, the consent, if any, can be inferred from the circumstances, would become meaningless.

5. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first

A be borne in mind that in her statement recorded on 17th
 September, 1997, the prosecutrix had not attributed any rape
 to Abbas Ahmad Choudhary. Likewise, she had stated that he
 was not one of those who kidnapped her and taken to Jalalpur
 Tea Estate and on the other hand she categorically stated that
 B while she along with Mizazul Haq and Ranju Das were returning
 to the village that he had joined them somewhere along the way
 but had still not committed rape on her. It is true that in her
 statement in court she has attributed rape to Abbas Ahmad
 Choudhary as well, but in the light of the aforesaid
 C contradictions some doubt is created with regard to his
 involvement. Some corroboration of rape could have been
 found if Abbas Ahmad Choudhary too had been apprehended
 and taken to the police station by P.W. 5 -Ranjit Dutta the
 Constable. The Constable, however, made a statement which
 D was corroborated by the Investigating Officer that only two of
 the appellants Ranju Das and Md. Mizalul Haq along with the
 prosecutrix had been brought to the police station as Abbas
 Ahmad Choudhary had run away while en route to the police
 station. Resultantly, an inference can be rightly drawn that Abbas
 Ahmad Choudhary was perhaps not in the car when the
 E complainant and two of the appellants had been apprehended
 by Constable Ranjit Dutta. We are, therefore, of the opinion that
 the involvement of Abbas Ahmad Choudhary is doubtful. We
 are conscious of the fact that in a matter of rape, the statement
 of the prosecutrix must be given primary consideration, but, at
 F the same time, the broad principle that the prosecution has to
 prove its case beyond reasonable doubt applies equally to a
 case of rape and there can be no presumption that a
 prosecutrix would always tell the entire story truthfully.

G 6. The appeal filed by Abbas Ahmad Choudhary is
 allowed. We order his acquittal. The appeal filed by Mizazul
 Haq is dismissed.

R.P.

Appeals disposed of.

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