

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

NOVEMBER 25, 2009

[Harjit Singh Bedi and J.M. Panchal, JJ.]
2010 (1) SCR 869

The following Order of the Court was delivered

ORDER

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:-

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 for the aforementioned offences and as they denied the charges, they were brought to trial. The trial court relying on the evidence of 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 Dhires Chandra Nath - P.W. 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 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 inter course 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 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 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 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 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 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 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.

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