

ABDUL GAFUR & ORS.

A

v.

THE STATE OF ASSAM

DECEMBER 6, 2007

[DR. ARIJIT PASAYAT AND D.K. JAIN, JJ.]

B

Penal Code, 1860—ss. 395, 397 and 354—Prosecution under—Accused were known of the victims—Animosity between the parties—Evidence of one of the witnesses contrary to medical evidence—On telephonic information, during commission of the offence, miscreants were mentioned as strangers—Conviction by trial Court—Confirmed by High Court—On appeal, held: Accused are entitled to be acquitted, in view of infirmities in the background of animosity between the parties—Order of High Court was on surmises and conjectures.

D

Prosecution alleged against the appellants-accused, that they entered the house of the victims, armed with deadly weapons, assaulted the inmates of the house, looted gold ornaments and committed rape on two of the female members. During the course of the occurrence one of the members of the family, informed the police over telephone that some strangers were committing dacoity in the house and had assaulted two inmates of the house. Thereafter, FIR was lodged. Three of the accused were declared to be proclaimed absconders. The accused who faced trial were convicted u/s 395 and 397 IPC. Two of the accused were additionally convicted u/s 354 IPC. The conviction was based on evidence of PWs 1, 2, 3, 5 and 8. High Court dismissed the appeal, upholding the conviction. Hence the present appeal.

E

F

Allowing the appeal, the Court

G

HELD 1. The appellants deserves to be acquitted. The infirmities in the background of admitted animosity between the parties render the prosecution version unacceptable. The trial Court and the High Court did not analyse the evidence correctly and acted

H

A on mere surmises and conjectures.

[Paras 11 and 12] [1035-E, F, G]

B 2. The High Court has erred in holding that the evidence of PWs. 1, 2, 3, 5 and 8 stood fully corroborated by the medical evidence. Significantly, on consideration of the evidence of PW 4, it is clear that the evidence of this witness is clearly contrary to the medical evidence. High Court recorded as finding that one of the appellants was absconding. As a matter of fact the evidence of Investigating Officer shows that he had arrested him on the date the First Information Report was lodged. High Court has merely referred to certain conclusions of the Trial court without analyzing the evidence and various submissions made by the appellants. To add to the vulnerability of the prosecution version, the FIR was lodged long after the incident and in fact law was already set on motion after the telephonic message had been received. [Para 10]

D 3. The High Court has noted as if a telephonic message was given by a stranger regarding decoity. However, in the evidence it has come that the information was given not by a stranger but by PW 1 who was member of the family. In the information given it was stated that some stranger had committed decoity. The accused persons are not strangers and were practically neighbours of the informant and his family. The High Court noted that there was no intention to falsely implicate accused persons because of enmity and there was no reason as to why dignity of two young girls would be put at stake by alleging rape. It is to be noted that in fact rape was alleged but the trial Court found that there was no material to substantiate the plea of rape. The evidence is totally inconsistent and lacks credence. [Para 9 and 10] [1034-G, H; 1035-A, B]

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1675 of 2007.

From the final Judgment and Order dated 12.5.2006 of the Gauhati High Court in Criminal Appeal No. 201 of 1998.

H H.L. Agrawal, Azim H. Laskar, Anand and Abhijit Sengupta for the Appellants.

Avijit Roy (for M/s Corporate Law Group) for the Respondent. A

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted.

2. Challenge in this appeal is to the order passed by a learned Single Judge of the Gauhati High Court dismissing the appeal filed by the appellant. B

3. Background facts according to the prosecution in a nutshell are as follows:

On the night of 11.4.88 at about 6.30 P.M. the accused Abdul C
Gafur, Hokoi Mian, Najir Ali, Sayed Ali, Latif Ali, Aklas Mian, Ashu Mian
and Tabai Mian being armed with deadly weapons namely, dao, lathis,
dagger etc. surrounded the house of Satyendra Nath Gupta at village D
Brahmanshashan, assaulted him, his wife Smti Hemamalini Gupta, his son
Subhendu Gupta, his eldest daughter Anjali Gupta and his relatives Sushil
Chanda causing grievous injuries to them, tied them up and then looted
gold ornaments, namely, chains, bangles, ear rings etc. valued at
Rs.42,950.00 from the possession of the female inmates of the house,
namely, Hemamalini Gupta, Anjali Gupta, Mitra Gupta, Rubi Gupta and
Nell Gupta. That apart two of the accused persons, namely, Hokoi Mian E
and Aklas Uddin committed rape respectively on Mitra Gupta and Rubi
Gupta and decamped with the looted booties. During the course of
occurrence Sushil Chandra Gupta the son of Satyendra Nath Gupta
informed police over telephone that decoity was being committed in the
house of Satyendra Nath Gupta and that Satyendra Nath Gupta and his
wife were assaulted by the decoits causing grievous injuries to them. At
the Nilambazar out post a general diary vide entry no.212 at 8.15 p.m.
on the night of 11.4.1988 was recorded and on the basis of such
information enquiry was launched. Thereafter Satyendra Nath Gupta also
lodged a written Ejahar with police of Nilambazar out post. The Officer
Incharge of Nilambazar out post sent the written ejahar to the Officer
Incharge of Karimganj P.S. whereupon the Officer Incharge of Karimganj
P.S. registered a case under Section 395/397/376 of the Indian Penal
Code, 1860 (in short the 'IPC'). S.I. of police T.C. Bailong after
completion of enquiry/investigation submitted charge sheet against the H

A accused Abdul Gafur, Hokoi Mian, Bolo Mian, Sayed Ali, Aklas Uddin, Najir Ali, Latif Ali, Ashu Mian and Tabai Mian for alleged commission of offences punishable under Section 395 and 397 IPC.

B The charges against the accused Najir Ali, Ashu Mian and Tabai Mian were proven and they were declared to be proclaimed absconders. The case against other six accused persons, namely Abdul Gafur, Hokoi Mian, Bolo Mian, Sayed All, Alas Uddin and Latif Ali was committed to the Court of Sessions by learned Judicial Magistrate, 1st Class, Karimganj.

C 4. During trial nine witnesses were examined to further the prosecution version.

D 5. Placing reliance on the evidence of witnesses-PWs. 1, 2, 3, 5 and 8, the trial court found that accused appellant 1, 2, 3, 5 & 6 guilty of offence punishable under Section 395 read with Section 397 IPC and accused appellant Nos. 3 & 5 were guilty of offence punishable under Section 354 IPC. For the offence relatable to Section 395 read with Section 397, each was sentenced to undergo rigorous imprisonment for seven years and to pay a fine of Rs.2,000/- with default stipulation. For the offence relatable to Section 354 IPC they were sentenced to rigorous imprisonment of one year each.

E 6. The convicted accused persons preferred an appeal before the High Court. As afore-stated the High Court dismissed the appeal and affirmed the conviction and sentence.

F 7. In support of the appeal learned counsel for the appellant submitted that the High Court has disposed of the appeal cryptically without even discussing the various submissions made. There are also several infirmities in the conclusions arrived at.

G 8. Learned counsel for the respondent-State on the other hand supported the judgment of the trial court and the High Court.

H 9. The High Court has noted as if a telephonic message was given by a stranger regarding decoity. However, in evidence it has given that the information was given not by a stranger but by Sushil Chandra Gupta, PW 1. In the information given it was stated that some stranger had

committed decoity.

10. The accused persons are not strangers and were practically neighbours of the informant and his family. The High Court noted that there was no intention to falsely implicate accused persons because of enmity and there was no reason as to why dignity of two young girls would be put at stake by alleging rape. It is to be noted that in fact rape was alleged but the Trial Court found that there was no material to substantiate the plea of rape. The evidence is totally inconsistent and lacks credence. The High Court's observations were clearly based on surmises and contrary to the factual scenario. The High Court has noted that the evidence of PWs. 1, 2, 3, 5 & 8 stand fully corroborated by the medical evidence. Significantly, on consideration of the evidence of PW 4, it is clear that the evidence of this witness is clearly contrary to the medical evidence. To add to the confusion, it is noted that the High Court recorded as finding that appellant Abdul Gafur was absconding. As a matter of fact the evidence of Investigating Officer (in short the 'I.O') shows that he had arrested Abdul Gafur on the date the First Information Report (in short the 'FIR') was lodged. Unfortunately the High Court has merely referred to certain conclusions of the Trial court without analyzing the evidence and various submissions made by the appellants. To add to the vulnerability of the prosecution version, the FIR was lodged long after the incident and in fact law was already set on motion after the telephonic message had been received.

11. The aforesaid infirmities in the background of admitted animosity between the parties renders the prosecution version unacceptable. The Trial Court and the High Court did not analyse the evidence correctly and acted on mere surmises and conjectures. That being so, the appellants deserve to be acquitted, which we direct.

12. Appeal is allowed. The appellants are acquitted of the charges. They be set forth at liberty if not required in any other case.

K.K.T.

Appeal allowed.