



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 25-03-2013

CORAM

**HON'BLE THE ACTING CHIEF JUSTICE
MR. JUSTICE S. P. WANGDI**

CrI.A. No. 09 of 2012

State of Sikkim ... **Appellant**

Versus

Sangay Sherpa,
S/o Shri Phurba Sherpa,
R/o Lower Ribdi,
West Sikkim ... **Respondent/
Accused**

For Appellant : Mr. Karma Thinlay Namgyal,
Additional Public Prosecutor with
Mr. S. K. Chettri, Assistant Public
Prosecutor and Mr. Thinlay
Dorjee Bhutia, Advocate.

For Respondent : Mr. S. S. Hamal, Legal Aid
Counsel with Mr. Tashi Wongdi
Bhutia and Mr. Madan Kumar
Sundas, Advocates.

J U D G M E N T

Wangdi, ACJ.

This is an appeal under Section 378 of the Code of Criminal Procedure against acquittal of the Respondent/ Accused of the charges under Section 376/511 IPC in S. T. Case No.11 of 2009, passed by the learned Sessions



Judge, South and West Sikkim at Namchi by the impugned judgment dated 04.05.2012.

2. The Respondent/Accused had been charged sheeted under the aforesaid provisions by the Sombaria P.S., West Sikkim, consequent to a written FIR submitted by one Phurba Sherpa of lower Ribdi, West Sikkim, stating that his daughter aged about 13 years had been sexually abused by the Respondent/Accused. Resultantly a case under Section 376 IPC was registered against him under Sombaria Police Case No.04(03)09 dated 23.03.2009. Upon completion of the investigation, charge sheet under Section 376 IPC was filed against the Respondent/Accused for being tried in accordance with law.

3. During the trial, the prosecution examined as many as 17 witnesses and exhibited 25 documents. The learned trial Court after considering the evidence on record came to a finding that the prosecution had failed to prove not only the charge under Section 376/511 IPC but also the minor offence under Section 354 IPC even if it exercised its powers under sub section 2 of Section 222 of the Code of Criminal Procedure. These facts are sufficient for disposal of the present appeal.



4. In the Appeal, the Appellant - State has sought to assail the impugned judgment only to the limited extent of the finding of the learned trial Court of having found the Respondent/Accused not guilty even in respect of the offence under Section 354 IPC by application of its powers under sub section 2 of Section 222 of the Code of Criminal Procedure.

5. It is relevant to note that this Court having found prima facie case had granted leave to appeal and upon hearing the State had admitted the Appeal for hearing.

6. Mr. Karma Thinlay Namgyal, the learned Additional Public Prosecutor, while pressing the Appeal submitted that the learned Trial Court while coming to the finding under challenge had failed to appreciate the overwhelming evidence appearing against the Respondent/Accused of having outraged the modesty of the victim and that the finding was perverse to the evidence on record, in as much as, the only ground of rejection of bringing down the charge to Section 354 IPC against the Respondent/Accused was the absence of injuries on the body of either the accused or the victim.



The learned Additional Public Prosecutor drew the attention of this Court to the evidence of PW 2 – Passang Dawa Sherpa, PW 4 – the victim, Passang Lhamu Sherpa, PW 5 – Nim Chikey Sherpa and PW – 6 Lalit Tamang and submitted that it had been established from their evidence that the victim PW 4 had been lured by the Respondent/Accused away from her home to a fair distance in the late evening and committed the offence of outraging the modesty of the victim. As per him, the learned trial Court had overlooked the evidence of these witnesses completely and had acquitted the Respondent/Accused on a ground not contemplated by law. Reference was made by him to the case of ***Tarakeshwar Sahu vs. State of Bihar (now Jharkhand) : (2006) 8 SCC 560*** and ***Premiya alias Prem Prakash vs. State of Rajasthan : (2008) 10 SCC 81*** in support of his contention.

7. Mr. S. S. Hamal, the learned Legal Aid Counsel representing the Respondent/Accused, supporting the impugned judgment, submitted that no reliance could be placed upon the evidence of PW4 who was a deaf and dumb witness and in her evidence she has not stated of her being sexually assaulted by the Respondent Accused in



so many words. Relying upon the case of ***Kashiram vs. State of Madhya Pradesh : AIR 2001 SC 2902*** (para 21) it was submitted that the High Court while exercising its jurisdiction under Section 401 Cr.P.C. ought not to interfere with the decision of the trial Court and displace his acquittal by conviction if two views are possible from the evidence on record. Under such circumstances, as per the learned Counsel, the view taken by the trial Court ought to be accepted. It is further his submission that when the offence under Section 376/511 IPC was not found to have been proved on an analysis of the evidence of the witnesses, more particularly that of the victim, PW4, who had rendered her evidence only by gesticulations, it would be fraught with risk to conclude that a lighter offence under Section 354 IPC stands established based upon such evidence. By referring to a Division Bench judgment of the Rajasthan High Court in ***Darshan Singh alias Darshan Lal vs. State of Rajasthan 2006 CRLJ 3008*** it was submitted that the evidence of PW 4 as it stands on the record cannot be relied upon as the services of an expert or a person familiar with her mode of conveying ideas to others in day to day life had not been taken while examining the victim who was a deaf and dumb person.



8. I have examined the evidence and the records and considered the rival submissions placed by the learned Counsels representing the parties and I am of the view that the finding of the learned trial Court that on the evidence available, even a lighter offence under Section 354 IPC was not made out against the Respondent/Accused by application of Section 222(2) Cr.P.C. appears to be incorrect.

9. The interpretation of Section 354 IPC and its parameters have been set out comprehensively in ***Tarakeshwar Sahu*** vs. ***State of Bihar (supra)*** which the learned Additional Public Prosecutor has appropriately placed reliance upon. For better appreciation, we may reproduce some relevant portions of the judgment which are as under: -

"37. On the basis of evidence and documents on record, in our considered view, the appellant is also guilty under Section 354 IPC because all the ingredients of Section 354 IPC are present in the instant case.

38. Section 354 IPC reads as under:

"354. *Assault or criminal force to woman with intent to outrage her modesty.*—Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

39. So far as the offence under Section 354 IPC is concerned, intention to outrage the modesty of a woman or knowledge that the act of the accused would result in outraging her modesty is the gravamen of the offence.



40. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty is an attribute associated with female human beings as a class. It is a virtue which attaches to a female owing to her sex.

41. "Modesty" is given as, "womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct" (in man or woman); reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions". (SCC p.377, para 13 Raju Pandurang Mahale v. State of Maharashtra (2004) 4 SCC 371).

42. The ultimate test for ascertaining whether the modesty of a woman has been outraged, assaulted or insulted is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. A person slapping on the posterior of a woman in full public glare would amount to outraging her modesty for it was not only an affront to the normal sense of feminine decency but also an affront to the dignity of the lady. (Rupan Deol Bajaj v. Kanwar Pal Singh Gill, (1995) 6 SCC 194)."

10. On the anvil of the above, when we examine the evidence on record, we find that the prosecution has been successful in establishing the offence under Section 354 IPC. PW1 Phurba Sherpa, the father of the victim, PW2 Passang Dawa Sherpa, the sister-in-law, PW3, Pem Chikey Sherpa, the mother, PW5 Nim Chikey Sherpa, sister and PW6 Lalit Tamang a neighbor of the victim respectively have in no uncertain terms corroborated each other of the fact that on 22.03.2009 the Respondent/ Accused had been in the house of the victim and after some time both had disappeared from there. That when they had



searched for the victim she was found with the Respondent/Accused at a considerable distance from the house sitting on a freshly excavated road and that the Respondent/Accused had fled on seeing them leaving the victim who was weeping. That they brought the victim back home, where by gesticulation she narrated the incident of the accused having committed the offence against her. That the victim's clothes were soiled with mud and the mother, PW3 gave her a bath. These statements find corroboration in the evidence of PW4 the victim herself. It is of significance to note that the learned trial Court had noted that although the witness was challenged in hearing and speech she could gesticulate and speak some words that could be understood. We may reproduce the evidence of PW4 which also contains the above observation of the learned trial Court: -

P.W.4 – Passang Lhamu Sherpa – D/o Phurba Sherpa

"I know the accused standing in the dock. He is Sangay.

(The witness is hearing challenged as well as speaking challenged, however she can gesticulate and speak some words which are found to be understandable by the Court. The witness is accordingly found fit to depose as she is not prevented from understanding the questions put to her due to her tender years or because of her physical challenges.)

The accused is Sangay and thereafter the victim gesticulated with her fingers of both hands that the accused had fondled her body and committed the sexual act on her.



Cross-examination by Ld. legal aid Counsel Shri Amitabh Shankar for the accused person.

The accused lives above. My father’s name is ‘Papa’. There are several person in my house, Papa, Ama and four others. It is not a fact that the accused did not fondle my body and committed sexual assault. I came to the Court with my papa. It is not a fact that I was tutored by my father to make allegation of sexual assault on the accused.

It is not a fact that I am deposing falsely.”

11. From the above there is no manner of doubt that the Respondent/Accused is guilty of the offence. We find corroboration of this from the evidence of PWs 1, 2, 3, 5 and 6. The relevant portions of which are reproduced below: -

P.W.1 - Phurba Sherpa, S/o Late Lakpa Sherpa

.....
“..... I found my son-in-law Passang Sherpa had come to visit and brought some sweets for my children. That while distributing the sweets Passang Lamu Sherpa could not be found in the house. That on looking for her my other daughter Nim Chukie and Passang Sherpa found her below the new road being constructed about half a Km. away from our house. When we reached the spot they found accused committing rape on the victim but the accused fled on seeing them. The victim was then brought to the house where my wife washed the victim. That on account of heavy rains and storm that evening we were unable to report the matter to the Police Station but the next day we went and lodged the FIR.”

P.W.2 - Passang Dawa Sherpa, D/o Phurba Sherpa

.....
“..... I returned from Bharang to Ribdi, West Sikkim to spend the night in the house of my father-in-law. I had also carried some sweets with me for my brother and sister in laws. On reaching the house of my father-in-law, I looked for my sister-in-laws to give them the sweets but I could not locate my sister-in-law (victim) who is dumb. At that point of time my parents-in-law noticed that the victim was



missing. Thereafter we all started to look for her. My younger sister in law and I went towards the new road cutting. It was about 6 pm, we located the victim with the accused sitting by the side of the road. The victim was weeping so I brought her home leaving the accused there. After we brought the victim home, she gesticulated and started telling me of the incident of the accused having raped her. As I was ashamed I could not disclose the same to my parents in law so I left the victim with her parents and I saw her gesticulating and informing her parents of the incident.
....."

P.W.3 - Pem Chikey Sherpa, W/o Phurba Sherpa

.....
"..... While I was distributing the said sweets and biscuits among my children I did not find 6th daughter the victim in the house. She is dumb. It was about 4:00 PM. As she was not found in and around, my husband went in search for her towards upper Ripdey while my son-in-law Passang Sherpa and my youngest daughter Nim Chikey Sherpa went towards new cutting road. At bout 7/8 PM my son in law Passang Sherpa and my daughter Nim Chikey brought the victim to the house. The clothes of the victim were soiled and she was weeping. My son-in-law and my youngest daughter told us that they met the accused bringing the victim with him at Gitangey Dara. They further told that the accused fled away after seeing them leaving the victim there. On arrival I gave a bath to the victim. I also asked her as to what had happened to her. The victim told by gesticulation that the accused took her by alluring to give her money and committed sexual assault on her. We could not inform the police on the same night as it was raining and we informed the police on the following day."

P.W.5 - Nim Chikey Sherpa, D/o Phurba Sherpa

.....
"..... He had also brought some sweets and biscuits for us. It was about 4:30 PM. While he was distributing sweets and biscuits to us my elder sister Passang Lhamu was not found in the house. Passang Lhamu cannot speak and she expresses her mind by gesticulation. My father went in search of her towards upper Ribdey while my brother-in-law and I went towards new cutting road. While we were going in search of her we saw the accused and Passang Lhamu coming. She was crying. The accused fled away and we brought Passang Lhamu to our house. Her clothes were dirty and my mother gave her a bath. My mother also asked the victim. The victim stated that the accused lured her towards new cutting road by showing money and committed rape on her.
(Witness gesticulated with her finger to indicate rape as show by the victim)"



P.W.6 – Lalit Tamang, S/o Buddhey Tamang

.....
"..... I do not remember the exact date but it was about 1 year ago one day around 4 p.m. I happened to visit the house of the victim whose name I do not know but she is dumb. I also found the accused in the house of the victim. On seeing the accused requested me to prepare "Khaini" (Tobacco) which I prepared for him. I also noticed the victim asking for money from the accused by way of gesture. After some time both the accused and victim were not found in and around the vicinity. After about an hour the parents of the victim sought my assistance to trace out the victim as she was missing. I also help them to locate the victim but failed to locate her I returned to my house. Later I came to learn that the victim had been traced with the accused."

12. There is another aspect of the matter which calls for consideration as it lends support to the credibility of the evidence of PWs 1 to 6. In his statement recorded under Section 27 of the Evidence Act marked Exhbt. 22 the Respondent/Accused had disclosed that -

"....Then Passang Lamu went with them and I came below to the house of Rinchen Doma. I went there and changed my clothes which I had worn at that time. I kept those muddy clothes in that house and I can show those clothes in front of witness and the Police....."

12(a) The concealment of the muddied clothes by the Respondent/Accused corroborates the evidence of PW3 Pem Chikey Sherpa, the mother that the clothes of the victim were soiled and that of PW5 Nim Chikey Sherpa, as per whom the clothes of the victim were dirty. The disclosure statement under Section 27 and the evidence of PWs 3 to 5 establishes the fact that they were exposed to



muddy conditions of a freshly excavated road and, as per the evidence of PW1 and PW3, it was raining heavily. Inference of guilt of the Respondent/ Accused can be reasonably drawn from his concealment of the soiled clothes worn by him, otherwise there was no reason for him to do so.

13. It is a well settled position of law that in a case based upon circumstantial evidence, each of the circumstances appearing against an accused requires to be proved beyond reasonable doubt, and that such circumstances form an unbroken chain and further that this chain leads to the sole hypothesis that the accused is guilty of having committed the offence charged against him. In the present case which is also a case based on circumstantial evidence, we find that the following circumstances appear to have been well established: -

- (i) The Respondent/Accused was in the house of the victim in the evening of the incident;
- (ii) The Respondent/Accused and the victim were together found missing from the house after sometime;
- (iii) On searches being made by PWs2 and 5 they were found sitting together in darkness considerable distance away from the house;



- (iv) The Respondent/Accused fled away on seeing PWs2 and 5 leaving the victim girl who was found weeping;
- (v) The victim girl was found with her clothes soiled with mud;
- (vi) The victim girl who was challenged both in speech and hearing had narrated by gesticulation to all those present in the house of the Respondent/Accused having outraged her modesty;
- (vii) In his statement recorded under Section 27 of the Evidence Act, Exbt.22, the Respondent/Accused had disclosed of him having concealed his mud soiled clothes in the house of one Rinchen Doma/Lakpa Sherpa which was later seized vide seizure memo Exbt. 23 at his behest.

13(a) The above circumstances indisputably form an unbroken chain and the chain leads to the sole conclusion that the Respondent/Accused is guilty of having committed the offence under Section 354 IPC against the victim, PW4.

14. The submissions placed on behalf of the Respondent/Accused by Mr. Hamal cannot be accepted as the decision in ***Darshan Singh alias Darshanlal (supra)*** is clearly distinguishable, in as much as, in that case the learned trial Court had not made any effort to ascertain the intelligence, understanding or the capacity of the victim



who was dumb to communicate, etc. as a precautionary measure before embarking upon examining her. We may refer to a portion of paragraph 14 in ***Darshan Singh*** where the factual position relevant for us has been set out: -

“14. In the instant case, the learned trial Court did not make any effort to ascertain prelims like her intelligence, the understanding of oath, capacity to communicate by writing. Irrespective of the fact that application was made by the witness herself to arrange for an expert, no efforts were made in this direction. Instead he on his own by deciphering the gesture of the witness proceeded to record the statement.
.....”

15. The requirement to examine the victim by an expert as asserted by the learned Counsel would arise only if there is no one else available who is a witness in the case to interpret his evidence or to converse with a deaf and dumb witness. In the present case, PW1 is the father, PW2 is the sister-in-law, PW3 is the mother, PW5 is the elder sister and PW6 is the neighbor of the victim PW4 and, there cannot be better persons than them to interpret her evidence.

16. In so far as the embargo cast upon the Appellate Court to unsettle an acquittal of an accused if two views are possible, it does not appear to be of any application to the present case, as we find that the learned trial Court has not at all considered or analyzed the



evidence pertaining to the offence under Section 354 IPC., but rather has chosen to discard the charge solely on the ground that no injuries were found on the body of either the victim or the accused. We have already noted in ***Tarakeshwar Sahu vs. State of Bihar (supra)*** that the ultimate test for ascertaining whether the modesty of a woman has been outraged or not is that the action of the offender should be such that it may be perceived as one which is capable of shocking the sense of decency of a woman. The culpable intention of the accused is the crux of the matter and that the reaction of the woman is relevant but its absence is not always decisive. In other words presence of physical injury is not a *sine qua non* in an offence under Section 354 IPC.

17. In ***State of Punjab vs. Major Singh : AIR 1967 SC 63*** referred to in the very case of ***Tarakeshwar Singh vs. State of Bihar (supra)*** the majority out of three-Judge Bench held as under: -

"15. The offence punishable under Section 354 is an assault on or use of criminal force to a woman the intention of outraging her modesty or with the knowledge of the likelihood of doing so. The Code does not define, 'modesty'. What then is a woman's modesty?

16..... the essence of a woman's modesty is her sex. The modesty of an adult female is writ large on her body. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses a modesty capable of



being outraged. Whoever uses criminal force to her with intent to outrage her modesty commits an offence punishable under Section 354. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive, as, for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act; nevertheless, the offender is punishable under the section.

A female of tender age stands on a somewhat different footing. Her body is immature, and her sexual powers are dormant. In this case, the victim is a baby seven-and-half months old. She has not yet developed a sense of shame and has no awareness of sex. Nevertheless from her very birth she possesses the modesty which is the attribute of her sex."

(underlining supplied)

18. It, therefore, follows from the above that presence of physical injury is not an essential requirement to indicate assault as contemplated under Section 354 IPC, the sole reason for the learned trial Court to hold that even if the course is taken to Section 222(2) of the Cr.P.C. the offence under Section 376/511 IPC could not be brought down to Section 354 IPC. The learned Court, therefore, has clearly fallen in error in arriving at such a finding. The fact that the victim was merely 12 years old also cannot be lost sight of.

19. For the aforesaid reasons, the assertion of Mr. S. S. Hamal stands rejected as being unacceptable.



20. The final contention that was feebly raised by Mr. Hamal was that PW1, PW2, PW3 and PW5 were interested witnesses being closely related to the victim, PW4 and, therefore, their evidence could not be relied upon to fix culpability against the Respondent/Accused. This submission on the facts of the case does not appear to be acceptable as there is nothing to indicate that these witnesses were biased. They have withstood the test of cross-examination and have remained firm. The well established principle of appreciation of evidence by interested witness is that the Court requires to be circumspect and subject such evidence to closer scrutiny and careful examination. It certainly does not lay down that evidence of an interested witness ought to be rejected outright only for that reason.

21. On an analysis of the evidence appearing on the records as disclosed above, I am of the view that the learned trial Court has misdirected itself and committed an error in coming to the conclusion that offence under Section 354 IPC has not been made out against the Respondent/Accused.

22. In the result, the Appeal is allowed.



23. The Respondent/Accused is found guilty of the offence under Section 354 IPC.

23(a) Before proceeding further, it is observed that the entire process of the trial appears to have far exceeded the punishment for imprisonment provided under Section 354 IPC., as it appears that the Respondent/Accused had been in police custody with effect from 23.03.2009 to 27.03.2009, and thereafter, in judicial custody until he was released on bail on 04.05.2012. It is surprising neither the prosecution nor the defence nor the trial Court appears to have taken note of this. This is a travesty of justice which ought to have been avoided at all costs. It is expected that the trial Courts will take note of Section 436-A of the Code of Criminal Procedure, 1973, inserted by the Cr.P.C. (Amendment Act) 2005 that was brought into force with effect from 23-06-2006.

24. Considering the above fact, interest of justice will be served if his sentence is limited to 2 years' simple imprisonment which is the optimum period of imprisonment prescribed under the law which shall be set



off from the period of custody the Respondent/Accused has already undergone.

25. No order as to costs.

26. A copy of the judgment along with the case records be transmitted to the learned Sessions Judge, South and West Sikkim at Namchi forthwith for its due compliance. Copies also be circulated to all the Courts for general guidance, more particularly, paragraph 23(a).

Sd/-

(S. P. Wangdi)
Acting Chief Justice
25-03-2013

Approved for reporting : Yes/~~No~~

Internet : Yes/~~No~~

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