



HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

J U D G M E N T

S.B. CrI.A. No.11 of 2014

Passang Tamang @ Lailas,
S/o Late Dhan Bahadur Tamang,
R/o Pashupati,
Nepal
(At present – State Jail, Rongyek)
... **Appellant**

versus

State of Sikkim ... **Respondent**

CORAM

HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

DATE OF JUDGMENT : 31-10-2014

For Appellant : Mr. S. S. Hamal, Legal Aid Counsel.

For Respondent : Mr. J. B. Pradhan, Additional Advocate General and Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor.

Wangdi, J.

1. By filing this Appeal, the Appellant seeks to assail the judgment dated 29-04-2013 passed by the Learned Judge, Fast Tract Court, East Sikkim at Gangtok

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in Sessions Trial Case No.34 of 2013 by which he was convicted and sentenced for committing offence under Section 376 of the Indian Penal Code, 1860 (in short the "IPC").

2. Briefly, the facts of the prosecution case is that, on a oral complaint lodged by one Shanti Gurung, P.W.1, that her daughter, Priyanka Gurung, P.W.2, aged about 7 years was raped by the Appellant on 25-09-2012, case under Sections 376/506 IPC was registered by the Officer-in-Charge, Sadar Police Station, Gangtok being FIR No.121(09)12 dated 26-09-2012 against the Appellant and taken up for investigation.

3(i). During the course of the investigation, the victim Priyanka Gurung, P.W.2, was forwarded to the STNM Hospital, Gangtok, for medical investigation. The Investigating Officer (in short the "I.O."), P.W.11, visited and inspected the place of occurrence at Sunguray Dhunga, Merung Busty, East Sikkim, took photographs and prepared rough sketch map of the place of occurrence. The victim, the complainant and other witnesses conversant with the facts and circumstances of

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the case were examined and their statement recorded under Section 161 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C."). The statements of the victim girl, P.W.2 and one Nima Lhamu Sherpa, P.W.3 were also recorded under Section 164 Cr.P.C. by the Chief Judicial Magistrate, East and North Sikkim at Gangtok. The I.O. thereafter arrested the Appellant and was sent for medical examination. The wearing apparels of the victim were forwarded to CFSL, Kolkata, for comparison and analysis.

(ii) Investigation revealed that the families of the victim and the Appellant were familiar with each other as they lived as neighbours at Merung, Chongey, East Sikkim. The Appellant who was a Nepal national, being a frequent visitor to her house was also familiar and known to the victim. On 25-09-2012 at about 1200 hours, the Complainant, Shanti Gurung, P.W.1, had gone to the nearby jungle to collect firewood leaving behind her ailing husband and two minor children at home. When she returned at about 1300 hours she found her victim daughter absent from home and when she enquired from her husband she was informed that she had left the house with the Appellant. The victim later returned home alone

complaining of severe stomachache and then went to bed early.

(iii) In the evening of 26-09-2012 at about 1700 hours when the Complainant, P.W.1, was engaged in her household chores, Nima Lhamu Sherpa, P.W.3, aged about 11 years and a friend of the victim, informed her that the victim had told her of the Appellant having done terrible things to her due to which she was suffering from severe pain and was unable to walk properly. The Complainant then immediately called her daughter and on being asked she disclosed that on 25-09-2012 when her mother, the Complainant, was away in the jungle collecting firewood, the Appellant arrived in the house and asked her to accompany him for sweets at the nearby shop of one Joseph Aunty, P.W.4. Unaware of the evil intentions of the Appellant, she accompanied him who first purchased few sweets from the shop and gave it to her and then led her behind "Sunguray Dhunga" where he suddenly pushed her on to the ground, lifted her skirt, pulled down her panties and sexually assaulted her. When she tried to scream due to pain and the trauma caused by the Appellant's assault, he covered her mouth with his palm to

smother her cry but, by then she was profusely bleeding from her private part. On seeing this, the Appellant wiped the blood with some grass and asked the victim to wash her blood stained panties. The Appellant then washed it in a stream flowing below "Sunguray Dhunga", wrapped it in a newspaper and gave it back to the victim asking her to dry it at home threatening her of dire consequences if she revealed about the incident to anyone.

(iv) On completion of the investigation, the I.O., P.W.11, having found sufficient evidence to make out a case against the Appellant under Sections 376/506 IPC read with Section 14 of the Foreigners Act, 1946 and Notification No.848, charge-sheet was accordingly filed for his trial in accordance with law.

(v) The Learned Fast Track Court having found sufficient material, framed charge under Section 376 IPC against the Appellant to which, when read over and explained, he pleaded not guilty and claimed trial.

4. In order to sustain their case, the prosecution examined 11 witnesses and after closure of the prosecution evidence the Appellant was examined under

Section 313 Cr.P.C. during which he denied all the incriminating circumstances appearing against him. No defence witness was examined as the Appellant chose not to adduce any evidence in his defense. The Learned Fast Track Court upon examination of the prosecution evidence and after hearing the Learned Counsel for the parties, found the Appellant guilty of the charge under Section 376 IPC for having raped the minor victim girl of 7 years on 25-09-2012 and accordingly convicted him and sentenced to undergo imprisonment of 10 years and to pay a fine of ` 2,000/- (Rupees two thousand) and in default of payment of the fine, to undergo further simple imprisonment for a period of two months duly setting off the period of detention already undergone by him.

5(i). Mr. S. S. Hamal, Learned Legal Aid Counsel, appearing on behalf of the Appellant, sought to press three grounds in support of the Appeal. Firstly, it was submitted that the medical report, Exhibit 7, in respect of the victim Priyanka Gurung, P.W.2, was not sustainable as it was not prepared by a Medico Legal Expert. Even if it was assumed to be a valid medical report there was no categorical finding that the injury to the vulva and vagina

was caused by partial penetration but, was only suggestive of that as would appear from the relevant entries in the report.

(ii) Next, it was contended that the CFSL report in respect of the penile swab of the Appellant and his garment was not exhibited, a fact which is admitted by the I.O. in his evidence. Finally, it was contended that there were major contradictions in the evidence of the material witnesses including that of the victim. It was urged that the statement of the victim recorded under Section 164 Cr.P.C. Exhibit 11, was in conflict with her statement recorded under Section 161 Cr.P.C. by the police. Reference in this regard was made to the cross-examination of the victim Priyanka Gurung as P.W.2. As per the Learned Counsel, the details narrated by her in her statement recorded under Section 164 Cr.P.C. were not at all stated by her in her statement under Section 161 Cr.P.C. Referring to the evidence of Nima Lhamu Sherpa, P.W.3, it was pointed out that her evidence could not be relied upon as it has been admitted by her that she had been tutored by the mother of the victim, P.W.1, to state

that she had come to know about the incident when she had gone to play with the victim in her house.

(iii) It was then contended that there was a serious infirmity in the evidence of the victim P.W.2 in as much as when it has come in the evidence of P.W.4, Pema Lhamu Sherpa alias Joseph Aunty, that the Appellant had gone to the shop along with his two kids and the victim, it has not been stated so in the evidence of the victim girl thereby rendering her evidence unreliable.

(iv) As per Learned Counsel these infirmities appearing in the case of the prosecution renders their case unsustainable and the Appellant entitled to be acquitted by giving him the benefit of doubt.

6. Mr. J. B. Pradhan, Learned Additional Advocate General and Public Prosecutor, on the other hand, submitted that the discrepancies pointed out on behalf of the Appellant are inconsequential as they do not constitute material contradiction in the prosecution case. It is submitted that the evidence of the prosecutrix, P.W.2, in Court and her statement recorded under Section 164 Cr.P.C. are consistent which stand fully corroborated by

the evidence of P.W.3, Nima Lhamu Sherpa, the mother of the prosecutrix, P.W.1. and the medical report, Exhibit 7. He contended that considering the well-settled position of law that the sole evidence of the prosecutrix was sufficient to sustain a charge under Section 376 IPC, if found reliable, the case of the prosecution stands fully established and no interference is called for with the impugned judgment of the Learned Fast Track Court.

7(a). I have considered the rival contentions and have examined the grounds urged on behalf of the Appellant by Mr. S. S. Hamal, Learned Legal Aid Counsel, to assail the impugned judgment and in my view, those do not appear to sustain both on facts and in law. The medical report, Exhibit 7, has been prepared by a qualified Gynecologist of the STNM Government Hospital after her examination of the victim girl. There can be no better expert than a Gynecologist to have examined the victim and the nature of injuries sustained by her. The relevant entry in the medical report reads as under: -

".....

Local – The vagina is swollen and tender.



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- The lateral vaginal walls show abrasions^{B/L} (recent, tender, superficial).
- Hymen is partially torn with swollen edges.
- No bleeding seen at + nt.

.....

Name of Injury Clinical examination suggests recent (Simple, Grievous or dangerous) injury to.

The kind of weapon used or poison suspected Vulva & vagina suggestive of partial penetration of vagina.

....."

(b) As would appear from the above, it has been clearly mentioned that the clinical examination revealed recent injury to the vulva and vagina which was suggestive of partial penetration of the vagina. There cannot clearer opinion than this and, therefore, I do not find any infirmity in the medical report.

(c) The CFSL report which admittedly had not been produced was not that of the victim girl but the penile swab of the Appellant. This fact does not demolish the injury that had been caused to the victim girl who was of the tender age of 7 years.

(d) The evidence of P.W.1, Shanti Gurung, mother of the victim girl, P.W.2, the victim and P.W.3, Nima Lhamu Sherpa, corroborate the evidence of P.W.2 on all

material particulars. It is relevant to note that P.W.3, Nima Lhamu Sherpa, is a minor aged about 12 years when her evidence was recorded. It has been noted by the Learned Fast Track Court that she was capable of understanding the nature of the activities going around her and conveying those and that she was aware of the sanctity of the oath and, therefore, was found fit to be examined as a witness. Although the Learned Counsel for the Appellant has heavily relied upon the fact that she had admitted that she was tutored by the mother of the victim to say that she came to know of the incident when she had gone to play with the victim in her house on the relevant day, she has clarified by stating that she had in fact come to know of the incident when she was going to "Mantaray Bajey's house" to reach milk. She has also denied that she had given false statement to the police and the Magistrate that the Appellant had committed rape of the victim. In substance, therefore, there is no discrepancy or contradiction on any of the material facts in her evidence. I, therefore, do not see any reason why her evidence should be discarded.



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(e) Finally, as regards the contradictions as pointed out in her statement recorded under Section 164 Cr.P.C. and under Section 161 Cr.P.C. recorded by the police, it was admitted by the Learned Counsel for the Appellant that the prosecutrix was not confronted with her former statement during her examination as required under Section 157 of the Indian Evidence Act, 1872. Thus the statement of the victim under Section 161 Cr.P.C. said to be contradictory to her statement recorded under Section 164 Cr.P.C., having not been brought on record, it would be impermissible in law to refer to it as being inadmissible in evidence. I, therefore, do not find any substance in the contention and accordingly reject it.

(f) In so far as the law as regards the reliability of evidence of a prosecutrix is concerned, it is now well-settled that a conviction can be held even on the sole testimony of the prosecutrix if it is found to be reliable and that it is only in exceptional cases when the Court finds that the testimony of the prosecutrix is untrustworthy that corroboration may be necessary. In ***State of Punjab vs. Gurmit Singh and Others*** : (1996) 2 SCC 384 it has held as under: -



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"8. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances."

(g) It may be noted that this decision was rendered in a case where the prosecutrix was a fully grown matured woman. In the present case, the prosecutrix is a minor of the tender age of 7 years only. In Mohd Imran Khan Vrs. State Government (NCT of Delhi):(2011)10 SCC 192 in which a minor girl of 15 years was the victim, it is held as under: -

"22. It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount



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of suspicion as that of an accomplice. The Evidence Act, 1872(hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of the Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the Court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

23. The court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations. Rape is not merely a physical assault, rather it often distracts the whole personality of the victim. The rapist degrades the very soul of the helpless female and, therefore, the testimony of the prosecutrix must be appreciated in the background of the entire case and in such cases, non-examination even of other witnesses may not be a serious infirmity in the prosecution case, particularly where the witnesses had not seen the commission of the offence. (*Vide State of Maharashtra v. Chandraprakash Kewalchand Jain, State of U.P. v. Pappu and Vijay v. State of M.P.*)

24. Thus, the law that emerges on the issue is to the effect that statement of the prosecutrix, if found to be worthy of credence and reliable, requires no corroboration. The court may convict the accused on the sole testimony of the prosecutrix."

8. Following from the above, in the present case, considering the consistency in her evidence which is supported by the medical evidence, I find no reason as to



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why her evidence should not be accepted. She evidently has no malice or motive for her to make a false allegation against the Appellant. In any case, her evidence is also corroborated in full measure by P.W.1, her mother, the minor witness, P.W.3. and the Gynecologist P.W.8. as well as the Medical Report Exhibit 7.

9. For all these reasons and despite the brave effort on the part of the Learned Legal Aid Counsel, I find no merit in the Appeal.

10. In the result, the Appeal is dismissed.

11. No order as to costs.

12. A copy of this judgment and the original case records be transmitted to the Court of the Learned Judge, Fast Track Court, East Sikkim at Gangtok, for its record.

Sd/-
(**S. P. Wangdi**)
Judge
31 -10-2014

Approved for reporting : Yes

Internet : Yes



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