



Sanjay Tamang vs. State of Sikkim

**HIGH COURT OF SIKKIM : GANGTOK**

(Criminal Appeal Jurisdiction)

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**S.B. : HON’BLE MR. JUSTICE S. P. WANGDI, JUDGE**  
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**Crl. Appeal.No. 8 of 2014**

**Appellant** : Sanjay Tamang,  
Aged 22 years,  
Son of Birdhan Tamang,  
Resident of Singling, P.S.  
Singling, West Sikkim.  
  
[At present in State Jail at  
Rongyek, East Sikkim].

***Versus***

**Respondent** : State of Sikkim

**Application under Section 374 (2) of the  
Code of Criminal Procedure, 1973**

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**Appearance**

Mr. S. S. Hamal Advocate as Legal Aid Counsel for  
the Appellant.  
  
Mr. S. K. Chettri, Assistant Public Prosecutor with  
Ms. Prathna Ghataney, Advocate for the State-  
Respondent.  
  
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# **J U D G M E N T**

(17.06.2015)

## **Wangdi, J.**

1. This Appeal is directed against the judgment dated 12.08.2013 of the Learned Judge, Fast Track Court, South and West Sikkim at Namchi, in Sessions Trial (Fast Track) Case No. 15 of 2013 whereby the Appellant was convicted of the offence under Section 375 read with Section 376 of the Indian Penal Code, 1860 (in short "IPC") and was sentenced to undergo imprisonment of seven years and fine of Rs.2,000/- (Rupees two thousand) and, in default of payment of the fine, to undergo further simple imprisonment of three months.

2. Based on a written FIR lodged at Soreng Police Station on 29.10.2011 at about 0130 hours by Jushna Tamang, Prosecutrix P.W.1, Soreng P.S. Case No.20(11)11 dated 29.10.2011, under Sections 341/323/354/376(ii)(g) IPC was registered against the Appellant and two other persons and investigation taken up.

3. It was alleged in the FIR that on the eve of Dushera Festival on 28.10.2011 at about 7.45 p.m. when

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the Complainant prosecutrix, her sister Prabina Tamang, P.W.2 and their brother Sushan Tamang, P.W.15, were returning home from Dewani Tar, West Sikkim, they were accosted on the way at Final Dara by the Appellant and wrongfully restrained by them. The prosecutrix was then forcefully dragged below the road, made naked and raped by them.

**4.** Investigation having been completed, Charge-Sheet was filed against them under Section 376(2)(g)/341/354/323 IPC and after the trial, the Appellant was convicted under Section 376 IPC and sentenced by the impugned judgment as stated above.

**5.** Mr. S. S. Hamal, Legal Aid Counsel appearing on behalf of the Appellant, rested the Appeal primarily on the following grounds. They were (i) medical report Exhibit 30 does not support the offence of rape. No opinion on the medical report have been filed by the Prosecution although the doctor had recorded that it was awaiting CFSL report. (ii) The CFSL report Exhibit 32 also does not support the case of the Prosecution as no semen was found on the undergarments Exhibit C of the Appellant but only on his seminal swab Exhibit B.

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6. Apart from the above, Mr. Hamal, submits that there is material contradiction in the evidence of the victim/prosecutrix P.W.1, which is apparent from the fact that in the written FIR she had named only Appellant and one Vibek Chettri. In her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 (in short "Cr.P.C."), she has named Rewash Gurung in addition to the Appellant and Vibek Chettri but, in her evidence in Court she had named the Appellant, Rewash Gurung and another person, Santosh Chettri.

7. These statements of the prosecutrix, as per the Learned Counsel being vascillating and inconsistent, could not be relied upon. On this the Learned Legal Aid Counsel has relied upon ***Munna vs. State of Madhya Pradesh (2014)10 SCC 254*** .

8. It is pointed out further that at the time of the incident, as per the prosecutrix, she was said to have been in the company of sister Prabina Tamang, P.W.2, and her brother Mahendra Tamang, P.W.3. But, these witnesses have again named one Atit Subba, apart from Vibek Chettri and the Appellant. Her evidence gets further eroded when she named only the Appellant to P.Ws 4 and 5 at their residence where the prosecutrix

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had taken shelter after fleeing from the place of occurrence.

**9.** There is contradiction also when in the evidence of P.W.12 Hemant Subba, eye witness to the offence of rape, as he has mentioned Vibek Chettri and Rewash Chettri as the ones holding the hands of the victim while the Appellant was committing rape on her when the name of Vibek Chettri had not been named by the prosecutrix. As per her, it was Santosh Chettri and Rewash Chettri who had held her so.

**10.** It is submitted that these evidence were also disbelieved by the Trial Court as would appear from paragraph 6 of the impugned judgment. Besides the above, the Learned Legal Aid Counsel also pointed out that CFSL report, Exhibit 32, showed negative presence of semen on the vaginal swabs, Exhibit A1 to A4, and found positive only on the penile swab of the Appellant. The presence of semen on the penile swab being an incriminating circumstance appearing against the Appellant, it ought to have been put to him while recording his statement under Section 313 Cr.P.C. Since this was not done the Appellant has been seriously prejudiced.

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**11.** The next contention is that the prosecutrix witnesses P.W. 4, 5 and 12 being interested witnesses, their evidence could not be considered as reliable. In view of the inconclusive nature of the medical evidence and the inconsistent and contradictory evidence of the prosecutrix considered along with the evidence of P.Ws 2, 3, 4, 5 and 12 as well as the other discrepancies indicated above, the Prosecution cannot be said to have proved its case beyond reasonable doubt.

**12.** Upon hearing the Learned Counsels for the Appellant and the Counsel for the prosecution and after carefully examining the evidence on record, I find it difficult to be persuaded to be convinced by the submissions made on behalf of the Appellant. The contradictions and the discrepancies pointed out by Mr. S.S. Hamal, Learned Legal Aid Counsel, in my view, are not so substantial as to shake the foundation of the prosecution case. The prosecutrix, P.W.1 and P.Ws, 2, 3, 4, 5 and 12 have consistently named the Appellant in their evidence as the one who actually committed rape on her. Even in the FIR exhibit 1, he has been specifically named.

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**13.** No doubt, there is some discrepancy in the names of the persons who had caught her by the hand and pinned her down to the ground when the Appellant was committing sexual assault on her but, one of them, Accused Rewash Gurung, has been named by the prosecutrix P.W.1, her sister Prabina Tamang, P.W.2, and the eye witness Hemant Subba, P.W.12. The eye witness P.W.12, Hemant Subba has given account of the incident in sufficient detail and has remained firm in his cross examination. He has corroborated the evidence of prosecutrix P.W.1 in full measure and so has the P.W.2, Prabina Tamang, in as much as she had seen her sister, the prosecutrix, being dragged below the road by the Appellant and others.

**14.** The evidence of P.W. 4, Dolma Sherpa, and P.W.5, Tshering Sherpa, would be relevant and corroborative to the evidence of the prosecutrix of her having fled to their house at about 8 p.m. after the Appellant and the others were interrupted in their act by the eye witness P.W. 12 Hemant Subba when he lit his torch light and then pelted stones in the direction of the Accused persons giving her an opportunity to escape. These witnesses in their evidence have most categorically



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stated that when the prosecutrix knocked at their door they found her half naked and the P.W.5, Tshering Sherpa, gave her a jumper and track and to wear. That she looked panicky and frightened, had grass on her hair and some scratch marks on her thigh. Apart from the above, the injuries noted by the Gynaecologist Dr. Tukki Doma Bhutia, P.W.18, which are as many as nine (9) on various parts of her body would certainly lend credence to and supportive of the evidence of prosecutrix as well as the other prosecution witnesses.

**15.** It is a settled position of law that if the prosecution evidence is otherwise convincing, even in the absence of a medical evidence, an accused can be convicted of the offence of rape. In the very case of **Munna vs. State (Supra)** cited by Mr. Hamal, the Apex Court has referred to one of its earlier decisions in **State of Punjab vs. Gurmit Singh: (1996) 2 SCC 384**, where it has been held as follows: -

**"10.** .....

**"8**..... 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



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base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. 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. It must not be overlooked that a woman or a girl subject to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable."

**16.** In the case at hand although the evidence of P.W.1, prosecutrix, in my view, by itself is convincing, it is found to have been further reinforced even by the evidence of P.Ws 2, 4, 5 and the eye witness account of P.W. 12.

**17.** In such view of the matter, I find that the prosecution has been able to discharge its onus of proof

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beyond reasonable doubt. Under such circumstances, I do not find any reason to interfere with the impugned judgment.

**18.** In the result, Appeal is dismissed.

**19.** A copy of this judgment and the original case records be transmitted forthwith to the Court of Fast Track Court, South and West Sikkim at Namchi, for its compliance.

**( S. P. Wangdi )**  
**Judge**  
**17-06-2015**

to

Approved for reporting : **Yes**  
Internet : **Yes**