



**THE HIGH COURT OF SIKKIM: GANGTOK**  
**(Criminal Appeal Jurisdiction)**

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**SINGLE BENCH: MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**  
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**Crl. Appeal No.10 of 2019**

Yabesh Rai,  
Son of Shri Ganga Prasad Rai,  
Resident of Kopchey, Namchi

.... Appellant

**Versus**

State of Sikkim

.... Respondent

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**Appeal against conviction under Section 374 (2)**  
**Cr.P.C. 1973.**

**Appearance:**

For Appellant	:	Mr. Anjan Sharma and Mr. Nirmal Kr. Berdewa, Advocates.
For Respondent	:	Mr. Sujan Sunwar, Assistant Public Prosecutor.
Date of hearing	:	16.03.2020
Date of Judgment	:	21.03.2020

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**J U D G M E N T**  
**(21.03.2020)**

***Bhaskar Raj Pradhan, J***

1. The appellant has been convicted for the offences under Sections 279, 323, 342 and 506 of the Indian Penal



Code, 1860 (IPC). The judgment of conviction and order on sentence both dated 30.03.2019 are under challenge.

**2.** The learned Sessions Judge on examination of the evidence of the victim came to the conclusion that it was not safe to rely upon her sole testimony to convict the appellant under Section 376 (1) and Section 354 D IPC. However, the learned Sessions Judge found corroboration of the victim's evidence in the evidence of the prosecution witnesses for the rest of the offences.

**3.** The First Information Report (FIR) (exhibit-1) was lodged at the police station on 10.09.2016 by the victim. Kessang D. Bhutia (P.W.16) the station house officer received the FIR (exhibit 1) on 10.07.2016 and registered it. On the basis of the FIR investigation was done by Joshna Gurung (P.W.23). Subarna Rai (P.W.18) the learned Judicial Magistrate recorded the statement of the victim under Section 164 Cr.P.C. (exhibit 11). Keshar Tamang (P.W.4) and Bikash Thapa (P.W.5) are signatories of seizure memo (exhibit-2) seizing the wooden roll (MO I). Karna Bahadur Gurung (P.W.6) and Kailash Pradhan (P.W.8) witnessed the seizure of one of the victim's slipper from below the women's hostel near her house. Emmanuel Rai (P.W.10) and Julius Brown Rumbang Rai (P.W.11) witnessed the seizure of the ignition key and the mobile phone from the appellant. S. Ali (P.W.7) used to reside in



the same building as the appellant. According to him one lady and a man had come to the appellant's room and inquired about the appellant and the girl who used to stay in the room. He told them that as far as he knew they were leaving peacefully and had not come to know anything unusual between them. He witnessed the seizure of some clothes belonging to the girl vide seizure memo (exhibit-4). Bir Bahadur Subba (P.W.21) and Dilli Ram Sharma (P.W.22) were signatories to the seizure memo (exhibit-17) by which the appellant's vehicle was seized.

**4.** On examination of the charge sheet and the material on record the learned Sessions Judge framed charges under Section 376 (1), 354 D, 342, 324, 506 and 279 IPC on 03.10.2018. The appellant pleaded not guilty and the trial commenced. Twenty three prosecution witnesses including the investigating officer were examined. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) on 12.03.2019. The appellant either denied having any knowledge of the circumstances put to him or stated that the allegations were not true.

**5.** Heard Mr. Anjan Sharma, learned Counsel for the appellant and Mr. Sujan Sunwar, learned Assistant Government Advocate for the respondent.



**6.** Mr. Anjan Sharma submitted that the failure of the prosecution to examine the medical officer who first examined the victim at the primary health center casts a doubt upon the prosecution case regarding the injuries sustained by the victim. He further submitted that the material discrepancies in the evidence of the prosecution witnesses Dik Bahadur Pradhan (P.W.14) and Kiran Pradhan (P.W.12) have been ignored. He submitted that the learned Sessions Judge has relied upon the uncorroborated testimony of the victim to convict the appellant. He argued that there were contradictions in the testimonies of the victim and her mother (P.W.1). It was also submitted that the mere fact that the appellant was driving the vehicle in great speed does not amount to driving in a rash and negligent manner. Finally he submitted that this was a fit case in which benefit of the Probation of Offenders Act, 1958 ought to have been given to the appellant as the offences for which he was convicted are not serious offences and that he was a first time offender. He relied upon several judgments of the Supreme Court on this point which shall be discussed later.

**7.** Mr. Sujan Sunwar on the other hand took this Court through the evidence and submitted that all the ingredients of the offences alleged have not only been proved by the evidence of the victim but has also been corroborated by



the other witnesses. He submitted that the learned Sessions Judge had correctly appreciated the evidence on record to come to the conclusion convicting the appellant and sentencing him. Mr. Sujan Sunwar submitted that on examination of the nature of the offence it is not a fit case in which benefit of the Probation of Offenders Act, 1958 should be granted.

**8.** The prosecution story as it unfolded was that the victim and the appellant were known to each other. The evidence also suggests that they were known to each other quite intimately. Although, the victim desired to sever her relationship with the appellant, he had been insistent. This ultimately culminated in the incident of 09.07.2016 evening.

**9.** P.W.1 is the victim's mother. She identified the appellant as they belong to the same religious congregation. According to her on 09.07.2016 at around 7 to 7.30 p.m. she heard someone call out to the victim addressing her as ma'am from the bamboo grove next to the women's hostel. She thought that some student from the women's hostel was calling the victim and accordingly informed her. The victim went out. She assumed that the victim had gone to the women's hostel. At around 8 p.m. when they sat for the evening prayer she noticed that the victim was not there. She sent her younger son to the



women's hostel to call the victim. Her son returned and informed that the door of the women's hostel was closed from inside. He also told her that they might be attending prayer. Thereafter, they started their prayer without the victim. After a while she tried to contact the victim but found that she had left her mobile at home. About an hour later she received a phone call from an unknown lady who told her that the victim had sustained injuries and was at the police station.

**10.** P.W.2 is the victim's father and P.W.3 is the victim's brother. They corroborated the statement of P.W.1.

**11.** The victim (P.W.17) deposed about the incident that happened on the evening of 09.07.2016 in elaborate detail. On 09.07.2016 at around 7 p.m. she heard somebody calling her - ma'am. She went towards the place. The appellant came from the bamboo grove and covered her mouth. He dragged her down the stairs and took her to his vehicle (white Xylo) parked beside the road. He put her inside the vehicle forcibly and punched her on her right temple. She lost consciousness for a while. When she regained consciousness she saw the appellant drinking alcohol and driving the vehicle in great speed. She started shouting out for help. He stopped the vehicle and started hurling abuses at her. He also physically assaulted her with a wooden roll (MO I) in her right arm, punching her



several time on her face and even tried to strangulate her. She managed to jump out of the vehicle but realized she was wearing only one slipper as the other one (MO II) had slipped off while the appellant was dragging her down the stairs near her house. She started running and saw one white Wagon R. She stopped the car, got inside the front seat and requested the driver to help her giving him her identity. The appellant reached there and told him not to interfere as it was a personal matter between them. In spite of the request the driver refused and the appellant pulled her out of the car and took her towards his vehicle. Another vehicle (Maxx) passed them and she started shouting for help but the appellant covered her mouth and the vehicle passed away. The appellant put her inside the vehicle again forcibly. He made her swear upon the bible asking him to promise to marry him or else he threatened to push her down the steep cliff. Once again he forced her to swear upon her father that she would marry him. She agreed on the condition that he would reach her home. After that the appellant turned his vehicle. As they moved a little further she saw a group of people gathered on the road and also saw the two vehicles (Maxx and Wagon R) parked on the road. She again raised an alarm. The people gathered also started shouting. Instead of taking her home the appellant drove towards Gangtok. On the way he



threatened to take the vehicle and drive it off the cliff; all the while he was driving in a rash manner. On the way the tyre of the vehicle punctured, the vehicle could not be driven up and so he started driving it in the other direction. They passed by several cars. The drivers of the said cars shouted at the appellant as he was driving in high speed and in a rash and negligent manner. He punched her again on her face. When they were about to reach the bazaar she noticed a policeman standing beside the road. The appellant warned her and told her to tell the police that she was his wife and there was no problem between them. She rolled down the glass and requested the police to help her. The appellant sped the vehicle away and once again physically assaulted her. As they were driving she saw a white Swift car slowly moving towards them as it was raining heavily. At a particular point she noticed that the road had been blocked with big stones and a policeman standing next to the road. The appellant once again warned her to tell the police that she was his wife and that there was no problem between them. She then got down the vehicle and held the police. The appellant saw this and sped the vehicle through the edge of the road. The persons inside the Swift car took her inside their car from where she called her mother. Thereafter, the police took her in their vehicle to locate the appellant. They saw the





appellant's vehicle parked beside the road a little further away but without the appellant. The police deflated the tyres and took its documents. The police then took her to the police station. She verbally reported about the incident to the police who sent her for medical examination to the primary health center. The next morning she lodged the FIR after which the police sent her for medical examination to the District hospital where she was examined by the doctor. According to the victim as a result of the physical assault by the appellant on her she sustained injuries and swelling on her right eye, blood had clotted inside the eyes; injuries on her teeth; injuries on her right arm and wound on her elbows; strangulation mark on her neck and abrasion and swelling on her cheek; cut marks on her lips and injuries on her feet and legs. The following morning she vomited blood. The elaborate deposition of the victim has sustained a thorough cross-examination by the defence. The cross examination makes it clear that the defence did not dispute that the appellant and the victim were known to each other.

**12.** Dr. Sunita Thapa (P.W.20) the medical officer at the District hospital examined the victim on 10.07.2016. She found that the victim had sustained bruise, swelling and tenderness over her right arm, lacerated wound over right elbow, bruise and swelling over the left hand with



tenderness, abrasion over right side of her neck, abrasion over both knees, tenderness, swelling and bruise over the right upper and lower eye lid, redness of conjunctiva over her right lateral side, swelling and bruise over the right side of the cheek, swelling over the right side upper lip, multiple abrasion over the left hand palmar aspect.

**13.** Dr. Anne Rai (P.W.15) examined the x-rays of skull and shoulder joints of the victim on 10.07.2016. There were no injuries. On 11.07.2016 the victim was sent for x-ray of the neck and chest. No injuries were found. This was on the request of Dr. Sunita Thapa (P.W.20).

**14.** The deposition of the victim about the injuries sustained by her due to the physical assault by the Appellant has been adequately corroborated.

**15.** Laxuman Rai (P.W.9) is an eye witness. On 09.07.2016 at around 7.30 to 8.30 p.m. while returning home he saw a white coloured Xylo parked on the side of the road. He also saw the front door of the vehicle open and the light switched on. After driving about 200 feet away he saw one girl being dragged by the appellant. The girl was screaming loudly for help. He parked his vehicle to see what was happening. After about five minutes the same vehicle passed by and he saw the girl waving her hand from the front seat window of the vehicle and shouting for help. He tried to stop the vehicle but the appellant drove away at



high speed towards Gangtok. He was able to note down the number of vehicle which he remembered as SK-04 0113.

**16.** Dik Bahadur Pradhan (P.W.14) who was the policeman on duty at the bazaar received information that one vehicle (Xylo) bearing registration number SK-04Z/0113 was carrying one lady who was screaming for help. They were directed to stop the vehicle. When they tried to stop the vehicle it did not stop but sped away at high speed.

**17.** Kiran Pradhan (P.W.12) while on duty at the police station received a phone call from Dik Bahadur Pradhan (P.W.14) informing him that while they were on duty at the bazaar, one vehicle Xylo bearing registration number SK-04Z/0113 came at high speed and nearly hit them as it sped away. Thereafter, he along with other police personnel went to apprehend the vehicle. When they reached a particular place they found the victim surrounded by many people. They were informed by the public that the vehicle had gone towards Rabong. They found the vehicle locked and parked on the road side a little further away but did not find anyone near the vehicle.

**18.** The victim's narration of what transpired on 09.07.2016 after the appellant forcibly put her into his car, drove her away and driving the vehicle in a rash and



negligent manner while drinking alcohol and in high speed endangering her life, punching her, physically and verbally abusing her, threatened to take the vehicle and drive it off the cliff and restraining her from alighting the vehicle although people including the police had tried to stop him till she was finally rescued clearly establishes the offence of wrongful restraint, voluntarily causing hurt, criminal intimidation and rash driving on a public way. There is adequate corroboration to the deposition of the victim from the evidence of the prosecution witnesses as discussed above.

**19.** The failure to examine the doctor who examined the victim at the primary health center on the night of the incident does not cast any doubt about the injuries sustained by her due the physical assault by appellant. The incident is of the late night of 09.07.2016. According to the victim she was sent for medical examination at the primary health center that night itself and thereafter she went home. This deposition remained intact in spite of detailed cross examination. The next morning after she lodged a written FIR she was once again sent for medical examination. The medical report (exhibit 16) records that the victim was examined at 12.25 p.m on 10.07.2016 itself. There is no reason to doubt the evidence.



**20.** The contradictions pointed out by Mr. Anjan Sharma are minor. They do not demolish the substratum of the prosecution case. While Dik Bahadur Pradhan (P.W.14) deposed about what he saw; Kiran Pradhan (P.W.12) deposed about what he heard from Dik Bahadur Pradhan (P.W.14). A minor discrepancy of what one said and what the other heard does not affect the core of prosecution case. Similarly, whether the victim's mobile was taken by the appellant as stated by her or it was left in the house as deposed by her mother (P.W.1) does not shake the foundation of the case proved by the prosecution beyond any reasonable doubt. There is evidence that the appellant was driving the vehicle not only in high speed but while consuming alcohol. That apart the evidence also shows that although a policeman tried to stop him, he did not. With such facts glaring it is difficult to hold that the ingredients of the offence under Section 279 IPC have not been proved although generally it may sometime be true as a proposition that speed alone cannot be the sole determinative factor for coming to the conclusion that the vehicle was being driven in a rash and negligent manner endangering human life.

**21.** Thus the conviction of the appellant under Sections 279, 323, 342 and 506 IPC are upheld. The learned Sessions Judge has sentenced the appellant to simple



imprisonment for six months and a fine of Rs.500/- for each of the offences separately and in default the appellant to undergo simple imprisonment of two months. The sentences have been directed to run concurrently.

**22.** Mr. Anjan Sharma has vehemently argued that during the sentence hearing he had sought the release of the appellant under Section 4 (1) of the Probation of Offenders Act, 1958 and under Section 360 Cr.P.C. however, the learned Sessions Judge declined to do so although it was a fit case.

**23.** In *State of Karnataka v. Muddappa*<sup>1</sup> the Supreme Court examined a conviction under Section 304 part II IPC and the circumstances under which the blow was inflicted by the accused on the deceased and directed that the accused be released under Section 4 (1) of the Probation of Offenders Act, 1958. In *Hari Kishan v. Sukbir Singh*<sup>2</sup> the Supreme Court while upholding the view of the High Court of releasing the accused giving them benefit of probation of good conduct held that many offenders are not dangerous criminals but are weak characters who had surrendered to temptation or provocation and in placing such type of offenders on probation, the Court encourages their own sense of responsibility for their future and protect them from the stigma and possible contamination of prison. It

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<sup>1</sup> (1999) 5 SCC 732

<sup>2</sup> (1988) 4 SCC 551



was observed that the High Court had come to a finding that there was no previous history of enmity between the parties and the occurrence was an outcome of a sudden flare up. In **Sitaram Paswan v. State of Bihar**<sup>3</sup> the Supreme Court held that for exercising the power which is discretionary, the Court has to consider circumstances of the case, the nature of the offence and the character of the offender. While considering the nature of the offence, the Court must take a realistic view of the gravity of the offence, the impact which the offence had on the victim. The benefit available to the accused under Section 4 of the Probation of Offenders Act, 1958 is subject to the limitation embodied in the provisions and the word “may” clearly indicates that the discretion vest with the Court whether to release the offender in exercise of the powers under Section 3 or 4 of the Probation of Offenders Act, 1958 having regard to the nature of the offence and the character of the offender and overall circumstances of the case. This power can be exercised by the Court even at the appellate or revisional stage and also by the Supreme Court while hearing appeal under Section 136 of the Constitution. It was held that the facts revealed that the incident had occurred at the spur of the moment and was traverse in nature. There was no material on record to indicate that

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<sup>3</sup> (2005) 13 SCC 110



the appellant's therein had previous conviction. It was in these circumstances that the Supreme Court decided that the accused was entitled to the benefit of good conduct. In ***State v. Sanjiv Bhalla***<sup>4</sup> the Supreme Court held:

*“11. Every accused person need not be detained, arrested and imprisoned- liberty is precious and must not be curtailed unless there are good reasons to do so. Similarly, everybody convicted of a heinous offence need not be hanged however, shrill the cry “off with his head” – and this cry is now being heard quite frequently. Life is more precious than liberty and must not be taken unless all other options are foreclosed. Just sentencing is as much as an aspect of justice as a fair trial and every sentencing judge would do well to ask: is the sentence being awarded fair and just.”*

The Supreme Court summed up in the following manner:

*“28. To sum up:*

- 28.1. For awarding a just sentence, the Trial Judge must consider the provisions of the Probation of Offenders Act and the provisions on probation in the Code of Criminal Procedure;*
- 28.2. When it is not possible to release a convict on probation, the Trial Judge must record his or her reasons;*
- 28.3. The grant of compensation to the victim of a crime is equally a part of just sentencing;*
- 28.4. When it is not possible to grant compensation to the victim of a crime, the Trial Judge must record his or her reasons; and*
- 28.5. The Trial Judge must always be a life to alternative methods of a mutually satisfactory disposition of a case.”*

**24.** The learned Sessions Judge has held that the appellant was a mature man of 38 years who could not be expected to treat a woman so badly that she is traumatized for the rest of her life. He held that the agony and the pain

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<sup>4</sup> (2015) 13 SCC 444





suffered by the victim and her family members cannot be compensated in monetary terms. It was held that the appellant cannot be shown too much leniency and releasing him on probation would send a wrong signal to the society. The learned Sessions Judge has recorded his reasons for declining to exercise his discretion in the appellant's favour.

**25.** The paramount consideration for release of a convict who has not committed any offence punishable with death or imprisonment for life under Section 4(1) of the Probation of Offenders Act, 1958 is the nature of the offence and the character of the offender. In order to release a convict on probation under Section 360 Cr.P.C. again, the character, antecedents of the offender and the circumstances in which the offence was committed are vital considerations. The record does not reveal that the appellant has a good character. The records revealed the manner and the circumstances in which the offences have been committed. It was premeditated and deliberate. The vivid description of what transpired with her in her deposition corroborated by the multiple injuries sustained by the victim clearly establishes the nature of the offences. Keeping in mind the circumstances of the case including the nature of the offences and the character of the offender, although he may have been a first time offender, this Court sees no reason



to unsettle the sound reasoning given by the learned Sessions Judge in declining to apply Section 4(1) of the Probation of Offenders Act, 1958 and Section 360 Cr.P.C in exercise of his judicial discretion.

**26.** The judgment of conviction and order on sentence both dated 30.03.2019 are upheld. Consequently, the appeal is dismissed. No order as to costs.

**27.** The appellant shall surrender before the Court of the learned Judge, Fast Track Court, East & North Sikkim at Gangtok during the course of the day to undergo sentence as pronounced.

**28.** Certified copies of this Judgment to be forwarded to the Court of the learned Judge, Fast Track Court, East & North Sikkim at Gangtok. A copy thereof may be supplied free of cost to the appellant.

**(Bhaskar Raj Pradhan)**  
**Judge**  
21.03.2020