

**HIGH COURT OF TRIPURA
AGARTALA**

CRL.A.(J)49 of 2016

Bimal Saha,
son of Shri Anil Saha,
resident of Tulabagan Chowmuhani,
P.S. Sidhai, District : West Tripura

----Appellant(s)

Versus

The State of Tripura

---- Respondent(s)

For Appellant(s)	:	Mr. A. Basak, Adv.
For Respondent(s)	:	Mr. S. Ghosh, Special. P.P.
Date of hearing	:	14.11.2019
Date of delivery of Judgment & Order *	:	29.05.2020
Whether fit for reporting	:	YES/NO

**HON'BLE MR. JUSTICE S. TALAPATRA
HON'BLE MR. JUSTICE ARINDAM LODH**

Judgment & Order

[Talapatra, J]

The appellant was charged under Section 376(1) of the IPC for committing rape on the victim on 15.12.2012 at about 14/30 hrs. in a place near the Swami Vivekananda College Road and within Fatik Chara Tea Estate under Sidhai Police Station and the appellant was also charged under Section 341 of the IPC for wrongfully¹

* The pronouncement of the Judgment was deferred for lockdown of the court.

restraining the victim. After trial, by the judgment dated 23.03.2016 delivered in Case No.ST(T-1)04 of 2014 by the Additional Sessions Judge, Court No.5, West Tripura, Agartala the appellant has been convicted under Section 376(1) and Section 341 of the IPC.

2. Pursuant to the said judgment of conviction by the order dated 23.03.2016, the appellant has been sentenced to suffer rigorous imprisonment of ten years and to pay fine of Rs.10,000/- with default stipulation for committing offence of rape. The appellant has been further sentenced to suffer simple imprisonment for one month for committing the offence of wrongful restraint.

3. By means of this appeal, the said judgment and order of conviction and sentence are challenged fundamentally on two grounds that the appreciation of evidence has defied all established norm of appreciation. Even, it has been asserted in this appeal that the testimony of the victim [PW-6] cannot be relied, inasmuch as the victim has identified the appellant in her statement recorded by the police under Section 161 of the CPC whereas the victim's statement as recorded under Section 164 of the Cr.P.C. did not disclose the name of the appellant, the said statement even though was recorded on 16.12.2012. The victim had got long time of reflection. Even the trial court did not properly appreciate the evidence of the Medical Officer [PW-3] who had examined the victim. PW-3 gave the opinion that vaginal penetration by adult penis cannot be ruled out. But in the

cross-examination, he has stated that the injuries i.e. laceration or rupture were found on vagina of the victim. It has been opined further that those injuries may be self-inflicted. The said statement was made while confronting a suggestion whether the lacerative injuries can be self-inflicted.

4. The prosecution case is rooted in the complaint [Exbt.5] filed by one Subal Das [PW-5] whereby he revealed to the Officer-in-Charge of Sidhai P.S. that his daughter aged about twelve years [the name is withheld for purpose of protecting her identity] was studying in Class-VI in the Kamalghat School. Everyday she used to go to the school from his house and used to come back by a vehicle. On 15.02.2012 while the victim was returning home from the school at around 2.30 p.m. and when she reached a place along the Swami Vivekananda College Road, the appellant had forcibly raped her in the Fatikchara Tea Estate. The labourers who were working in the garden heard the screams of the victim girl and they nabbed the appellant and rescued his daughter. He had reached that place immediately after receiving the news and filed the complaint to Sidhai Police Station. Based on the said complaint, Sidhai P.S. Case No.101/2012 under Section 341/376 of the IPC was registered and taken up for investigation. On completion of the investigation, the final report was filed by sending up the appellant to face the trial. After commitment of the police papers, the Additional Sessions Judge [hereinafter the trial

Judge] on transfer of the trial framed the charge, as stated, to which the appellant pleaded not guilty and claimed to be tried.

5. To substantiate the charge, the prosecution adduced 13 witnesses and introduced thirteen documentary evidence including the medical examination report of the victim [Exbt.2] and the report from the Forensic Science Laboratory [Exbt.3]. The defence did not adduce any evidence. After recording the evidence of the prosecution, the victim was examined under Section 313 of the Cr.P.C., when he had reiterated his plea of innocence. Thereafter, the trial Judge returned the finding of conviction.

6. Mr. A. Basak, learned counsel appearing for the appellant has quite succinctly submitted that the entire prosecution case is dependent on the testimonies of PW-6 and PWs-9, 10, 11 and 12 who had rescued the victim and detained the appellant for doing a heinous crime. Mr. Basak, learned counsel has submitted that the appreciation of evidence by the trial Judge is quite disturbing as much as, the statements made in the cross-examination were not mostly appreciated whereas the law demands that both the examination-in-chief and the cross-examination shall be given equal importance so far the question of measuring probative value is concerned. He has stated that the victim had been tutored and that is why when the statement of the victim was recorded under Section 164 of the Cr.P.C. she did not tell the name of the appellant as the accused. In the report of the

State Forensic Science Laboratory, as asserted by Mr. Basak, learned counsel, there was no opinion about recent sexual intercourse. Mr. Basak, learned counsel has further referred the testimony of PW-4 in this regard. PW-4 has categorically stated that no semen/seminal stain/spermatozoa of human origin could be detected in the exhibits marked as Exbts.E1, E2, E3, E4, E5, E6 and E7. According to Mr. Basak, learned counsel the testimony of the victim lacks the natural expression, even not graphical. As such, it would not be safe to rely on the testimony of the victim [the prosecutrix]. PWs-9, 10, 11 and 12 appears to the stock- witnesses in the process for fabricating the evidence.

7. Mr. Basak, learned counsel has also submitted that if the SFSL Report is given primacy than the opinion of the Medical Officer [PW-3] cannot entirely be believed. Hence, the benefit must go in favour of the appellant. Mr. Basak, learned counsel has referred a decision of the apex court in **Guddu alias Santosh versus State of Madhya Pradesh** reported in **(2007) 14 SCC 654** where it has been held by the apex court that if no definite medical opinion as regards commission of rape is available then no finding of conviction is warranted.

8. In **Aman Kumar versus State of Harayana** reported in **(2004) 4 SCC 379** the apex court had categorically observed as under :

"7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little."

9. The law has been restated in the similar manner in **Tarkeshwar Sahu versus State of Bihar** reported in **(2006) 8 SCC 560**. In **Tarkeshwar Sahu**(supra) the apex court has clearly observed that no offence under Section 376 of the IPC can be made out, unless, there was penetration to some extent. In the absence of penetration, to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the Penal Code. Therefore, the evidence unless is available in that regard, the accused cannot be punished for committing offence of rape.

10. From the other side, Mr. S. Ghosh, learned Special P.P. has robustly defended the judgment of conviction as returned by the trial Judge. His contention is that there is no reason to disbelieve the victim for not mentioning the name of the appellant in her statement recorded under Section 164 of the Cr.P.C. But she had disclosed to the police that the appellant committed rape on her. According to Mr. Ghosh, learned Special P.P. the testimony of the victim, if cumulatively read with PWs-9, 10, 11 and 12 there cannot be any confusion that the victim was raped and she had identified the perpetrator. The medical evidence [Exbt.2] is quite categorical about the commission of rape. Mr. Ghosh, learned Special P.P. has also

stated that the opinion of SFSL could not destroy the opinion of the Medical Officer who had examined the victim. Absence of semen, spermatozoa or seminal stain either in the vaginal swab or on the inner garments of the victim or other apparels is not at all the indicators of non-commission of rape. Similarly, absence of spermatozoa in the wearing apparels of the accused may not always be indicator of non-commission of rape. Hence, Mr. Ghosh, learned Special P.P. has urged this court that interference in the judgment of conviction is not at all warranted.

11. In order to appreciate the submission of the learned counsel appearing for the parties, the evidence may be re-evaluated meaningfully. True it is that PW-6 [the victim], PWs-9, 10, 11 and 12, the persons who after hearing the scream of the victim rescued the victim in a vulnerable situation and detained the appellant are most vital witnesses for the prosecution. Their testimonies are required also to be read together to reveal the truth.

12. PW-1, Sudip Kumar Das is the witness of seizure of vaginal swab of the victim.

13. PW-2, Saraswati Saha is the another witness of seizure of vaginal swab of the victim.

14. PW-3, Dr. Urmimala Debbarma of Mohanpur Community Health Centre has testified in the trial that she had examined the victim in connection with Sidhai P.S. Case No.101 of 2012. She

collected vaginal swab of the victim and preserved the swab in three glass vials and sealed those vials properly. Thereafter put label on them. Those vials were seized by the police officer. She has testified in the trial in the form of opinion on the basis of the report [Exbt.2] which has recorded as under :

“(A) There was evidence of recent vaginal penetration by adult penis size object;

(B) There were multiple 6 to 7 number of nail marks present over the right side of the neck;

(C) Fresh tear laceration was present over the hymen on 4 ‘o’ clock and 8 ‘o’ clock” position which was actively bleeding then;

(D) Auxiliary hair, public hair and breast of the victim girl were not well developed;

(E) No foreign particle was available on the private part of the victim girl;

[Emphasis added]

In the cross-examination, the said Medical Officer was consistent but the Medical Officer had also made the statement that the rapture and lacerations are not same thing. Hymen of the victim girl was not ruptured.

15. PW-4, Sabyasachi Nath, a Scientific Officer from SFSL has stated that he had examined the eight exhibits [E-E7] as forwarded to SFSL. On the basis of his report [Exbt.3] he has testified in the trial and stated as follows :

“1) No semen/seminal stain/spermatozoa of human origin could be detected in the Exhibits marked as E, E1, E2, E3, E4, E5, E6 & E7.

2) Soil could be detected in the Exhibit marked E8.

3) Soil stain could be detected in the exhibits marked E4 & E6.

4) Soil contained in the Exhibits marked as E4 & E6 was insufficient for any comparison with the control sample. So no opinion could be given regarding comparison of soil."

It may be noted here that Exbt.E, Exbt.E1 & Exbt.E2 are vaginal swab of the victim. Exbt.E3, Exbt.E4 & Exbt.E5 are the inner garment and the wearing apparels of the victim. Exbt.E6 & Exbt.E7 are the wearing apparels of the appellant. Exbt.E8 is the soil collected from the place of occurrence.

16. PW-5, Sri Nikhilesh Bhattacharjee, has stated that the victim was a student of Class-VII in the year 2013.

17. PW-6, the victim has testified in the trial. She has stated that she was a student of Class-VI when the occurrence took place at a place 5 km. away from her house. When she was returning from school alone, the appellant asked her to give her mobile number then she had reply that she had no mobile. Suddenly, he caught hold of her and dragged her towards the left side of the road and removed her under-wear. She tried to resist. But the appellant removed her skirt also. The appellant then 'inserted his penis in her vagina'. She cried out but the appellant gagged her mouth by his palms. Four persons who are labourers in the tea-estate came to the place and rescued her. She was taken to the police station. From there, she was sent to Mohanpur Hospital for her medical examination. She has confirmed

that the Magistrate recorded her statement. She identified her signature on the said statement [Exbt.4]. She identified the signature of her father who lodged the complaint [Exbt.5] as during the investigation her father expired. The defence has made an attempt to refute the statements of the victim but their attempt was not successful. The victim has truthfully stated in the trial that the name of the appellant was not initially known to her but she had come to know his name from her father.

18. PW-7, Sabita Das is the mother of the victim and stated that her daughter was reading in Class-VI on the day of occurrence. The appellant, as she came to know, dragged her daughter towards a lunga and did the bad act. She has also stated that some labourers rescued her daughter. She was the seizure witness of the wearing apparels of the victim. She identified the seizure list [Exbts.6 & 7]. She was also the witness of the seizure of the soil from the place of occurrence and put her signature on the seizure list [Exbt.8]. Even she was the witness of seizure of the wearing apparels of the appellant by preparing the seizure list [Exbt.9]. The birth certificate was seized by the police by preparing the seizure list [Exbt.10] where she put her signature. She was cited as the witness for proving the seizures.

19. PW-8, Smt. Laxmi Das the aunt of the victim has almost stated similarly in the trial. But she refused to mention what was done

to the victim as did not see the said act by her eyes. Even she did not name the four labourers.

20. PW-9, Dilip Sabor, PW-10, Gopal Sabor, PW-11, Dipu Sabor and PW-12, Rakhal Sabor are the persons who have been termed as the labourers and who had rescued the victim. Those witnesses have stated similarly in the trial. They have stated that on 15.11.2012, they all along with another Dipak Sabor, were returning home after their work at Fatikcharra Tea Estate. On the way they heard the scream of a girl. On searching they found the appellant was throttling the girl who was undressed. On seeing them, the appellant tried to flee away. They chased him and caught him from a nearby place. The victim girl sustained bleeding injury on her face and also injury on her throat. The appellant had thrown away her school bag and her school dress on the place of occurrence. On getting the information, the father of the victim came there. The police also arrived there and took away the victim and the accused. The accused disclosed his name at the place of occurrence as Bimal Saha. All of them had identified the accused in the dock. By cross-examination, no part of their statement could be dented.

21. PW-13, Kiran Sankar Chowdhury a sub-inspector of Sidhai Police Station who was entrusted with the investigation has narrated in the trial how he carried out the investigation by preparing the site map, examining the witnesses and sending the victim for

medical examination. He has stated that the appellant was arrested from the house of one Bina Nama as the public detained him in the said house. He has also given the narration how he had caused the seizures of various materials. He had arranged for sending the victim for recording her statement under Section 164(5) of the Cr.P.C. After collection of the medical examination report and the report from SFSL, he found a strong prima facie case and filed the police report.

22. From the oral testimony of the victim and the testimony of PW-3, this court does not have any doubt that the appellant caused penetration in the vagina of the victim and for the said penetration, fresh tear laceration was found present over hymen on 4'o or 8'o clock and that part was actively bleeding at the time of examination. Even no dispute has been raised about the age of the victim and she was a child much below the age of consent. Therefore, the commission of rape as well as unlawful restraint are well proved. Detailed discussions do not appear necessary inasmuch as during the transaction of crime PWs-9, 10, 11 & 12 appeared at the place of occurrence and they rescued the victim without dress. Her school dress and school bag were found lying on the ground. The statement of the victim has inspired confidence and hence this court has totally believed her version. Moreover her version has been corroborated by PWs-9,10,11 & 12 and by the medical examination report [Exbt.2]. Absence of spermatozoa, semen or seminal stain on the Exhibit.E to E8 is not

material inasmuch as in all the situations when the sexual assault takes place, such stain may not be available.

Having held thus, we do not have any hesitation to affirm the judgment of conviction and the consequential order of sentence.

In the result, the appeal fails and the same is dismissed. The appellant shall serve out the remaining period of sentence.

Send down the LCRs forthwith.

JUDGE

JUDGE

