

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 29th October, 2021

**DIVISION BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**

Crl. A. No.10 of 2020

Appellant : State of Sikkim

versus

Respondent : Padam Bahadur Panday (Chettri)

Appeal under Section 378(3) of the
Code of Criminal Procedure, 1973

Appearance

Dr. (Ms.) Doma T. Bhutia, Public Prosecutor with Mr. S.K. Chettri, Additional Public Prosecutor, for the Appellant.

Mr. Karma Thinlay, Senior Advocate (*Pro Bono*) with Ms. Sonam Wangmo Dorjee, Advocate, for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal assails the Judgment of the Learned Fast Track Court, East and North Sikkim at Gangtok, dated 30.05.2019, in S.T. (FT) Case No.03 of 2019, whereby the Respondent-Accused was acquitted of the offence under Section 376 (2)(l) and Section 376(2)(n) of the Indian Penal Code, 1860 (*for short, the "IPC"*), citing lack of evidence and thereby extending the benefit of doubt to him.

2. Learned Public Prosecutor, impugning the Judgment of the Learned Fast Track Court contended that, in fact, there was adequate evidence which proved the Prosecution case beyond a reasonable doubt against the Respondent who ought to have been convicted of the offences charged with. That, the Victim has

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categorically asserted in her Statement under Section 164 of the Code of Criminal Procedure, 1973 (*for short, the "Cr.P.C."*) that there was penetration of her genital by that of the Respondent's, thereby constituting the offence of rape. That, penetration does not have to be complete penetration for the offence of rape as held in ***Aman Kumar and Another vs. State of Haryana***¹. That apart, the evidence of the Victim is of sterling quality being cogent and trustworthy. Although her speech may have been incoherent, the incoherence did not extend to her evidence. That, the Hon'ble Supreme Court in ***Mohd. Imran Khan vs. State Government (NCT of Delhi)***² has laid down that the Statement of the Prosecutrix, if found to be worthy of credence and is reliable, requires no corroboration and the Accused may be convicted on the sole testimony of the Prosecutrix. That, in ***Wahid Khan vs. State of Madhya Pradesh***³, the Hon'ble Supreme Court observed that in an Indian society, no woman would make allegations of rape as she is aware of the repercussions flowing therefrom. The Victim herein also had no reason to make any false allegations against the Respondent. The evidence of P.Ws. 2, 3 and 4 corroborate and support the Statements of the Victim, which have remained consistent. That, the Learned Trial Court failed to appreciate the fact that there was sufficient evidence on record to establish that the Victim was sexually assaulted by the Respondent on the relevant day apart from which, the evidence of the Victim has not been decimated under cross-examination. That, in his examination under Section 313 Cr.P.C., the Respondent did not deny the allegations made

¹ (2004) 4 SCC 379

² (2011) 10 SCC 192

³ (2010) 2 SCC 9

against him nor did he state that he was innocent. Hence, the Appeal be allowed and the Respondent be convicted of the offences as charged viz. under Section 376 (2)(l) and Section 376(2)(n) of the IPC.

3. Vehemently resisting the arguments of the Learned Public Prosecutor, Learned Senior Counsel for the Respondent contended that the Judgment of the Learned Trial Court can be set aside only if there is a perversity in the findings which, in the instant matter, is non-existent. That, this Court, in the first instance, is to examine whether the Statement of the Victim is trustworthy. That, at the time of the alleged offence, the Respondent was sixty years of age and the Victim, fifty five years. According to the Victim, the Respondent caught hold of her hands, dragged her forcibly to the latrine, touched and rubbed her breasts and committed rape on her. That, the entire circumstance narrated by the Victim appears to be incongruous and impossible considering that the Respondent was sixty years old at the relevant time, rendering it an impossibility for him to have dragged a grown woman of fifty five years for a long distance. According to Exhibit 1, the First Information Report (*for short, the "FIR"*), the Respondent had dragged her to the female toilet. Exhibit 11, the Rough Sketch Map of the Place of Occurrence indicates that the female toilet is situated at the end of the out house of the Old Age Home, preceded by six other such facilities. If the intention of the Respondent was to rape the Victim, there was no reason for him to have dragged her to the seventh facility to commit the offence. It could well have been committed in the first bathroom, which is the closest to the Old Age Home. That, the place where she was

allegedly dragged from is visible from the roadside and a *Mandir* is located close by as also a Camp of the Indian Reserve Battalion, therefore, the act of dragging the Victim could easily have been witnessed by the persons in the area. That, there were seventeen inmates of the Old Age Home at the time of the alleged offence but none of them appear to have seen the Victim being dragged neither did she shout for help. That, it is not the Prosecution case that she was unable to shout out for help. That, the Respondent was not seen coming out of the toilet after the Victim, neither did the Victim point to him when she was narrating the incident to P.Ws. 2, 3 or 4. Nothing incriminating emerged from the Forensic Examination Report as well as the Medical Examination Report although both the Respondent and the Victim were examined on the date of the alleged offence i.e. 04.11.2018. Hence, the impugned Judgment being a reasoned one ought not to be interfered with and the Appeal deserves a dismissal. To buttress his arguments, reliance was placed on ***Union of India and Others vs. Sepoy Pravat Kumar Behuria***⁴, ***State of Uttar Pradesh vs. Wasif Haider and Others***⁵ and ***Santosh Prasad vs. State of Bihar***⁶.

4. We have carefully considered the rival submissions of Learned Counsel, examined the evidence and documents on record, as also the impugned Judgment and the citations made at the Bar.

5. The only question that falls for consideration before this Court is whether the impugned Judgment of the Learned Trial Court warrants interference? To examine this aspect, we may advert to

⁴ (2019) 10 SCC 220

⁵ (2019) 2 SCC 303

⁶ (2020) 3 SCC 443

the Prosecution case which, briefly stated, is that on 04.11.2018, Exhibit 1, the FIR, came to be lodged at the concerned Police Station by P.W.2, informing that at around 16:45 Hrs, the Victim was forcibly dragged by the Respondent to a female toilet situated in the out house of the Ground Floor of the Old Age Home of which both the Victim and the Respondent were occupants. P.W.2 the Complainant, who was working as a Caretaker of the Old Age Home, was informed of the incident by P.W.4, also a Caretaker of the Home, upon which, she went to the Place of Occurrence. The Victim narrated the incident to P.W.2 stating that the Respondent had caught her hands, dragged her to the said toilet, raped her and squeezed her breasts. That, in fact, previously also he had attempted to rape her several times. Upon the lodging of Exhibit 1, Ranipool Police Station Case bearing FIR No.43/2018, dated 04.11.2018, under Section 376 of the IPC was registered against the Respondent and the case endorsed to P.W.9, the Sub Inspector at the Ranipool Police Station for investigation. On completion of investigation, Charge-Sheet was submitted against the Respondent under Section 376 of the IPC.

6. The Learned Trial Court framed Charge against the Respondent under Section 376 (2)(l) and Section 376 (2)(n) of the IPC. On his plea of "not guilty," nine Witnesses for the Prosecution were examined. On closure of the Prosecution evidence, the Respondent was afforded an opportunity under Section 313 Cr.P.C. to explain the incriminating evidence against him. He denied any involvement in the offence. Arguments of the parties were finally heard and the Judgment of Acquittal was pronounced on 30.05.2019, hence this Appeal.

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7.(i) On careful perusal of the evidence of the Prosecution Witnesses and the documents relied on by the Prosecution, as well as upon viewing the Video Recording of the proceedings, prepared by the Learned Trial Court while recording the evidence of P.W.1 the Victim, it emerges with clarity that there is no reason for this Court to interfere with the findings and conclusion of the Learned Trial Court for the reasons that; in the first instance, the Learned Trial Court, before recording the evidence of the Victim has recorded as follows;

"(As the victim has low I.Q. and could not express herself like normal person, hence the entire proceeding is videographed in camera by using Smart Phone.)

....."

This Statement itself indicates that the Victim was not competent to testify. The Learned Judicial Magistrate who recorded the Section 164 Cr.P.C. Statement of the Victim has *inter alia* recorded as under;

"The victim could not be administered Oath as she did not understand when she was tried to be administered the same even through gestures. The victim also could not be asked the questions as provided in the questionnaire as she could not be properly conveyed the same and she also could not understand it. However, the victim could understand the simple questions put to her as such her statement is recorded in question and answer form. She could speak few words and also showed her answers sometimes through gestures.

....."

(ii) It is imperative at this juncture to refer to the provisions of Section 118 of the Indian Evidence Act, 1872 (*for short, the "Evidence Act"*) which provides as follows;

"118. Who may testify.—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease,

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whether of body or mind, or any other cause of the same kind.

Explanation.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.”

(iii) The Court therefore is vested with the discretion of examining the competency of a Witness to testify. If the Court concludes that the Witness does not understand the questions put to her and fails to give rational answers, the Court is not to proceed to take the evidence of that Witness. We are indeed conscious that there is no legal requirement to hold a preliminary examination to detect the competency of any Witness, however, as a rule of prudence, when a person appears to be mentally challenged, it is desirable to resort to a preliminary examination which would disclose the capacity and intelligence of the Witness. Section 119 of the Evidence Act lays down as hereunder;

“119. Dumb witnesses.—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court. Evidence so given shall be deemed to be oral evidence.”

(iv) On the anvil of the above Sections of Law, although it is essential to state here that the Victim appeared to have a partial speech impediment and was not “dumb” as envisaged by the provisions of Section 119 of the Evidence Act, the Victim lacked the mental capacity to understand the questions put to her, which can be culled out from the observations recorded by the Learned Judicial Magistrate who proceeded to record the Section 164 Cr.P.C. Statement of the Victim and from the evidence recorded by the Learned Trial Court. To satisfy ourselves further, we have also examined the Video Recording of the Court proceedings prepared

by the Learned Trial Court, the Recording not having been objected to by either the Learned Public Prosecutor or the Learned Defence Counsel. On such viewing, it is apparent that the Witness was not in a position to take oath as she lacked any understanding of the requirement of oath or even the consequences of taking oath. That apart, the Learned Public Prosecutor, on examining the Victim, recorded, "*.....Thereafter, the accused touched and rubbed my breasts and committed rape on me.*" Besides a gesture indicating that someone had rubbed her breasts, there was no indication that rape had been committed on her by any person. The Video Recording indicates that she did not use the word "rape" at all nor did she make any statement about the Respondent having raped her. She made no gesticulation to indicate the offence of rape. Not only did the Victim specifically not utter the word "rape" in her evidence but the medical examination of the Victim and the Respondent conducted on the date of the alleged offence i.e. 04.11.2018 lent no credence to the allegation of rape. P.W.6 is the Doctor/Medical Officer who examined both the Victim and the Respondent. Her findings for the Victim were *inter alia* as follows;

"On examination the patient was conscious, oriented to time, place and person.

On local examination tenderness was present on both breasts, there were no bruises or any external injuries in her body parts, there were no external injuries in her genitals i.e. Labia minora/labia majora. All her vitals were within normal limit.

....."

On examining the Respondent, she found the following;

"On the same day i.e. 04.11.2018 the accused was brought for his medical examination by S.I. Chomu Lachungpa of Ranipool P.S. with an alleged history of sexual assault upon the victim on 02.11.2018 at T, East Sikkim.

On examination the patient was conscious, oriented to time, place and person. All his vitals were within normal limit.

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On local examination there were no external injuries present in his body parts or his genitals.

.....”

Her cross-examination revealed that she had examined the Respondent and the Victim within twenty four hours from the time of the alleged incident. She also stated that if a Victim of rape is examined within twenty four hours from the time of incident, fresh injuries and swelling, or bruise marks may be detected on her private parts. She admitted that there were no old or fresh injuries on the Victim’s private parts. So far as the Respondent is concerned, her cross-examination revealed that if a person performs sexual intercourse with a woman and such person is examined within twenty four hours from the time of the sexual intercourse, the Accused may have some swelling or laceration of glans in his private parts. That, there was no such swelling or laceration in the private parts of the Respondent neither were there any old or fresh injuries present on his body or genitals.

(v) It is pertinent to observe that it is not the Prosecution case that either the Victim or the Respondent had taken a bath after the incident or changed their clothes. The Doctor collected specimen of the pubic hair of the Victim (M.O.I), nail clippings of the Victim (M.O.II), the buccal swab of the Victim (M.O.III), her vaginal swab (M.O.IV) as also the pink floral pyjama of the Victim (M.O.V). She also collected specimen of the pubic hair of the Respondent (M.O.VI), his nail clippings (M.O.VII), his buccal swab (M.O.VIII), the penile swab of the Respondent (M.O.IX) and his undergarment (M.O.X).

(vi) P.W.7, the Junior Scientific Officer at Regional Forensic Science Laboratory, Saramsa, examined the Material Objects *supra*

by using Serological Techniques and did not find blood, semen or other body fluids in M.O.I to M.O.IV, M.O.V, M.O.VI to M.O.IX and M.O.X which had been forwarded to him. The Forensic Examination indicated absence of any body fluids on the wearing apparels of both the Victim and the Respondent. In the absence of injuries on the Victim and the Respondent, as also lack of body fluids on any of the Material Objects, the offence of rape appears to be a figment of the imagination of the Complainant P.W.2.

8.(i) The Learned Public Prosecutor harped on the Victim being a sterling Witness. It was also submitted that penetration need not be full penetration. Not only is penetration a *sine qua non* for the offence of rape but in order to constitute penetration, there must be clear and cogent evidence 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 (See **Aman Kumar and Another vs. State of Haryana** *supra*). However, the evidence of the Victim before the Learned Trial Court, her Medical Examination and that of the Respondent, as also the Forensic Evidence do not support the Prosecution allegation of penetration. At the same time, it is necessary to observe that a sterling Witness is one whose oral testimony is cogent, reliable, convincing and trustworthy for it to be accepted by the Court. In **Raju and Others vs. State of Madhya Pradesh**⁷, the Hon'ble Supreme Court, while observing that the Prosecutrix should not be disbelieved, also cautioned that a false allegation of rape can cause ignominy to the Accused. It was held *inter alia* as hereunder;

'10. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a

⁷ (2008) 15 SCC 133

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prosecutrix should not be suspected and should be believed, more so as her statement has to be evaluated on par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the court.

11. It cannot be lost sight that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration.'

(ii) We are indeed aware that in every case of rape, it is not necessary that there would be injuries on the person of the Victim or that absence of injuries would not necessarily be an indication of absence of rape. However, in this context, it is apposite to notice that the Victim's evidence points to no such incident and the evidence of P.Ws.6 and 7 lend no support to the Prosecution case. If the Victim, as alleged, had been dragged from one place to the next, there would have been some bruises/marks on her body as such dragging would have required force to be employed by the perpetrator of the offence. Besides, there ought to have been marks on the body of the perpetrator as well, if efforts had been made by the Victim to fight off the assault. These are missing in the case at hand, as evident from the entire evidence on record. The Rough Sketch Map Exhibit 11, shows no marks where the Victim was dragged and the I.O's evidence is devoid of such Statement.

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(iii) Although it was the constant refrain of the Learned Public Prosecutor that the Section 164 Cr.P.C. Statement of the Victim was recorded wherein she had stated that rape had been committed on her, however, in this context, it may be noticed that the Victim's Statement under Section 164 Cr.P.C. is of no relevance, as no oath was administered to the Victim as required by law before recording of her Statement under Section 164 Cr.P.C. Appositely, it may be stated that the Statement of a Witness recorded under Section 164 of the Cr.P.C. is not substantive evidence and can be utilized only for the purpose of contradiction and corroboration. In **R. Shaji vs. State of Kerala**⁸, the Hon'ble Supreme Court observed *inter alia* as follows;

"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction.

.....

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. (Vide Jogendra Nahak v. State of Orissa [(2000) 1 SCC 272 : 2000 SCC (Cri) 210 : AIR 1999 SC 2565] and CCE v. Duncan Agro Industries Ltd. [(2000) 7 SCC 53 : 2000 SCC (Cri) 1275])

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence." **It thus falls to reason that the Learned Trial Court could only rely on the evidence given on oath in the Court and not one under Section 164 of the Cr.P.C.**

⁸ (2013) 14 SCC 266

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which can be relied on only for the purposes of corroboration and contradiction."

[Emphasis supplied]

9. While addressing the argument advanced by the Learned Public Prosecutor that the Respondent failed to deny his act of sexual assault against the Victim in his Statement under Section 313 Cr.P.C., we may relevantly refer to the questions put to the Respondent under Section 313 Cr.P.C. wherein he has specifically stated in response to Questions No.1, 2 and 69, as extracted hereinbelow;

"Q.1. *It is in the evidence of PW 1 (Victim) that she knows you and calls you Padam daju. During the relevant time you caught hold of her(victim's) hand and dragged her forcibly to the latrine. What do you have to say?*

Ans: *It is not true.*

Q.2 *It is in the evidence of PW1 that thereafter (in the said latrine) you touched and rubbed her (victim's) breasts and committed rape on her. What do you have to say?*

Ans: *It is not true.*

Q.69 *Do you have any statements to make in your defence? Do you have any witnesses to produce before this Court in your defence?*

Ans: *I do not have witnesses to examine but I am an innocent person and have been falsely implicated in this case."*

Thus, contrary to the assertion of the Learned Public Prosecutor, the Respondent has categorically denied his involvement in the alleged offence. That having been said, in this context, we may also relevantly refer to the Judgment of the Hon'ble Supreme Court in **Nagaraj vs. State, represented by Inspector of Police, Salem Town, Tamil Nadu**⁹ wherein it was observed *inter alia* as under;

"15. In the context of this aspect of the law it has been held by this Court in *Parsuram Pandey v. State of Bihar* [(2004) 13 SCC 189: 2005 SCC (Cri) 113] that Section 313 CrPC is imperative to enable an accused to explain away any incriminating circumstances proved by the prosecution. It is intended to benefit the accused, its corollary being to benefit the court in reaching its final conclusion; its intention is not

⁹ (2015) 4 SCC 739

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to nail the accused, but to comply with the most salutary and fundamental principle of natural justice i.e. *audi alteram partem*, as explained in *Asraf Ali v. State of Assam* [(2008) 16 SCC 328:(2010) 4 SCC (Cri) 278].

.....**Having made this clarification, refusal to answer any question put to the accused by the court in relation to any evidence that may have been presented against him by the prosecution or the accused giving an evasive or unsatisfactory answer, would not justify the court to return a finding of guilt on this score. Even if it is assumed that his statements do not inspire acceptance, it must not be lost sight of that the burden is cast on the prosecution to prove its case beyond reasonable doubt.** Once this burden is met, the statements under Section 313 assume significance to the extent that the accused may cast some incredulity on the prosecution version. It is not the other way around; in our legal system the accused is not required to establish his innocence.”

[Emphasis supplied]

The position of law having been soundly explained in the context of Section 313 Cr.P.C. Statement and its utility, no further discussions are required in this aspect.

10. In light of the discussions that have emanated hereinabove, although the Charges have been framed under Section 376 (2)(l) and Section 376(2)(n) of the IPC, the Prosecution has failed to substantiate the Charges beyond a reasonable doubt by means of any evidence. The evidence of the Victim does not inspire the confidence of this Court with regard to the offence of rape unfortified as it is, by the Medical Examination Reports of the Victim and the Respondent, Exhibit 6 and Exhibit 7 respectively, as also the Forensic Examination Report, Exhibit 8.

11. Therefore, on due consideration of the evidence on record, as already stated *supra*, we are in agreement with the findings of the Learned Trial Court that the Prosecution has failed to prove its case beyond a reasonable doubt. Hence, the impugned Judgment warrants no interference whatsoever.

12. Consequently, we find no merit in the Appeal which fails and is accordingly dismissed.

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- 13.** No order as to costs.
- 14.** Copy of this Judgment be sent to the Learned Trial Court, for information.
- 15.** Lower Court Records be remitted forthwith.

(Bhaskar Raj Pradhan)

Judge
29.10.2021

(Meenakshi Madan Rai)

Judge
29.10.2021