

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 21st of July, 2021

DIVISION BENCH: THE HON'BLE MR. JUSTICE JITENDRA KUMAR MAHESHWARI, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.09 of 2020

Appellant : State of Sikkim

versus

Respondent : Jigmee Bhutia

Appeal under Section 378 (1)(b)
of the Code of Criminal Procedure, 1973

Appearance

Mr. Sudesh Joshi, Public Prosecutor with Mr. Sujan Sunwar,
Assistant Public Prosecutor for the Appellant.

Mr. N. Rai, Senior Advocate with Mr. Yozan Rai, Advocate for the
Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Dissatisfied with the Judgment in Sessions Trial (F.T.)
Case No.17 of 2018, dated 29.08.2019, vide which the Respondent
was acquitted of the offences under Sections 376(1), 457 and 323
of the Indian Penal Code, 1860 (for short, "IPC"), the instant
Appeal has been preferred.

2. Assailing the findings of the Learned Trial Court, the
Learned Public Prosecutor, before this Court, contended that there
was sufficient and cogent evidence to establish the Prosecution
case against the Respondent. That, in a plethora of Judgments, the
Hon'ble Supreme Court has held that conviction on the sole
testimony of a victim is permissible and requires no corroboration.
On this aspect, reliance was placed on **Ganesan vs. State,**

represented by its Inspector of Police¹. That, the case of the victim has been consistent in the First Information Report (for short, "FIR"), in her Statement under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") and in her evidence during trial. That, her testimony has been duly corroborated by the evidence of P.Ws.2, 3, 4, 6 and 7, which the Learned Trial Court overlooked. That, a woman who is a victim of sexual assault is not an accomplice to the crime but stands at a higher pedestal than an injured witness as she suffers from emotional injury, to support this submission strength was garnered from the ratio in **Mohd. Imran Khan vs. State Government (NCT of Delhi)**². It was further urged that the evidence of the Prosecution Witnesses have withstood the test of cross-examination, hence the Learned Trial Court was in error in arriving at the finding that due to differences between the Respondent and the victim on account of a debt owed by her to the Respondent, the possibility of false implication could not be ruled out. That, this observation was based solely on the evidence of the Defence Witnesses. That, in his responses under Section 313 Cr.P.C., the Respondent merely denied having committed the offence but did not explain the circumstances of his presence in the victim's house. Hence, the impugned Judgment be set aside and the Respondent be convicted of the offences that he was booked under.

3. Resisting the arguments of the Learned Public Prosecutor, Learned Senior Counsel for the Respondent submitted that it is the bounden duty of the Prosecution as per law, to prove its case beyond a reasonable doubt, however, no incriminating

¹ (2020) 10 SCC 573

² (2011) 10 SCC 192

evidence has emerged against the Respondent. That, P.W.7, the Doctor, who examined the victim and P.W.9, the Scientific Officer of the Regional Forensic Science Laboratory (for short, "RFSL"), Saramsa, East Sikkim, who examined the Material Objects, were unable to detect any evidence to indicate involvement of the Respondent in the alleged crime. That, the Respondent and the victim were, in fact, known to each other, as emanates from the evidence of D.Ws.1, 2 and 3 and since she was unwilling to repay the amount owed by her to the Respondent for purchases made by her from D.W.1, the Respondent's wife, she chose to settle the score by implicating him in a false case. Learned Senior Counsel put forth the alternative argument that the Respondent was at the victim's house with her consent. Hence, the conclusion of the Learned Trial Court requires no intervention. To bolster his contentions, Learned Senior Counsel placed reliance on ***Alok Debroy and Another vs. State of Assam***³, ***Panua alias Pravat Kumar Chand vs. State of Orissa***⁴ of the Hon'ble High Court of Orissa, and ***(Cr. Appeal 30 of 2011) Pratap Chand vs. State of H.P. and (Cr. Appeal No.31 of 2011) Duni Chand vs. State of H.P.***⁵

4. Before embarking on examining the merits of the matter, it would be appropriate to briefly narrate the facts of the Prosecution case for clarity. On 31.07.2017, at around 21:40 Hrs, P.W.1, the Prosecutrix, lodged the FIR, Exhibit 1, before the Singtam Police Station informing that at around 18:30 Hrs the same evening, an unknown person had entered her house on the pretext of requesting her for a glass of water and then raped her. Based on the FIR, Singtam P.S. Case No.56/2017, dated

³ 2004 Cri.LJ 3048

⁴ 2009 SCC OnLine Ori 616

⁵ 2014 SCC OnLine HP 3307

31.07.2017, under Section 376 IPC was registered against the Respondent. During investigation it emerged that the Respondent entered the house of the Prosecutrix, carried her to a room on the second floor of her house, tore off her clothes and committed penetrative sexual assault on her. Despite resistance, she was unable to fend off his assault and her screams went unanswered, her house being isolated from other houses. After the incident, the Respondent allegedly stayed in the room where the incident occurred, while she escaped and telephonically contacted P.W.3, her mother, narrating the incident to her. P.W.3 advised her to call the Police. Instead, she called P.W.6, the Panchayat President of Martam, Lingtam Ward, who incidentally is her maternal uncle, as the Police number was not known to her and narrated the incident to him as well. P.W.6 called the Police upon which, both P.W.6 and P.W.3 then reached the place of occurrence (for short, "P.O."). They found the Respondent inside the room and on coaxing by the Police, he opened the door, after which he was taken to Singtam Police Station by P.W.2 ASI Tashi Pincho Bhutia. He was arrested that night around 01:10 Hrs (i.e. of 01.08.2017). On completion of investigation, Charge Sheet was submitted against the Respondent under Sections 376 and 457 of the IPC. The Learned Trial Court framed Charge against the Respondent under Sections 376(1), 457 and 323 of the IPC. On his plea of "not guilty," twelve Prosecution Witnesses were examined, on closure of which, 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 and examined three witnesses in his defence. Arguments of the parties were finally heard and the Learned Trial

Court, finding that the Prosecution had failed to prove its case beyond a reasonable doubt, extended the benefit of doubt to the Respondent and acquitted him of all Charges *supra*.

5. In the backdrop of the submissions of Learned Counsel for the Appellant that conviction on the sole testimony of the Prosecutrix is permissible, it is firstly to be examined as to whether the evidence of the Prosecutrix is reliable, trustworthy and of sterling quality to inspire the confidence of this Court. It is also to be examined as to whether the Prosecution has proved its case beyond reasonable doubt or whether the Learned Trial Court erred in acquitting the Respondent.

6.(a) The Prosecutrix, examined as P.W.1, deposed that the Respondent came to her house, stood near the entrance of her building and asked her for a glass of water at which time, she noticed that he appeared to be drunk and his eyes were red. Pausing here for a moment, while reverting to Exhibit 1, the FIR and Exhibit 2, her Statement recorded under Section 164 Cr.P.C., identified by her before the Court, it is clear that she has made an effort to improve her case during trial, since neither in Exhibit 1 nor in Exhibit 2, has she stated that the Respondent appeared to be drunk. This Court is conscious that an FIR is not an encyclopaedia but immediate relevant facts would obviously have been recorded in it, although unnecessary details may not have been noted. P.W.2, the Police personnel who took the Respondent to the Police Station did not observe that the Respondent appeared to be drunk, while P.W.10, the Medical Officer of District Hospital, Singtam, who examined the Respondent on 01.08.2017, at 12.40 a.m., deposed *inter alia* as follows;

*".....His breath had no smell of alcohol at the time of his examination. His gait was steady and speech clear. His chest was bilaterally normal, per abdomen was soft.
On local examination he had no external injuries."*

(Emphasis supplied)

P.W.6 was witness to the Respondent coming out from the room and thereafter being taken away by the Police but makes no mention of him being drunk. P.W.12, the Investigating Officer (for short, "I.O.") formally arrested the Respondent but does not state that when he forwarded the Respondent for medical examination, he noticed that he was drunk.

(b) That having been said, it is the case of the Prosecution that the Respondent caught hold of the Prosecutrix's neck, carried her to a room in her house forcefully, tore off her clothes and committed rape on her. It is worth mentioning that the torn clothes of the Prosecutrix finds no place in the Material Objects exhibited by the Prosecution before the Learned Trial Court. In the same thread, it may be noticed that the Prosecutrix has not described which article of her clothing was torn by the Respondent or that the Police seized the said torn clothes, neither does P.W.2, the Police personnel who was the first person to reach the P.O. after the alleged incident, make any mention of seeing the victim in torn clothes. P.W.3, the victim's mother, testified that the victim had informed her that the Respondent had torn off her clothes and then raped her but she too failed to enlighten the Court of the state of the Prosecutrix's clothes, whether she saw the Prosecutrix wearing torn clothes, or that the Police had seized such clothes from the Prosecutrix. P.W.4, the father of the Prosecutrix, stated that the Prosecutrix had informed him that one person had entered her house forcefully and 'tried' to force himself on her. His evidence, in

fact, makes no mention of rape on the Prosecutrix. This witness found the Prosecutrix standing in the court yard of her house when he reached there. He noticed that she was wearing her night dress but did not state that it was torn. P.W.6 too reached the P.O. and witnessed the Police giving the Respondent his clothes through the ventilator of the room, which was allegedly locked from the inside but his evidence does not reveal that the Prosecutrix was wearing torn clothes, although he had witnessed P.W.3 and the Prosecutrix standing outside her house. P.W.7 was the Doctor who examined the victim at 12.10 a.m. on 01.08.2017, the alleged assault having taken place at 6.30 p.m. on 31.07.2017. He makes no mention of any torn clothes on the person of the Prosecutrix, nor was any such item of clothing forwarded to P.W.9, the Scientific Officer at RFSL, Saramsa, for analysis. P.W.12, the I.O., furnished no evidence of seizure of the alleged torn clothes neither did he state that he found her in such a state or that she showed him the said clothes. Hence, the testimony of the Prosecutrix with regard to her torn clothes appears to be a figment of her imagination totally devoid of truth and unsubstantiated by evidence.

7.(a) Secondly, there are glaring anomalies regarding the time when P.W.1 reported the incident to P.W.3 and P.W.6. According to her, the incident occurred at 6.30 p.m. After the Respondent allegedly pushed her away, she had the opportunity to flee from the room whereupon she telephonically informed P.W.3 about the incident. P.W.3, however, stated that she received the call from P.W.1 informing her of the incident at around 9 p.m. to 10 p.m. According to P.W.6, he too received telephonic information from P.W.1 at 9 p.m. to 10 p.m., which is almost three hours after

the alleged incident. As per P.W.1, her information to P.W.6 was only telephonic, while P.W.6 under cross-examination, revealed that after the phone call, P.W.1 personally came to his house when he did not go to her house in response to her call. P.W.1 has nowhere divulged that she visited the house of P.W.6. after making a call to him. P.W.6 revealed further that it was only after about one hour of the call of P.W.1 that he, along with the Police personnel, reached her house.

(b) Added to this, is the anomalous evidence of P.W.2, who stated that Head Constable, one Lakpa Tshering Bhutia of Sang Police Out Post, received a call from P.W.6 on 31.07.2017, at around 7 p.m. to 7.30 p.m., informing that the Respondent had entered the Prosecutrix's house. Contrarily, P.W.6, as reflected *supra*, duly supported by the evidence of P.W.2, individually reveal that they received the call from the Prosecutrix at 9 p.m. to 10 p.m., rendering the Prosecution story suspicious, besides pointing towards shoddy investigation and non-verification of necessary facts. If P.W.2 and P.W.6 received the call from P.W.1 at 9 p.m. to 10 p.m., it is rather strange that the Police Out Post received the information from P.W.6 at 7 p.m. to 7.30 p.m. This inconsistency remains unexplained by the Prosecution.

(c) According to P.W.2, after the Head Constable of the Out Post informed him of the call from P.W.6, he informed his Senior Officer at the Singtam Police Station, who directed him to go to the Prosecutrix's house, which he complied with, taking along with him the said Head Constable. The Head Constable, however, is not a Prosecution Witness for unexplained reasons. P.W.6 further deposed that after he informed the Police personnel at the Out

Post, they arrived at his house and he along with them *viz.*, one Eden Bhutia and Bhai Bhutia, went to the house of the Prosecutrix. Both Eden Bhutia and Bhai Bhutia are not witnesses in the instant case thereby leading this Court to draw an adverse inference under Section 114 Illustration (g) of the Indian Evidence Act, 1872. The evidence of P.W.2 belies the evidence of P.W.6 with regard to him (P.W.6) having been accompanied by Police personnel to the P.O. The Prosecutrix also does not state that P.W.6 came to her house together with any Police personnel. According to her, the Police came to her house about half an hour to one hour after the call. That, P.W.6 also came to her house and knocked on the door of the room where the Respondent was present. The Prosecution story on the above discussed aspects are haphazard, inconceivable and thereby fails to convince this Court of the events that transpired.

8. Another relevant factor is that according to the Prosecutrix, her mother P.W.3, lives about twenty minutes away from her house but P.W.3 to the contrary, stated that the Prosecutrix lives at a distance of about five minutes walk from her residence. The house of P.W.6, as stated by him, is at a distance of about five to eight minutes walk from the house of the Prosecutrix. This leads one to mull over as to why the Prosecutrix did not take shelter in her mother's house after having fled from the room, or why P.W.3 and P.W.6 went belatedly to her house when it was a short walk from their respective residences. The veracity of the evidence of the Prosecutrix and the Prosecution witnesses do not inspire confidence and appear to be far-fetched, as the evidence discussed above is rife with contradictions at every turn.

9. While considering the medical evidence of the Prosecutrix, the incident allegedly occurred at around 6.30 p.m. on 31.07.2017. She was forwarded to the District Hospital, Singtam where she was examined by P.W.7, the Consultant Gynaecologist at 12.10 a.m. of 01.08.2017 viz., after about five hours of the alleged incident. She had not bathed or changed her clothes after the alleged incident, as stated by her to P.W.7. P.W.7 prepared his Report, Exhibit 4. He deposed *inter alia* as under;

".....I examined the victim after taking due consent from her.

On my examination the victim was conscious, cooperative and all her vitals were stable.

On local examination;

One bruise was found over her right neck(sic) and four bruises were found over her left neck(sic). There were no bleeding from the bruises. No injury or bleeding was present over the breast(sic), abdomen and other parts of the body.

Per vaginal inspection-No any(sic) bruise, injury present over the Perineal region, vulva and vagina.

Per vaginal examination-No fresh injury present over the hymen and vagina.

Vaginal swab and vaginal wash was collected and sent for examination to determine the presence of spermatozoa. Urine for pregnancy test was found to be negative."

(Emphasis supplied)

The medical examination thus revealed no fresh injuries on the person or the genital of the Prosecutrix despite her claim of use of force by the Respondent. The Doctor went on to identify MO I and MO II as the glass vials containing the vaginal wash and vaginal swab respectively, of the Prosecutrix collected by him. Under cross-examination, it came to light *inter alia* as follows;

*".....I asked the patient whether she had taken a bath or wash(sic) **her clothes after the alleged incident and in reply to that she said she had neither taken a bath nor washed her clothes.***

*I had taken the vaginal wash and vaginal swab on the request of the police. I have also answered in my medical report Exbt. 4, the other requests made by the I.O. **It is true that in my medical report Exbt. 4, I have mentioned "the patient refused to give her undergarments and other clothing for examination".***

I am not able to identify the signature of the Pathologist in Exbt. 4 who has given his/her opinion as "no motile/non-motile spermatozoa seen in the sample studied."

It is true that my examination as recorded in medical report Exbt. 4 does not show a possible forceful rape on the victim."

(Emphasis supplied)

P.W.7 recorded in Exhibit 4 that the Prosecutrix refused to give her undergarment and other clothing for examination with no reason assigned by her for such refusal and investigation too is silent on this count. The age of the bruises found on the left and right portion of the Prosecutrix's neck, was not disclosed by P.W.7, hence, it is not clear whether the bruises were fresh and thereby allegedly caused by the Respondent or whether they were old injuries. The examination of the vagina of the victim too revealed no fresh injuries although she claimed to have been forcibly raped, thereby raising doubts about her allegation of penetrative sexual assault.

10.(a) Along with the evidence of P.W.7 *supra*, it is relevant to examine the evidence of P.W.9, the Scientific Officer, RFSL. She examined MO I and MO II (detailed *supra*). She also examined MO III, the underwear of the Respondent and MO IV and MO V, two glass vials containing the penile swab of the Respondent. In these Exhibits, neither blood nor semen, or any other body fluid could be detected.

(b) The collective evidence of P.W.7 and P.W.9, when meticulously examined, fail to establish that the Prosecutrix had been subjected to rape by the Respondent nor did the Prosecution fortify their case with any other evidence. The medical and scientific evidence therefore fail to support the Prosecution case.

(c) The Pathologist who had given his/her opinion on Exhibit 4 regarding the absence of motile or non-motile spermatozoa in the samples studied, was not made a Prosecution

witness. P.W.10, the Medical Officer who examined the Respondent at District Hospital, Singtam stated that he did not detect any stain marks on MO III, the undergarment of the Respondent.

11.(a) This Court is aware of the settled position of law that every rape victim need not have injuries on her body to prove her case (See *Krishan vs. State of Haryana*⁶). Further, the Hon'ble Supreme Court observed in *State of Rajasthan vs. N.K. the accused*⁷, *inter alia*, as follows;

"18.The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case."

However, the Prosecution must establish with some trustworthy evidence that the Prosecutrix had indeed been subjected to sexual assault which, in the instant matter, has not been furnished.

(b) It may relevantly be noted here that after having committed a heinous offence, in the ordinary course of human nature, the first instinct of an accused would be to flee the place of occurrence but the incongruously unbelievable version of P.W.1 is that the Respondent continued to stay inside the room where he had committed the alleged offence and bolted himself from inside to boot. The evidence of P.W.6 is to the effect that P.W.1 had visited his house subsequent to the call made by her. It is rather surprising that in that interval the Respondent although left alone, still made no effort to escape. No investigation was conducted on

⁶ (2014) 13 SCC 574

⁷ (2000) 5 SCC 30

this aspect. P.W.1 is evidently spinning a yarn regarding the incident which fails to find substantiation by evidence.

12.(a) In **Ganesan vs. State** (*supra*), relied on by the Appellant, reference has been made by the Hon'ble Supreme Court, to a catena of decisions wherein it was observed that conviction can be based on the sole testimony of the victim with the caveat that such testimony must be found to be reliable and trustworthy. Consequently, we cannot lose sight of the fact that a sole witness must be a sterling witness and the evidence given by her must be cogent, consistent and the version of the events should be unassailable. On the anvil of these enumerated qualities, we are constrained to opine that these are lacking in the instant case and the Prosecutrix, in no way, can be described as a sterling witness. Her solitary evidence is not trustworthy, cogent or unblemished.

(b) The Prosecution version that the Respondent has not explained the incriminating evidence against him under Section 313 Cr.P.C. besides which, he also had the option of explaining it under Section 106 of the Indian Evidence Act, cuts no ice in view of the fact that the Hon'ble Supreme Court, in **Nagaraj vs. State, represented by Inspector of Police, Salem Town, Tamil Nadu**⁸ 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 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

⁸ (2015) 4 SCC 739

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)

13.(a) Besides, the Prosecution is to relevantly note that Section 106 of the Indian Evidence Act is not intended to relieve the Prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. This Section will apply to cases where the Prosecution has succeeded in proving facts from which reasonable inference can be drawn about the existence of certain other facts, unless the accused, by virtue of his special knowledge regarding such facts, fails to offer any explanation which might thus lead the Court to draw a different inference. In other words, Section 106 of the Indian Evidence Act is designed to meet certain exceptional cases where it is an impossibility for the Prosecution to establish certain facts. (See ***State of W.B. vs. Mir Mohammad Omar and Others***⁹).

(b) At this juncture, it may be noticed that the Respondent produced three witnesses. The Prosecution was afforded fair opportunity to cross-examine the witnesses. It emerged from the evidence of D.Ws.1, 2 and 3 that the Respondent was not unknown to the Prosecutrix as alleged by her but they had prior acquaintance. Under cross-examination, D.W.1, the wife of the Respondent, revealed that in the month of October, 2014, the Prosecutrix had purchased a carpet from her shop on credit, the

⁹ (2000) 8 SCC 382

cost of which was Rs.60,000/- (Rupees sixty thousand) only, and Rs.10,000/- (Rupees ten thousand) only, was paid by the Prosecutrix to D.W.1. D.W.3, evidently an acquaintance of D.W.1 deposed that the Prosecutrix had been introduced to him by the Respondent as a relative of his wife. The evidence of the D.Ws. adds to the doubts about the veracity of the evidence of the Prosecutrix.

14. In consideration of the gamut of facts and circumstances of the case, the contradictory evidence on record, as discussed in detail hereinabove, the medical evidence and the scientific evidence, all miserably fail to buttress the Prosecution case. Thus, the evidence of the Prosecutrix definitely lacks the quality of being sterling neither is it absolutely trustworthy. Resultantly, we are in agreement with the finding 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.

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

16. No order as to costs.

17. Copy of this Judgment be sent to the Learned Trial Court, for information.

18. Lower Court Records be remitted forthwith.

(Meenakshi Madan Rai)
Judge
21.07.2021

(Jitendra Kumar Maheshwari)
Chief Justice
21.07.2021