

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 16 of 2019

Prakash Subba,
Son of Akal Man Subba,
Resident of Kakeybong,
Jhepi, Pulbazar,
Darjeeling,
West Bengal.

*Presently lodged at Central Prison,
Rongyek, East Sikkim.*

..... Appellant

Versus

State of Sikkim

..... Respondent

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

Appearance:

Mr. Gulshan Lama, Legal Aid Counsel for the Appellant.

Mr. S.K. Chettri, Additional Public Prosecutor for the
Respondent.

Date of hearing : 26.08.2020

Date of Judgment : 24.09.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The learned Judge, Fast Track Court, South & West Sikkim at Gyalshing, (the learned Judge) has convicted the appellant under Section 376(1) of the Indian Penal Code, 1860 (IPC), sentenced him to rigorous imprisonment for a term of seven years and directed him to

pay a fine of Rs.20,000/-. The impugned judgment of conviction as well as order on sentence both dated 26.07.2017 are under challenge.

2. Mr. Gulshan Lama, learned counsel for the appellant submits that the medical evidence does not support the allegation of forceful rape upon the victim and there are conflicting statements made by the victim in her deposition which makes it unreliable. He submits that the victim's deposition that there are no houses nearby hers, has been contradicted by the deposition of P.W.3, P.W.4 and P.W.9 having admitted that the victim used to have petty quarrels with the appellant, it is quite probable that a false allegation had been levelled against him. Mr. Lama further submits that the delay in lodging First Information Report (FIR) (exhibit-1) has not been properly explained and if it was actually a case of forceful rape there was no reason for the victim not to immediately report the matter to the police. Mr. Lama relied upon the following judgments; ***Sadashiv Ramrao Hadbe v. State of Maharashtra & Anr.***¹; ***Tukaram & Anr. V. State of Maharashtra***²; ***Tameezuddin alias Tammu v. State (NCT of Delhi)***³; ***Abbas Ahmad Choudhary***

¹ (2006) 10 SCC 92

² (1979) 2 SCC 143

³ (2009) 15 SCC 566

***v. State of Assam*⁴; *Amar Singh v. Emperor*⁵; *Thulia Kali v. State of Tamil Nadu*⁶**

3. Mr. S.K. Chettri, learned Additional Public Prosecutor however, submits that the evidence of the victim is cogent and the defence could not extract anything from the prosecution witnesses which would completely destroy their version. He submits that it is settled law that the deposition of a victim of sexual assault does not require any further corroboration if it inspires confidence. He further submits that merely because the medical evidence could not detect any physical injury on the body of the victim that would not, *ipso-facto*, create doubt on the victim's version. Mr. S.K. Chettri relied upon the following judgments; ***Hem Raj v. State of Haryana*⁷; *State of H.P v. Gian Chand*⁸; *Naval Kishore Singh v. State of Bihar*⁹.**

CONSIDERATION

4. The FIR was lodged on 29.09.2016 by the victim before the police station alleging that the appellant, a resident of the same village, had come to her house on the pretext of asking for drinking water and thereafter, he had grabbed her neck, taken her forcibly to her bed and

⁴ (2010) 12 SCC 115

⁵ AIR 1935 Lahore 8

⁶ AIR 1973 SC 501

⁷ (2014 (2) SCC 395

⁸ (2001) 6 SCC 71

⁹ (2004) 7 SCC 502

forcefully raped her. Based on the FIR (exhibit-1) lodged by the victim the formal FIR (exhibit-2) was registered by the Station House Officer-Karma Tshering Bhutia (P.W.12) on the same day. The investigation was conducted by Sub Inspector (SI) Sonam Topgay Bhutia (P.W.13) (the Investigating Officer). The Investigating Officer thereafter, filed the charge sheet dated 19.12.2016.

5. During the trial 13 witnesses including the Investigating Officer were examined by the prosecution. The victim was examined as P.W.1 and her husband as P.W.2. P.W.3 was the zilla panchayat member of the village. P.W.4 was the elder brother of the victim's husband (P.W.2) and a co-villager of the accused. Prem Kumar Sharma (P.W.5) (Junior Scientific Officer), RFSL, Ranipool examined the forensic evidence collected during the investigation and gave his report (exhibit-5). P.W.6 turned hostile and was cross examined by the prosecution. The appellant was the brother-in-law of the P.W.7. P.W.8 and P.W.9 were seizure witnesses to the seizure of the appellant's voter identity card (exhibit-8) vide seizure memo (exhibit-7) and the rough sketch map (exhibit-10) vide seizure memo (exhibit-9). P.W.10 was a seizure witness to the seizure of a carpet from the house of the victim vide seizure memo (exhibit-9).

Dr. Birendra Subba, Medical Officer (P.W.11) examined the victim on 19.09.2016 after five days of the incident and prepared the medical report (exhibit-11). On the same day he also examined the appellant and prepared the medical report (exhibit-12).

6. The learned Judge held that the delay of five days in lodging the FIR has been clearly explained by both the victim and her husband. She held that the most vital evidence, i.e. the testimony of the victim, was incriminating and inspired confidence to sufficiently prove that she was raped by the appellant on 24.09.2016. She further held that merely because there was absence of injuries on the victim it was not sufficient to discredit her evidence. She found that the testimony of the victim inspired confidence and there was nothing to render it inconsistent or unreliable. She declined to accept the suggestion of the learned defence counsel that the appellant had been falsely implicated as she and her husband had a history of petty quarrels. She opined that it was highly unlikely that any woman would put her modesty, chastity and reputation at stake simply on account of minor squabbles that too over petty matters. She further opined that no reasonable man would wish to put the reputation of his wife and the mother

of his children, as well as the family at risk over trivial disputes with another. The learned Judge, thus, concluded that the prosecution had been successful in establishing beyond reasonable doubt that the appellant had raped the victim while she was alone at home on 24.09.2016.

7. The identification of the appellant is certain. The victim identified him as the perpetrator of the crime. The victim's husband (P.W.2) and his brother (P.W.4) identified him as the person accused by the victim of having raped her. P.W.8, P.W.9 and P.W.10 all identified him in court as the person from who certain seizures were made by the police. He was a resident of the same village where the victim and her family resided and known to them.

8. Section 375 IPC reads as under:-

"375. Rape—A man is said to commit "rape" if he-

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
- (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
- (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

under the circumstances falling under any of the following seven descriptions:-

First — Against her will.

Secondly — Without her consent.

Thirdly — With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly — With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly — With or without her consent, when she is under eighteen years of age.

Seventhly- When she is unable to communicate consent.

Explanation. — 1.- For the purposes of this section, "vagina" shall also include labia majora.

Explanation.- 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicate willingness to participate in the specific sexual act.

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Exception 2 - Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

DELAY IN LODGING FIR

9. This court will now deal with the concerns raised by the defence. In ***Thulia Kali (supra)*** the Supreme Court held:

“12. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained.”

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10. In ***Gian Chand (supra)*** the Supreme Court held:

“12. Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot be itself be a ground for disbelieving and discarding the entire prosecution case.”

11. The incident, according to the victim, transpired on 24.09.2016. The FIR was lodged on 29.09.2016 after five days. According to the victim she informed her husband (P.W.2) that evening when he returned home from work who then reported the matter to the zilla panchayat member (P.W.3) and others and thereafter, lodged the FIR at the police station with the help of the zilla panchayat member (P.W.3). In cross-examination she admitted she could not read and write. She also admitted that the nearest police station is two hours walk from her house and that her husband (P.W.2) had called the appellant to settle the matter amicably. P.W.2 was not present at the time of the alleged assault as he had gone to the jungle to collect cow fodder but when he returned home, the victim had informed him that the appellant had come to her house asking for drinking water when he suddenly grabbed her neck, took her forcibly to her bed, removed her clothes and committed rape on her after locking the door. According to him, as it was late that evening and their house far away from others, he informed his elder brother (P.W.4) the next morning, who then called the appellant to his house to settle the matter. As the appellant did not come the next day, they reported the matter to the police a

few days later. During cross-examination P.W.2 admitted that in his statement to the police he had not used the word rape but alleged that the appellant had committed "*dusht karma*". He admitted that he and his brother (P.W.4) had called the appellant for amicable settlement. He admitted that he had not mentioned about suffering from pain in the leg, him being unable to walk to the police station as there was no motorable road and the police station being two miles away, in his statement to the police. He also admitted that in the year 2012 when he had a quarrel with one Angad Thapa he had immediately gone to the Soreng police station to lodge the FIR. He admitted that he lodged the FIR after consulting his elder brother and his wife. He further admitted that he had not given details of the incident in his statement to the police. From the evidence that had been brought by the prosecution it is quite clear that the setting of the crime is a rustic village. The victim as well as her husband (P.W.2) were poor villagers. There are discrepancies in their depositions. However, none so shocking or not understandable given the situational setting of the crime. In view of the circumstances, which can be gathered from the evidence brought forth, this court is of the view that the learned

Judge's finding that the delay of five days in lodging the FIR has been adequately explained by the victim and her husband cannot be faulted.

VICTIM'S DEPOSITION NOT CONSISTENT WITH MEDICAL EVIDENCE AND OTHER CONTRADICTIONS

12. The next contention vociferously argued by Mr. Lama is taken up next. He contends that the medical evidence and the contradictions in the witness statements does not support the prosecution allegation that the appellant had committed rape upon the victim.

13. In *Tukaram (supra)* the Supreme Court had occasion to examine Section 375 IPC as it then existed in the year 1972. The allegation was that the rape had been committed at the police station. On examination of the facts of the case the Supreme Court held that the onus is always on the prosecution to prove affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It was, therefore, incumbent on it to make out that all the ingredients of Section 375 IPC were present in the case. For the proposition that the requisite consent was lacking in the case, reliance on behalf of the State could be placed only on clause-thirdly, so that it would have to be shown that the girl had been put in fear of death or hurt and that was the reason for her consent. In

the absence of such findings, the alleged fear would not vitiate the consent. Further, the circumstantial evidence to be used in order to prove an ingredient of an offence, it has to be such that it leads to no reasonable inference other than that of guilt. The Supreme Court disbelieved the prosecution evidence and the judgment of the High Court was reversed and conviction and sentence set aside.

14. In *Sadhashiv Ramrao Hadbe (supra)* the Supreme Court was examining a case in which the allegation against the appellant therein, convicted both by the Sessions Court as well as the High Court, was that the prosecutrix had been raped by the doctor at his clinic where she, her husband and their child had visited on 17.12.1990. The Supreme Court was of the view, that the prosecution evidence had so many contradictions that the whole incident seemed highly improbable. The Supreme Court noticed that although the prosecutrix had been examined the same day there was no injury on her body. Furthermore, the pathological report also reflected that the vaginal swab did not have presence of spermatozoa. It was noticed that the appellant therein was also medically examined the same day and found that smegma was present around the corona glandis. It was also found that

the scientific evidence did not support the prosecution as the doctor who examined the appellant therein had negatived sexual intercourse. The Supreme Court noticed that the evidence suggested that there were so many persons in the clinic and therefore, it was highly improbable that the appellant would have made sexual assault on the patient in the presence of large number of people in the vicinity. It is in these facts that the Supreme Court held:

“9. It is true that in a rape case the accused could be convicted on the sole testimony of the prosecutrix, if it is capable of inspiring confidence in the mind of the court. If the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. The courts shall be extremely careful in accepting the sole testimony of the prosecutrix when the entire case is improbable and unlikely to happen.”

15. In **Tameezuddin (supra)** the Supreme Court held:

“9. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that the story is indeed improbable.”

16. In **Abbas Ahmad Choudhary (supra)** the Supreme Court held:

“11. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to

prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully.”

17. In **Naval Kishore Singh (supra)** the Supreme Court did not find the contradictions pointed out by the defence sufficient to disbelieve the prosecution case.

18. The victim has clearly deposed that on 24.09.2016 while she was alone, washing dishes at home, the appellant appeared and asked for water. As she was giving him water, he suddenly shut the door, grabbed her by the neck, threw her on the bed and raped her.

19. It is correct that in her cross-examination, certain contradictions have been brought out. The victim admitted that the house of one “Thuli” is situated above her house and across the river there is another house. However, she categorically denied that other houses were situated close to her house. She also admitted that she did not raise alarm when the appellant shut the door and that she was not injured during the incident. She however, denied the assertion that she had held the appellant while she was raped. She also denied that she was a consenting party and that she had in fact not been raped.

20. P.W.3 admitted in cross-examination that the houses of two persons were nearby to that of the victim. He

also admitted that if one were to make noise or scream from the house of the victim it could be heard by the neighbours.

21. Dr. Birendra Subba (P.W.11) had examined the victim on 29.09.2016. During the time of her examination, according to Dr. Birendra Subba (P.W.11) the victim gave the history of being forcefully sexually assaulted by the appellant. This fact is mentioned in the medical report (exhibit-11) as well. According to Dr. Birendra Subba (P.W.11) on her examination he did not detect any external injuries on her private parts or genital area. He also noted that there were no resistance injuries on her body. According to him a vaginal swab sample of the victim was taken for laboratory investigation and handed over to the investigating officer. The Junior Scientific Officer (P.W.5) examined the vaginal swab and opined that no blood, semen or any other body fluid could be detected in it.

22. Dr. Birendra Subba (P.W.11) also examined the appellant on 29.09.2016. On his examination he did not find injuries either on his genital organs or in any other part of his body. The penal swab taken from him was also examined by the Junior Scientific Officer (P.W.5) who opined that blood, semen or any other body fluid could not

be detected in it. The medical evidence thus does not provide any corroboration to the allegation made by the prosecution that the victim had been raped. It must be however, borne in mind that the examination of the victim, a 40 years old married woman who was also a mother to her children as well as of the appellant was done after five days. Thus, the only direct evidence of the incident is that of the victim. It is true that the medical evidence does not support the prosecution case due to the delay in their medical examination. It however, does not rule it out either. It is by now well settled that the defence of rape would be held to have been proved even if there is an attempt of rape [penetration to any extent] on the woman and not the actual commission of rape. In such circumstances it was important to examine the other evidences produced by the prosecution in great depth. In ***Puran Chand v. State of Himachal Pradesh***¹⁰ the Supreme Court held that in some cases where a doubt is sought to be created by the defence relying upon the lacunae in the medical evidence which could not establish the incident in view of non-committal statement of the doctor regarding the hymen being intact, the prosecution version could not be brushed aside totally

¹⁰ (2014) 5 SCC 689

and will have to be judged by the other attending circumstances brought on record.

23. Mr. Lama questions the credibility of the victim's deposition on the ground of inconsistencies as pointed out earlier. The victim's husband (P.W.2) corroborated the statement of the victim that she had narrated about the rape to him when he returned after collecting cow fodder and thereafter, to the zilla panchayat member (P.W.3) and others. The zilla panchayat member (P.W.3) corroborated the victim's version that she and her husband (P.W.2) had reported about the incident to him after which they had lodged the FIR with his help. The victim's husband's elder brother (P.W.4) corroborated the fact that the zilla panchayat member (P.W.3) had called him to his house and told him that the victim and her husband (P.W.2) had come to his house and requested him to scribe the FIR. There are some inconsistencies in the prosecution witness statements with regard to whether there were other houses around the victim's house and at what distance they were located. The inconsistencies pointed out are minor and does not affect the substratum of the core of the victim's evidence. In fact, the victim had candidly admitted that at the time of the rape she was alone at home. Had it then been a case of

consensual sexual act between the appellant and the victim as has been suggested during her cross-examination there was no reason for her to narrate the incident to her husband in the evening when he returned home. Thus, in fact, these inconsistencies appearing in the deposition of an untrained rustic mind lends credence to prosecution version as deposed by the victim and other prosecution witnesses.

24. Mr. Lama also points out that P.W.9 had admitted that on one occasion the appellant and the victim had come to him to settle a petty dispute and they often quarrelled over petty matters. Mr. Lama suggests that this admission from P.W.9, who was a seizure witness, is enough to dislodge the victim's assertion that she was in fact raped. The delay in lodging the FIR having been sufficiently explained it is noticed that the accusation made by the victim has been consistent throughout. The victim's deposition has been found to be reliable by the learned Judge. The fact that she narrated about the incident to her husband (P.W.2) immediately on his return home is also well established. There is no adequate reason available on the records to show that the victim and her husband would go to the extent of levelling false allegation of rape on the

appellant. Even penetration to a minor extent can amount to rape now. The victim admitted, in cross-examination, that she was not injured during the act of rape which explains why no injury was seen during her medical examination. On examination of the victim's deposition and especially the cross-examination, it is seen that the appellant had sought to raise the defence of consent rather than false allegation due to petty quarrels. As such this court is of the view that the defence of petty quarrel had been raised by the defence as an afterthought.

25. Section 375 IPC as it stands today provides in explanation 2 that consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act. The proviso thereto states that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity. Except for the fact that the victim admitted to have not raise any alarm when the appellant shut the door to rape her, there is no evidence to show unequivocal voluntary agreement on the part of the victim to participate in the specific sexual act. Passive submission

to the sexual act, cannot any longer be a defence for rape in view of explanation 2 to Section 375 IPC as it stands today. In fact, the victim categorically denied the assertion that she had held the accused while she was being raped and that she was a consenting party. In the circumstances, this court is unable to agree with the suggestion made by Mr. Lama that the victim had made a false allegation of rape upon the victim as a result of their petty quarrels or that she had consented to the alleged act of rape. The testimony of the victim does inspire confidence. Her deposition is truthful and unblemished by trained minds. There is nothing to render the surrounding circumstances highly improbable and belie the case set up by the prosecution, save certain discrepancies in her deposition which are the normal wear and tear in the depositions rendered by incautious villagers in the controlled atmosphere of an overwhelming courtroom.

26. The appeal is dismissed. This court is of the view that the judgment of conviction and order on sentence both dated 26.07.2017 need not be interfered with.

27. The incident is of September 2016. The allegation of rape upon the victim stands proved. This court thus enhances the compensation of Rs. 50,000/- granted

by the learned Judge to Rs. 1,00,000/- under the Sikkim Compensation to Victims or his Dependents Schemes, 2011.

28. The original records of the trial court may be returned forthwith.

29. The registry may transmit a copy of this judgment to the learned Judge, Fast Track Court, South & West at Gyalshing and to the Sikkim State Legal Services Authority for compliance. A copy thereof shall also be furnished to the appellant, free of cost.

BHASKAR RAJ
PRADHAN

Digitally signed by
BHASKAR RAJ
PRADHAN
Date: 2020.09.24
14:54:59 +05'30'

(Bhaskar Raj Pradhan)
Judge

Approved for reporting	Yes
Internet	Yes

to /