



Shakuntala

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEAL NO. 24 OF 2023

SHRI TENZIN @ ELIN DORJE
S/o Tashi Dorje,
aged 37 years, R/o Armambol Beach,
Arambol, Pernem-Goa,
N/o Chouglan Sar, Leh, Ladakh,
Jammu & Kashmir, Presently in
Judicial Custody, Modern Central Jail
Colvale, Goa

....APPELLANT

VERSUS

State of Goa
Through
1. The Police Inspector/Officer
Incharge, Pernem Police Station

2. The Public Prosecutor
High Court of Bombay at Goa,
Porvorim Goa

.....RESPONDENTS

Mr. Ryan Menezes, Advocate for the Appellant.
Mr. Shailendra G. Bhobe, Public Prosecutor for the Respondents.

CORAM:- BHARAT P. DESHPANDE, J.
DATED :- 30th August 2024

ORAL JUDGMENT

1. Heard Mr. Ryan Menezes learned Advocate for the Appellants, Mr. S. G. Bhobe learned Public Prosecutor for the State.

2. The present appeal is filed challenging conviction and sentence awarded by the learned Sessions Court for the offences punishable under Sections 376, 323, 324 and 506(ii) of the Indian Penal Code(I.P.C. for short).

3. Mr. Menezes learned counsel appearing for the Appellant would submit that first of all there is a serious doubt with regard to identification of the Accused as perpetrator of the said offence. He submits that the complaint clearly shows that the victim was not knowing the Accused prior to that date and that she did not describe the Accused by his features or otherwise, except stating the name as Elin. He submits that the Accused is infact a totally different person and a resident of Tibet/Leh Ladakh.

4. Mr. Menezes would submit that the test identification parade though conducted, there is evidence to show that the Accused was shown to the victim in the Police station prior to conducting such parade. He also claimed that the dummies which were used for conducting such test identification parade were all from Goa whereas the Accused is a person residing in Tibet/Leh Ladakh having totally different features.

5. Mr. Menezes would further submit that the arrest of the Accused is also in doubt and on what basis he was arrested is itself not clear from the evidence of the prosecution witnesses. The officer who claimed that he arrested the Accused was not given specific directions to arrest with the details including the features or otherwise of the Accused.

6. Mr. Menezes would further submit that the deposition of the victim itself creates serious doubt about the alleged incident qua the Accused and her subsequent conduct. He submits that the victim herself went to the hospital without disclosing anything to the Police and thereafter she was examined. Mr. Menezes would further submits that even the report of the Doctor is not conclusive of the offence of rape. The hurt certificate though shows some injuries the question of identification of Accused is not been properly dealt with. The Doctors who examined the victim was not available and in his place another doctor was examined.

7. Mr. Menezes would further submit that though learned Trial Court accept that the Accused was shown to the victim at the Police Station, deliberated upon itself that there is no

material to show that the Accused was shown prior to test identification parade. He submits that the Investigating Officer admit that the Accused was in police custody only upto the test identification parade. He submits that therefore there is clear doubt about the identification of the Accused and since he was shown to the Victim in the Police Station, such identification is certainly affected.

8. Mr. Menezes placed reliance in the case of ***Vilas Vasantrao Patil Vs. State of Maharashtra, 1996 (1) ALL MR 513*** wherein the Division Bench of this Court observed that if the test identification parade is not conducted as provided under the Criminal Manual, it cannot be relied upon for identification of the Accused.

9. Mr. Menezes also placed reliance in the case of ***Jafar Vs. State of Kerela, 2024 SCC OnLine SC 310*** and ***Hari Nath and Anr. Vs. State of Uttar Pradesh, (1988) 1 SCC 14.***

10. Per contra, Mr. Bhobe learned Public Prosecutor appearing for the State submit that there was ample opportunity to the victim to identify the Accused since she was

with the Accused through out the day. He submits that the statement of the Victim alone is sufficient to prove the case of the prosecution.

11. The points for determination are as under together with my findings against it:-

(i) Whether the Accused is properly identified as the Perpetrator of the said offence

(ii) Whether a test identification parade was conducted in the manner as provided under the Criminal Manuel.

(iii) Whether observation of the Trial Court require interference.

12. All the above points are taken for joint discussion.

13. The complaint was lodged on 18.12.2015 by the Complainant who is a Canadian National. In the said complaint she disclosed that on 17.12.2015, at around 14.30 hours she was on Arambol beach and at that time she met one person playing Freebies by name Eline and he is from North India but does not look like North Indian. The Complainant further disclosed that she went with said Elin to some Restaurant and met other

friends. Subsequently, she went to the market and returned on 20:00 hrs and she again met Elin at Mama Cafe Arambol and then went on the beach. When they were at a secluded place and in darkness, suddenly said Elin pounced on her and after removing her clothes, committed rape on her. She then stated in the complaint that said Elin then asked her to come in the sea water, however, she escaped and started screaming and running away leaving behind her clothes. She met one girl who caught her hand and both of them started running towards Surf Club where they called for a taxi and went to the Hospital at Mapusa. After examination she told Doctor about the said incident and then she went to the Pernem Police Station for filing the complaint. Finally she claimed that she will be able to identify the said Elin, if shown to her.

14. As rightly pointed out by Mr. Menezes, there is no description or any other features of the said Elin disclosed in the entire complaint. She has specifically mentioned that though said Elin told her that he is North Indian, she stated that he does not look like a North Indian., Except such description there is no other specification of Elin disclosed in the complaint.

15. The Complaint was registered on 18.12.2015 and thereafter, the search for said Elin started.

16. PW-11 PSI Vijaykumar claimed that on 18.12.2015 at around 21:45 hrs he along with the constables was directed by P.I. Pernem to trace the Accused in Crime No. 190/2015. The said PSI disclosed that after conducting inquiry with the locals and reliable source that he came to know that the Accused is known as Tenzine Dorje @ Elin. Accordingly, he conducted the search and apprehended the Accused near Sweet Lake, Arambol. During cross examination the said PSI (PW-11) claimed that he had no written direction by the PI to carry out investigation in the matter.

17. First of all it is not brought on record as to what is the inquiry conducted by PSI Vijaykumar about the said alleged Accused who committed the offence. There are no details given by the complainant in her complaint about the said person except the name Elin and that he is not looking like a North Indian. The question remains as to how PW-11 Vijaykumar identified Tenzin Dorje as the Accused or the perpetrator of the said offence and that he is also known as Eline. Not a single

witness is examined by the Prosecution to show that the Accused Tenzin is also known as Elin. It is only the complainant/victim who stated it in her complaint. It is really surprising as to how PW-1 got the knowledge that Accused Tenzin is the same person who committed such offence.

18. The investigating Officer was also unable to answer this aspect in his deposition. He only claimed that PW-11 Vijaykumar apprehended the Accused and he was then placed under arrest on 19.12.2015 at around 06:00 a.m. PW-1 the pancha witness stated that he was present at the time of arrest panchanama, however, this witness also failed to disclose about the features and other aspects and how he identified the Accused as Elin. There is no document placed on record to show that the Accused Tenzin is also known as Elin.

19. The test identification parade conducted by PW-3 is again under the cloud of doubt. The Mamlatdar claimed that on 22.12.2015 he carried out test identification parade, however, though he claimed that all the dummies were having similar physical appearance as that of Accused, it is admitted fact that all the dummy witnesses are basically from Goa. The

memorandum of test identification parade and more particularly page no. 117 of the paper book show that all dummies are Goa residents. The Accused is admittedly of Tibetan/Leh Ladakh ethnicity which is far away place. The features of persons residing in Leh Ladakh/Tibet are admittedly different from the person residing in Goa. Thus, it is clear that the dummies who were used for the purpose of test identification parade were not having similar features though they might be having similar physique.

20. In such circumstances identification of a person who is from totally different place, is easy.

21. Beside, the victim who is examined as PW-12 admitted in the Cross examination that she was shown the Accused in the Police Station. The Investigating Officer admitted that Accused was in Police custody only upto conducting the test identification parade. Thus, it is clear that the Accused was shown to the Victim in the Police station and prior to conducting test identification parade. It creates a serious doubt about the identification of the Accused as perpetration of the said offence.

22. The Medical Examination Report of the victim is also not certain as far as the offence of rape is concerned.

23. The doctor who deposed as PW-13 claimed that opinion as far as vaginal penetration was not ruled out. The victim/PW-12 was aged 26 years at the relevant time and therefore, such opinion would not be considered as the proof of any forcible vaginal penetration as tried to be claimed in her complaint.

24. As far as the identification of the Accused is concerned, he was asked a specific question under Section 313 of the Code of Criminal Procedure Code (Cr.P.C. for short) wherein he clearly disclosed that thought the victim identified him in the line, he was asked to remove the mask when he was standing outside and was shown to the said victim before conducting test identification parade.

25. In ***Hari Nath (supra)*** further discussed earlier decisions on the aspect of test identification parade. The Apex Court observed that test identification parade under Section 9 of the Indian Evidence Act is only for the purpose of ascertaining that the investigation is going in the right direction. The report of the test identification parade and the testimony of the

Executive Magistrate is only corroborative piece of evidence. What is primary evidence is the deposition of the witness in the Court. However, when there is serious doubt about the identification of the Accused during test identification parade, such report is required to be discarded.

26. In the case of ***Jafar (supra)***, the Apex Court observed that in absence of proper identification parade being conducted, the identification for the first time in the court cannot be said to be free from doubt. In the present mater victim herself admitted that the Accused was shown to her in the Police Station which was prior to conducting test identification parade.

27. In the case of ***Vilas Patil (supra)***, the Division Bench of this Court observed that the parade is required to be conducted as per the instructions found in the criminal Manual and if it is found that such procedure was not followed there is serious doubt about such identification of the Accused. The matter in hand would first of all show that the complaint did not disclose the feature, the complexion, the height of the Accused-Elin who allegedly committed such offence. There is serious doubt as to how and on what basis the concerned PSI Vijaykumar suspected

that the present Appellant Tenzin Dorje. Infact the person who committed such offence and that he is also known as Eline. The identification parade is conducted by ignoring the procedure disclosed in the Criminal Manual and more particularly about selection of dummies.

28. The Appellant is named as Tenzin Dorje. While framing of charge, the prosecution claimed that he is also known as Elin and without any prove to that effect. Another disturbing feature is the fact that that statement of Accused recorded under Section 207by the Court which is at page No. 94. The Accused was asked his name which he has clearly mentioned as Tenzin Dorje. He was asked whether he received the copies as referred in Section 173 of Cr.P.C. to which he answered in negative.

29. The second question was put to him as to whether he understood the charge which was read and explained to him and the copy which was given to him and he again answered in negative. This clearly shows that there is non compliance of the mandatory provisions of handing over of the copies of charge sheet. Similarly, the Accused in clear terms disclosed that he failed to understand the charge explained to him. At that stage

itself, it was the duty of the learned Sessions Judge to explain the charge to the Accused in his own language and only after recording the answer in the affirmative proceed to record further answers. Once the Accused says that he has not understood the charge which was read and explained to him and that there is non compliance of Section 173 of Cr.P.C., the Court ought to have complied with such mandatory provisions without proceeding further with the trial. When the Accused failed to understand the charge, that itself shows that the entire trial stands vitiated.

30. The Accused has a right to know what is actually alleged against him and if he fails to understand it, the duty of the Court is to explain him in his own language.

31. Besides, there is a specific doubt with regard to identification of the Accused as perpetrator of the offence.

32. The learned Session Court has completely lost sight of the above facts and convicted a person who has not been properly identified and further more, that he has not been properly explained the charge against him. Accordingly, point Nos. 1 and 2 are answered in negative. Hence, point No. 3 has to be

answered in affirmative.

33. For all the above reasons, the conviction and sentence awarded by the trial court stands vitiated and cannot stand to the scrutiny of the Court. The appeal is therefore required to be allowed.

34. The appeal stands allowed. The conviction and sentence awarded in the impugned order dated 20.10.2020 in the Sessions Case No. 23/2016 is hereby quashed and set aside. The Appellant who is in custody is hereby directed to be released forthwith.

35. Appeal stands disposed in above terms.

36. Registrar Judicial is directed to inform the Superintendent of Jail, accordingly.

BHARAT P. DESHPANDE, J.,