

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 10th December, 2021

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

Crl.A. No.06 of 2021

Appellant : Hem Kumar Chettri

versus

Respondent : State of Sikkim

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

Appearance

Mr. Gulshan Lama, Advocate (Legal Aid Counsel) for the appellant.

Mr. Thinlay Dorjee Bhutia and Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

[1] The Appellant, aged about 40 years, is alleged to have raped the victim, aged about 79 years, on 15.12.2019, at around 12 p.m. On 16.12.2019, at 1.30 p.m., the victim was medically examined and the Doctor found that she was bleeding from her genital. Charge-Sheet was submitted against the Appellant under Sections 376/457/506 of the Indian Penal Code, 1860 (for short, the "IPC"), on completion of investigation by P.W.11, the Investigating Officer of the case.

[2] Learned Counsel for the Appellant before this Court submitted that on account of the inconsistency of the victim's statement the offence would fall under Section 354 of the IPC and not under Section 376(2)(I) of the IPC. While asserting that

the Appellant was not guilty of the offence of rape it was urged that the sentence of imprisonment imposed by the Learned Trial Court for the offence of rape extending to 15 years be reduced to 10 years, i.e., the minimum period prescribed by the provision, should it be found by this Court that the offence was indeed committed. That, mitigating circumstances exist for such reduction, viz., the Appellant is married and has two children both of whom are studying and are financially dependent on him. His wife is a home-maker and on account of his incarceration his entire family is financially dependent on his aged father. Reliance was placed on ***State of Himachal Pradesh vs. Nirmala Devi***¹ and it was contended that the philosophy of sentencing is undergoing change and should not be confined to deterrence, other aspects such as mental health and mitigating circumstances ought to be taken into consideration. The attention of this Court was drawn to the Judgment of the Hon'ble Supreme Court in ***Rai Sandeep alias Deepu vs. State (NCT of Delhi)***² and it was canvassed that the victim has not specifically stated that the offence of rape was perpetrated on her, she has merely stated that "izzat bezzat garyo". The words employed by her do not indicate rape and would at the most constitute an offence under Section 354 of the IPC. That, the Prosecution had also failed to prove that the offence was one under Section 376(2)(I) of the IPC as no medical report was furnished by it to establish that the victim was physically challenged as stated by her in her evidence. Hence, the assailed Judgment and Order on Sentence be set aside and the Appellant acquitted of the offence charged. In the

¹ (2017) 7 SCC 262

² (2012) 8 SCC 21

alternative the offence reduced to one under Section 354 of the IPC. However, he be found guilty of the offence under Section 376 of the IPC, the sentence be reduced as prayed.

[3] *Per contra*, it was the argument of the Learned Additional Public Prosecutor that there is no question of the evidence of the victim being inconsistent. That, there was no eye witness to the incident and P.W.2 has been categorical and consistent in her claim that the Appellant committed the offence. That, the evidence of P.W.4 reveals that she had heard the victim shouting on the night of 15.12.2019, which was the night of the incident and the next morning she found the victim in the kitchen with her mother-in-law. The victim then told her that she had shouted for help the whole night but, P.W.4 had not woken up. P.W.5, mother-in-law of P.W.4 and the victim had in fact gone to the house of the Appellant to inform his parents of the incident and to the house of one "D.B. Police", the same night to lodge a complaint but returned as he was not at home. The victim had also told P.W.4 that the Appellant had sexually assaulted her. That, P.W.5 also clearly supported the Prosecution case. Her evidence revealed that P.W.2 had approached her at 1 p.m. the same night of the incident and she along with the victim had gone to the house of one "D.B. Police" and also to the house of the Appellant, thereby fortifying the evidence of P.W.2. The Learned Trial Court in its impugned Judgment at Paragraph 44 has reflected that the Defense Counsel at the time of arguments admitted that the victim was physically challenged. In light of these circumstances, the impugned Judgment requires no interference and the appeal be dismissed.

[4] The Learned Counsel for the parties have been heard and all the relevant documents perused as also the impugned Judgment and Order on Sentence.

[5] The Appellant is aggrieved by the impugned Judgment dated 18.02.2021, in S.T. (Fast Track) Case No. 01/2020 in the Court of the Learned Judge, Fast Track, South & West Sikkim, at Gyalshing, whereby he was convicted of the offence under Sections 376(2)(I) and 457 IPC. The assailed Order on Sentence, dated 18.12.2021, incarcerated him as follows;

"a. The convict shall undergo rigorous imprisonment for a term of fifteen years under Section 376(2) (I), IPC and shall pay a fine of Rs.10,000/- (Rupees Ten Thousand) only. In default of payment of fine, the convict shall undergo simple imprisonment for a term of one year.

b. under Section 457, IPC, the convict is sentenced to undergo rigorous imprisonment for a term of five years and to pay a fine of Rs.2,000/- (Rupees Two Thousand) only. In default of payment of fine, the convict shall undergo simple imprisonment for a term of six months.

c. Both sentences shall run concurrently."

[6] The Prosecution case summarized is that, on 16.12.2019, at 10.30 hours, the victim, P.W.2 lodged an oral complaint before the Melli Police Station, reduced to writing by the SHO, Melli Police Station (Exhibit 13). As per the victim, she lives alone and that night when she retired to bed at around 00.30 hours after finishing her household chores she heard some sounds. She saw her neighbour, the Appellant, breaking into her room through the gap between the roof and the windows. He turned off the light, disrobed her forcefully and sexually assaulted her. After an hour, he threatened her and directed her

not to narrate the incident to anyone and that he would give her money if required and then left her house. She immediately went to the house of her nearest neighbour P.W.5, took her to the house of the parents of the Appellant who offered her no assistance. The next morning she lodged the Complaint.

[7] Pursuant to the lodging of Exhibit 13 investigation into the matter was taken up and Charge-Sheet filed as detailed hereinabove. The Learned Trial Court framed Charge against the Appellant under Sections 376(2)(I), 457 and 506 of the IPC who pleaded "not guilty" to the Charges and claimed trial. The Prosecution thus examined 11 (eleven) witnesses to prove its case, on closure of which the Appellant was examined under Section 313 of the Cr.P.C. The final arguments of the parties were heard thereafter and the Judgment and Order on Sentence pronounced.

[8] While considering the evidence on record and the merits of the Prosecution case, the word 'inconsistency' employed by the Learned Counsel for the Appellant for describing the evidence of P.W.2 appears to be a misnomer considering that her evidence reflects no inconsistency at all. She has deposed *inter alia* as follows;

"..... On 15.12.2019 around midnight, while I was sleeping in my room, Hem Kumar Chettri entered my room through the ventilation. When I started screaming out for my neighbors, he told me not to shout and also put off light in my room. Thereafter, he undressed me and pushed me down, got on top of me and raped me. He then told me "Mo Mamm Lai Kei Gardina" (I won't do anything to you). Everyone in the village calls me 'Mamm' (Grandmother). I cried out for help but no one came and I got tired thereafter. After he committed rape, he left quietly."

[9] Her evidence-in-chief withstood the cross-examination and could not be decimated. The evidence of P.W.2 regarding the occurrence of the incident is supported by P.W.4 and P.W.5 inasmuch as P.W.4 was told of the incident by the victim P.W.2 and P.W.5 had accompanied P.W.2 to the house of one "D.B. Police" after P.W.2 narrated the details of the incident to her. P.W.5 was the witness who woke up to the knock on her door by P.W.2 at around 1 a.m. of the night of the incident. When she opened the door the victim told her "*Hem Kumar lay malai izzat bezzat garyo*". The victim could not be more specific than this to describe the offence. Her rustic background on account of which she has used the above words cannot be disregarded or the offence reduced to one under Section 354 of the IPC merely on account of her inability to use the word 'Rape'. The evidence of P.W.5 remained undecimated in cross-examination. Exhibit 13 also lends credence to the evidence of P.W.2.

[10] P.W.10 was the Medical Officer who examined P.W.2. On her local examination he found the following;

"..... There was no external injuries seen, No fresh injuries were noted in skin. Pubic hair present. **Per vagina bleeding was present due to forceful penetration. The bleeding was fresh.** Hymen also not intact due to forceful penetration. This injury was also fresh." [emphasis supplied]

[11] His evidence thus revealed that the vaginal bleeding of the victim was not due to any infection, but on account of forceful penetration duly fortifying the evidence of the victim P.W.2, thereby establishing the offence of rape committed by the Appellant along with the offence under Section 457 of the IPC. Even if no certificate of physical disability was furnished by the

Prosecution to prove the fact of disability of the victim it is undisputed that she was around eighty years old, which itself suffices to not only hold her testimony regarding the state of her health as the truth but also to believe that she would at her age not be physically agile. Besides, the Learned Trial Court has recorded in Paragraph 44 of the impugned Judgment that the Counsel for the accused had conceded to the claim of physical disability of the victim, during the course of arguments. The Learned Trial Court has also recorded the physical disability of the victim was evident when the victim appeared before the Court for recording her evidence.

[12] In light of the discussions which have emanated hereinabove, we do not find any mitigating circumstance to reduce the sentence imposed on the Appellant. We also find no reason to interfere with the findings of the Learned Trial Court.

[13] The impugned Judgment and Order on Sentence are upheld.

[14] Appeal dismissed.

[15] No order as to costs.

[16] Copy of this Judgment be transmitted forthwith to the Appellant in Jail.

(Bhaskar Raj Pradhan)
Judge
10-12-2021

(Meenakshi Madan Rai)
Judge
10-12-2021

Approved for reporting : **Yes**