

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

**Dated: 23<sup>rd</sup> August, 2019**

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**D.B.: HON'BLE MR. JUSTICE VIJAI KUMAR BIST, C.J.**  
**HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.**  
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**Crl. A. No. 21 of 2018**

Shri Sangay Bhutia,  
S/o Phurba Bhutia,  
Aged about 24 years,  
R/o Tikithang,  
Gyalshing, West Sikkim,  
Presently undergoing imprisonment  
in the State Central Prison, Rongyek,  
Gangtok, East Sikkim.

... Appellant

Versus

State of Sikkim.

... Respondent

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Appearance:  
    Ms. Manita Pradhan, Advocate as Legal Aid Counsel.  
  
    Mr. Thinlay Dorjee Bhutia, Additional Public  
    Prosecutor with Ms. Pollin Rai, Assistant Public  
    Prosecutor for the State.  
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## **JUDGMENT**

### **Chief Justice**

This appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, "Cr. P.C.") is directed against the judgment and order dated 30.05.2018 passed by the Court of the Fast Track Judge, South & West Sikkim at Gyalshing in Sessions Trial (F.T.) Case No. 04 of 2017 (*State of Sikkim vs. Sangay Bhutia*), whereby the said Court convicted the accused/appellant Sangay Bhutia under Sections 376(1), 323, and 341 of the India Penal Code, 1860 (for short, "IPC"). The accused/appellant Sangay Bhutia has been sentenced to rigorous imprisonment for a period of 10 (ten) years and imposed a fine of Rs.50,000/- (Rupees Fifty Thousand) under Section 376 (1) IPC, simple imprisonment of 1 (one) year under Section 323 IPC and simple imprisonment of 1 (one) month under Section 341 IPC. It is also directed that if the fine is not deposited, the accused/ appellant shall undergo further simple imprisonment of 1 (one) year. It is also directed that all the sentences awarded to him shall run concurrently and the period of detention/imprisonment already undergone by the accused/appellant be set off against the period of imprisonment imposed upon him.

**2.** Heard learned counsel for the parties. Perused the lower court records and documents annexed thereto.

**3.** The prosecution story, in short, is that on 29.09.2016 one report was lodged in the Gyalshing Police Station by one Dhan Raj Subba, husband of the victim stating therein that on 29.09.2016, while his wife was returning to her house from her duty at Rabdentse, Archeological Department via short-cut-route, upon reaching near Maney one person called Sangay Bhutia suddenly appeared from back and grabbed her from behind and when the victim tried to shout for help the accused pressed her mouth and neck and started assaulting her on head. Following which she became unconscious and when she regained consciousness she found that the accused already ran away from the spot. Thereafter, the victim went to her house and told the same to her husband (complainant).

**4.** Officer-In-Charge of P.S. Gyalshing referred the victim for medical opinion with the following query:

“ ..... during examination she stated that she has some reasonable doubt that she might have been raped by the alleged person Sangay Bhutia. Please kindly opine whether she was sexually assaulted or not. If so then biological sample may kindly preserved to aid into investigation please.”

Relevant portion of opinion/medical report submitted by the Doctor PW-9 is as follows:

“ ..... No motile or non motile spermatozoa detected in sample Examined.”

**5.** Investigation was taken up by SI Naresh Chettri (PW-11), who interrogated the victim and started the investigation. After completion of the investigation, the investigating officer submitted the charge-sheet against accused-Sangay Bhutia for his trial for offences punishable under Section 341, 323, 354 and 376 IPC.

**6.** The case was committed to the Court of Sessions Judge, West District at Gyalshing. Learned Sessions Judge, West District framed charges under Section 323, 341 and 376 IPC against the accused and the same was read over and explained to the accused to which he pleaded not guilty and claimed to be tried. On this, the prosecution got examined as many as 11 witnesses, namely, PW 1 Victim, PW 2 Victim's husband, PW 3 Maya Subba, PW 4 Shanti Subba, PW 5 Tseten Bhutia, PW 6 Rashmila Pradhan, PW 7 PI Mahendra Pradhan, PW 8 Roshan Gurung, PW 9 Dr. Reebika Lama, PW 10 Dr. Suman Gurung, PW 11 SI Naresh Chhetri. Thereafter the accused/appellant was also examined by the Court under Section 313 of the Cr. P.C. He denied the allegation.

**7.** PW 1 Victim stated on oath that on 29.09.2016 she was returning from duty at Rabdentse Garden when she was suddenly attacked from behind by Sangay Bhutia. The incident

occurred around 12:45 in the afternoon and she could clearly recognize the accused, Sangay Bhutia. When she was walking down through the jungle, the accused grabbed her from behind and when she screamed, he covered her mouth with his hands. However, when she was trying to scream and resisting him, he boxed her on her head several times. When she screamed again, he caught her by her throat with his two hands and throttled her as a result of which she lost consciousness for a while. When she got consciousness, she found her trousers and panties had been pulled down. She also felt pain/ burning in her private part. She then called her husband on his mobile and informed him of the incident and thereafter rushed home. They went to the Police Station where her husband lodged a complaint. She was taken to the District Hospital at Gyalshing for medical examination. Later, she went to Soreng Court where she was asked some questions by the Judge and her statement was recorded. She proved Exhibit 1, 1 (a) (complaint), her statement under Section 164 Cr. P.C. In cross-examination, she stated that it is true that when she lost consciousness, she did not know what had happened to her body or what was done to her during that period. She also stated that she cannot say why she felt burning in her private part (however, she felt that she was raped).

**8.** PW 2 victim's husband stated on oath that on 29.09.2016 at around 01.00 pm he received a call from his wife, who was crying. When she reached home, she told him that when she was returning home from duty, accused Sangay Bhutia had suddenly caught her from behind and when she screamed he closed her mouth. Thereafter, he hit her on the head after which she lost consciousness. Later, by the time she got consciousness, the accused left the place. Upon knowing what had happened and since he knew the mother of the accused, he got the cell number of the accused from her and called the accused and asked him to come to meet him but he did not turn up. However, his mother came and she was told what the accused had done. Mother of the accused also called the accused but he refused to come. Thereafter, she told them, they should go ahead and do what was required. Then they went to the police station (thana) and lodged a report. In cross-examination, he admitted that he had not stated anywhere in the complaint that his wife had been raped by the accused.

**9.** PW 8 Roshan Gurung, is the witness of recovery. He stated that in the year 2016, on receipt of phone call, he went to Gyalshing Police Station. There he saw the victim, her friend and her husband. From Gyalshing Police Station he along with police men, victim, her friend and victim's husband went to the place of

incident, located below Rabdentse where there is a Maney (Prayer Stupa). From that place the police recovered one spectacle. Police also prepared the rough sketch map of that place in his presence. The spectacle was seized in his presence after preparing a seizure memo wherein he also signed as a witness.

**10.** PW 9 Dr. Reebika Lama conducted the medical examination of the victim. She in her deposition stated that on 29.09.2016, at around 2145 hrs. the victim was brought by Shanti Rai of Gyalshing Police Station to the hospital for medical examination. She was brought to the hospital with the alleged history that on 29.09.2016 at around 1245 hrs. at Rabdentse jungle she was caught by a person named Sangay Bhutia, pressed over her mouth and neck following which she felt unconscious and when she regained her consciousness it was around 1.00 pm. She found herself lying down. At the time of examination she had already changed her clothings and undergarment, urine passed, bath not taken. On examination, she found the linear shaped abrasion (reddish is colour) few scattered over left breast, linear scratch over right temporal region approx 5 cm in size. On local examination, no fresh injury/ bleeding seen at the time of examination. She found old tear present in hymen. Swab was collected from vaginal canal

and was sent for examination for presence of spermatozoa. At that time she reserved her opinion till the lab report was received. After the receipt of the Cytopathological report on 18.05.2017 she gave her opinion that the cytopathological report revealed that there was no motile or non motile spermatozoa detected in the samples examined. She also stated that it is true that she cannot say that whether the victim sustained penetrative sexual assault.

**11.** PW 11 SI Naresh Chettri, the investigating officer was also examined by the prosecution. He narrated the same things which were stated by PW 1, PW 2, PW 8 and PW 9.

**12.** Ms. Manita Pradhan, learned counsel for the appellant submitted that the court below has committed grave error both on facts and law in passing the impugned judgment. She submitted that in the facts and circumstances of the case the prosecution failed to prove its case beyond reasonable doubt. She submitted that the learned trial Judge failed to appreciate the fact that the first person who was informed about the alleged assault upon PW 1 by the appellant was her husband PW 2. But PW 1 never told her husband PW 2 that after she regained her consciousness she found that her trousers and underwear had been pulled down while she was in a state of

unconsciousness. Neither in the FIR nor in the evidence of PW 2 he has stated that victim told him about her being raped by the appellant. She also submitted that the trial Court failed to appreciate the fact that PW 2 has not stated in the FIR that victim ever told him about her feeling a burning sensation in her private part upon her regaining consciousness. The trial Court also failed to appreciate the fact that even victim admitted that she cannot say for sure if she had been raped by the appellant/accused while she was unconscious. Learned counsel submitted that the allegation of her having been raped by the appellant/accused is not corroborated by any evidence or witnesses and in absence of any corroboration, the suspicion of the victim cannot be equated with proof and cannot form the basis of the conviction of the appellant/accused. Even the medical report, Exhibit 7 does not support the claim of rape upon her as PW 9 (Doctor) has clearly supported report Exhibit 7 to the effect that she did not find any fresh injury/bleeding at the time of examination and that the Hymen had old tear which is understandable given the fact that the victim is a married woman. PW 9 Gynecologist has clearly stated that she cannot say if the victim sustained penetrative sexual attack. Therefore, the prosecution failed to prove rape by the appellant/accused upon the victim. The learned trial Court also failed to consider

that the prosecution case must stand on its legs and it is the prosecution which must prove its case beyond reasonable doubt.

**13.** Learned counsel for the appellant relied on ***Ramdas vs. State of Maharashtra : (2007) 2 SCC 170***, in which Hon'ble Apex Court held that the conviction in a case of rape can be based solely on the testimony of the prosecutrix, but that can be done in a case where the Court is convinced about the truthfulness of the prosecutrix and there exist no circumstances which casts a shadow of doubt over her veracity. She also referred paragraph 34 of the judgment reported in ***Raja and others vs. State of Karnataka : (2016) 10 SCC 506***. Same is reproduced below:

**"34.** This Court in *Raju* [*Raju v. State of M.P.*, (2008) 15 SCC 133 : (2009) 3 SCC (Cri) 751], while reiterating that the evidence of the prosecutrix in cases of rape, molestation and other physical outrages is to be construed to be that of an injured witness so much so that no corroboration is necessary, ruled that an accused must also be protected against the possibility of false implication. It was underlined that the testimony of the victim in such cases, though commands great weight but the same, cannot necessarily be universally and mechanically accepted to be free in all circumstances from embellishment and exaggeration. It was ruled that the presumption of absence of consent of the victim, where sexual intercourse by the accused is proved as contemplated in Section 114-A of the Evidence Act, was extremely restricted in its application compared to the sweep and ambit of the presumption under Sections 113-A and 113-B of the Indian Evidence Act. It was expounded that insofar as the allegation of rape is concerned, the evidence of the prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should always without exception, be taken as gospel truth. The essence of this verdict which

has stood the test of time proclaims that though generally the testimony of a victim of rape or non-consensual physical assault ought to be accepted as true and unblemished, it would still be subject to judicial scrutiny lest a casual, routine and automatic acceptance thereof results in unwarranted conviction of the person charged."

Learned counsel for the appellant also referred **(2018) 9 SCC 137 : Amar Nath Jha vs. Nand Kishore Singh and others** and **(2015) 7 SCC 272 : Mohd. Ali alias Guddu vs. State of Uttar Pradesh.**

**14.** On the other hand, learned Additional Public Prosecutor submitted that there has been no change in the version of the prosecution from beginning till end and the evidence of the victim is sufficient to convict the appellant as the same is the most vital piece of evidence. He submitted that prosecutrix in her statement clearly stated that after she regained consciousness, she felt that she was raped as she was having burning sensation in her private part. He submitted that evidence of the victim also establishes that she was assaulted by the accused on the head. He submitted that even if no injury is found on body, that does not mean that no rape was committed. In support of this submission, he referred **SLR (2018) SIKKIM 1 : Sancha Hang Limboo vs. State of Sikkim.** By referring **SLR (2017) SIKKIM 477 : Robin Gurung vs. State of Sikkim,** he argued that sole testimony of victim is sufficient to

prove the case of the prosecution. Learned counsel for the respondent also referred paragraphs 16, 17 and 18 of the judgment reported in **(2010) 5 SCC 445 : *Santhosh Moolya and another vs. State of Karnataka*** and submitted that no woman would allege rape or dishonor herself by claiming to be raped. Paragraph 16 of the judgment is quoted below:

**"16.** In *State of Punjab v. Gurmit Singh* [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] speaking for the Bench Dr. A.S. Anand, J. (as His Lordship then was) has observed thus: (SCC pp. 395-96, para 8)

"8. ... The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge

levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable." (emphasis in original)

**17.** Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her honour at stake by falsely alleging commission of rape on her and, therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. (Vide *Rajinder v. State of H.P.* [(2009) 16 SCC 69 : (2010) 2 SCC (Cri) 156 : JT (2009) 9 SC 9] )

**18.** In *Sohan Singh v. State of Bihar* [(2010) 1 SCC 68 : (2010) 1 SCC (Cri) 452] this Court has observed as under: (SCC p. 71, para 13)

"13. When FIR by a Hindu lady is to be lodged with regard to commission of offence like

rape, many questions would obviously crop up for consideration before one finally decides to lodge the FIR. It is difficult to appreciate the plight of the victim who has been criminally assaulted in such a manner. Obviously, the prosecutrix must have also gone through great turmoil and only after giving it a serious thought, must have decided to lodge the FIR."

**15.** We have considered the submission of learned counsel for the parties and carefully perused the record. It is true that sole testimony of the victim is sufficient to convict an accused. It is also absolutely correct that no self-respecting woman would falsely state that she had been raped. The testimony of the victim in such cases is vital and should not be doubted. But, at the same time, the Court is supposed to evaluate the evidence of the victim more carefully if medical evidence does not support the commission of sexual assault on the victim. Testimony of the victim should be accepted but it would be subject to judicial scrutiny. In the present case, the victim stated that when she was walking down through the jungle, the accused caught her from behind and when she screamed, he covered her mouth with his hands. He boxed on her head several times. When she screamed again, he caught her by her throat with his two hands and throttled her as a result of which she lost consciousness for a while. When she awoke, she found her trousers and panties had been pulled down. She also felt pain/burning in her private part. In her cross-

examination, she stated that it is true that when she lost consciousness, she did not know what had happened to her body or what was done to her during that period. She also stated that she cannot say why she felt burning in her private part (however she felt, she was raped). From her statement it is clear that she was not sure that she was raped. She being raped is neither mentioned in F.I.R. nor in the evidence of her husband PW 2. When victim is not sure about her being raped, in that event, medical report as well as medical opinion of the Doctor play vital role. Medical examination was conducted same day of the incident. Medical report does not suggest rape as according to same no motile or non motile spermatozoa detected in sample examined. Doctor (PW 9) also stated that it is true that she cannot say that whether the victim sustained penetrative sexual assault. The above evidence, in our view, is not sufficient to prove prosecution case regarding rape upon victim beyond reasonable doubt. Finding of trial court, so far commission of rape is concerned, is incorrect and is set aside. The appellant is given benefit of doubt and he is acquitted from charge under Section 376(1) IPC. Conviction under Section 376(1) and sentence awarded to the appellant under Section 376(1) is set aside. Here we make it clear that our finding on this point does not mean that prosecution case is totally false. Only thing is

that they failed to prove charge under Section 376(1) beyond reasonable doubt. Now, we deal the conviction of appellant under Sections 323 and 341 of IPC. We find that FIR was lodged by the husband of the victim stating that on 29.09.2016 the appellant grabbed her from behind and when the victim tried to shout for help the appellant pressed her mouth and neck and assaulted her on head. Following which she became unconscious and when she regained consciousness she found that the accused already ran away from the spot. In his statement before the Court, the PW 2 stated the same thing. Thus, there is consistency in his statement. The victim, in her statement also stated that when she was walking down through the jungle, the accused grabbed her from behind and when she screamed, he covered her mouth with his hands. When she was trying to scream and resisting him, he boxed her on her head several times. When she screamed again, he caught her by her throat with his two hands and throttled her as a result of which she lost consciousness for a while. This portion of her statement is supported by the medical evidence which is as follows:

"Injury Abrasion (reddish) few scattered, linear shaped over (L) breast  
Linear scratch over ® temporal region approx 5 cm in size"

Doctor (PW 9) proved the medical report. Spectacle of the victim was also found from the place of incidence. Therefore,

the charges under Sections 323 and 341 of IPC are proved. Consequently, the finding of trial court in this regard is affirmed. Conviction of the appellant and sentence awarded under Sections 323 and 341 IPC also stands affirmed. Appellant is directed to undergo sentence awarded to him under Sections 323 & 341 IPC.

**16.** Appeal stands partly allowed.

**17.** Let copies of this judgment be sent to the Trial Court as well as to the concerned Jail Superintendent.

*Sd/-*  
**( Vijai Kumar Bist )**  
**Chief Justice**  
23.08.2019

*Sd/-*  
**( Bhaskar Raj Pradhan )**  
**Judge**  
23.08.2019

Index : ~~Yes~~ / No  
Internet : Yes / ~~No~~

pm/jk