

IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Criminal Appeal No.26 of 2018

Mahindra Shanker (Bishwakarma)

Son of Devi Lall Shankar,

Resident of Basnett Ward No.2,

Namcheybong, East Sikkim.

Presently at Central Prison,

Rongyek, Gangtok,

East Sikkim.

... Appellant

Versus

State of Sikkim

... Respondent

BEFORE

HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.

For the appellant : Ms. Gita Bista, Legal Aid Counsel.

For the respondent : Mr. S.K Chettri, Assistant Public Prosecutor

Date of hearing
& Judgment : 08.11.2019

J U D G M E N T (Oral)

Arup Kumar Goswami, CJ.

Heard Ms Gita Bista, learned Legal Aid Counsel and
Mr. S.K. Chettri, learned Assistant Public Prosecutor, Sikkim.

2. This appeal is directed against the Judgment dated 11.07.2018 and the order on sentence dated 12.07.2018 passed by the learned Judge, Fast Track Court, East and North Sikkim at Gangtok in Sessions Trial (F.T.) Case No. 02 of 2017, whereby the appellant was convicted under Section 376(2) (j), 376 (2)(I) and 451 IPC and sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.3,000/- under Section

376(2)(j) IPC, in default, to undergo simple imprisonment for a period of three months; to undergo rigorous imprisonment for a period of ten years and to pay a fine to Rs.3,000/- under Section 376(2)(l) IPC, in default, to undergo simple imprisonment for a period of three months; and to undergo simple imprisonment for a period of one year and to pay a fine of Rs.1,000/- under Section 451 IPC, in default, to undergo simple imprisonment for a period of one month. All the sentences are to run concurrently.

3. The First Information Report (for short, "FIR") (Exhibit-1) was lodged by one 'A' (name withheld), a Member of Ward Panchayat, before the Pakyong Police Station on 20.08.2016 at 03.30 p.m. stating that she had received a telephone call at around 10 a.m. from one 'X' (name withheld), informing her that at around 7 p.m. of the previous night, rape was committed by the appellant upon 'Y' (name withheld), hereinafter referred to as the victim, at her residence.

4. On receipt of the information, Pakyong Police Station Case No. 18 of 2016 under section 376 IPC was registered. Subsequently, on completion of investigation, charge sheet being Charge Sheet no.13 dated 05.01.2017 under section 376 IPC was submitted.

5. The case being exclusively triable by the Court of Sessions, the learned Chief Judicial Magistrate, East at Gangtok, vide Order dated 13.01.2017 committed the case to the Court of the learned Sessions Judge, East Sikkim at Gangtok who transferred the case to the Court of Judge, Fast Track Court, East and North Sikkim wherein Sessions Trial (F.T.) Case No. 02 of 2017 was registered.

6. Upon hearing the learned counsel for the parties, the learned Trial Court Judge framed charges against the appellant under sections 376(2)(j), 376(2)(l) and under section 451 IPC. The same being read over and explained to the appellant in Nepali language, the language he understood, the appellant pleaded not guilty and claimed to be tried.

7. During trial, prosecution examined 17 (seventeen) witnesses. Defence adduced no evidence. The statement of the appellant was recorded under section 313 Cr.P.C, where a plea of denial was taken by the appellant.

8. The victim was examined as PW-1. The informant was examined as PW-2. The husband and son of the victim were examined as PW-8 and PW-9, respectively. X, who was stated to have given the information to PW-2, was examined as PW-11. PW-5 is the Doctor who had examined the victim on 20.08.2016 and PW-6 is the Doctor who had examined the appellant on 22.08.2016. PW-14 is the Medical Officer who had examined the appellant on 20.08.2016. PW-4 is a child witness, aged about 13 (thirteen) years and PW-3 is the mother of PW-4 and an eye witness. PW-7 is the Scientific Officer of Regional Forensic Science Laboratory (RFSL), Saramsa. PW-10 is a witness to the rough sketch map (Exhibit-6) of the place of occurrence and a seizure (Exhibit-7) witness of a boxer pant (Material Object-IV) stated to be of the appellant. PW-12 is the Judicial Officer who recorded the section 164 Cr.P.C. statement (Exhibit-11) of the victim. PW-13 is the Station House Officer of Pakyong who registered the Pakyong P.S Case No.18/2016. PW-15

is a neighbour of the victim and who met PW-3 immediately after the incident. PW-16 is the seizure witness of the "lungi" worn by the victim (Material Object-I) of the victim and the boxer pant of the appellant. PW-17 is the Investigating Officer of the case.

9. Ms Bista submits that there is no evidence on record to hold that the appellant had committed the offences as alleged and that the prosecution had miserably failed to prove the guilt of the appellant beyond reasonable doubt. She contends that even if it is accepted for the sake of argument that the appellant had sexual intercourse with PW-1, having regard to the facts and circumstances of the case, the same cannot be construed to be rape but a consensual act.

10. Mr. S.K. Chettri, learned Assistant Public Prosecutor, on the other hand, supports the impugned Judgment and also places reliance on a judgment of the Hon'ble Supreme Court in the case of ***State of Maharashtra vs. Chandraprakash Kewalchand Jain*** reported in ***(1990) 1 SCC 550***, with particular reference to paragraph 16 thereof.

11. We have considered the submissions of the learned Counsel for the parties and have perused the evidence and materials on record.

12. PW-1 is a differently-abled person being partially deaf and dumb and was about 51 years of age, when she deposed in the month of April, 2017. The learned Trial Court had recorded that PW-1 had partial speech and hearing impairment but she was capable of communicating through words and gestures. She had stated that on

the day of occurrence she was alone at home as her husband, PW-8, was in the hospital since he was suffering from fever. The appellant had come to her house and had made inquiries about whereabouts of her husband. On being told that he had gone to the hospital, the appellant had caught hold of her hands and had committed rape on her. She further stated that when the appellant caught hold of her hands, she had bitten him. She also stated that she had informed about the incident to her husband.

13. In her cross-examination as well as her statement under section 164 Cr.P.C., PW-1 had stated about biting the appellant in his hands. She had also stated therein that appellant had also bitten her in her stomach and as the appellant had pushed her, she sustained head injuries. In her cross-examination, she stated that the appellant was fully drunk and was not in a position to stand and that she did not shout for help.

14. While recording deposition of PW-1, the learned Trial Court observed that PW-1 had, in words and with hand gestures, demonstrated the act committed by the appellant.

15. Evidence of PW-14 goes to show that when the appellant was examined by him on being forwarded at about 06.00 p.m. of 20.08.2016, he was found to be under the influence of alcohol and smell of alcohol in breath was present.

16. The evidence of PW-2, i.e., the informant, is to the effect that she came to know about the occurrence on receipt of a phone call from PW-11. On getting to know of the incident, she had called PW-11 and the "mother" and "daughter" who had witnessed

the incident and based on their reporting, she had lodged the FIR. It appears from her evidence that scribe of FIR was one Shivji Gupta, who, incidentally, was not examined. PW-2 had made it very clear that she did not know the names of the mother and daughter duo.

17. Before discussing the evidence of PW-3, it will be appropriate to take note of the evidence of PW-4. PW-4, in her deposition, stated that she had gone to the victim's house and when she had reached the house, she had seen the appellant inside the kitchen, pushing the victim towards the bed which was there in the kitchen. Though the victim was shouting, she could not understand what she was saying and having witnessed the same, she went to PW-4 and narrated the incident to her. In her cross-examination, she stated that that it being dark, a kerosene lamp was lit in the house of the victim. She also stated that she had no apparent reason to visit the house of the victim.

18. PW-3, i.e., mother of PW-4, elucidated that the house of PW-1 is next to hers. She corroborated the statements made by PW-4 to the effect that PW-4 had told her that she had seen the appellant pushing the victim. She stated that on hearing the same, she ran to the victim's house and saw the appellant committing rape on the victim in her kitchen and when the appellant saw her, he fled away pulling his pants. She stated that her shout for help was heard by "Kamal's wife" and she had informed her about the incident.

19. Kamal's wife, referred to by PW-3, was examined as PW-15. PW-15 stated that she is a neighbour of the victim and hearing some noise coming from the victim's house, had gone to see what

had happened. She heard the PW-3 saying "Mahendra" "Mahendra" (the appellant) and PW-3 told her that he had gone down towards the jungle. She, however, did not notice anybody. It has come out of her deposition that, thereafter, she, along with PW-3 and others, had gone to the house of the uncle of the appellant and had informed him that the appellant had done "naramro" (behaved indecently).

20. PW-11 stated that one lady of the village had informed her that the appellant had committed sexual assault on the victim and therefore, she had inquired about the same from the victim and on being indicated by hand gestures she had informed the same to the Ward Panchayat. Who is that lady from whom she had got the information is not clear from her evidence in chief. However, from her cross-examination, it appears that she had heard about the incident from one Januka Shanker, who is the owner of the house of the victim.

21. PW-10 acknowledged seizure of Material Object-IV in his presence and affixing of his signature in rough sketch map, Exhibit-6. Evidence of PW-16 goes to show that a "lungi" of victim was seized vide Exhibit-8 in his presence. In his cross-examination he stated that he also signed on another document at the police station after one or two days. He proved his signature appearing in Exhibit-7 by which, Material Object-IV was seized. It appears that the boxer pant was not seized in his presence.

22. Exhibit-6 shows that distance between the house of the victim and PW-3 is about 300 feet approximately. The house of PW-15 is not reflected in Exhibit-6.

23. Evidence of PW-7 goes to show that blood, semen or any other human body fluid could not be detected in BIO 232A (Material Object-III), which is a small glass vial containing vaginal wash of PW-1. Her evidence goes to show that blood group of the victim is A⁺. Human blood of blood group AB was detected in green coloured boxer with black and white strips (Material Object-IV), allegedly belonging to the appellant. Human body fluid, which gave positive test for blood group A was detected in the blue and purple coloured "lungi" (Material Object-I) said to be belonging to the victim marked in laboratory as BIO 232C. From the above, it is clear that laboratory test do not advance the case of the prosecution.

24. It is also relevant to note that there is no evidence that the appellant was wearing the boxer pant (Material Object-IV) at the time of the occurrence. In her section 164 Cr.P.C statement, P.W-1 had stated that she was wearing a saree. It is not understood why a "lungi", which is distinct from saree, was seized.

25. PW-8, who was aged about 81 years on the date of giving evidence in the month of November, 2017, had, however, stated that it was his son, PW-9, who had informed him about the sexual assault on his wife.

26. PW-9, aged about 43 years, stated that he had accompanied his father, PW-8, to the hospital and when he returned

home in the morning, his co-villager Hira Lal Shanker had informed him of the sexual assault on the victim, who is his step-mother.

27. In the evidence of PW-17, some portion of evidence of PW-16 is wrongly reflected. It appears from his evidence that in the year 2001 appellant was convicted for an offence under section 304 Part II IPC along with two others and he had produced a Court Disposal Form as document-B.

28. Consideration of the evidence of PW-1, PW-8 and PW-9 goes to show that there is no corroboration of the assertion of PW-1 that she had reported about the incident of the sexual assault by the appellant to P.W-8. While PW-8 stated that he came to know about the incident from his son, PW-9. In cross-examination, he admitted that he did not state before the police that he had come to know about the incident from Hira Lal Shanker. He also stated that he had not stated before the police that he had informed about the incident to PW-8. How PW-8 or PW-9 came to know about the alleged incident is not clear. Prosecution has not also examined Hira Lal Shanker.

29. PW-1 was examined by PW-5 on 20.08.2016 at around 7:12 p.m, which is about two days after the occurrence. PW-5 deposed that there was no perineal injury and there was also no active bleeding in her vagina. He also proved Exhibit-2, the medical report of the victim, which indicates that no bodily injuries were seen on the victim. In his cross-examination, he stated that there are chances of perineal injuries if there was recent forceful intercourse. It is worthwhile to recapitulate that in her section 164

Cr.P.C statement PW-1 had stated that she had suffered head injuries and she was also bitten on her belly. Conspicuously, medical evidence belies the aforesaid assertion.

30. The evidence of PW-6, the doctor who examined the appellant on 21.08.2016 proved Exhibit-3, the medical examination report, and the same discloses that there were no injuries on the body of the appellant though PW-1 had stated that she had bitten appellant in his hand.

31. In her cross examination, PW-3 stated that she did not tell police that she had shouted for help. She also stated that as the door of the room was open she could see the incident. She also stated that during sexual intercourse, the victim did not raise any hue and cry. She also stated that she did not narrate anything about the incident to any person. The evidence of PW-15 would also indicate that PW-3 did not tell her that she had witnessed the appellant committing any sexual assault of the kind that is stated by PW-3 in her deposition. It is to be noted that in terms of the evidence of PW-3, PW-15 was the first person she had come in contact with. It is difficult to accept that if PW-3 had witnessed a rape, she would not have told about it to PW-15 whom she met almost immediately after the alleged occurrence. It is also significant to note that uncle of the appellant was not reported about a rape committed but of indecent behaviour by the appellant. In the circumstances, we find it difficult to accept the testimony of PW-3 that she had witnessed a rape being committed by the appellant.

32. Januka Shanker, from whom PW-11 stated to have learnt about the incident was not examined by the prosecution. The evidence of PW-1 does not indicate that she had narrated the incident to PW-11. PW-11 also does not say that she had any occasion to talk to PW-3 and PW-4 before informing PW-2 about the occurrence. PW-3 also does not say that she had talked about the incident to PW-11.

33. PW-13, who had registered the Police case, in his cross-examination had stated that the victim had also come to lodge the FIR along with PW-2. It is significant to note that evidence of PW-1 and PW-2 does not disclose that PW-1 had accompanied PW-2 to the Police Station.

34. In ***Chandraprakash Kewalchand Jain*** (supra), the Hon'ble Supreme court had laid down that a prosecutrix of a sex offence cannot be at par with an accomplice. If a prosecutrix is an adult of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.

35. In the instant case, neither the victim nor the family members of the victim had lodged the FIR. No doubt, PW-1 had stated that the appellant had committed rape on her. However, in the totality of the facts and circumstances as appearing on the evidence on record as discussed hereinabove, we are of the

considered opinion that the prosecution had not been able to establish the guilt of the appellant beyond reasonable doubt. We are of the opinion that the appellant is entitled to benefit of doubt.

36. Taking that view, we set aside the impugned Judgment. Resultantly, the appeal stands allowed. The appellant shall be released forthwith, if not required in any other case.

37. Lower Court records be sent back. Copy of this order be sent to the learned Trial Court.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

Approved for reporting : Yes
Internet : Yes

bp/avi