

HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Single Bench : HON'BLE MRS. JUSTICE MEENAKSHI MADAN
RAI, J.

(Crl. A. No. 05 of 2015)

APPELLANT : State of Sikkim

VERSUS

RESPONDENT : Roshan Kumar Chettri,
S/o Shri Man Bahadur Chettri,
Resident of Chisopani Busty,
P.S. Soreng, West Sikkim.

An Appeal under Section 378 of the Code of Criminal Procedure, 1973

Appearance:

Mr. S.K. Chettri, Assistant Government Advocate for the
Appellant - State.

Mr. N. Rai, Senior (Legal Aid) Counsel with Miss Wangmu
Bhutia and Miss Bindu Gurung, Advocates for the Respondent.

J U D G M E N T
(30.06.2015)

Meenakshi Madan Rai, J.

1. This Appeal, arises out of the Judgment and Order of the Learned Fast Track Court (South & West) Sikkim at Gyalshing dated 20.05.2014, in Sessions Trial (Fast Track) Case No. 3 of 2014, acquitting the Respondent of the offences under Section 376/511 and Section 447 of the Indian Penal Code, 1860 (hereinafter "IPC").

2. The brief facts of the Prosecution Case is that the Victim, PW-3 lodged a Complaint at the Soreng Police Station (West Sikkim) on 20.09.2013 to the effect that the Respondent on 19.09.2013 at 2100 hours, threatened her on her Cell Phone, by calling her from the Cell Phone of one Ganga Ram Pradhan, PW-7. She went out of her house, to check, upon which the naked Respondent dragged her forcibly towards the field where he restrained and molested her. Thereafter, he abused and threatened her with dire consequences, if she made any complaints to the police.

3. Based on the FIR, Soreng Police Station Case No. 19(9)13 dated 20.09.2013 under Section 447, 341, 354 and 506 of the IPC was registered against the Respondent and taken up for investigation. Investigation revealed that the Victim, a permanent resident of Lower Timburbung, Soreng, West Sikkim married to one Buddha Pradhan, was living in her marital home with two children and her parents in law, her husband being in the Army and posted in Assam. She was learning tailoring at Soreng Bazaar, for which purpose she used to commute in the taxi vehicle of one Ganga Ram Pradhan (hereinafter 'PW-7') also from Lower Timburbung, Soreng, West Sikkim and used to book her seat in advance by contacting PW-7 on his Cell Phone No. 9775962423 from her Cell Phone bearing No. 9475916920. In the evening of 19.09.2013, PW-7 contacted the Victim telephonically in the presence of the Respondent, at which time the Victim asked him to keep a seat for her, for the morning of 20.09.2013. At the relevant time, both the Respondent and PW-7 had consumed alcohol and spent the night in the house of PW-7. That, at around 2100 hours, the Respondent in an inebriated condition called the Victim on her Cell Phone from the Cell Phone of PW-7 and during the course of the conversation went towards the house of the Victim

his torso being naked. He started abusing her on her Cell Phone and told her he was outside her house. She accordingly came out alone from her house, near the “Dhikki Katera” (out-house) to check. The Respondent on seeing her used abusive language, intimidated her and accused her of having illicit relations with PW-7 and indulging in physical relations with him. That, if she did not have physical relations with the Respondent, he would inform her husband about her indiscretion. He then dragged the Victim towards an isolated field and molested her. She resisted him continuously but was unable to scream on account of the Respondent covering her mouth with his hands, however, she managed to snatch the Cell Phone from the Respondent and escape towards her house. Being frightened and ashamed, she did not narrate the incident to her mother-in-law, who was in the house.

4. The next morning i.e. 20.09.2013, she told her Father-in-Law and her sister about the incident, pursuant to which her Father-in-Law arrived from Gangtok and the matter was placed before the Panchayat members for an amicable settlement. At the said meeting, the Panchayat President PW-1, Panchayat Secretary PW-2 and Bhoj Kumar Pradhan PW-6, along with other members of the Public, the Victim, the Respondent and their guardians were present. A discussion ensued to settle the matter but on the Victim calling up her husband telephonically, he advised her not to compromise and hence the matter was reported to the police. It was further revealed that the Mobile Phone call details of PW-7 indicated that the Victim was contacted several times by the Respondent after 2105 hours, prior to the incident through the Mobile Phone of PW-7. That, the SIM Card bearing No. 9775962423 was registered in the name of one Laxuman Subba of Buriakhop Busty, Soreng which PW-7 had been using for the last 5(five) years. On the basis of the investigation, Charge Sheet

was filed against the above Respondent under the above provisions of the IPC.

5. The Learned Trial Court after hearing the parties and finding *prima facie* materials against the Respondent under Section 376/511 and Section 447 of the IPC framed charges accordingly, to which the Respondent pleaded “not guilty”. The Prosecution, thereafter examined 10 (ten) witnesses in an effort to establish its case beyond reasonable doubt. The Learned Trial Court after considering the evidence on record, acquitted the Respondent of the Charges under which he was booked, hence this Appeal.

6. Mr. S. K. Chettri, Learned Assistant Public Prosecutor on behalf of the Appellant assailing the Judgment of the Learned Trial Court, advanced the argument that the Learned Trial Court failed to appreciate the evidence of the Prosecution witnesses in its correct perspective, as the evidence of PW-1, PW-2 and PW-4 corroborate each other, while the evidence of PW-3, PW-4, PW-9 and PW-10 are also corroborative. That, the evidence led by these witnesses have not been demolished under cross-examination. That, the Learned Trial Court ought to have meticulously examined the evidence of the Prosecution witnesses which establish that the Respondent had committed the offences under Section 376/511 and Section 447 of the IPC. That, accordingly the Judgment dated 16.11.2014 by the Learned Fast Track Court be set aside.

7. In order to fortify his submissions, Mr. S.K. Chettri has placed reliance on *State of Punjab vs. Gurmit Singh and Others : (1996) 2 SCC 384*, *Koppula Venkat Rao vs. State of A.P. : (2004) 3 SCC 602*, *Tarkeshwar Sahu vs. State of Bihar (now Jharkand) : (2006) 8 SCC 560* and *Wahid Khan vs. State of Madhya Pradesh: (2010) 2 SCC 9*.

8. Mr. N. Rai, Learned Senior (Legal Aid) Counsel for the Respondent, *per contra*, urged that the instant case against the Respondent arises out of a false allegation made by the Victim, as the Respondent had threatened to divulge to her husband the extra marital affair that she was indulging in with PW-7. That, the allegation of the Respondent dragging the Victim to a field from her house is unbelievable on two counts because firstly, there were no injuries on her limbs and secondly, her wearing apparels were not seized during investigation to establish that there was mud on them when she was dragged. It was also contended that the Victim herself has admitted that she is physically stronger than the Respondent, therefore the question of the Respondent dragging her does not arise. That, the Doctor PW-9, in his Report **Exbt.4** gives no reason for his opinion which is instead based on the history narrated by the Victim. It was also argued that the question of the Prosecutrix wanting to settle the matter before the Panchayat and her husband disagreeing are false allegations, as infact no offence was committed. It was expostulated that the Mother-in-Law of the Victim, who was in the house at the relevant time was not examined, neither were the children of the alleged Victim. That, the allegation of the Victim that the Respondent was naked is controverted by the investigation of the I.O. PW-10, who says that it was only the upper part of the body of the Respondent that was naked. That, infact, the evidence of the I.O. does not support the Prosecution case at all and there is no corroboration of the Victim's evidence by the Medical Report, making her statement unreliable.

9. Learned Counsel for the Respondent placed reliance on **Ashok Kumar vs. State of U.P : 1991 Crl. LJ 2859**. He submits that in the facts

and circumstances, the Judgment of the Learned Fast Track Court requires no interference and the Appeal be dismissed accordingly.

10. Having heard the Learned Counsels at length and given due consideration to the same and also having perused the entire evidence and documents furnished before the Learned Trial Court, I find that the question that requires determination is whether the Respondent had infact committed the offences of which he was acquitted.

11. On a meticulous examination of the Prosecution evidence, it is clear that besides the Victim there are no eye witnesses to the incident. PW-1 is the Panchayat President of the area concerned while PW-2 is the Panchayat Secretary. Their evidence pertains to the Complaint of the Victim PW-3 against the Respondent. PW-1 appears to have been informed by PW-6 on 20.09.2013 at around 11 a.m. that the Respondent had sexually molested PW-3 and that they wanted to settle the matter at the village level. PW-1, then telephonically informed PW-2 and at around 3:00 p.m., PW-2, the Respondent, his relatives, the Victim PW-3 and her relatives collected in the house of PW-3. On inquiry by PW-1, PW-3 narrated to him the threats made by the Respondent to her and told him that she had snatched the Mobile Phone from the hand of the Respondent. PW-1 advised them to settle the matter at the Panchayat level but her husband telephonically advised her against it. The evidence of PW-2, with regard to the incident, at the house of PW-3 where they had gathered, corroborates the evidence of PW-1, however, the cross-examination of both witnesses also belies the evidence of PW-3 who stated that “*Under the orange tree, the accused made me lie down and touched me all over my body and opened the string of my pyjama*”. According to PW-1 and PW-2, she had not stated this at the Panchayat Meeting. Both PW-1 and PW-2 under

cross-examination by Counsel for the Respondent have categorically stated that at the Panchayat Meeting, PW-3, the Victim did not tell them that the accused had untied the string of her pyjama at the relevant time. An effort was made during the cross-examination to indicate that the Victim had demanded an amount of Rs. 1,50,000/- (Rupees one lakh fifty thousand) only, from the family members of the accused for settlement of her complaint but this is not being taken into consideration as there is no direct evidence on this count.

12. On further consideration of the evidence of PW-3, she has stated that the Respondent contacted her from the Cell Phone of PW-7 at around 2100 hours on 19.09.2013 and as she was in the kitchen and did not know who was calling her on the phone, she stepped out of the house and saw the Respondent outside. He accused her of having an illicit affair with PW-7. Thereafter, according to her the Respondent molested her by touching her all over her body and forcibly took her near an orange tree next to her house. There he made her lie down and again touched her all over her body and untied the string of her pyjama, when she tried to shout for help, he covered her mouth with his hands, at which time she saw the Respondent had PW-7's cell phone which she snatched from him, freed herself and ran towards her house.

13. The fact of molestation could not withstand the test of cross-examination, where she has stated *"It is true that I have not stated in my 161 statement that the accused forcefully took me near the orange tree and forcefully made me lie down and further touched my body and opened the string of my pyjama"*. Why this statement is of importance is because not only has she failed to tell the police the said account but she did not make a statement to PW-1 and PW-2 of the same at the Panchayat meeting,

when the said fact ought to have been fresh in her mind. The FIR too does not bear this allegation, thereby leading to the undisputed conclusion that it is a specious statement against the Respondent. On this aspect, when the I.O. PW-10, was cross examined, he admits that none of the Panchayat members told him that the accused person had untied the string of her pyjama to commit sexual intercourse with her. He further admitted that *“It is true that the victim had no injuries on her person to prove that she was attempted for rape (sic) by the accused person”*. That apart, the Victim has also admitted as follows:-*“It is true that physically I am strong than the accused (sic) and the body structure of the accused appears to be lean and thin”*.

14. It has been stated by the Victim that the Respondent was fully intoxicated at the relevant time. On examining the ground reality, the Respondent was admittedly of smaller physical built and inebriated, therefore, would it have been possible for him to physically restrain the Victim with one hand and molest her with the other, while the hands and legs of the Victim were free for use against him, since it is no one's case that the hands and legs of the Victim were tied by the Respondent. Besides, the argument of Learned Counsel for the Respondent holds strength on the point that no wearing apparels of the Victim were seized to prove the assault. If she was dragged through the field as indicated in the rough sketch map **Exbt.7**, it was undoubtedly through mud and earth which would have not only stained her clothing but would have resulted in injuries on her lower limbs, where she was dragged and on her arms, where he would have held her to drag her. The I.O. PW-10, did not deem it essential to seize her clothes to establish the Prosecution Case, however, the fact that the I.O. admitted that during his investigation, he did not find any mud stains over the clothes of the Victim and the Respondent to prove that the Victim was dragged to the orange field/agricultural field

ofcourse cannot be overlooked. The above testimony of the witnesses do not at all support the Prosecution case to establish the charges against the Respondent.

15. While examining Exbt.4, the Medical Report of the Victim prepared by PW-9, it reads as follows:-

“The patient gave history of physical assault attempting to rape her by a boy named Roshan Chettri.

On examination

All vitals within normal limit

Esocoriation (sic) of nail on (R) hand, palmer aspect near wrist joint.

No other external injury noted.

100/80, 76bpm

Chest }
P/A } avg
CUS }

Impression: With history and clinical examination, the patient seem to have been molested by the boy (the alleged).

Signature : Sd/-, Dated : 20.09.2013

*Name : Dr. BirendraSubba
PHC, Soreng”*

16. On consideration of the above document, the word **‘excoriation’** means *the breaking and wearing away of the superficial protective surface, as of the skin by galling or scratching (see Butterworths Medical Dictionary, Second Edition, 1978).* The age of the injury has not been noted by the Doctor, leaving the Court to wonder whether it was a fresh injury or an old one. Secondly, he has opined that the Victim *“seems to have been molested by the boy”*, which is based on her narration. It is not for the Doctor to opine as to who has molested the Victim, his opinion ought to be confined to the injuries found on the Victim and the reasons as to how such injuries could be caused. Despite his opinion, it is evident that there were no other injury marks whatsoever on the legs and arms of the Victim, although she had allegedly been dragged through the mud field. Her mouth was allegedly closed by the Respondent with his hand but no injuries were

seen on her face to substantiate this statement. **Exbt.5**, the Medical Report of the Respondent also reveals no external injuries on his person to convince this Court to believe that a free fight ensued between the parties when the Respondent allegedly sought to molest the Victim or that the Victim struggled to free herself from the Respondent's clutches. It would be appalling to imagine the struggle as alleged, without any injuries on the assailant or for that matter on the Victim.

17. In *Wahid Khan's* case *supra* relied on by the Appellant, the Hon'ble Apex Court discussed that Medical Corroboration for rape is not mandatory. In this regard, on perusal of Paragraph 20 of the Judgment, while referring to the opinion expressed by **Modi in Medical Jurisprudence & Toxicology 24th Edition**, it was held *inter alia*, that Rape is a crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is to the effect whether there is evidence of sexual activity. Whether the rape has occurred or not is a legal conclusion not a medical one. The above is appropriate for applying in the opinion put forth in **Exbt.4**. The opinion of the Doctor that "*the patient seems to have been molested by the boy*", is pivoted around the history given by the Victim and reflects no independent opinion of the Doctor pertaining to sexual assault, as a result of which the opinion is of no value for the Prosecution Case.

18. Coming to **Exbt.8**, the Vodafone Call detail records alleged to be of the SIM Card used by PW-7 registered in the name of Laxuman Subba, in this regard there appears to be no investigation conducted by the I.O. to establish as to how the SIM Card of Laxuman Subba

was in the possession of PW-7, this being relevant for the purpose of establishing whether the phone calls were indeed made from the Cell Phone of PW-7 or anyone else. That having been said, on careful scrutiny of the call details furnished in **Exbt.8**, undoubtedly there appears to have been a phone call from the number allegedly used by PW-7 to the Cell Phone Number said to be that of the Victim's at around 5 minutes past 9 p.m. However, if the statement of the Victim that "*I saw the accused had Ganga Ram's phone and I snatched it from the accused and I somehow managed to free myself and I ran towards my house*" is to be believed, then it would be difficult for the Prosecution to explain as to how the Victim who was in possession of the Cell Phone of PW-7 continued to make calls to her own Number from the Cell Phone of PW-7 at 2140 hours and thereafter approximately four more calls between 2154 hours to 2323 hours. It would be incongruous to imagine that anyone would be calling her from the Cell Phone of PW-7, when she was admittedly in possession of both the phones.

19. Added to all of the above anomalies, it is pertinent to point out here that PW-3 in her evidence-in-chief, stated as follows; "*I saw the accused had Ganga Ram's phone and I snatched it from the accused and I somehow managed to free myself and I ran towards my house*". To the contrary, on cross-examination she contradicts her own statement and testifies that "*It is true I did not see the cell phone which was carried by the accused with him at the relevant time. It is true that I also was not able to see who was the owner of the said cell phone*".

20. On careful perusal of the decisions of the Hon'ble Apex Court relied on by the Learned Assistant Public Prosecutor, I find that they lend no support to the case of the Prosecution. In **Gurmit Singh's** case *supra*, it was held that corroboration of the evidence of the Victim is not necessary and the Courts should examine the broader probabilities

of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case.

21. Bearing the above principle in mind and taking into consideration the facts of the case at hand, it is clear that the contradictions in the evidence of PW-3 are not minor contradictions. One is tempted to point out on pain of repetition that the Victim has failed to narrate the incident of the Respondent untying the string of her pyjama either to the police or to PW-1 and PW-2 or for that matter neither does **Exbt.1** reflect the same and therefore, appears to be a statement made after much after thought. The Medical Report is of no assistance to the Prosecution case for the reasons already discussed *supra*. The statements of PW-3 being incessantly inconsistent, the Court is required to be alive to the fact that the Victim appears to be indulging in diatribe against the Respondent for reasons best known to her, as it has not been proved at all that the Respondent intimidated her either verbally or physically. Therefore, in this background, it would be a travesty of justice, if the statement of PW-3 in the said circumstances were to be taken as gospel truth.

22. The facts in *Tarkeshwar Sahu's* case *supra* relied on by Learned Assistant Public Prosecutor is of no assistance to the Prosecution case. The Victim therein was a mere child of 12 years and hapless in the face of the circumstances. In the instant case, however, it is surprising to note that the Victim admitted that she was in her house when the Respondent called her on the Cell Phone and threatened her using abusive language. In such circumstances, it cannot be fathomed as to why she left the safe confines of her house and ventured to confront the very person who was threatening her. It

is not her case that the Respondent was knocking or creating a nuisance outside her house so as to disturb her aged Mother-in-Law or her minor children. Her natural instinct ought to be to inform her Mother-in-Law of the incident. To the contrary, she has gone out of the house unarmed to face the Respondent. The evidence on record indicates that after the incident she did not contact her husband telephonically to tell him of the incident, neither did she get in touch with the Panchayat members or the police the same night. The conduct of the Prosecutrix does not appear to be that of a victim retaliating against the Respondent when she found her modesty in peril. It would be relevant to point out that although she desisted from informing her Mother-in-Law of the incident allegedly due to shame, but the next morning informed her Father-in-Law telephonically of the same with no qualms about her modesty, which also raises a doubt in her story. Thus, the inherent contradictions in her evidence do not lend support to make out a case against the Respondent either under Section 376/511 of the IPC or Section 354 of the IPC or for that matter under Section 447 of the IPC.

23. In *Koppula Venkat Rao's* case *supra*, the Hon'ble Apex Court has enunciated the different stages that lead to a crime and held as follows:-

*"9. A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence.....The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The word "attempt" is not itself defined, and must, therefore, be taken in its ordinary meaning. This is exactly what the provisions of Section 511 require. An attempt to commit a crime is to be distinguished from an intention to commit it;.....
Mere intention to commit an offence, not followed by any act, cannot constitute an offence. The will is not to be taken for the deed unless there be some external act which shows that progress has been made in the direction of it, or towards maturing and effecting it. Intention is the direction*

of conduct towards the object chosen upon considering the motives which suggest the choice. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission after preparations are made.

24. In the light of the principle enunciated supra, while discussing the facts and circumstances of the case at hand, there appears to be nothing on record to substantiate as to how the accused had any intention to commit the offence, much less making an attempt to commit it, as the evidence of PW-3 is not credible or cogent and being riddled with contradictions, inspires no confidence.

25. With regard to the seizure of **MO-I**, PW-4 & PW-6 have deposed that they were witnesses to the seizure of **MO-I** from the possession of PW-3 but they were not privy to the number of the SIM Card used in **MO-I**. Although, the Learned Trial Court has completely over looked the relevance of **Exbt.8**, however, it is evident that if the Victim was in possession of **MO-I** as couched by the evidence of PWs-4 & 6 and of the I.O. PW-10, then it is not clear as to who was making the calls to PW-3 from **MO-I** and who she was talking to when both phones were in her possession.

26. The decision of the Allahabad High Court in **Ashok Kumar's** case *supra*, relied on by the Counsel for the Respondent, are relevant for the facts of the instant case, since, it was held therein that when the FIR was lodged by the prosecutrix herself and all the important facts were known to her but she did not mention the facts in the FIR, such omission goes to the root of the Prosecution and affects the probabilities of the case. For brevity, the omissions made by the victim in the instant case at hand are not being repeated, the same having been discussed at length, hereinabove.

27. Consequently, on careful consideration of the entire facts and circumstances, as well as the evidence furnished by the Prosecution and the documents on record, I find that the Judgment of the Learned Fast Track Court brooks no interference.

28. This Appeal being devoid of merit stands dismissed.

29. Records of the Learned Trial Court be remitted forthwith.

Sd/-
(MEENAKSHI MADAN RAI)
Judge
30.06.2015

Approved for reporting : Yes/~~No~~
Internet : Yes/~~No~~

bp

