IN THE HIGH COURT OF SIKKIM AT GANGTOK
(CRIMINAL APPELLATE JURISDICTION)

CRIMINAL APPEAL No. 02 OF 2009

Shri Tika Ram Chettri,
Son of Meher Man Chettri,
Resident of Amdo Golai,
Near S.D.F. Bhawan,
Gangtok, East Sikkim.
Presently at Rongyek Jail, Sikkim.

...Appellant

-versus-

State of Sikkim
Through the Chief Secretary,
Tashiling Secretariat,
Gangtok, East Sikkim.

... Respondent

For the Appellant: Mr. N. Rai, Senior Advocate with Ms. Jyoti Kharka, Advocate.

For the respondent: Mr. J.B. Pradhan, Public Prosecutor with Mr. Karma Thinlay, Additional Public Prosecutor and Mr. S.K. Chettri, Assistant Public Prosecutor for the State.

Date of Hearing : ***28.04.2010***

Date of Judgment : 04.05.2010

PRESENT: HON'BLE THE CHIEF JUSTICE
MR. JUSTICE BARIN GHOSH

JUDGMENT AND ORDER

Ghosh, CJ

A written complaint dated 31.07.2006 alleging that the appellant entered the house of the complainant and attempted to rape her minor daughter aged 8 years, led to registration of Singtam Police Station Case No. 26/2006 dated 31.07.2006 under Sections 454/376/511 of Indian Penal Code. In course of investigation the victim girl recorded her statement under Section 164 of the Code to the effect, inter alia, as follows:-

> "Tika Maya Chettri lifted me and forced me to lie down on the bed. He then took out my underwear and also put his hand over my mouth so that I could not shout. He then took out his private part and started rubbing it in between my thighs. He did not, however, put it in my private part. After sometime he left me."

2. On completion of investigation, a charge sheet was filed against the appellant under Section 376 read with Section 511 of IPC, i.e. attempt to rape. Thereupon, charge was framed against the appellant under Sections 376/511 of IPC. 10 witnesses were produced by the prosecution to prove its case. The accused had no witnesses to examine. After conclusion of the trial, by the judgment and sentence under appeal, the learned Sessions Judge, East and North Sikkim at Gangtok, by invoking the provisions of Section 221 of the Code, held the appellant guilty of offence under Section 375 of IPC punishable under Section 376 of IPC, i.e. of

rape, and sentenced him to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/- which, if recovered, to be made over to the victim, and in default of payment of fine, to undergo further rigorous imprisonment for one month.

3. In the present appeal, amongst others, it is being contended that by taking recourse to Section 221 of the Code, the learned Sessions Judge could not convict the appellant for the offence of rape, when the charge, as was framed, was attempt to rape. It was submitted by the learned Senior Counsel appearing in support of the appeal that Section 221 of the Code cannot be taken recourse to in isolation. It was contented that Section 221 of the Code is controlled by Section 222 of the Code. In other words, it was submitted that if the charge was for an offence of greater magnitude, punishment for an offence of lesser magnitude can be awarded, but not the vice-versa. It was also contended that the appellant had not been charged for rape, a distinct and separate charge than an attempt to rape, and as such the appellant was prevented from organizing his defence to the charge of rape, which in turn resulted in failure of justice.

4. The learned Senior Counsel for the appellant cited the judgment of the Hon'ble Supreme Court rendered in the case of **Nanak Chand vs. State of Punjab**, reported in **AIR 1955 SC 274**, for the proposition that if there is a conviction for a charge not framed it is an illegality and not an irregularity curable by the

provisions of Sections 535 and 537 of the erstwhile Criminal Procedure Code. I do not think that the decision rendered in the said case helps the appellant. In that case, the charge was under Section 302 read with Section 149 of IPC. The Sessions Judge convicted the accused persons, four in number, under Section 302 read with Section 34 of IPC. On an appeal, the High Court convicted the appellant before the Hon'ble Supreme Court under Section 302 of IPC, but altered the conviction of other three persons from Section 302 read with Section 34 of IPC to Section 323 of IPC. Hon'ble the Supreme Court held that when the charge under Section 302 read with Section 34 of IPC failed against the other accused persons, the appellant could not convict under the said charge and in fact he was not found guilty by the High Court under the said charge, but the High Court convicted the appellant before the Hon'ble Supreme Court under Section 302 of IPC alone, whereas the charge defended by him at the trial was under Section 302 read with Section 149 of IPC. The Hon'ble Supreme Court held that the charge under Section 149 of IPC is an independent charge. In the sense, under Section 149 of IPC, an offence may be committed by any member of an unlawful assembly while the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence, provided the conditions laid down in the section are fulfilled. The Hon'ble Supreme Court declared that a person charged with an offence under Section 149

cannot be convicted for the specific offence, when no charge for that offence had been framed against him. The Hon'ble Supreme Court took note of the provisions of Sections 236 and 237 of the erstwhile Code, which are akin to the provisions of Sections 221(1) and 221(2) of the present Code. It declared that Section 237 is dependent on Section 236 and that the provisions contained in Section 236 can apply only in cases where there is no doubt about the facts which can be proved but a doubt arises as to which of several offences have been committed on the proved facts, in which case any number of charges can be framed. It further declared that if there had been an omission to frame a charge, then under Section 237, a conviction could be arrived at on the evidence although no charge had been framed. It then observed that in the case at hand there is no doubt about the facts and if the allegations against the appellant before the Hon'ble Supreme Court that he had caused the injuries to the deceased was established by evidence there could be no doubt that the offence of murder had been committed, but inasmuch as the same was not alleged there was no room for application of Section 236 of the then Code. Inasmuch as by framing a charge under Section 302 read with Section 149 of IPC, the Court indicated that it was not charging the appellant with the offence of murder; conviction for murder and sentence under Section 302 of IPC would tantamount to conviction for an offence for which no charge was framed. In other words, in that case the Hon'ble Supreme Court found that the facts

constituting the offence did not give rise as to which of several offences have been committed; the doubt that arose was of the facts.

5. It appears to me that Sections 221 and 222 of the Code deal with different situations. In this connection, it would be appropriate to take note of the said sections which are as follows:-

> "**221. Where it is doubtful what offence has been committed.**- (1) If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.
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> (2) If in such a case the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of sub-section (1), he may be convicted of the offence which he is shown to have committed, although he was not charged with it.
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> **222. When offence proved included in offence charged.**- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.
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> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
>
> (3) When a person is charged with an offence, he may be convicted of an attempt to

commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorize a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

6. As was held in the case of **Nanak Chand vs. State of Punjab** (supra.), so was held in the case of **State of West Bengal vs. Laisal Haque** reported in **AIR 1989 SC 129**, that Section 221 applies to a case only when from the evidence led by the prosecution it was doubtful which of several offences has been committed by the accused person. There must not be any doubt as to a single act or series of acts which constitute the transaction, that is to say, there must not be any doubt as to the facts. The doubt must be as to the inference deduced from those facts, thus making it doubtful which of several offences the facts which can be proved will constitute. In the present case there was no doubt as to the facts. The doubt was as to the inference deduced from those facts. In the circumstances I do not see any irrationality in applying Section 221 of the Code. While saying so I do not say that doubtless facts of the present case could lead to an inference that rape was committed.

7. Section 222 of the Code as would be evident therefrom and as explained in **Tarkeshwar Sahu vs. State of Bihar**, reported in **(2006) 8 SCC 560**, applies when the accused is charged with a

major offence and the said charge is not proved, but at the same time the charge of a minor offence has been proved. In such circumstances, the accused may be convicted of the minor offence, though he was not charged with it. The conclusion, therefore, would be that Sections 221 and 222 of the Code deal with separate situations and while Section 221 of the Code deals with a different situation; Section 222 of the Code deals with a separate situation and none of them is dependent on the other.

8. In the instant case, the appellant was charged with a minor offence, but was sentenced for a major offence. Accordingly, no part of Section 222 of the Code applies to the present case. The question is to whether the same is permissible under Section 221 of the Code.

9. In the case of **K. Prema S. Rao vs. Yadla Srinivasa Rao**, reported in **2003 Cri LJ 69 (SC)**, the accused was charged under Section 304-B of IPC and in the alternate under Section 498-A of IPC. While the charge was framed, it was mentioned that the accused subjected the deceased to such cruelty and harassment as to drive her to commit suicide. The accused was sentenced under Section 306 of IPC along with or instead of Section 498-A of IPC. It was held that the accused could not legitimately complain of any want of opportunity to defend the charge under Section 306 of IPC and consequent failure of justice inasmuch as the same facts were found in evidence, which justified conviction under Section 498-A

for cruel treatment of his wife and made out a case under Section 306 of IPC of having abetted commission of suicide by the wife. It is true that the accused in that case was charged for an offence of higher degree, but that was not the reason for holding that recourse to Section 221 of the Code can be taken for awarding sentence for an offence of lesser degree, i.e. abetment of suicide. The reason was that the accused can be sentenced for abetting suicide under Section 306 of IPC on the same facts constituting the offence of cruelty under Section 498-A of IPC. Thus, as it appears to me, if on the facts alleged the charge is for a lesser offence, but such facts on being proved establish commission of a greater offence, conviction for the greater offence is permissible under Section 221 of the Code.

10. In the instant case, on the facts alleged it was deduced that it was short of rape, accordingly, the charge was framed alleging attempt to rape. If on the same facts, the logical deduction can be that it was a rape and not of an attempt to rape, to my mind, it was not inappropriate to sentence the accused/appellant for rape.

11. The learned Senior Counsel appearing in support of the appeal submitted that the facts proved do not suggest that there was a rape or even an attempt to rape, he submitted that the whole story is a got up story. The learned Counsel took me through the entire evidence on record; a part thereof would be discussed by me

hereafter. The medical report opined that there was an attempt to penetrate hymen. The same was based on the findings as follows: -

> "Mild Vulvae Swelling C reduces.
> Hymen infect.
> No abrasion or laceration.
> Local area (Vulva & intwitus) washed & sent to Pathology/CFL for examination of presence of Semen."

The said medical report suggested that microscopic examination has been done. On such examination, it was found that there was no motile or non-motile sperm, but large number of acute inflammating cells were present comprising of polymorphs. The incident took place at the home of the victim, when, apart from the victim and the appellant, no one was present. Although the victim had stated that the incident was watched by "Bhabhi" but she was not called to give evidence. In the circumstances, as regards the incident in question, the evidence of the victim is of prime importance. In her examination-in-chief, the victim had, inter alia, stated as follows:

> "As such I was alone at home at that time. At that time our Bhena who is standing in the dock today (identified) came to our house. The accused entered our residence. The accused thereafter carried me to the bed, made me lie down on the bed. The accused pulled down the underwear that I was then wearing. He pulled up the frock about my waist. The accused shut my mouth with his hand and thereafter committed sexual act on me. I tried to shout for help but could not do so as the accused had shut my mouth with his hand. I also tried to free myself but I could not. The accused freed

> me and left towards the river for taking a bath when a neighbour whom I refer to as Bhabhi came to our house and saw the accused committing the sexual act on me. After the accused had committed the sexual act on me he had given me a ten rupee Indian currency note, one five rupee note and one coin of the denomination of rupees two as allurement for not disclosing the incident to anybody. Thereafter I rushed to my mother who was on her way back home after washing the clothes."

In cross-examination the victim deposed, inter alia, as follows:-

> "The accused had worn a pant and a shirt that day. I do not remember the colour of the shirt but he was wearing a brown coloured pant. When the accused put me in the cot and came on top of me he did not undress himself. I did not feel any pain. The accused did not even touch on my sexual organ. There was no injury, bruise or any kind of contact over my vagina. It is not a fact that whatever the accused did to me i.e. coming on top of me after lying me on the cot is the sexual act as told to me by my mother. .....It is true that I do not know what is the meaning of the sexual act."

The question is when the evidence is as above, can it be said that commission of rape or attempt to rape has been proved? As will be evidence from the explanation to Section 375 of IPC, in order to constitute a rape there must be penetration as has also been held in **Tarkeshwar Sahu vs. State of Bihar** (supra.). In order to constitute rape, the male organ is required to penetrate labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough to

constitute rape. In the instant case, since the accused/appellant did not undress himself, the question of his male organ penetrating into the private part of the victim did not arise. There is, therefore, no evidence of rape.

12. The Doctor, who examined the victim and submitted the medical report, deposed in her examination-in-chief, inter alia, as follows: -

> "Brief history suggested alleged sexual assault by one person named Tika Ram Chettri on the same day at 1 p.m. I examined the patient with the Medical Officer Dr. Geeta Gurung when I found the patient's general condition was fair and she was conscious and well-oriented. She was not febrile. Her BP was 100/70 mmhg. There was no external injury. Her chest and cardiovascular system appeared normal in clinical examination. Her abdomen was soft. On local examination, there was mild vulval swelling and redness. Hymen was intact. No laceration and abrasion was seen. The local area including vulva and introitus was washed with normal saline water and was sent to Pathology Department for evidence of presence of seminal fluid components. The Report came as there was no motile or non-motile sperm seen, however, there were large number of acute inflammatory cells comprising of polymorphs. .... After examination of the patient and the Pathological Report of the vaginal swab I was of the opinion that there was an attempt to penetrate the hymen of the patient which I have recorded on the Medical Report."

In cross-examination, the Doctor deposed, inter alia, as follows: -

> "In rare cases the swelling and redness of vulva can occur in a woman due to the hygienic condition and also by insect bites."

13. In view of the evidence tendered by the victim, as discussed above, the logical conclusion would be that the Doctor, who conducted the medical examination of the victim, being briefed of the alleged sexual assault on the victim and finding mild vulva swelling and redness, which may occur in rare cases due to hygienic condition and also by insect bites, opined in the report that there was an attempt to rape. This medical report, in view of the evidence of the victim, was of no help to the prosecution.

14. The question is, can it be said that the proven facts suggest commission of no offence of attempt to rape? That part of the evidence on record that when the victim was alone at home, the appellant came, carried the victim to bed, made her lie down on the bed, pulled down her underwear, pulled up her frock above her waist and shut her mouth with his hand has not been displaced. At the same time, there is no reason not to believe that part of the evidence. Can it be said that such an act would not constitute an attempt to rape? In **Tarkeshwar Sahu vs. State of Bihar** (supra.) the Hon'ble Supreme Court held that even an attempt of penetration into the private parts of the victim slightly would be enough to constitute rape. I think what the Hon'ble Supreme Court meant was that when an attempt has been made to penetrate, but the penetration was slight, the same would

constitute rape inasmuch as in terms of explanation to Section 375 of IPC, penetration is a must. In that case the victim was taken to a gumti by the accused but before he could do anything, on raising an alarm by the victim, she was rescued. In that background, the Hon'ble Supreme Court held that there was no rape. It concluded that in the facts and circumstances of the case at hand it cannot be said that even a case of attempt to rape was not made out. While coming to the said conclusion, the Hon'ble Supreme Court referred to many decided cases. It took note of the case of **Ahmed Asalt Mirkhan** where a milkmaid, aged 12 or 13 years, entered the house of the accused to deliver milk, when the accused got up from the bed on which he was lying and chained the door from inside. The accused then removed his clothes and the girl's petticoat, picked her up, laid her on the bed, and sat on her chest. He also put his hand over her mouth to prevent her from crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. In **Niranjan Singh vs. State**, as was found by the Hon'ble Supreme Court in **Tarkeshwar Sahu**'s case (supra.), the accused took a girl of six years, on the pretext of getting her some biscuits, to public toilets, took off her salwar and also his own pant, made her to lie on the floor and bent down on her, when he was caught hold by a watchman of the locality and it was held that the accused was not

guilty of an attempt to rape. In **Nuna vs. Emperor**, as it was noted in the said judgment by the Hon'ble Supreme Court, the accused took off a girl's clothes, threw her on to the ground and then sat down beside her. He said nothing to her, nor did he do anything more to her. It was held that he was not guilty of an attempt to commit rape.

15. Learned Senior Counsel appearing in support of the appeal, accordingly submitted that under no circumstances a case of attempt to rape has been made out.

16. I think distinction between an attempt to rape and rape is very suttle. When an attempt to penetrate is made, but no penetration takes place, it can be said to be an attempt to rape; but when an attempt to penetrate is made and a slight penetration takes place, the same would constitute rape. In the instant case, the evidence on record does not suggest that there was an attempt to penetrate. That being the situation, there was no attempt to rape.

17. However, the action of lifting the victim, putting her on bed, removing her underwear and lifting her frock did outrage the modesty of the victim, inasmuch as modesty is the attribute of the female sex, which she possess irrespective of her age and such modesty would be outraged by an act which is not normal and

which in turn would belittle the victim in her own estimation as well as in the perception of others.

18. The facts proved in the instant case, therefore, suggest commission of an offence of outraging the modesty of the victim girl punishable under Section 354 of IPC, in terms whereof the maximum sentence that may be awarded is imprisonment of two years, or with fine, or with both.

19. I, therefore, set aside the judgment and order on sentence under appeal and sentence the appellant for two years rigorous imprisonment with fine as was imposed by the order under appeal and with the same condition. Accordingly, I direct release of the appellant inasmuch as he has already undergone sentence of more than two years and one month. There shall be no order as to costs.

Chief Justice

jks/-