

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 19th November, 2021

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

Crl.A. No.08 of 2021

Appellant : Cho Mingur Lepcha

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor with Ms. Pema Bhutia, Assistant Public Prosecutor, for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Whether the Appellant was the perpetrator of the offence of rape, is what this Court is required to determine in the instant matter.

2. Before delving into a discussion on this aspect, the facts of the case are briefly being traversed. On 10.05.2020, P.W.2 lodged a Complaint, Exhibit 4, of the same date, before the Mangan Police Station informing therein that the Victim, his sister, aged about 12 years at the time of the incident had been impregnated by the Appellant. That, he had been informed of this fact by P.W.3, the Accredited Social Health Activist (ASHA) of the area. Based on Exhibit 4, the Mangan Police Station registered FIR Case No.07(05)2020, dated 10.05.2020, under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (*for short,*

the "POCSO Act"), against the Appellant, following which the I.O., P.W.17 took up the matter for investigation. On completion of investigation, finding *prima facie* case under Section 376 of the Indian Penal Code, 1860 (*for short, the "IPC"*) read with Sections 4 and 6 of the POCSO Act, Charge-Sheet was accordingly submitted against the Appellant.

3. Before the Learned Trial Court, the Appellant pleaded "not guilty" to the Charges framed against him under Section 511 of the IPC, Section 5(j)(ii) and (l) punishable under Section 6 of the POCSO Act and Section 375 of the IPC punishable under Section 376 of the IPC. The Learned Trial Court having duly considered the evidence including that of seventeen Prosecution Witnesses concluded that the Prosecution was unable to prove the Charge against the Appellant under Section 511 of the IPC, Sections 5(j)(ii) and (l) of the POCSO Act, but succeeded in bringing home the Charge under Section 375 punishable under Section 376 of the IPC. On closure of Prosecution evidence, the Appellant was afforded an opportunity to explain the incriminating circumstances appearing in evidence against him and his Statements recorded under Section 313 of the Code of Criminal Procedure, 1973 (*for short, the "Cr.P.C."*). He did not seek to examine any Witnesses in his defence.

4. Before this Court Learned Counsel for the Appellant while emphasizing that the Appellant had not committed the offence put forth a two-pronged argument, the first being that, as per the Victim, she was raped by the Appellant in the month of December, 2019 and January, 2020, but gave birth to the girl child in the month of May, 2020 on which count alone the Prosecution

case is demolished. Secondly, although the Prosecution claims that the DNA Profiling of the Appellant and the child born to the Victim matches, the evidence on record clearly indicates that the Prosecution has failed by way of cogent proof to establish that any blood was drawn from the Appellant for the purposes of DNA Profiling. Drawing the attention of this Court to Exhibit 17 a Letter addressed to the Director, Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad, Telangana, it was urged that the specimen blood of the Appellant, as per the document, was drawn by Dr. Dawa Dolma Bhutia, District Hospital Mangan, allegedly under the Requisition of the I.O. The said Doctor was not examined as a Prosecution Witness to substantiate this aspect. That, Exhibit 21 the "Identification Form" pertaining to the Appellant does not disclose the date of collection of his Blood Sample while Exhibit 13 the Blood Sample Collection Form of the Victim and Exhibit 14 the Blood Sample Collection of the girl child, it was contended, bear not only the date of sample collection but is duly countersigned by Dr. O.T. Lepcha, who was examined as P.W.14. His evidence with clarity reveals that he affixed his signature along with his seal on the said documents. In the absence of the signature of the collecting Doctor or the date of Sample Collection on Exhibit 21, in contrast to Exhibit 13 and Exhibit 14, Exhibit 21 is indeed a suspicious document and evidently manufactured by the I.O., P.W.17. P.W.13 in his evidence has stated that on 13.05.2020, he received a Requisition from the I.O. of the case requesting for collection of Blood Sample of the Appellant. That, he had in fact directed a technician to collect the Sample and not a Doctor. The Appellant was thus made

a scapegoat and the crime foisted on him sans his Blood Sample, in order to shield the real rapist. It was next contended that the Victim had not lodged a Complaint against the Appellant which was instead initiated by P.W.2 on the basis of the Victim's urine test conducted by P.W.3, indicating her pregnancy. That, the Victim neither in her Section 164 Cr.P.C. Statement nor in her evidence before the Court has ever alleged that the Appellant had forcefully committed the offence on her against her will or that she was traumatized by the incident. All evidence points to the fact that the offence was consensual. That, the Learned Trial Court had concluded that the minor age of the Victim on the date of the alleged incident was unproved and therefore did not attract the provisions of Section 5(j)(ii) and (l) of the POCSO Act which was not assailed by the Prosecution. To buttress his submissions on this point, Learned Counsel placed reliance on the ratio of ***Binod Pradhan and Another vs. State of Sikkim***¹. Consequently, in view of the grounds put forth the Appellant deserves an acquittal.

5. Learned Additional Public Prosecutor raised the contention that the evidence of the Victim is proof of the fact that the Appellant had committed penetrative sexual assault on the Victim without her consent. That, the DNA Profiling of the child born from the Victim matched that of the Appellant and the Victim duly buttressed by the evidence of P.W.16, the DNA Examiner who deposed that on examination of the DNA Profiles of the new born baby with that of the Victim and the Appellant, it emerged that the Appellant is the biological father of the child whereas the Victim is the biological mother of the baby. Contrary to the argument placed

¹ 2019 SCC OnLine Sikk 227

by the Appellant that the drawal of blood of the Appellant for DNA Profiling was not proved, the evidence of P.W.17 the I.O. indicates that he had collected the Blood Sample of the Appellant from the Chief Medical Officer at District Hospital, Mangan, North Sikkim where it had been packed and sealed and handed over to I.O. In light of the evidence furnished by the Prosecution, the conclusion arrived at by the Learned Trial Court in convicting the Appellant under Section 375 punishable under Section 376 of the IPC warrants no interference.

6. Having heard Learned Counsel for the parties at length and having examined all documents on record and considering the arguments advanced at the Bar, we may refer to the relevant portions of Section 375 of the IPC.

“375. Rape.—A man is said to commit “rape” if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
- (b)
- (c)
- (d)

under the circumstances falling under any of the following seven descriptions:—

*First.—*Against her will.

Secondly.— Without her consent.

Thirdly.— With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly.— With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through

another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under eighteen years of age.

Seventhly.—When she is unable to communicate consent.

Explanation 1.—For the purposes of this section, "vagina" shall also include labia majora.

Explanation 2.—Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.—A medical procedure or intervention shall not constitute rape.

Exception 2.—Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

7(a). Whether the Prosecution case falls within the parameters described hereinabove is thus to be examined. In the first instance, it is noticed that the Victim in Exhibit 2, her Section 164 Cr.P.C. Statement has stated that the Appellant came to her room one night told her he likes her, forcefully opened her clothes, touched her on her chest and left. Two days later he came to her room at night forcefully opened her undergarment and had sex with her. Three days later while she was working in the kitchen during the night, he came and pulled her and took her to the nearby School where he again had sex with her and she was pregnant.

(b) Her evidence during trial reveals that the Appellant had visited her home in the month of December, 2019 on which date, he spoke with her father and returned to his home. The following day also, he came to her house when she was alone in the kitchen

and told her that he likes her and started touching her body. Thereafter, he left her house. Two days later, he again came to her house and as she was alone, he came into her room, undressed her forcefully and committed penetrative sexual assault without her consent. When she shouted for help, the Appellant closed her mouth with his hand and told her not to disclose the incident. Three days later again in the night time, he came to her house, took her to the nearby School and committed penetrative sexual assault in the corridor of the School twice. Thereafter, the Appellant did not come to her house. Later, P.Ws 2 and 3 came to her house and conducted Urine Pregnancy Test and found that she was pregnant. P.Ws 3 and 4 went to the Mangan Police Station to report the incident. She was then called to the Mangan Police Station and later forwarded to District Hospital, Mangan for medical examination where she was found to be eight months' pregnant and was therefore taken to the Mamtalaya Shelter Home where she remained for about a month. On the 19th day of some month in the year 2020, which she did not remember, she delivered a baby girl at the STNM Hospital. She was shifted to Balika Niketan Orphan Home, Tadong and is residing in the said Home till date. Under cross-examination, it emerged that she did not disclose the incident including that of her pregnancy to any of her family members.

8. Thus, from her evidence and her Section 164 Cr.P.C. Statement, it is apparent that she has not stated anywhere that the Appellant forced her to commit the offence or that she was put in fear by the Appellant that he would hurt her or any of her family members or for that matter any of her kith and kin. It is not her

case that she was traumatized by the incident and in fact it emerges that on the third night when he came to her house and took her to the nearby School where he committed penetrative sexual assault on her she accompanied him without demur. It is not her case that she was forced by the Appellant to go to the School with him or that he forcefully raped her.

9. P.W.2 lends no credence to the Prosecution case regarding the offence of Section 375 of the IPC save to the extent that after P.Ws 3 and 4 examined the Victim and her Urine Pregnancy Test was positive, he lodged the FIR (Exhibit 4). The Victim also appears not to have complained to either P.Ws 2 or 3 or 4 or told them that the Appellant had forcefully raped her. P.W.5, a co-villager, stated that the Victim did not disclose anything to him. P.W.6 was the Revenue Inspector in the District Administrative Centre, Mangan, North Sikkim where the father of the Victim took her in the month of February, 2020 and requested him to keep his daughter in his house to enable her to attend School. The Victim, according to him, stayed in his house for fifteen days. P.W.8 could only testify that the Victim was pregnant but gave no other details. P.W.9 identified Exhibit 2 as the Section 164 Cr.P.C. Statement of the Victim recorded by him. P.W.10 was the Medical Officer posted at Mangan District Hospital during May, 2020. She physically examined the Victim on 10.05.2020 at around 3.30 p.m. The Victim had been brought with an alleged history of sexual assault by the Appellant in the month of December, 2019 and thereafter again on 6th and 7th May, 2020. She found that the Victim was about thirty-two weeks pregnant and she had bruises on her inner thigh which were assessed to be around three days old. The Doctor

also stated that although the Victim told her that the offence was committed in the month of December, 2019, however, on physical examination it transpired that the alleged offence would have occurred in the month of September or October, 2019, to complement the length of the pregnancy. P.W.13 Dr. P.K. Basnett had given evidence with regard to the Birth Certificate of the Victim which is not relevant in this Appeal. On being recalled for re-examination by the Court, he deposed that on 13.05.2020, he received a Requisition from the I.O. of the case requesting for collection of Blood Sample of the Appellant. That, he directed one of the Technicians of the Mangan District Hospital to collect the Blood Sample of the Appellant but he did not recall who the person was. His cross-examination revealed that he did not witness collection of the Blood Sample of the Appellant in the Laboratory of the District Hospital, Mangan. That, there was no document in the case records to substantiate the fact that the Blood Sample of the Appellant was taken by the Technicians of the District Hospital, Mangan and handed over to the I.O. of the case duly following the required procedure. He also admitted that in the Identification Form containing the photograph, signatures and name of the Appellant, no stamp of District Hospital was affixed and it was not prepared at the Mangan Hospital. He was unaware about collection of the Blood Sample of the Appellant or which Technician was directed by him to draw the blood or whether the blood was drawn out at all. He appears to have no knowledge of Dr. Dawa Dolma whose name appears in Exhibit 17. The evidence of P.W.14 substantiates the Prosecution case that vide Exhibits 13 and 14, the Identification Forms for collection of blood for DNA analysis was

done for the Victim and her child. P.W.15 examined the Appellant and on examining him, he opined that the Appellant was capable of performing the sexual act. Under cross-examination, his admission was that he did not take the Blood Sample of the Appellant at the time of his DNA Profiling.

10. Thus, after careful consideration of the Exhibits specifically referred to by Learned Counsel for the Appellant, we are inclined to agree with his submission that although Exhibits 13 and 14 bear the counter-signatures of P.W.14 Dr. O. T. Lepcha, Exhibit 21 bears no such counter-signature. The date of Sample collection is missing. P.W.13 is unable to shed light on whether the blood of the Appellant was actually drawn out to examine the DNA Profiling of the Appellant. P.Ws 14 and 15 also could lend no succour to the Prosecution case in this respect. Added to this is the fact that Exhibit 17 reveals that the specimen Blood Sample of the Appellant was drawn by the Medical Officer Dr. Dawa Dolma Bhutia posted at the Mangan District Hospital. This Doctor was not produced as a Prosecution Witness leading this Court to draw an adverse inference against the Prosecution in terms of Section 114 *Illustration* (g) of the Indian Evidence Act, 1872. Reverting back to Exhibit 21, the alleged Doctor, *viz.*, Dr. Dawa Dolma Bhutia has not signed on Exhibit 21 as proof of her having drawn the blood of the Appellant. The evidence on record fails to inspire confidence on the aspect of blood withdrawal of the accused for the purpose of DNA Profiling. The evidence of the I.O. is also unreliable on this count as he has failed to fortify his statement of blood withdrawal by any substantive evidence. In the light of these anomalies in the Prosecution case, the Court cannot conclusively hold that the blood

of the Appellant was drawn for DNA Profiling to establish the paternity of the child born to the Victim. It thus emerges that the victim appears to be closting the actual circumstance of her pregnancy, the fact that she gave birth in May, 2020 after making claims of being raped in December, 2019/January, 2020 is proof of this circumstance. Her evidence in no manner can be classified as that of a sterling witness and is unreliable.

11. We conclude that the Prosecution has not been able to establish beyond a reasonable doubt that the Appellant was the perpetrator of the offence of rape as charged. Consequently, the conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

12. The Appellant is acquitted of the Charge under Section 375 punishable under Section 376 of the IPC.

13. Appeal allowed.

14. Appellant be released from custody forthwith unless required to be detained in connection with any other case.

15. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

16. No order as to costs.

17. Copy of this Judgment be transmitted to the Learned Trial Court, for information, along with its records and a copy be sent forthwith to the Jail Authorities as also e-mailed.

(Bhaskar Raj Pradhan)
Judge
19-11-2021

(Meenakshi Madan Rai)
Judge
19-11-2021

Approved for reporting : **Yes**