

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

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**DIVISION BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**  
**THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**  
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**Crl. A. No. 12 of 2020**

Lendup Lepcha,  
Aged about 35 years,  
S/o Tenshung Lepcha,  
R/o Sungdung Busty,  
Chuchachen,  
Rongli,  
East Sikkim.

*At present:* Central Prisons,  
Rongyek, East Sikkim.

..... Appellant

**versus**

State of Sikkim

..... Respondent

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**Appearance:**

Ms Puja Lamichaney, Advocate (Legal Aid Counsel) with Ms Anusha Basnett for the appellant.

Mr. Sudesh Joshi, Public Prosecutor with Mr. Yadev Sharma, Additional Public Prosecutor, for the respondent.

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

*[from the judgment dated 27.02.2020 and order on sentence dated 28.02.2020 passed by the learned Fast Track Court, East & North Sikkim at Gangtok in Sessions Trial (F.T) Case No. 05 of 2019 (State vs. Lendup Lepcha)]*

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**Date of hearing :** 11.05.2022

**Date of judgment:** 01.06.2022

**J U D G M E N T**

**Bhaskar Raj Pradhan, J.**

**1.** The appellant stands convicted for commission of rape on the victim (P.W.1) under section 376(1) of the Indian

Penal Code, 1860 (IPC) and sentenced to rigorous imprisonment for a term of ten years and fine of Rs.20,000/-. The fine imposed was directed to be paid as compensation to the victim. In default to pay the fine, the appellant was to undergo simple imprisonment for a period of three months. The period of imprisonment already undergone during investigation and trial was to be set off.

**2.** The impugned judgment dated 27.02.2020 and the order on sentence dated 28.02.2020, are both under challenge.

**3.** Heard Ms Puja Lamichaney, learned counsel for the appellant as well as Mr. Sudesh Joshi, learned Public Prosecutor for the State.

**4.** The learned counsel for the appellant submitted that the prosecution had failed to establish the offence of rape upon the victim beyond reasonable doubt. There are material contradictions in the statement of the victim recorded under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) (statement) and her deposition in court. Substantial and material improvements had been made in the deposition of the victim. More importantly, although the victim had deposed in detail about an attempt to rape by the appellant in a jungle prior to the actual incident of rape, she had not stated so before the police or the learned Judicial Magistrate while her statement was being

recorded. The learned counsel also pointed out that the allegation of being raped by the appellant brandishing a knife to threaten her of dire consequences in her statement was also an improvement from the FIR. It was submitted that although the allegation is of violent and forceful rape upon the victim, the medical as well as forensic evidence failed to corroborate the same. It was also argued that the evidence of the victim is not consistent with how a victim would behave after an incident of rape. The learned counsel relied upon various judgments of the Supreme Court to explain to us how material contradictions must be dealt with. The judgments relied upon are ***Narender Kumar vs. State (NCT of Delhi)***<sup>1</sup>, ***Sadashiv Ramrao Hadbe vs. State of Maharashtra and Another***<sup>2</sup>, ***Abbas Ahmad Choudhary vs. State of Assam***<sup>3</sup>, ***Tameezuddin alias Tammu vs State (NCT of Delhi)***<sup>4</sup>, ***Suraj vs. State of Maharashtra, Through Police Station***<sup>5</sup> and ***Suchand Pal vs Phani Pal and Another***<sup>6</sup>.

**5.** In ***Narender Kumar*** (supra), the Supreme Court held that minor or insignificant inconsistencies, discrepancies or contradictions in the testimony of a prosecutrix is inconsequential but if her statement suffers from serious infirmities, inconsistencies and deliberate improvements on material points, no reliance can be placed thereon and the accused is entitled to benefit of doubt. In ***Sadashiv Ramrao Hadbe***

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<sup>1</sup> (2012) 7 SCC 171

<sup>2</sup> (2006) 10 SCC 92

<sup>3</sup> (2010) 12 SCC 115

<sup>4</sup> (2009) 15 SCC 566

<sup>5</sup> (2021) SCC online 325

<sup>6</sup> (2003) 11 SCC 527

(supra), the Supreme Court held that in rape cases conviction on the sole testimony of the prosecutrix is sustainable if it inspires confidence in the mind of the court. However, if the version given by the prosecutrix is unsupported by any medical evidence or the whole surrounding circumstances are highly improbable and belie the case set up by the prosecutrix, the court shall not act on the solitary evidence of the prosecutrix. In **Abbas Ahmad Choudhary** (supra), in the light of contradictions, the Supreme Court held that some doubt was created with regard to one of the accused persons involvement and decided to give benefit of doubt to him. In **Tameezuddin alias Tammu** (supra), the Supreme Court reversed the conviction of the appellant for rape doubting the evidence of the prosecutrix and finding it essential to seek for corroboration. It was held that evidence of prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing violence to the very principle which governs appreciation of evidence in a criminal matter. In **Suchand Pal** (supra), the Supreme Court reiterated the well settled principles that if two views are possible, one which favours the accused should be preferred and the prosecution must substantially prove its case, it cannot take advantage of weakness in the defence case.

**6.** The learned Public Prosecutor fairly submitted that the investigation is wanting. However, he sought to persuade us

that it was the duty of the court to ensure justice is done to the victim inspite of the failure of the investigation agency. The learned Public Prosecutor submitted that the deposition of the victim of the commission of rape by the appellant is consistent from the time of the lodging of the FIR although there may be contradictions in certain aspects. He relied upon the judgment of the Supreme Court in *Phool Singh vs. State of Madhya Pradesh*<sup>7</sup>. The Supreme Court summarised the principles by which a conviction of an accused on the sole testimony of the victim, with or without corroboration, is permissible. It held that when the deposition of the prosecutrix is found to be trustworthy, unblemished, credible and her evidence is of sterling quality conviction can be based on her sole testimony. Testimony of the victim is vital and unless there are compelling reasons which necessitate looking for corroboration, the court should find no difficulty to act on her testimony and seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insults to injury.

**7.** The learned Sessions Judge found that the evidence of the deposition of the victim was detailed and corroborated by her statement. It was found that the depositions of PW-1, PW-2, PW-3, PW-4, PW-6 and PW-7 corroborated each other. The FIR stood proved. There was no material to suggest false implication.

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<sup>7</sup> (2022) 2 SCC 74

The ingredients of sections 375 and 376(1) IPC had been proved beyond reasonable doubt by the evidence of the above witnesses as well as of PW-8 and PW-9. The learned Sessions Judge held that the prosecution had failed to establish the case under section 506 IPC.

**8.** The FIR was lodged by the victim on 07.04.2019 before the Station House Officer at Lachung Police Station. It bears GD entry No. 45 dated 07.04.2019. The FIR states that the victim had gone to Lachung for finding a hotel for lease. She had a contact person by the name of Lendup Lepcha who also ran a hotel in Lachung. She reached Lachung on 05.04.2019 at around 19:30 hours. On 06.04.2019 from 12:30 hours, she went with him to many hotels to inquire if they were available for lease. They returned to the hotel at around 7 to 8:30 p.m. Lendup Lepcha, thereafter, told her that they should check another hotel and they went there walking. After a while, he tried to rape her in the dark but she ran away and came back to the hotel. He was threatening her not to tell anyone. She entered the hotel room. He also did so suddenly, closed the door and raped her.

**9.** Based on the above information, Case No. 01/2019 dated 07.04.2019 under section 376/342 IPC was registered against Lendup Lepcha-the appellant, and taken up for investigation. The written complaint (Exhibit-1) and the formal FIR (Exhibit-2) were proved by the victim as well as Jigme W.

Bhutia (PW-10)-the Investigating Officer of the case. The investigation culminated in filing of the charge-sheet and eventually the appellant was charged by the learned Sessions Judge on 02.09.2019 for commission of rape upon the victim on 06.04.2019 at a hotel in Lachung, North Sikkim as well as criminally intimidating the victim by showing her a knife punishable under section 506 IPC.

**10.** The prosecution examined ten witnesses including the Investigating Officer. The appellant was examined under section 313 Cr.P.C. on 15.02.2020. He pleaded innocence and stated that he did not have any witness to produce before the court.

**11.** Besides the victim, the material witnesses are PW-3 (who was the victim's neighbour and her father's friend); PW-4 (in whose hotel the appellant had brought a girl to and requested him to accommodate her there); PW-6 (who was also staying in the same hotel where the incident of rape is alleged to have taken place and to whose room a girl had knocked at around 2 a.m. in the morning at the relevant time and taken refuge till the next morning). Dr. Akithla Nadikpa (PW-5) was the General Duty Medical Officer (GDMO) at District Hospital, Mangan who examined the victim on 07.04.2019 at around 7 p.m. brought by the Lachung Police with an alleged history of sexual assault upon her. Dr. Chanda Rai (PW-8) was the Assistant Professor at the

Central Referral Hospital, Tadong, who also examined the victim on 08.04.2019 with a history of being physically and sexually assaulted. Prem Kumar Sharma (PW-9) was the Junior Scientific Officer in the Biology Division of RFSL, Saramsa, who examined the material exhibits forwarded to him by the SDPO, Chungthang Sub-Division in connection with Lachung P.S. Case No. 1 of 2019 dated 07.04.2019. PW-2 was the learned Judicial Magistrate who recorded the statement of the victim.

**12.** In a matter of rape, the statement of the victim must be given primary consideration. The prosecution has necessarily to prove its case beyond reasonable doubt. The prosecution has to establish each of the ingredients of the offence on the basis of cogent evidence. It cannot establish its case merely on the basis of suspicion and moral belief. There can be no presumption that a victim would always tell the entire story truthfully. A prosecutrix complaining of being a victim of rape is not an accomplice. Her deposition has to be examined sensitively just as the testimony of any other witness.

**13.** The victim who had given her statement to the learned Judicial Magistrate on 16.04.2019 deposed before the learned Sessions Judge on 25.09.2019. The victim identified the appellant in court. According to the victim, she had completed her Diploma in Hotel Management and was interested in taking a hotel in Lachung and running it on lease. PW-3 gave the contact



number of the appellant to her as he was running a hotel there. Accordingly, she contacted the appellant who asked her to come to Lachung and assured her of help to find a hotel. On 04.04.2019 and 05.04.2019, the victim and the appellant contacted each other with regard to the conveyance. The appellant informed her that he had arranged a seat in a tourist vehicle proceeding to Lachung. On 05.04.2019, she reached Lachung at around 7 to 7:30 p.m. The vehicle stopped near the hotel which was being run by the appellant on lease. She went and met the appellant who was at the hotel. He informed her that the rooms of the hotel were booked and he would accommodate her in another hotel located about 20 to 25 minutes walk from the appellant's hotel. This hotel was located in an isolated place and she had noticed a monastery about 5 minutes walk from the hotel. She along with the appellant started walking towards the hotel where she was to stay the night at around 8:30 to 9 p.m. On the way to the hotel, the appellant bought a bottle of Breezer and offered it to her. She declined. On reaching the hotel, she asked the appellant whether she needed to pay the room rent of the hotel. He replied that she need not pay. Thereafter, they went to one of the rooms where once again the appellant offered a bottle of Breezer which she declined stating that she did not drink or smoke. The appellant persuaded her to drink saying that all girls drink and smoke these days. When she declined to do so, the appellant opened the bottle of Breezer and drank it.

Thereafter, he left the room and returned after 15 to 20 minutes with dinner for her. The appellant gave her dinner and left the room. After the appellant left, the victim locked the room from inside and took rest. At around 1 a.m. the following morning, the appellant called her twice but she did not take his calls. On 06.04.2019, the appellant came to her room around 7 to 7:30 a.m. Thereafter, they walked towards the hotel run by the appellant and during this walk he showed her various scenic points. They reached the hotel around 8:30 to 9 a.m. after which she had breakfast. At around 12 to 12:30 p.m. they went around the locality looking for a hotel which she could lease till 7 to 7:30 p.m. and met several people during the day. They returned to the appellant's hotel. Thereafter, the appellant told her that he would show her yet another hotel which was located further away. They proceeded towards the said place on foot around 8:30 to 9 p.m. After walking for 5 to 10 minutes, they reached a dark and isolated place where she could hear just the sound of the river. It was pitch-dark and she asked the appellant to switch on the flash light of his mobile phone as she had left hers to charge in the hotel. He did not do so saying that they were about to reach the destination. She got scared and insisted that the appellant switch on his mobile flash light. He eventually did so and she took it from him and tried to look around. She noticed that the road where they were walking was in the middle of the jungle and there were no houses around. She asked the appellant as to

where they were headed and he said that it was an alternative route towards their destination. Suddenly, the appellant pulled her hands and told her that he admired her as soon as he saw her but was unable to express all the while. He caught hold of her and tried to kiss her. She resisted and begged him to stop but he did not listen to her. The appellant then overpowered her, pushed her on the road and pulled off her trouser and panty. She tried her best to resist him and raised hue and cry but no one could hear her as the place was isolated. She managed to pick herself up and started looking for her clothes. The appellant pulled her and took her towards the flank side of the road, pushed her on the ground and tried to rape her. She somehow managed to find her clothes and wore it. After that she started running towards the appellant's hotel since she had already left the hotel where she had stayed in the night of 05.04.2019. She could see the appellant chasing her. With much difficulty and struggle she managed to reach the hotel and saw that everyone had gone off to sleep. The appellant also reached the hotel and offered her dinner which she declined. Thereafter, she went inside the room which the appellant had given to her and the appellant also came inside with a glass of water and bolted the room. She told the appellant to leave. He said he did not have another room to stay so he would also sleep there. When she forced him to go, the appellant started threatening her saying that this was Lachung and she could not

take any action as she had no one there. On hearing his threat she was shaking with fear and begged him for mercy but he did not pay any heed to it. Thereafter, the appellant pushed her on the bed, pulled her trousers and panty, removed his pants and underwear, covered her mouth with his hands and committed rape. She tried to resist him but he overpowered her. After the incident, the appellant went to the washroom and she hurriedly put on her clothes during which time the appellant returned. The appellant then told her to go off to sleep and that she now belonged to him and had nowhere else to go. After saying this appellant went off to sleep. After the appellant fell asleep, she took her phone and fled from the room after bolting the door from the outside. She had earlier been informed by the appellant that the house owner of the hotel resided in the upper floor of the building and therefore she ran towards the upper floor and knocked on one of the doors. No one opened the door. She went to the next floor as the building was four storied structure and knocked on another door. The door was opened by one person whom she later learnt was a driver of a tourist vehicle. She was nervous and traumatised and managed to tell him that she had been tortured by the appellant. Since she had entered another room with only the said person in it she felt insecure and went inside the washroom and locked herself there. She was feeling scared and was worried that her voice would be heard if she made any calls. So she sent text messages to PW-3 asking him to

help her as the appellant had tortured her and she had locked herself inside the washroom. She also sent him pictures of the injuries that the accused had inflicted on her. She sent a text message to him asking him to bring the police along with her father and reach immediately. It was already 2 a.m. when she sent the message to PW-3. He immediately called back. However, as she was crying and too scared to even talk over the phone she disconnected the call and sent a text message once again. PW-3 replied saying that he would inform the Sadar Police Station and she would be saved. Thereafter, she got calls from her father and PW-3 several times but she was too scared to answer them. She communicated with them through text messages. She told them that they could speak to her and inform to her what they were doing although she would not be talking with them. A little later, she was informed by them that they had reached the Sadar Police Station and would reach as soon as they could. She kept waiting for them inside the washroom, too scared to go out. At around 7 to 7:30 a.m. she received a call from the police who told her that they had reached the place. After some time they came outside the room and called her over the phone. Thereafter, she came out of the washroom and saw the police outside the room. They took her to Lachung Police Station where she lodged the FIR (Exhibit-1). Her father also reached there after some time. She was sent for medical examination to District Hospital, Mangan. During the medical examination the doctor asked her to

hand over her panty that she was wearing at the relevant time and so she handed it over. After this, a lady police brought her to the new STNM Hospital. However, as there were no doctors available she was taken to Central Referral Hospital, Manipal, Tadong. There were no doctors available there too. She was asked to come the next day. On 08.04.2019, she was once again brought to Central Referral Hospital, Manipal, Tadong, where she was examined by a lady doctor who conducted some tests as well. After a month and a half thereafter, she gave a statement to a lady Judge in a Court at Mangan. She identified her statement as Exhibit-3 and her signatures thereof as well.

**14.** During her cross-examination, she made a number of admissions which were highlighted by the learned counsel for the appellant as material contradictions which would completely tarnish the evidence of the prosecution. The victim admitted that:-

- i.** That her mobile phone from where she sent text messages on 07.04.2019 was not seized by the police.
- ii.** She had nothing to show that she had checked in the hotel at Lachung during 05.04.2019 to 07.04.2019.
- iii.** There was no permit in the case record for her visit to Lachung from 05.04.2019 to 07.04.2019.
- iv.** On 05.04.2019, when she stayed in hotel Cxxxx Vxxxx, the appellant had brought dinner to her room and left. She did not know if the appellant had also stayed in the same hotel that night.

**v.** That she had not stated in her section 161 Cr.P.C. statement that she had received two phone calls from the accused on 06.04.2019 at 1 a.m.

**vi.** That both in her statement to the police as well as to the Magistrate she has not stated about the incident of attempt to rape by pulling her trouser and panty. In fact, she admitted that she had not stated that suddenly, the appellant pulled her hands and told her that he admired her as soon as he saw her but was unable to express all the while. That he caught hold of her and tried to kiss her. That she resisted and begged him to stop but he did not listen to her. That the appellant then overpowered her, pushed her on the road and pulled off her trouser and panty. That she tried her best to resist him and raised hue and cry but no one could hear her as the place was isolated. That she managed to pick herself up and started looking for her clothes. That the appellant again pulled her and took her towards the flank side of the road, pushed her on the ground and tried to rape her. That she somehow managed to find her clothes and wore it.

**vii.** She admitted that when she came out of the hotel in the late evening of 06.04.2019, the appellant said that he loved her and proposed marriage. That the appellant had also tried to kiss her and when she resisted, she fell down.

**viii.** That when she shouted for help she did not mention that the appellant had tried to rape her.

**ix.** She admitted that the room from where they had left on 06.04.2019 was locked; that it may have been the appellant who had locked it; that when she returned on the night of 06.04.2019 she entered the same room which was locked; that it was the appellant who had unlocked the room for her before she entered it; that the appellant had not taken off his clothes in the jungle; that after she

entered the room the appellant put medicine on her injuries which she had sustained in the jungle; and that the appellant went on uttering that he cared about her and could not live without her but she paid no heed to what he was saying.

**x.** She denied the suggestion that she had told the appellant that if he converted himself to Christianity she would accept his proposal which he readily accepted. She also denied the suggestion that they had had a physical relation in the intervening night of 06.04.2019 - 07.04.2019 with her consent.

**15.** PW-3 deposed that he knew the appellant prior to the incident since he had stayed in his hotel at Lachung. He also knew the victim as they were neighbours, belonged to the same religious congregation and her father was his friend. Sometime in the month of February 2019, the victim had told him that she had completed a course in Hotel Management and was looking for a hotel which she could take on lease. She also requested him to find a hotel. He remembered that the appellant had told him that he could find a hotel to take on lease if required. Accordingly, he gave the victim the appellant's mobile phone number. Sometime during April 2019, he received a phone call from the victim's mother informing him that the victim was in trouble and she had come across some bad character. She told him to inquire about it as he knew where the victim had gone. He called the victim on her mobile phone but she did not answer it. So he sent her a whatsapp message asking her to send him her



travel pass which she had taken out to travel to Lachung. However, the victim replied that she had not obtained the pass. He asked her to send him pictures of herself and the surrounding areas which she did. He saw the pictures and noticed that the victim had sustained injuries on her person. On seeing the pictures, he called the victim's father on his mobile phone and informed him about the matter. Thereafter, he and the victim's father went to Sadar Police Station and informed the police and also showed the pictures that the victim had sent. The Duty Officer of Sadar Police Station contacted the police at Lachung and surrounding areas. The following morning at around 6 a.m., the victim's father left for Lachung.

**16.** During cross-examination PW-3 admitted that neither the mother of the victim nor the victim herself had informed him when he got the call from the mother of the victim and the text messages from the victim that the appellant whose phone number he had given to the victim had raped her or was trying to rape her. He also admitted that the police did not seize his mobile phone or the photographs of the injured victim which he had received.

**17.** PW-4 recognised the appellant since he also ran a hotel in Lachung. According to him, sometime in the year 2019, around the 6<sup>th</sup> of the month he does not remember, the appellant

had brought one girl to his hotel and requested to accommodate her as a guest.

**18.** During cross-examination, he admitted that there was no entry in the hotel guest register about the stay of the guest of the accused at the relevant time. He also admitted that without such details he would not be able to say the name and address of the guest who had checked in to his hotel at the relevant time. According to PW-4, the appellant was a married man who used to be with his wife at his hotel at Lachung. He had met both of them there. He also stated that he had not heard anything adverse about the appellant in the two years that he had known him.

**19.** PW-6 knew the appellant as the person who ran a hotel at Lachung. He was a driver by profession and drove a tourist vehicle from Gangtok to Lachung. According to him, during the relevant time he had gone to Lachung to reach tourists and reached around 6:30 p.m. He had been provided a room in the third floor of the hotel Ixxx by the appellant. At around 9 p.m., he went to his room and slept. At around 2 a.m., he heard someone knock loudly and continuously at his door of his room. He asked who was there but nobody answered. He went and opened the door and saw a girl standing outside. She looked frightened and was shivering. The girl rushed into his room and locked it from inside and told him not to open it. He

asked the girl what happened but she did not reply. She went inside the toilet of his room instead. After a while she came out and he noticed that she had bruises on her knees. He asked her if she had fallen down but she did not reply. After sometime she asked for a blanket with which she covered herself and sat on the floor next to the toilet. At around 5 a.m. he left the room while the girl was still inside. Later during the afternoon of the same day he was informed by some of his friends that the police had come to the hotel asking for him. He went to Lachung Police Station and told the police about the incident. The police seized the white coloured bedsheet from the room of the appellant at hotel Ixxx located in the ground floor in his presence through seizure memo (Exhibit-12).

**20.** During cross-examination, he admitted that he did not know the name and address of the girl who had come to his room at 2 a.m. at hotel Ixxx at the relevant time.

**21.** PW-7 also knew the appellant as they worked in the same hotel Rxxx at Lachung. He worked as a Cook and the appellant as the Manager in the same hotel. According to him, on 05.04.2019 the victim had come to hotel Rxxx and occupied a room there. At around 7:30 p.m. the victim left the hotel with the appellant. The following morning, i.e., 06.04.2019, the victim came to their hotel with the appellant at around 8:30 a.m. looking for a hotel which the victim was interested to take on

lease. They returned at around 7:30 p.m. The appellant was helping him to attend to the hotel guests till 9 p.m. after which he went to retire for the night. In the morning of 07.04.2019 at around 6:30 a.m. the police from Lachung Police Station came to the hotel and arrested the appellant. The police also seized a white coloured bedsheet from the room of the appellant in his presence vide seizure memo (Exhibit-12). He identified his signature as well as the white coloured bedsheet (M.O.X).

**22.** In cross-examination, he admitted that it was the police who had informed him that M.O.X had been seized from the appellant and he had not witnessed the seizure. He also admitted that the contents of seizure memo (Exhibit-12) was not read over to him when he put his signature thereon and that he did not know the contents thereof till date.

**23.** On 07.04.2019 at around 7 p.m., the victim was forwarded for medical examination by the Lachung Police Station with an alleged history of sexual assault upon her. Dr. Akithla Nadikpa (PW-5), the GDMO at District Hospital, Mangan, examined her and noted that on local examination there was abrasion on the lower back, right gluteal region lateral aspect, left upper thigh region lateral aspect, left calf area lateral aspect and right knee. On vaginal examination, she noted that the pubic hair was shaved, discharge was present and there was mild vulval swelling. She noted that the hymen was “absent” and

there were no fresh injuries. According to her final impression, no fresh or old penetration could be ascertained at the time of examination. She prepared the medical report (Exhibit-8). Two samples of vaginal wash, vaginal swab, blood sample, pubic hair sample and underwear of the victim were collected and handed over to the investigation of the case for further evaluation and expert opinion. The requisition of the Investigating Officer for examination of the victim was exhibited as Exhibit-7 and the requisition for collection of samples of the victim was exhibited as Exhibit-9.

**24.** On the same day, i.e., 07.04.2019, at around 7:30 p.m., the appellant was forwarded for his medical examination by Lachung Police Station with an alleged history of sexual assault upon a girl. Dr. Akithla Nadikpa (PW-5), on the appellant's local examination, noticed that there was keloid (fibrous formation after healing of an old wound) on the left elbow. She also noticed that abrasions were present on the dorsal aspect of the palm. The appellant's urethral swab, blood sample, pubic hair and his underwear were collected and handed over to the Investigating Officer of the case. Accordingly, she prepared the medical report (Exhibit-11). Exhibit-10 was the requisition of the Investigating Officer for medical examination of the accused.

**25.** In cross-examination, she admitted that in her medical report (Exhibit-8), she had not mentioned as to whether

the victim was sexually assaulted or not. She also admitted that she had not mentioned the time of injuries in her medical report (Exhibit-8).

**26.** On 08.04.2019, the victim was sent to STNM Hospital, Gangtok, for Medico Legal Expert opinion from where she was sent to CRH, Tadong, as the Expert at STNM Hospital was on leave. Dr. Chanda Rai (PW-8) was the Assistant Professor there. She examined the victim on 08.04.2019. On local examination, she noted multiple linear bruise marks on both her buttocks. Vulval examination showed localised redness and sticky discharge was found around the vulval region. Hymen was not intact. Vaginal examination was not done. Swab was taken and handed over to the police for examination. The vaginal swab was sent to confirm the presence of semen and blood samples was sent to rule out sexually transmitted infections like RPR (rule out syphilis) and HIV. The Gynae Outpatient Medical Report was exhibited as Exhibit-13.

**27.** In cross-examination, she admitted that she was not a Medico Legal Expert but volunteered to state that all gynaecologists have been trained to examine rape victims.

**28.** Prem Kumar Sharma (PW-9), the Junior Scientific Officer, in the Biology Division of RFSL Saramsa, received the case exhibits packed and sealed. The exhibits were examined by

using serological/biological techniques and based on these examinations, the result were as follows:-

“Sample blood bearing exhibit BIO 483 E1 (sample blood of the victim collected in filter paper) gave positive test for Blood Group ‘AB’.

Sample blood bearing exhibit BIO 483 E2 (sample blood of the appellant collected in filter paper) gave positive test for Blood Group ‘AB’.

Human blood was detected in exhibit 483 C (pink coloured undergarment said to belong to the victim and BIO exhibit 483 I (white coloured bed sheet having suspected reddish stain) but the blood grouping could not be done due to insufficient exhibits.

Blood, semen or any other body fluids could not be detected in exhibit BIO 483 A1 and BIO 483 A2 (vaginal wash of the victim ), BIO 483 B (pubic hair of the victim), BIO 483 D [vaginal swab of the victim collected in cotton gauge], BIO 483 F (penile swab of the appellant collected in cotton), BIO 483 G (grey coloured underwear said to belong to the appellant) and BIO 483 H (pubic hair of the appellant).”

**29.** The forensic examination report was marked Exhibit-14.

**30.** Jigme W. Bhutia (PW-10) was the Investigating Officer, who investigated the case and submitted the charge-sheet. According to him, it was he who examined the victim and recorded her 161 Cr.P.C. statement; made requisition for medical examination of the victim (Exhibit-7), made requisition for collection of blood and other samples of the victim (Exhibit-9); effected the seizure of the white coloured bedsheet on 07.4.2019 vide Exhibit-12 from hotel Rxxx in the presence of PW-7 and PW-6; arrested the appellant vide Exhibit-17 and sent him for medical examination vide Exhibit-10.

**31.** During his cross-examination, the Investigating Officer admitted of not having collected any evidence other than the statement of witnesses regarding victim's stay in Lachung and not having seized mobile phone from the victim or any other person.

**32.** The victim's deposition is elaborate and detailed. The victim had informed the police about the attempt to rape and rape by the appellant in her FIR. The allegation of attempt to rape and its details is, however, missing in her statement. The graphic details of what transpired in the room of the hotel given by the victim in her deposition leads us to believe that the act of rape was a violent one, however, the medical evidence is not corroborative. Dr. Akithla Nadikpa (PW-5) categorically states that no fresh or old penetration could be ascertained at the time of examination. The medical expert gave this opinion inspite of noticing the abrasions on various parts of her body and also vulval swelling. The medical examination of the victim was at 7 p.m. on 07.04.2019 and the alleged incident transpired in the night of 06.04.2019. The forensic evidence also could not confirm sexual intercourse between the appellant and the victim. This creates a problem. It may be necessary, therefore, to seek corroboration. Quite evidently, the entire case of the prosecution hinges on the deposition of the victim. The prosecution has not led any credible evidence besides that of the victim which would establish its case beyond reasonable doubt. The fact that the



victim visited Lachung on 05.04.2019 and stayed in the appellant's hotel on 06.04.2019 is established by the evidence of the victim as well as PW-7. The fact that Dr. Akithla Nadikpa (PW-5) examined the victim at Lachung on 07.04.2019 corroborated the fact. However, rest of the evidence including that of PW-4 and PW-6 are wanting. Although, there is possibility that the two of them were talking about the victim as the girl who came and stayed in the two hotels at the relevant time, nothing beyond that has been established. They did not identify the girl to be the victim. The victim stated that the appellant had arranged a room in his hotel and the incident of rape happened there. PW-7, who was a cook in the same hotel, deposed that the police seized the white coloured bedsheet bearing blood stains from the room of the appellant. Whether the victim was put up by the appellant in a separate room in the hotel or in his own room is uncertain. This discrepancy has not been explained by the prosecution. According to the victim she was rescued by the police the next morning from the room of the driver who was staying in the same hotel where she had taken refuge. However, the prosecution failed to lead any evidence to establish this fact. All that the Investigating Officer deposed was that he and his team of police officers had found the victim in the hotel. PW-6, the driver of the tourist vehicle, who may have been there at the hotel at the relevant time, did not identify the girl who came to his room to be the victim. The medical evidence shows abrasions

in various parts of the victim's body. However, the prosecution has failed to establish the age of these abrasions and how it was caused. From the victim's statement there is possibility that it may have been caused when the victim alleges the appellant tried to rape her but again she did not state that the abrasions were caused because of the incidents. The victim's admission that she had not stated about the alleged incident of rape in the forest in both her statement to the police as well as before the learned Judicial Magistrate creates uncertainty about the fact. According to the victim when the appellant attempted to commit rape on her, she ran towards the appellant's hotel and he chased her. She also deposes that she raised a hue and cry in the forest where the appellant had attempted to rape her. Yet, the victim also admits that in the hotel bedroom the appellant came with a glass of water for her, applied medicine on her wound she had sustained in the forest and offered her dinner. Significantly, the victim does not depose that when she ran back to the hotel she tried to raise hue and cry and alarm the inmates. Evidently she did not talk about it to the first and the only person she met in the hotel or the persons she messaged from the room of the driver. These discrepancies are glaring. There is not even an attempt on the part of the prosecution to explain them. According to PW-6, when a girl entered his room and locked it from inside, he asked her what happened but she did not reply. Similarly, the evidence of PW-7 who worked in the same hotel in

which the appellant was employed and was also present during the relevant time does not take the prosecution case further. According to him, on 06.04.2019 after the victim returned with the appellant at around 7:30 p.m., the appellant helped him to attend to the hotel guests till 9 p.m. after which he retired for the night. Strangely, his evidence does not suggest anything extraordinary happening the night of the alleged incident. Although, the Investigating Officer did preserve the undergarments of both the victim and the appellant; vaginal wash and vaginal swab of the victim; urethral swab of the appellant and their respective blood samples and pubic hair, the forensic examination by PW-9 did not yield any positive result to suggest sexual intercourse. There was blood found in the victim's panty, however, it could not be pinpointed to the victim or the appellant and further there is evidence to show that there was abrasion on her buttocks which could have also led to the bleeding. As noted above, how the victim sustained the injuries remain unexplained. The prosecution has failed to establish that the abrasions were caused by the acts of the appellant.

**33.** In *Rai Sandeep vs. State (NCT of Delhi)*<sup>8</sup>, the Supreme Court had occasion to consider who can be said to be a “sterling witness”. It held that:-

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<sup>8</sup> (2012) 8 SCC 21

“In our considered opinion, the “sterling witness” should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have correlation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a “sterling witness” whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.”

**34.** The records reveal that based on the victim’s version in her statement recorded under section 164 Cr.P.C. that the appellant had locked the room from inside, showed her a knife

and threatened her before touching her body and thereafter raping her while cupping her mouth with one of his hands, the learned Sessions Judge had framed the charge under section 506 IPC. However, the investigation could neither produce the knife nor prove the charge. The vivid details of the alleged attempt to rape by the appellant late in the night in a jungle by disrobing her would have been embedded in her memory for a long time. However, as revealed by her cross-examination, the victim had failed to mention it both to the police as well as to the learned Judicial Magistrate. Quite evidently, the victim seems to have made significant exaggerations and embellishments. The opinion of a medical expert who examined the victim immediately after the alleged incident would be of great value and significance. The unquestioned opinion of Dr. Akithla Nadikpa (P.W.5) that there was no fresh or old penetration rules out penetration which is *sine qua non* for rape to be proved. The statement of the victim, unfortunately, stands alone and does not withstand the test of sterling witness in view of these significant anomalies, material contradictions, unexplained circumstances and the variation in her versions. Further, it is also equally obvious that the investigation has been lethargic and tardy. We are, therefore, constrained to give the benefit of doubt to the appellant. The impugned judgment of conviction and order on sentence, are set aside.

**35.** The appellant is set at liberty forthwith if not required in any other case. Fine, if any, deposited by the appellant in terms of the impugned order on sentence, shall be refunded to him.

**36.** The appeal is allowed.

**37.** CrI. A. No. 12 of 2020 stands disposed of.

**38.** Copy of this judgment shall be transmitted to the learned trial court for information and compliance along with the trial court records.

**( Bhaskar Raj Pradhan )**  
**Judge**

**( Meenakshi Madan Rai )**  
**Judge**

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

*bp*