THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 16th April, 2025

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

Crl. A. No.14 of 2021

Appellant : Ganesh Dhakal

versus

Respondent : State of Sikkim

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

Appearance

Mr. Rahul Rathi and Ms. Khushboo Rathi, Advocates for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the Respondent.

Crl. A. No.27 of 2023

Appellant : State of Sikkim

versus

Respondent : Ganesh Dhakal

Application under Sections 377(1)(b) and (3) of the Code of Criminal Procedure, 1973

Appearance

Mr. S. K. Chettri, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the Appellant.

Mr. Rahul Rathi and Ms. Khushboo Rathi, Advocates for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. Crl. A. No.14 of 2021 (*Ganesh Dhakal* vs. *State of Sikkim*) and Crl. A. No. 27 of 2023 (*State of Sikkim* vs. *Ganesh Dhakal*) are being taken up together and disposed of by this common Judgment, as the facts involved are the same.

Crl. A. No.14 of 2021

2. The Appellant, a thirty year-old male, was convicted of the offences under Sections 342, 366 and 376(1) of the Indian

Penal Code, 1860 (hereinafter, the "IPC"), by the Court of the Learned Judge, Fast Track, South and West Sikkim, at Gyalshing, in ST (Fast Track) Case No.03 of 2020 (*State of Sikkim* vs. *Ganesh Dhakal*), vide the impugned Judgment, dated 26-08-2021, for committing the said offences, against the victim PW-1, aged about eighteen years, at the time of the offence. The Appellant was consequently sentenced to simple imprisonment of one year under Section 342 of the IPC, rigorous imprisonment of ten years under Section 366 of the IPC and fine of ₹ 50,000/- (Rupees fifty thousand) only, and rigorous imprisonment for ten years and fine of ₹ 1,00,000/- (Rupees one lakh) only, under Section 376(1) of the IPC. The fines bore default stipulations.

Crl. A. No.27 of 2023

3. The State-Appellant by filing an Appeal under Section 377 of the Cr.P.C., sought enhancement of the sentence imposed on the Respondent by the impugned Order on Sentence, dated 31-08-2021, by conversion of the Charge framed against the Respondent under Section 376(1) of the IPC, under which he was convicted, to Sections 376(2)(b) and (c) of the IPC, it was contended that the charges framed against the Respondent were erroneous and the sentence imposed upon such conviction was inadequate as the Respondent was a Government servant, thereby bringing him within the ambit of the aforementioned provisions of law and not under Section 376(1) of the IPC.

4. Before proceeding to analyse the evidence on record and the arguments advanced before this Court, the Prosecution case is summarised herein. PW-1, the eighteen year-old victim girl, lodged an FIR, Exbt-1, on 15-07-2020, alleging that she had

been sexually assaulted by the Appellant on 12-07-2020 (Sunday), at around 09.00 p.m. PW-2 her cousin, had spent the relevant night in her home (home of PW-1). After PW-1 had fallen asleep she was later woken up by PW-2, asking her to accompany her to the roadside below the house as a friend of hers was delivering a packet for her. On the insistence of PW-2, PW-1 accompanied her. At the road a car driven by the Appellant, accompanied by another male passenger, PW-4, seated in the back seat arrived at where they were. PW-2 boarded the second seat of the car where PW-4 was already seated, while the Appellant physically overpowered PW-1, forced her into the car and drove with one hand, while holding her hands with other. Despite her threat to jump out of the moving vehicle, he refused to stop and after some time reached a house. He then took her forcibly into one of the bedrooms of the house, while PW-2 went into another room with PW-4. PW-1 was sexually assaulted by the Appellant for about half an hour, after which he went into the kitchen alone for food, while taking her clothes with him, returned and again continued to rape her. At around 02.30 a.m. PW-4 came knocking at their door, urging the Appellant to open it and to drop PW-1 and PW-2 back to their house. She was finally driven back to the same roadside by the Appellant, duly accompanied by PW-2 and PW-4. PW-1 and PW-2 then walked to the house of PW-1, while the Appellant and PW-4 drove away. PW-1 *en route* to her house questioned PW-2 as to why she had failed to come to her aid although she had called out to her, to which PW-2 responded that PW-4 had prevented her.

(i) The relevant Police Station registered Case No.05(07)2020, dated 15-07-2020, under Sections 376, 366 and

342 of the IPC against the Appellant and upon completion of investigation, submitted Charge-Sheet against the Appellant under the same sections of law *supra*. Charge was framed against the Appellant by the Learned Trial Court also for the same offences. The Appellant entered a plea of "not guilty" and claimed trial. The Prosecution examined eleven witnesses in a bid to establish their case. On closure of Prosecution evidence, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."), to enable him to explain the incriminating evidence appearing against him. He claimed not to have committed any of the alleged offences. His responses were recorded. He sought to and was permitted to examine one Head Constable as DW-1. After hearing the final arguments of the parties the impugned Judgment and Order on Sentence were pronounced.

5. Being thus aggrieved, the Appellant in Crl. A. No.14 of 2021 is before this Court wherein the following arguments were advanced by Learned Counsel for the Appellant *viz*;

(a) The incident occurred on 12-07-2020 but was reported only on 15-07-2020, the Prosecution case lacks credence on account of the delayed reporting.

(b) The delay in lodging the FIR Exbt-1, was sought to be explained away by PW-1 on grounds that she took time to inform her friend '*K*' and her family but her friend '*K*' was not examined as a Prosecution witness to authenticate her stand.

(c) The alleged scribe of the FIR was not examined to prove the presence of PW-1 in his cybercafé.

(d) PW-1 was in possession of her cell phone at the time of the alleged offence but she failed to call anyone for help.

(e) Her evidence that the Appellant was able to hold her hands with one hand and drive his vehicle with the other at the same time is at best incongruous.

(f) The evidence of the victim is rife with discrepancies and fails to corroborate the statements made by her in her Section 161 Cr.P.C. statement. Learned Counsel urged that the "*Explanation*" provided in Section 162 Cr.P.C. in this context be duly considered.

(g) Moreover, there is no explanation as to why Exbt-4 the Section 164 Cr.P.C. statement of the victim was lodged one month after the incident, enabling her to improve her case.

(h) That, in light of the consistent anomalies emerging in the deposition of the victim, she does not fulfil the criteria of a sterling witness, hence her evidence deserves to be disregarded by this Court and the Appellant acquitted of the offences charged with.

6. Repelling the arguments advanced, Learned Additional Public Prosecutor contended that, the medical evidence on record establishes forceful sexual assault perpetrated on PW-1. That, minor anomalies in the evidence of PW-1 and her statement under Section 161 Cr.P.C. which are otherwise consistent, do not demolish the Prosecution case and the argument thereby deserves no consideration. The delay in the lodging of the FIR has been

explained by PW-1 and the non-examination of "K" is not fatal to the Prosecution case. The Appeal thereby deserves a dismissal.

7. We have given due consideration to the rival contentions advanced before us and examined all the evidence, documents on record and perused the impugned Judgment and Order on Sentence. Whether the Learned Trial Court erred in convicting the Appellant under the above sections of law is to be determined in Crl. A. No.14 of 2021 and whether the Prosecution having proved its case as concluded by the impugned Judgment and Order on Sentence, the Appeal under Section 377 of the Cr.P.C. should be duly considered for enhancement of sentence, is to be determined in Crl. A. No.27 of 2023.

(i) Addressing the argument of Learned Counsel for the Appellant regarding the anomalies in the deposition of PW-1 in the Court with that of her Section 161 Cr.P.C. statement, it would be imperative to examine the provisions of Section 161 and Section 162 of the Cr.P.C. along with Section 145 of the Indian Evidence Act, 1872 (hereinafter, the "Evidence Act").

(ii) Section 161 of the Cr.P.C. deals with the examination of witnesses by the Police. The said provision is extracted hereinbelow for easy reference;

> **"161. Examination of witnesses by police.**—(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.
>
> (2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.
>
> (3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he

> shall make a separate and true record of the statement of each such person whose statement he records:
>
> Provided that statement made under this sub-section may also be recorded by audio-video electronic means.
>
> Provided further that the statement of a woman against whom an offence under section 354, section 354A, section 354B, section 354C, section 354D, section 376, section 376A, section 376AB, section 376B, section 376C, section 376D, section 376DA, section 376DB, section 376E or section 509 of the Indian Penal Code (45 of 1860) is alleged to have been committed or attempted shall be recorded, by a woman police officer or any woman officer.**"**

(iii) Section 162 of the Cr.P.C. deals with the purpose and the manner in which the statement recorded under Section 161 of the Cr.P.C. can be used at any stage of trial and provides as follows;

> **"162. Statements to police not to be signed—Use of statements in evidence.**—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect if any of any offence under investigation at the time when such statement was made:
>
> **Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872);** and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.
>
> *Explanation.*—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particulars context shall be a question of fact. **(emphasis supplied)**

(iv) The provisions extracted hereinabove are self-explanatory and on pain of repetition it must be stated that statements under Section 161 Cr.P.C. made to the Police by a witness is not substantive evidence and can be used only for the limited purpose of contradicting a witness on what he has deposed during the trial, in terms of Section 145 of the Evidence Act. Suffice it to elucidate that Section 162 Cr.P.C. prohibits the use of statement of witness made to the Police, except for the purpose of contradicting such witness as laid down in the proviso to Section 162(1) Cr.P.C.

(v) The Supreme Court in ***V. K. Mishra and Another*** vs. ***State of Uttarakhand and Another***[1] has laid down as follows;

> **"17.** The court cannot suo motu make use of statements to police not proved and ask questions with reference to them which are inconsistent with the testimony of the witness in the court. The words in Section 162 CrPC "if duly proved" clearly show that the record of the statement of witnesses cannot be admitted in evidence straightaway nor can be looked into but they must be duly proved for the purpose of contradiction by eliciting admission from the witness during cross-examination and also during the cross-examination of the investigating officer. The statement before the investigating officer can be used for contradiction but only after strict compliance with Section 145 of the Evidence Act that is by drawing attention to the parts intended for contradiction.**"**

(vi) Section 145 of the Evidence Act provides as follows;

> **"145. Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; **but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him."** **(emphasis supplied)**

(vii) It is thus reiterated herein that, during the cross-examination of a witness, when the statement made by the witness

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[1] (2015) 9 SCC 588

is sought to be contradicted, the witness must be shown those portions of the previous statement, which have been reduced into writing and which are to be used for the purpose of contradicting him. It is settled law that, while recording the deposition of the witness, the Trial Court is to ensure that the part of the statement recorded by the Police, which is intended to contradict the witness is brought to the notice of the witness, in his cross-examination. Should the witness admit the part which is intended to contradict him, it stands proved and will have to be considered by the Court when appreciating the evidence. If the witness denies that part of the statement to which his attention is drawn and which is sought to be contradicted, the Trial Court is to mention it in the deposition. Thereafter, when the IO is examined in the Court, his attention is to be drawn to the passage marked for the purpose of contradiction and his evidence recorded, in the context of the witnesses' statement, made to him. The Courts cannot use statements made to the Police without the witness being confronted with the specific statements sought to contradict the witness. There has to be specific adherence to the provisions of Section 162 of the Cr.P.C. and Section 145 of the Evidence Act.

(viii) In the matter at hand, admittedly PW-1 during cross-examination was not confronted with the statement made by her under Section 161 Cr.P.C. before the Police, to prove any contradiction therein with her deposition in the Court, neither was the IO examined on such statements. All that the Learned Trial Court has recorded in some places of the victim's evidence is "*objected to as beyond her Section 161 Cr.P.C. statement*". In the absence of the witness being confronted with the concerned

statements, such objections as seen (*supra*), serve no purpose as they lack in specifics. The above discussions lends a quietus to the arguments regarding anomalies in the Section 161 Cr.P.C. As no significant contradictions in the cross-examination of PW-1 was noticed, in terms of the provisions of law as discussed at length above, the "*Explanation*" in Section 162 Cr.P.C. (*supra*) relied on by Learned Counsel is of no consequence for the instant purposes.

(ix) Next, the contention pertaining to improvements made by the victim in her Section 164 Cr.P.C. statement is being addressed. That, the contents of a statement under Section 164 Cr.P.C. is not substantive evidence is now no more *res integra* and should the Court contemplate considering its contents, then the author of the contents ought to be confronted with it and the provisions of Section 145 of the Evidence Act, 1872, complied with. The object of statement of witnesses, recorded under Section 164 Cr.P.C. is concerned the object is twofold. The first is to deter the witness from altering his stand by denying the contents of his previously recorded statement. Secondly, it is to tide over immunity from Prosecution by the witness under Section 164 Cr.P.C. The proposition that if a statement of a witness is recorded under Section 164 Cr.P.C., his evidence in Court should be discarded is not at all warranted. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C. cannot be relied upon and is only for the purpose of corroborating statements made by the witnesses in the committal Court or even to contradict it, for the reason that the Defence has had no opportunity of cross-examining the witnesses whose statements were recorded under Section 164 Cr.P.C. [See ***R. Shaji*** vs. ***State of***

Kerala (2013) 14 SCC 266)]. It is also settled law that the formalities prescribed by Section 145 of the Evidence Act are to be complied with, even for statements recorded under Section 164 Cr.P.C. Every circumstance intended to be used as contradiction or corroboration has to be put to the witness point by point and the whole statement read out to him. The admission or denial thereof has to be extracted from the witness, before the Court can consider such contradiction or corroboration. In the instant matter, it is seen that all that the witness has stated with regard to Section 164 Cr.P.C. statement, in her testimony before the Court is that, during the course of investigation she was taken to Court and her statement recorded, which she identified as Exbt-4, on which she had affixed her right thumb impression. In her cross-examination she denied having improvised her statement at the time when her Section 164 Cr.P.C. statement was recorded. Clearly she was not confronted point by point, fact by fact or paragraph by paragraph on each circumstance that was intended to be contradicted or corroborated, and hence the arguments advanced by Learned Counsel for the Appellant on this aspect is untenable.

(x) Now, on examining the evidence of the victim we are of the considered view that it is cogent and consistent with regard to what transpired before she left her house, then accompanied PW-2 on her insistence and of the sexual assault perpetrated on her. That, the Appellant after forcing her into his car in which PW-4 was already seated and PW-2 climbed in as well. He dragged her into one bedroom, where he sexually assaulted her till around 02.30 a.m. At around 02.30 a.m. PW-4 knocked on the door of the

bedroom, which the Appellant finally opened and thereafter drove PW-1 and PW-2 and to the same roadside, PW-4 accompanied them. It was her case that she called out to PW-2 the entire time when she was being sexually assaulted but PW-2 did not come to her aid and later on confronting her, PW-2 told her that she had been restrained by PW-4. On the next day PW-2 gave her two "I-pills" which the Appellant had sent through PW-4 and she consumed one on being coerced by PW-2. The other pill was later handed over by her to the Police, vide the seizure memo Exbt-3. This evidence regarding the seizure, was fortified by that of PW-5 and PW-6, witnesses to such seizure. After the incident she was determined to report the matter. She completed her household chores and told her friend, one *"K"*, that she was going to lodge a complaint. He advised her to take a guardian with her. She went to her maternal aunt, PW-3 and narrated the incident to her. PW-3 opined that her parents ought to be informed about it, but before that called the Appellant from the cell phone of PW-2, who however, rejected her call. Then, PW-3 accompanied by PW-1 and her parents, went to the residence of the area MLA, where the Appellant pleaded with PW-3 not to report the matter as he had committed a mistake. However, both PW-1 and PW-3 went to the concerned Police Station and reported the matter on 15-07-2020, *en route* having requested a cyber cafe owner to prepare Exbt-1, the FIR which PW-1 signed and filed at the Police Station. This evidence withstood the test of cross-examination. The conduct of PW-2 is rather bizarre, who despite having deposed that PW-1 had been forced into the vehicle by the Appellant and forcibly taken into his room, chose to remain calmly outside with PW-4 and only

at 02.00 a.m. told PW-4 to knock on the Appellant's door. Admittedly, she heard the victim calling out to her but she did not rush to her assistance. She corroborated the evidence of PW-1 pertaining to the fact that the Appellant had sent contraceptive pills for PW-1 which she persuaded PW-1 to consume. In fact, her cross-examination extracted the fact that the Appellant had threatened to take the victim's life if she did not take the I-pills (contraceptive pills).

(xi) The alleged delay in the FIR in no manner razes the Prosecution case to the ground, for the reason that PW-1 has clearly explained the dilemmas facing her before she lodged Exbt-1. On the morning after the incident she had told PW-2 that she wanted to report the matter but PW-2 advised her against it by convincing her that she would ruin her own reputation. It was only after she confided in her friend "*K*" who advised her to lodge a Complaint that she did so with the help of PW-3. In any event it is no one's case that the act was consensual.

(xii) In ***State of Punjab*** vs. ***Gurmit Singh and Others***[2], the Supreme Court while addressing the issue of belated lodging of FIR in matters pertaining to sexual offences held that;

> **"8.** ..... The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. ....."

It was further observed that, the Courts while evaluating evidence, should remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a Court just to make

[2] (1996) 2 SCC 384

a humiliating statement against her honour as is involved in the commission of rape on her. In such cases, considerations which have no material effect on the veracity of the Prosecution case or even discrepancies in the statement of the Prosecutrix should not, unless the discrepancies are of fatal nature, be allowed to throw out an otherwise reliable Prosecution case. That, the inherent bashfulness of females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should act on the testimony of the victim alone to convict an accused. It was held that seeking corroboration of her statement before relying upon the same, as a rule, in such cases, amounts to adding insult to injury. The evidence of a girl or a woman who complains of rape or sexual molestation, should not be viewed with doubt, disbelief or suspicion. That, no law requires insistence upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable.

(xiii) In ***State of Maharashtra*** vs. ***Chandraprakash Kewalchand Jain***[3], it was observed as follows;

> **"16. A prosecutrix of a sex offence cannot be put on par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars.** She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and

[3] (1990) 1 SCC 550

> conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessarily depend on the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base a conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence. ……..**"** **(emphasis supplied)**

The principles enunciated in the above ratiocinations have to be borne in mind.

(xiv) PW-3 having checked her niece's body found several bite marks on her chest and breasts and she was not in a condition to even walk properly.

(xv) That, having been said, the evidence of the Doctor PW-10, in her medical examination was clearly revelatory of the fact of sexual assault on the victim. Exbt-12 is the medical report prepared by PW-10 which bore the following remarks;

"Arrived – 3.30 p.m.
Examined – 3.45 p.m.

Ms. Sxxxxx xxxxxx, 18/F was escorted to the p.m. PHC along with her mother by NK Neelam Rai for medical examination.

Identification mark – small mole of around <0.2 cm on the upper outer quadrant of right breast.

Type of injury (cuts, bruise burns, etc)	Size of each injury (3 dimensional)	Part of the body inflicted	Nature of injury (Simple/Grievous)	Weapons used for inflicting injury	Remarks

O/E Patient is conscious, cooperative and oriented to time place and person

Vitals –	S/E CNS-WNL	Local Examination
BP – 104/72 mm Hg	CVS – S1S2 ⊕	-> Vaginal tear - present
PR – 76 min	Resp – B/L AE ⊕	-> No swelling
RR – 16/min	P/n – soft NT	-> Ecchymosis on right vaginal wall
afebrile		-> perineal tear absent
		-> hymen lost/not intact

Head to toe examination
Head & neck – neck 4 cm x 1.5 cm purplish red bruise over upper $^{1}/_{3}$ at neck below ear lobe on left side.
Chest & torso – (purplish red) bruise of 5 x 2 cm over left side, above acromioclavicular joint.
– pectoral region ① 3 x 1 cm over upper outer quadrant of left breast purplish red bruise
* UPT -> — ve ② 5 x 3 cm of greenish bruise over the left areolar region
* no other signs of bruise, scratch mark, laceration, or abrasion sign. ③ cut of < 0.4 cm over lower end of nipple
* apparel worn @ time of assault is not available as she washed them the very day
Advice

- Two vaginal swab are collected and handed to police
- The swabs are to be sent to RFSL, Ranipool

....."

(xvi) Penetrative sexual assault perpetrated on PW-1 was thus indubitably established by the evidence of PW-10, who under cross-examination volunteered to state that the injuries on the person of the victim appeared to be a few days old. The victim was medically examined on 15-07-2020 after she lodged the FIR, the incident having occurred on 12-07-2020. In fact the statement of PW-1 and the medical evidence are more than adequate to prove the fact of penetrative sexual assault. The Learned Trial Court has clearly held in the impugned Judgment that in her considered opinion various minor discrepancies and inconsistencies pointed out by the Learned Defence Counsel in his argument, hardly shakes the evidence of the Prosecutrix nor were they found significant enough to cause a doubt on the Prosecution case. That, all other surrounding evidence on the record, as already described cogently and satisfactorily proves the case of the Prosecution against the Appellant beyond reasonable doubt.

8. In consideration of the foregoing discussions, we are of the considered view that the Prosecution has established beyond

reasonable doubt that the Appellant had perpetrated the offence of rape on PW-1 after abducting and unlawfully restraining her. We therefore find no reason to differ with the findings of the Learned Trial Court as pronounced in the impugned Judgment and the consequent Order on Sentence in Crl. A. No.14 of 2021. Both are accordingly upheld.

Crl. A. No.27 of 2023

9. Learned Counsel for the parties were heard at length in Crl. A. No.27 of 2023. Learned Counsel for the Respondent relied on ***Eknath Shankarrao Mukkawar*** vs. ***State of Maharashatra***[4], wherein the Supreme Court discussed the provisions of Sections 377(1) and (2) of the Cr.P.C.

10. We find that the Prosecution has failed to bolster with any documentary evidence, their claim that the Respondent was a Government servant. All that the State-Appellant was able to indicate to this Court was the "Arrest/Court Surrender Memo", Exbt-14 reflecting the arrest of the Respondent which recorded his particulars and at Serial No.6(x) of the form, it was recorded *inter alia* as follows; "Occupation — Government servant". Although strenuous efforts were made to convince this Court that PW-3 had categorically deposed that the Respondent was a "security guard" attached to the residence of area MLA and PW-4 a police personnel had also identified him as his friend and colleague, we are unable to convince ourselves that such statement would suffice to establish the identity of the Respondent as a Government servant. No identification card of the Respondent towards this end was seized by the IO, who merely deposed that the Respondent was posted as a "house guard" of the local MLA and shared

[4] (1977) 3 SCC 25

accommodation with other guards. The yardstick set for the Prosecution for proving its case is; "beyond reasonable doubt" the Courts can accept no less.

11. That apart, we also observe that Section 376(2)(b) of the IPC has been invoked erroneously by the Prosecution. The provision reads as follows;

> **"376. Punishment for rape.**—(1)……
> (2) Whoever,—
> (a) …….
> (b) being a public servant, commits rape on a woman in such public servant's custody or in the custody of a public servant subordinate to such public servant; or
> ……."

(i) Custody, in the said provision, would mean when the victim is in the care of such a person. The Oxford Dictionary, defines "Custody" as follows;

> **"Custody**/ **1.** the protective care or guardianship of someone or something. *Law* parental responsibility, especially allocated to one of two divorcing parents. **2.** Imprisonment. ……."

By no stretch of the imagination can the victim be said to have been in the custody of the Respondent.

12. So far as Section 376(2)(c) of the IPC is concerned, as already discussed, no evidence establishes this position, hence the Prosecution has also failed on this facet.

13. In view of the foregoing discussions, we find that the Prosecution having failed to establish the identity of the Respondent as a Government servant, cannot belatedly seek alteration of the charges against him and consequent enhancement of Sentence. It is worth noticing and remarking that the Prosecution failed to take advantage of the provisions of Section 216 of the Cr.P.C., by bringing to the notice of the Learned Trial

Court that it was clothed with powers to alter or add any charge at any time before Judgment was pronounced. Indeed, the piteous state of affairs of the Prosecution can be gauged from the admission made in the "Memo of Appeal" that, the fact the Respondent was a Government employee came to the notice of the State-Appellant only during the course of hearing in Crl. A. No.14 of 2021 (*Ganesh Dhakal vs. State of Sikkim*). Need we add more.

14. Crl. A. No.14 of 2021 and Crl. A. No. 27 of 2023 accordingly stand dismissed and disposed of.

15. No order as to costs.

16. Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

(Bhaskar Raj Pradhan)
Judge
16-04-2025

(Meenakshi Madan Rai)
Judge
16-04-2025

Approved for reporting : **Yes**

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