THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 20th September, 2023

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

Crl. A. No.16 of 2022

Appellant : Dawagyal Lepcha

versus

Respondent : State of Sikkim

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

Appearance

Ms. Zola Megi, Advocate (Legal Aid Counsel) for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Court of the Learned Judge, Fast Track, South and West Sikkim, at Gyalshing, convicted the Appellant/Accused in Sessions Trial (Fast Track) Case No.05 of 2021 (*State of Sikkim vs. Dawagyal Lepcha)*, vide Judgment dated 04-06-2022, under Sections 376(2)(f) and (l), Section 457 and Section 506 of the Indian Penal Code, 1860 (hereinafter, the "IPC"). Although the Learned Trial Court opined that the Prosecution had however failed to prove the charge against the Appellant under Section 376(2)(j) of the IPC but did not pronounce an Order of acquittal under the said sections.

2. The Appellant assails the conviction (*supra*) and Order on Sentence dated 06-06-2022, whereby he was sentenced to undergo ten years rigorous imprisonment under Section 376(2)(f) of the IPC with a fine of ₹ 10,000/- (Rupees ten thousand) only, a similar period of imprisonment under Section 376(2)(l) of the IPC

with a fine of ₹ 15,000/- (Rupees fifteen thousand) only, five years rigorous imprisonment under Section 457 of the IPC with a fine of ₹ 5,000/- (Rupees five thousand) only, and two years imprisonment under Section 506 of the IPC. The sentences of imprisonment were ordered to run concurrently. All the sentences of fine bore default clauses of imprisonment.

(i) The facts as per the Prosecution is that, the forty-three year old victim, being physically challenged is unable to hear or speak properly and thereby employs gestures and a few words for communication. P.W.1, her sister-in-law and P.W.2, her cousin are able to communicate with her as they understand her gestures and words. The Complainant, P.W.5, the brother of the victim, lives in the main house, which is adjacent to the victim's house. P.Ws 7 and 8, working as labourers, are tenants in the same house as that of the victim and are friends with the Appellant. The Appellant is a resident of a nearby area and also a labourer.

(ii) On the night of the incident, the victim retired to her room after dinner. The Appellant allegedly being aware of the fact that she occupied the room alone, entered her room later that night, gave her some bananas and food and thereafter sexually assaulted her. He then waved his fist at her threatening her not to relate the incident to anyone. The same night P.W.1 the victim's sister-in-law, heard some sounds from the victim's house but paid no heed to it, as she herself was unwell. The following morning i.e., 30-06-2021, P.W.1 asked P.W.3 about the sounds coming from her room, whereupon the victim identified the Appellant as "*kancha*" and described how he had sexually assaulted her. The Prosecution version further is that, at around 3 a.m., the Appellant after committing the offence briefly entered the room of P.Ws 7

and 8, with the smell of alcohol in his breath. P.W.1 informed P.W.5 of the incident who in turn informed P.W.6, who advised him to lodge a report at the concerned Police Station. P.W.5 lodged Exhibit 3, the First Information Report (hereinafter, the "FIR") complaining that the offence occurred when the Appellant had come to their home and raped the victim during the night of 29-06-2021. He learnt of the incident on 01-07-2021 at around 7 p.m. from his wife P.W.1 and hence the FIR. The Police Station registered the case on 02-07-2021, against the Appellant, under Sections 376/448 of the IPC and endorsed it for investigation to P.W.14, the Investigating Officer (I.O.). On completing investigation, P.W.14 filed Charge-Sheet against the Appellant under Sections 376/448 of the IPC, duly informing therein that the Exhibits had been forwarded to the Regional Forensic Scientific Laboratory (RFSL), Saramsa, Ranipool, on 07-07-2021 and a supplementary Charge-Sheet would thereby follow on receipt of the RFSL Report.

(iii) The Learned Trial Court framed Charge against the Appellant under Sections 376(2)(f), 376(2)(j), 376(2)(l), 457 and 506 of the IPC, to which he took the plea of "not guilty" and claimed trial. Fourteen witnesses were examined by the Prosecution.

3. Learned Legal Aid Counsel for the Appellant before this Court submitted that the Learned Trial Court was in error in convicting the Appellant on the sole testimony of the victim with tangential reliance placed on the evidence of P.Ws 1, 2, 5, 7 and 8, which was of no assistance to the Prosecution case, as the witnesses not only failed to establish the case but were not ocular witnesses. The evidence of P.W.2 is an exacerbated version of the

incident as P.W.3 herself has nowhere deposed about such facts as alleged by P.W.2. That, the evidence of P.Ws 7 and 8 do not support the Prosecution case since they were not privy to the incident and admittedly heard no sounds from the room of the victim, during the course of the night when the incident allegedly took place. P.W.8 in fact specifically deposed that on the said night he did not hear any cries or shouts for help, although the victim has the ability to mouth some words. The evidence of the Doctor, P.W.13 reveals that there were no signs of sexual assault on the victim. She found injuries on the "*right lateral portion of the right thigh*" of the victim and deposed that such injuries can be caused by a fall. Although there were some scratch marks on the cheeks of the Appellant, it is not the Prosecution case that the marks were inflicted by P.W.3. Hence, the Doctor's evidence did not fortify the Prosecution version. That, although material Exhibits connected with the alleged incident were forwarded to the RFSL, the Expert who examined the Exhibits was not cited as a Prosecution witness and the RFSL Report failed to support the Prosecution allegations against the Appellant. P.W.2 in fact has been specific in her claim that the victim does not allow anyone to enter her room, hence the question of the Appellant entering the victim's room is negatived. That, there is no evidence to substantiate the Prosecution case and the evidence of P.W.3 is unreliable, the Learned Trial Court having failed to take into consideration the provisions of Section 119 of the Indian Evidence Act, 1872 (hereinafter, the "Evidence Act"), while examining P.W.3. Apart from which, P.W.3 admittedly suffers from mild retardation and epilepsy, making the requirement of testing of her competence to depose imperative. In fact, the evidence of P.W.1 reveals that P.Ws 2 and 5 had informed P.W.6, the

Panchayat Member, who summoned them to the Panchayat Bhawan on the next day. The victim, P.W.3 along with P.Ws 1, 2 and 5 went to the Panchayat Bhawan but as the matter could not be resolved with the Appellant, they went to the Police Station to report the matter where P.W.3 made her statement against the Appellant. That, the conduct of P.Ws 1 and 5 reveal that they sought to derive some benefit from the Appellant and on his refusal to settle the alleged incident, he was falsely roped in the case. That, the evidence of P.W. 1 establishes that she had not seen the Appellant on the night of the incident nor did she see him near the house of P.W.3. That, as per P.W.6, the victim allegedly narrated by gestures to the Panchayat President, one Meena Sharma, how the Appellant had sexually assaulted her, but the Panchayat President was not listed as a Prosecution witness, thereby leading to an adverse inference against the Prosecution. That, in view of the afore enumerated grounds, it is apparent that the Prosecution has failed to prove that the Appellant had committed the offence of sexual assault against the victim, hence the impugned Judgment be set aside and the Appellant be acquitted of all the charges.

4. Opposing the arguments of Learned Legal Aid Counsel for the Appellant, Learned Additional Public Prosecutor while supporting the impugned Judgment, submitted that, the entire evidence on record was considered by the Learned Trial Court and on being convinced thereof, the impugned conviction and Sentence were meted out to the Appellant. That, the evidence of P.W.2 who was called to interpret the gestures of P.W.3, corroborates the evidence of P.Ws 1 and 3. The Panchayat Member, P.W.6, has revealed that P.W.5 had reported the incident to him. That, the non-examination of the Panchayat President does not prejudice the

Prosecution case as the statements made to her by P.W.3 was heard by P.W.6, who has been duly examined. That, the evidence of P.W.7 reveals that the Appellant had left their company after the evening meal, but P.W.8 found the Appellant sleeping on an empty bed in their room at around 03.00 a.m. indicating that after he left their room, he committed the offence and returned to sleep on the empty bed. That, the victim through gesticulations, had unequivocally identified the Appellant and described the offence, thereby clearly establishing the commission of the offence on her by the Appellant. Her evidence is duly substantiated by the evidence of P.Ws 1 and 2. That, the Special Educator, P.W.4, also reveals that she had interpreted most of the words and actions of the victim, in the Court room and P.W.4 was duly assisted by P.W.2 in such process. The investigation of P.W.14 lends credence to the Prosecution case, which has therefore been proved beyond a reasonable doubt and the Appeal thereby deserves a dismissal.

5. Having considered the submissions and on due consideration of the entire evidence of the Prosecution witnesses and meticulous perusal of the records, we are unable to agree with the findings of the Learned Trial Court which led to the conviction of the Appellant for the following reasons;

(i) Exhibit 15 as per P.W.14 is an application for recording the statement of the victim under Section 164 of the Cr.P.C. Although the Prosecution has relied on Exhibit 1 (in two pages) purported to be the statement of the victim, recorded by the Learned Judicial Magistrate, in the presence of the Special Educator, P.W.4. The Learned Judicial Magistrate has not opined as to whether the victim who admittedly was physically and mentally challenged was competent to testify. According to the

I.O., Exhibit 1 was recorded on the same day with the assistance of the Special Educator/Interpreter, Mrs. Donkala Tshering Bhutia, P.W.4. It is worth noticing that the statement of P.W.4 before the Learned Trial Court was that the victim was asked some questions by the Learned Judicial Magistrate, which she i.e., P.W.4 interpreted and that P.W.3 gave her statement through some actions and few mumbled words. However, while reverting back to Exhibit 1, such interpretations alleged to have been made by P.W.4 have nowhere been recorded by the concerned Learned Judicial Magistrate. All that Exhibit 1 contains is the oath of the Special Educator and thereafter the "Preliminary questions 'of' the witness/victim" (*sic.*), which in all probability translates into preliminary questions that were put to the victim. Her answers to each of the questions put to her were recorded without so much as assessing her competence and ability to depose as envisaged by Section 118 of the Evidence Act, followed by the precautions set forth in Section 119 of the same statute. Above all, her answers to the preliminary questions put to her at no point even advert to or insinuate the commission of sexual assault on her by the Appellant. Exhibit 1 thereby serves no purpose in the context of the commission of the offence and deserves to be and is accordingly discarded, having no legal value.

(ii) P.W.4 is said to be a Special Educator working under the Education Department since June, 2021. We can safely presume that she is an expert in her field. In ***Malay Kumar Ganguly*** vs. ***Sukumar Mukherjee and Others***[1], the Supreme Court has observed that for the purpose of arriving at a decision on the basis of the opinions of experts, the Court must take into consideration the

[1] AIR 2010 SC 1162

difference between an 'expert witness' and an 'ordinary witness'. The opinion must be based on a person having special skills or knowledge in medical science. It could be admitted or denied. Whether such an evidence could be admitted or how much weight should be given thereto, lies within the domain of the Court. The evidence of an expert should, however, be interpreted like any other evidence.

(iii) On the anvil of the above principles while examining the evidence of P.W.4, in the first instance she does not reveal her educational qualifications or her field of expertise which qualifies and renders her as a Special Educator. The Learned Trial Court for its part, has while recording the evidence of P.W.4 failed to elicit information from the witness regarding her educational qualifications or for that matter other special qualifications that make her an expert in the field of interpreting the language and gesticulations of specially abled persons. Section 165 of the Evidence Act provides as follows;

> **"165. Judge's power to put questions or order production**.—The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-examine any witness upon any answer given in reply to any such question:
>
> Provided that the judgment must be based upon facts declared by this Act to be relevant, and duly proved:
>
> Provided also that this section shall not authorize any Judge to compel any witness to answer any question, or to produce any document which such witness would be entitled to refuse to answer or produce under sections 121 to 131, both inclusive, if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted."

This statutory provision clothes the Learned Trial Judge with powers to obtain proper proof and no provision of law debars the Learned Court from exercising such powers for attaining the ends of justice.

(iv) In ***Munna Pandey*** vs. ***State of Bihar***[2], the Supreme Court has held as follows;

> **"53.** Sarkar (1999, 15th pp. 2319 etc.) says that a Judge is entitled to take a proactive role in putting questions to ascertain the truth and to fill up doubts, if any, arising out of inept examination of witnesses. But, as stated by Lord Denning in *Jones* v. *National Coal Board*, [1957] 2 All ER 155 (CA), the Judge cannot "drop the mantle of a Judge and assume the robe of an advocate".
>
> **54.** Of course, the Judge should not be a passive spectator but should take a proactive role as emphasized by Phipson (Evidence, 1999, 15th Ed, para 1.21 as under:—
>
> *"When the form of the English trial assumed its modern institutional form, the role of the judge was that of a neutral umpire. This is still broadly the position in criminal cases. In civil cases, the abandonment of jury trial except in a few exceptional cases led to some dilution of this principle. The wholesale changes in 1999 of the rules governing civil procedure has emphasized the interventionist role of the modern judge. Whereas formally the tribunal was a 'reactive judge (for centuries past at the heart of the English Common Law — concept of the independent judiciary) instead we shall have a proactive judge whose task will be to take charge of the action at an early stage and manage its conduit."*
>
> (Emphasis supplied)
>
> **55.** This Court in *State of Rajasthan* v. *Ani @ Hanif*, (1997) 6 SCC 162, made very relevant and important observations as under:—
>
> *"11. … Section 165 of the Evidence Act confers vast and unrestricted powers on the trial court to put "any question he pleases, in any form, at any time, of any witness, or of the parties, about any fact relevant or irrelevant" in order to discover relevant facts. The said section was framed by lavishly studding it with the word "any" which could only have been inspired by the legislative intent to confer unbridled power on the trial court to use the power whenever he deems it necessary to elicit truth. Even if any such question crosses into irrelevancy the same would not transgress beyond the contours of powers of the court. This is clear from the words "relevant or irrelevant" in Section 165. Neither of the parties has any right to raise objection to any such question.*

[2] 2023 SCC OnLine SC 1103

> *12. Reticence may be good in many circumstances, but a Judge remaining mute during trial is not an ideal situation. A taciturn Judge may be the model caricatured in public mind. But there is nothing wrong in his becoming active or dynamic during trial so that criminal justice being the end could be achieved. Criminal trial should not turn out to be a bout or combat between two rival sides with the Judge performing the role only of a spectator or even an umpire to pronounce finally who won the race. A Judge is expected to actively participate in the trial, elicit necessary materials from witnesses in the appropriate context which he feels necessary for reaching the correct conclusion. There is nothing which inhibits his power to put questions to the witnesses, either during chief examination or cross-examination or even during reexamination to elicit truth. The corollary of it is that if a Judge felt that a witness has committed an error or a slip it is the duty of the Judge to ascertain whether it was so, for, to err is human and the chances of erring may accelerate under stress of nervousness during cross-examination. Criminal justice is not to be founded on erroneous answers spelled out by witnesses during evidence-collecting process. It is a useful exercise for trial Judge to remain active and alert so that errors can be minimised."*
>
> (Emphasis supplied)
>
> **56.** In the above context, it is apposite to quote the observations of Chinnappa Reddy, J. in *Ram Chander* v. *State of Haryana*, (1981) 3 SCC 191:—
>
> *"2. The adversary system of trial being what it is, there is an unfortunate tendency for a judge presiding over a trial to assume the role of a referee or an umpire and to allow the trial to develop into a contest between the prosecution and the defence with the inevitable distortions flowing from combative and competitive element entering the trial procedure. If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth.…"*
>
> (Emphasis supplied)**."**

From a consideration of the evidence of P.W.14, we find that the Learned Trial Court failed to comply with the obligations cast on the Court under Section 165 of the Evidence Act.

(v) On the other hand, the evidence of P.W.4 fails to reveal as to how she had interpreted the words or gesticulations of the victim. To enable evaluation of her evidence in chief it is reproduced hereinbelow;

> **"**I am a Special Educator posted at Kaluk Sr. Secondary School under the Education Department since June, 2021.
>
> I was present when the statement of the victim was recorded earlier by the Ld. Magistrate, West District at Gyalshing. The victim was asked some questions by the Magistrate which I interpreted. She gave her statement through some actions and a few mumbled words. She also wrote a few sentences.
>
> This is the same questionnaire of the victim recorded by the Magistrate in my presence [marked Exhibit 1 in two pages] and these are my signatures [marked Exhibit 1(a) collectively]. I also wrote down five questions in Nepali language [marked Exhibit 2] to which the victim wrote down her answers [collectively marked Exhibit 2(a)] as instructed by the Ld. JM to assess whether the victim is able to comprehend the questions put to her and whether she is capable of answering.
>
> She was accordingly found able to understand the questions and I found as per the questions put to her, she was capable of answering through gestures, actions and mumbled words as well as from her expressions.
>
> I was also present today when the statement of the victim was recorded before this Court. I found the victim was able to express herself with more clarity today as compared to the previous occasion when she was produced before the Magistrate.
>
> I was able to interpret most of the words and actions of the victim today especially since I was assisted by a person who was also present and who was familiar with the local signs and gestures of the victim and was therefore able to provide better clarity in the interpretation.**"**

(vi) On pain of repetition, it is imperative to notice that the questionnaire adverted to by the witness, P.W.4, being Exhibit 1 in her deposition, bears no revelations of the commission of offence by the victim whatsoever, far be it to have even implied sexual assault committed by the Appellant on the victim. Apart from the short falls pertaining to the educational and other qualifications of P.W.4, as already flagged by this Court (*supra*), from a careful perusal of her evidence, it is apparent that she has failed to indicate as to which words or gesticulations of the victim she had interpreted when Exhibit 1 was recorded to establish that sexual assault was committed on the victim and that the Appellant was responsible for the act of depravity. She has failed to inform as to how she concluded what the gesticulations of the victim amounted

to. In the absence of such clarity, it is indeed unfathomable as to how the witness was of any assistance to the Prosecution case. Her deposition before the Learned Trial Court throws no light whatsoever on the offence allegedly committed by the Appellant. Appallingly we find that while she claims to be a Special Educator with ability to interpret words and actions of the victim, she has admitted before the Learned Trial Court that "*I was able to interpret most of the words and actions of the victim today especially since I was assisted by a person who was also present and who was familiar with the local signs and gestures of the victim and was therefore able to provide better clarity in the interpretation"* (sic.). The evidence of P.W.4 is thus not only devoid of the fact of sexual assault committed on the victim but lacks in material facts to enable the Court to come to a conclusive finding regarding the allegation of sexual assault.

(vii) In ***State of H.P.*** vs. ***Jai Lal and Others***[3], while considering the value of an expert witness, the Supreme Court observed that;

> **"18.** An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.**"**

(viii) This Court is alive to the fact that in the ratio (*supra*) the Supreme Court was discussing the opinion of a expert under Section 45 of the Evidence Act, however as P.W.4 is said to be an expert witness, we are of the considered opinion that her evidence ought to be intelligible, convincing and tested to enable this Court

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[3] (1999) 7 SCC 280

to consider it with other evidence furnished by the Prosecution, to be able to draw an inference that the Appellant was the perpetrator of the offence. P.W.4 has failed in all the parameters delineated above, hence her evidence stands discarded as being purposeless and ineffectual.

(ix) That, aspect having been dealt with, it is now essential to bring to light the provisions of Sections 118 and 119 of the Evidence Act which reads as follows;

> **"118. Who may testify.**—All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them, or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind.
>
> *Explanation*.—A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.
>
> **119. Witness unable to communicate verbally.**—A witness who is unable to speak may give his evidence in any other manner in which he can make it intelligible, as by writing or by signs; but such writing must be written and the signs made in open Court, evidence so given shall be deemed to be oral evidence:
>
> Provided that if the witness is unable to communicate verbally, the Court shall take the assistance of an interpreter or a special educator in recording the statement, and such statement shall be videographed.**"**

(x) The Learned Trial Court before commencing the evidence of P.W.3 has failed to examine the competence of the witness, to testify in terms of Section 118 of the Evidence Act. Considering that the witness was mentally and physically challenged, it was incumbent upon the Court to have considered whether P.W.3 was prevented from understanding the questions put to her or from giving rational answers to those questions, on account of the witness's disabilities. Such examination of the witness (P.W.3) and the responses elicited from her would have either inspired the confidence of the Court with regard to the

victim's level of intelligence and thereby her abilities of comprehension or urged the Court to disregard such evidence as being unreliable, incomprehensible and unconvincing. The Learned Trial Court also ought to have been mindful of the requirements of Section 119 of the Evidence Act and adhered to the mandate therein, which *inter alia* lays down that if the witness is unable to communicate verbally, she can do so by signs or in writing and the Court shall take the assistance of an Interpreter or a Special Educator in recording the statement and such statement shall be videographed. Apart from the failure to enquire whether the victim had the ability to write and express herself, besides gesticulating, videography of the specially abled witness was not recorded, which if done, would have gone a long way in assisting the Appellate Court in understanding the import of the evidence of the witness.

(xi) In ***State of Rajasthan*** vs. ***Darshan Singh alias Darshan Lal***[4], the Supreme Court while considering the provisions of Section 119 of the Evidence Act *inter alia* held that;

> **"18.** ……. When a deaf and dumb person is examined in the court, the court has to exercise due caution and take care to ascertain before he is examined that he possesses the requisite amount of intelligence and that he understands the nature of an oath. On being satisfied on this, the witness may be administered oath by appropriate means and that also be with the assistance of an interpreter. However, in case a person can read and write, it is most desirable to adopt that method being more satisfactory than any sign language. The law required that there must be a record of signs and not the interpretation of signs.**"**

It was further held as follows;

> **"21.**To sum up, a deaf and dumb person is a competent witness. If in the opinion of the Court, oath can be administered to him/her, it should be so done. Such a witness, if able to read and write, it is desirable to record his statement giving him questions in writing and seeking answers in writing. In case the

[4] AIR 2012 SC 1973

witness is not able to read and write, his statement can be recorded in sign language with the aid of interpreter, if found necessary. In case the interpreter is provided, he should be a person of the same surrounding but should not have any interest in the case and he should be administered oath. **"**

(xii) The evidence of P.W.3 commences as follows;

> **"OATH ADMINISTERED**
> Evidence recorded in Camera
>
> The victim through the help of the Special Educator and witness Sumitra Subba, who is familiar with the words and actions of the victim is informed that she must swear to speak the truth.
>
> The victim is shown the accused on the screen through VC and asked who is he. Victim says Dawagyal.
>
> ……**"**

How the oath was administered to the specially abled victim is anyone's guess. The Appellate Court does not have the advantage of the Learned Trial Court to physically observe the demeanour of the witness and is totally dependent on the observations made and recorded by the Learned Trial Court which therefore require articulation and clarity. The Appellate Court can only be in a position to consider how the oath was administered based on the written recordings of the Learned Trial Court. As can be seen from the above statements, the victim was "informed" that she must swear to speak the truth. Whether she agreed to do so or not is a mystery. The Learned Trial Court also failed to record her findings as to how the Special Educator was familiar with the words and gestures of the victim as there is no proof whatsoever of the interactions or the number of times that such interactions ensued between P.W.3 and P.W.4, to enable P.W.4 to be familiar with the gestures of P.W.3.

(xiii) To augment the conundrum, the Learned Trial Court has recorded that, the victim through the help of Special Educator and witness Sumitra Subba is informed that she must swear to

speak the truth. Sumitra Subba (P.W.2), nowhere in her evidence has adverted to the fact that she was present when the evidence of P.W.3 was recorded by the Learned Trial Court or that P.W.3 by words or gestures during her evidence swore to speak the truth. P.W.4 has also merely stated that she was assisted by a person familiar with the local signs and gestures of the victim, but has not identified P.W.2 as the person who assisted her to make the interpretations. It thus falls to reason that not only has the Learned Trial Court failed to adhere to the statutory legal precautions as flagged (*supra*) but has been rather remiss during the recording of the evidence of P.Ws 2, 3 and 4, consequently it is an uphill task for the Appellate Court to comprehend the evidence to definitely conclude that P.W.3 was competent to testify or that the Appellant was the perpetrator of offence as alleged.

(xiv) That, having been said it would now be essential to consider what the offence of rape comprises of. Section 375 of the IPC reads as follows;

> **"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) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
>
> 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.**"**

(xv) From a reading of Section 375 (a) to (d) of the IPC *supra*, the basic constituents of the offence are described. Thus, the *sine qua non* for an offence under Section 375 of the IPC is penetration as described in the provision *supra* (a) to (c) and the act as described in Section 375(d). On the bedrock of these requirements, we now examine the evidence of the Prosecution

witnesses to consider whether it has been proved beyond a reasonable doubt that the Appellant was guilty of the offences, under which he was convicted.

(xvi) Although the Learned Trial Court has recorded that P.W.3 through her hand gestures pointed to her groin and with her forefinger showed thrusting movements at her groin, the Special Educator, P.W.4 has not interpreted the action or enlightened the Court that the said gestures indicated the act of penetration and thereby rape. P.W.2 has stated that when she was called to the house of P.W.1, she was asked by P.W.1 to interpret what the victim was saying through her gestures. The victim then used her forefinger to indicate how the Accused has thrust his penis into her private part. According to P.W.2;

> **"**……
> *Phuphu*, then through actions, hand gestures and some words told me the *Kancha*, *Dowgay* had touched her all over her body and kissed her on the cheeks. She also showed how he had caught her and thrown her on the ground and opened her pants. Then with her hands she pointed to her vagina and showed us how the accused had committed rape on her. *Phupu* used her forefinger to show us how the accused had thrust his penis into her private part. She also said the words *"Malai"* (me) and *"Dowgay"* (accused) after which she showed us through gestures that act committed by the accused on her. From her words and actions we understood Dawagyal had done *"chara"* to her.
> Question: Can you tell the Court as to what you mean by the word *"chara"*?
> Ans: By *"chara"* I mean sex. I saw the victim was in pathetic condition as her eyes were full of tears and she had bruises and marks on her breasts.
> ……**"**

(xvii) P.W.1 testified before the Court about how P.W.3 had narrated the incident to her but the hand gesticulation which was allegedly made to her by P.W.3 to describe the offence differs from the hand gesticulations shown by P.W.3 to P.W.2 and that she made before the Court. Why this is of importance is for the reason that the communication of the victim is through her hand gestures.

If the gestures are not consistent and vary from one witness to the next, added to the failure of the Court to record the competence of P.W.3 to testify, doubts arise about the authenticity of the gestures and of the Prosecution case of sexual assault, alleged to have been committed by the Appellant on the victim. The Learned Trial Court has recorded the evidence of the victim *inter alia* as follows;

> **"**……
>
> Q.No.3.Then what happened?
>
> Ans: The victim through her hand gestures shows she ate the banana and rice. **The victim then bends her left leg and points to the accused to show he did that to her.** She also through hand gestures point to her groin and with her forefinger shows thrusting movements at her groin. She also makes a fist and points to her mid section/waist and shows the accused then threatened her that he will box her and took out a "*khukuri".* The victim says the word "*khukuri".***"**

Pausing here momentarily, bending her left leg in our considered opinion has no relevance to the nature of the offence committed, nor is it indicative of sexual assault.

The Court went on to record as follows;

> "Q.No.4. Where did it happen?
>
> Ans: The victim pats the table and then the floor of the Court room to show where the incident had occurred. She through gestures interpreted by the Special Educator and witness Sumitra, says *"larayo"* (thrown to the ground). The victim specifically uses the word *"larayo"*. Thereafter, she showed the gestures of the act committed by thrusting her forefinger between the forefinger and the middle finger of the other hand to show what the accused did to her. The victim also held up one finger to say he did that to her once.
>
> Q.No.5. Did you tell anyone about it?
>
> Ans: Victim points to witness Sumitra and mouths and says the word "Bhauju" (sister-in-law). The victim then through gestures and words to the Interpreter and witness Sumitra says Dawagyal said *"tolai mo maya garchu. Bya garchu.***"**

(xviii) If the victim patted on the table, the interpretation thereto is not given by P.W.4. P.W.14, the I.O. by his investigation has not shed light on whether there was a table in the room of the

victim. The Court cannot draw conclusions without proof when the allegations are serious. The more serious the offence, the higher the degree of the proof required. P.W.4 has not deposed about P.W.3 having told her or made gestures about the Appellant having thrown her to the ground.

(xix) In ***Khekh Ram*** vs. ***State of Himachal Pradesh***[5]***,*** the Supreme Court observed that;

> **"33.** It is a common place proposition that in a criminal trial, suspicion however grave, cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this, the prosecution case has to be in the category of "must be true" and not "may be true". This Court while dwelling on this postulation, in *Rajiv Singh* v. *State of Bihar* [(2015) 16 SCC 369] dilated thereon as hereunder: (*Rajiv Singh case*, SCC pp. 392-93, paras 66-69)
>
> > "*66*. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt."
> >
> > ....."

(xx) It is also worth noting that the evidence of the victim from her first alleged narration of the incident to the witnesses P.Ws 1, 2 and 12 appears to have been clearly improved and exacerbated, since neither P.W.1 nor P.W.2 have mentioned that P.W.3 told them anything about a "*khukuri*". The sentence recorded in the Nepali language and attributed to the Appellant by P.W.3 being "*tolai mo maya garchu. Bya garchu.*"—"*I love you and will marry you*" have not been deposed by P.Ws 1, 2 and 12 as

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[5] (2018) 1 SCC 202

having been told to them by P.W.3. These sentences alleged to have been made by the Appellant is also not revealed in Exhibit 1. P.W.2 has also clearly exaggerated the physical condition of the victim when the victim allegedly narrated the incident to her and P.W 1. According to P.W.2, the victim was in a pathetic condition as her eyes were full of tears and she bore bruises and marks on her breasts. P.W.1 the person who met the victim first on the morning, following the incident, made no such observations of the victim's condition, as described by P.W.2, neither did P.W.12, the Police Constable who recorded the statement allegedly made by the victim. Contrary to the evidence of P.W.2 the evidence of P.W.13, the Doctor who examined the victim on 02-07-2021, two days after the incident, does not support the evidence of P.W.2 on the facet of the physical condition and bruises and marks on her breast, all that is recorded in the evidence of P.W.13 is that;

> **"**.....
> On examination: I found there was an abrasion in the right scapular region, irregular in size. No weapons were used.
> There were two bruises on the right lateral portion of the right thigh which was 2cm aprrox (sic.) in length and 6 approx cm in length.
> There was also a crushed wound in the right lateral maleolus (foot), 2cm approximately in diameter.
> All the injuries were simple in nature.
> Her UPT was done but since the result was faintly positive on the day of examination, I advised her to repeat it again. The result was thereafter negative.
> Her vaginal swabs collected and handed over to the accompanying police.
> .....**"**

(xxi) Hence, from the medical examination, it is apparent that there were no signs of sexual assault or force employed on the victim. This Court is aware that the Prosecution is not required to establish, in a case under Section 376 of the IPC that force was used. In this context, reference is made to ***State of Maharashtra*** vs.

Prakash and Another[6], wherein the Supreme Court ruled that for the offence of rape, it is not necessary that there should be actual use of force. A threat of use of force is sufficient and clause "thirdly" in the definition of rape in Section 375 of the IPC provides that; *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. It needs no reiteration that the person of the victim exhibited no signs of sexual abuse. Even if the evidence of P.W.3 is to be believed, then she has nowhere stated that before committing the alleged offence, the Appellant put her in fear of death or of hurt, thereby constraining her to grant consent to his assault. Further, in light of the vacillating evidence of P.Ws 1 and 2 about the gesticulations of the victim and the absence of injuries on P.W.3 as per the Medical Report Exhibit 8 and the evidence of P.W.13, it would indeed be a travesty of justice to conclude that the offence of rape had been committed by the Appellant. We are also inclined to draw an adverse inference against the Prosecution as provided by Section 114 *Illustration* (g) of the Evidence Act on the non-examination of the Panchayat President, one Meena Sharma, who according to P.W.6, was informed that the victim through hand gestures and actions had narrated the incident to her.

(xxii) The evidence of P.W.5 is hearsay evidence as he was informed of the alleged rape by P.W.1, his wife and thus is of no assistance to the Prosecution case. The evidence of P.W.6 also lends no support to the Prosecution case as the victim did not reveal anything before him. P.Ws 7 and 8 are oblivious of the alleged incident. P.W.9 was witness to the seizure of M.O.I., the T-

[6] 1993 Supp (1) SCC 653

shirt of the Appellant. The Prosecution has not elucidated as to why the T-shirt was seized as it is nowhere recorded that this was the same garment worn by the Appellant at the time of the alleged incident. P.W.14 has merely stated in his evidence that M.O.I., the navy blue T-shirt of the Accused was seized, vide Exhibit 5 the seizure Memo. It is also the admission of the P.W.14 that the RFSL Report revealed that no blood, semen or any other bodily fluids was detected in the vaginal swab of the victim and the penile swab of the Accused or even on M.O.II., the bed-sheet and M.O.III., the grey track pant of the Accused.

(xxiii) P.W.10 was merely a witness to the seizure of M.O.II., bed-sheet from the room of his brother-in-law. P.W.14, has failed to elucidate the reason for seizure of the bed-sheet from the room of P.W.5 when the incident is alleged to have occurred in the room of the victim herself. P.W.11 was also witness to the seizure of M.O.II., the bed-sheet and M.O.III., the grey track pant. It is nowhere mentioned that M.O.II., the bed-sheet and M.O.III., the grey track pant belonged to the Appellant.

(xxiv) P.W.12 was the Police Constable on duty at the Police Station on 02-06-2021 at around 1-2 p.m. and according to her the victim through gestures and actions revealed that the Appellant had given her five bananas and then raped her. Thereafter, the Appellant threatened her by waving her fist at her. Here, again the version of P.W.3 before the Court stating that the Appellant had threatened her with a "*khukuri*" or told her that he loved her and would marry her is belied as she had not stated so before P.W.12. P.W.12 failed to explain as to how she was in a position to interpret the gestures of P.W.3.

6. Consequently, after careful consideration of the entire evidence on record as discussed hereinabove, we are unable to conclude that the offence of rape in terms of Section 375 of the IPC had been committed on P.W.3 by the Appellant. The Prosecution has failed to prove its case beyond a reasonable doubt.

7. In light of the Prosecution failing to prove its case in terms of the high bar set for proof beyond a reasonable doubt, we deem it essential to and do hereby set aside the impugned Judgment and Order on Sentence.

8. Appeal is allowed.

9. The Appellant is acquitted of all offences under which he was charged.

10. He be set at liberty forthwith, if not required in any other matter.

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

12. No order as to costs.

13. Copy of this Judgment be forwarded to the Learned Trial Court along with its records.

(Bhaskar Raj Pradhan)
Judge
20-09-2023

(Meenakshi Madan Rai)
Judge
20-09-2023

Approved for reporting : **Yes**

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