

THE GAUHATI HIGH COURT

(The High Court Of Assam: Nagaland: Mizoram and Arunachal Pradesh)

ITANAGAR PERMANENT BENCH

CRL. REF (H) 2/2012

State of A.P. Petitioner.

-Versus-

Shri Kipa Tayu ... Accused

CRL. A(J) 2/2012

Shri Kipa Tayu ... appellant

-Versus-

State of A.P. Respondent.

**BEFORE
THE HON'BLE MR. JUSTICE HRISHIKESH ROY
THE HON'BLE JUSTICE DR.(MRS.) I. SHAH**

For the Accused : Mr. P. Taffo, Amicus Curiae

For the Respondent : Mr. I. Basar, P.P.

Date of Hearing and delivery of Judgment : 1.4.2013

JUDGMENT & ORDER (ORAL)

(Hrishikesh Roy, J)

This reference and appeal arise out of the judgment dated 29.6.2012 in the Sessions Case No. 01(YPA)/2010, rendered by the learned Sessions Judge, West Sessions Division, Yupia, Arunachal Pradesh. By this judgment, the trial Court convicted the accused (appellant) under Section 376 (2)(f) and sentenced him to R.I. for 10 years and fine of Rs.10,000/- and in default of fine, , simple imprisonment for further 3 months. Considering that the sentence is fore more than 7 years, the Criminal Reference (H) 2/2012 is filed under *Section 30(1) of the Assam Frontier (Administration of Justice) Regulation 1945* (hereinafter referred to as "*the Regulation*"), for confirmation of sentence.

2. We have heard Mr. P. Taffo, the learned Amicus Curiae representing the appellant. The State is represented by Mr. I. Basar, the learned Public Prosecutor.

3. According to the F.I.R. lodged by *Kipa Kain* (P.W.1) on 29.3.2009, the informant's minor sister aged about 5 years (hereinafter referred to as "*the victim*") was forcibly raped by the accused on the night of 28.3.2009. After receipt of the F.I.R., the Kimin P.S. Case No.4/2009 was registered under Section 376 of IPC and investigation was started by the O.C., Mr. M. Nyori (P.W.8). After the incident came to light, the fleeing accused was apprehended and tied up by the co-villagers. He was then arrested by the police and was charged under *Section 376(2)(f)* of IPC. The accused denied the charge and during the trial the prosecution presented 10 witnesses while the accused examined himself as the sole defence witness.

4. P.W.1 was the informant and is the elder brother of the victim. He was at *Kimin* and after receiving telephonic information of his sister's rape at *Kakoi village*, he lodged the F.I.R. and arranged for a vehicle to bring the victim from *Kakoi village* to the *Kimin Hospital*.

4.2 P.W.2 is the victim herself who was examined in the Court on 11.4.2011 – 2 years after the incident. She stated that she is a student of Class-I.

4.3 The victim's mother was examined as P.W.3, who stated that her daughter is now aged about 6 years. On 28.3.2009, she found the victim missing during dinner time and despite vigorous search, her daughter could not be found in the neighbouring houses. The witness went sleepless the whole night and at day break she resumed the search for the missing daughter. In the morning the P.W.3 found the victim returning to the house. The victim was barely able to walk. She narrated to her mother about the sexual assault by the accused under a tree in a nearby jungle in the confluence of 2 rivers. According to the witness, the accused belongs to the same *clan* and is like a brother to *the victim*.

4.4 P.W.4 is the *Gaon Burah* of *Kakoi village* who was informed about the incident by the victim's mother on the morning of 29.3.2009. As the victim was raped on the previous night, the mother was loudly crying and in fact she fainted in the residence of village headman.

4.5 P.W.5 was a Judicial Magistrate and was posted as the Circle Officer at *Kimin*. On 29.3.2009 he recorded the accused confessional statement which was proved as the *P.Exbt-2*. The Magistrate gave time for reflection and informed the accused that, he is not obliged to make the confessional statement.

4.6 P.W.6 was the Police S.I. at *Kimin* P.S. who took charge of the case at the final stage. He arranged for collection of the Forensic Report and filed the charge sheet in the case.

4.7 P.W.7 is Dr.(Mrs.) M. Lego (Tabi) was on emergency duty as the Medical Officer of the *Kimin* Community Health Centre on 29.3.2009. She examined the victim and noticed signs of recent sexual intercourse and found bleeding injuries on the victim's private parts. The Doctor also noticed the blood oozing out of the vagina when she examined the victim. Bloodstain on the victim's undergarments was also noticed by the doctor.

4.8 P.W.8 was the Officer In-charge of the *Kimin* P.S. who registered the case after receiving the F.I.R. He visited the place of occurrence and arrested the accused who was tied up by the co-villagers. The accused admitted his guilt before the police officer and the I.O. arranged for recording of his confessional statement, by the Magistrate.

4.9 Nyari Panklu (P.W.9) was villager of *Kakoi village* and he along with other villagers caught the accused as he was trying to flee after the incident came to light. He was witness to the seizure of the gunny bag, on which the assault was made.

4.10 P.W.10 was a member of the *Anchal Samity Member* and was a co-villager of *Kakoi village*. On 29.3.2009, the mother carried the bleeding victim on her lap and requested the P.W.10 to report the incident to the police. Accordingly the witness arranged for information to the *Kimin* P.S. He testified that the accused was caught by the villagers. He visited the place of occurrence and was an witness to the seizure of the blood smeared gunny bag upon which, the assault was made.

5. The accused in his testimony as the defence witness stated that he escorted the victim to her house, at a distance of 1 k.m. from his own house. According to the accused, he was drunk at that time and he did not know what happened. He suggested enmity between the family of the victim and his own family.

In his cross-examination, the accused stated that the victim was born sometime in the year 2001 and according to him she is unlikely to be 3 years but should be about 9 years, on the date of incident.

6. The material *Exbt.4* was prepared by the Medical Officer of the Kimin C.H.C. The victim was medically examined on the morning of 29.3.2009 and doctor gave the following opinion :

"There are signs of recent sexual assault in the genital organ of the child (Minor girl) with bleeding per-vaginum, with tear of vagina with signs of inflammation of Vulva (Labia Minora) with tenderness of genitalia and public region (Lower Abdomen) of the child (minor girl). Whole of the Genitalia and thigh of the child was stained with Blood and fresh Bleeding still coming from vagina at the time of examination of the child."

7.. Representing the accused, Mr. P. Taffo, the learned Amicus Curiae refers to the victim's statement recorded by the trial Court and he submits that, on the sexual assault, the testimony of *the victim* was not recorded. The Counsel also refers to the accused's evidence as D.W.1 and submits that he did not support the confessional statement, recorded under Section 164 Cr.P.C. by the Magistrate.

8.. A scrutiny of the evidence on record shows that the victim was a child who was aged about 4/5 years, when the incident occurred on 28.3.2009. The signs of recent sexual assault were noticed on the victim and she was bleeding from the vaginal tear. The wearing apparels of the victim were found bloodstained on account of the sexual assault and injury signs on her private part was discernible to the doctor. Therefore the minor *victim* was undoubtedly subjected to sexual assault on the night of 28.3.2009. The question is whether the trial Court rightly concluded the accused to be the perpetrator of crime.

9.. In his confessional statement (*Exbt.-2*), the accused clearly admitted his guilt and stated that he took the victim to the nearly river bank and sexually assaulted her at about 7 P.M. Next morning, he allowed the victim to go to her own house. Thereafter he was caught by the co-villagers. Although during trial, the victim doesn't support his confessional statement, in his testimony as a defence witness he stated that he was drunk when he was escorting *the victim* to her own house at about 9 p.m. He doesn't say categorically he did not commit the crime but feigns ignorance about the sexual assault. It must also be noted that it is not the case of the defence that accused was administered intoxicant without his knowledge and accordingly in this case, we see no scope to consider benefit for the accused under Section 85 of the IPC.

10. The victim's mother (P.W.3) in her testimony clearly stated how she saw *the victim* walking unsteadily on the morning of 29.3.2009 with the bleeding injuries on her private parts. The victim narrated the assault of the previous night to her mother and this was clearly stated by P.W.3. The two co-villagers as independent witnesses have supported the prosecution story. The village headman (P.W.4) to whom the victim's mother reported the incident testified that the mother fainted at his residence as she was highly agitated by the assault on the minor *victim*. More importantly the doctor (P.W.7), who examined *the victim* on the morning of 29.3.2009 gave vivid description on the injuries and also the flow of blood from the victim's private parts. Therefore there are enough evidence to support the prosecution case and having regard to the tender age and her rustic background, the Trial Court may have spared her the ordeal of recounting her experience in Court.

11. The accused in his statement under Section 164 Cr.P.C. had admitted his guilt and the evidence of the recording Magistrate (P.W.5) suggests that the statement was voluntary as the accused was informed of his rights and was also given time for reflection.

12. In the above circumstances, although the accused retracted from his confessional statement, having regard to the corroborative evidences of P.W.3, P.W.5, P.W.9 and P.W.10 and the *Exbt.2 & 4*, we are of the considered opinion that the appellant was rightly convicted under Section 376(2)(f) of the IPC. Consequently, the sentence is confirmed under *Section 30(1) of the Regulation* and the appeal is dismissed. For the assistance rendered to the Court, the Government will pay Rs.5,000/- as legal fee to the learned Amicus Curiae Mr. P. Taffo.

13. Send down the L.C.R.

JUDGE

JUDGE

Datta