

**IN THE GAUHATI HIGH COURT
(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM &
ARUNACHAL PRADESH)
ITANAGAR BENCH.**

Crl. A 02 (AP) 2015

- 1. Sri Kalu Tamang,
S/o Sher Bahadur Tamang,
R/o Village- Lower Bhalukpong,
P.S.- Bhalukpong,
District- West Kameng (A.P.),
C/o David Kakaling Road,
Bomdila.**
- 2. Sri Suresh Thapa,
S/o Sri Bombar Bahadur Thapa,
R/o Village- New Kashki,
Ward No. 7,
P.S.-Kaski (Nepal),
Camp-Bomdila Bakaling,
C/o Himalayan Holidays**

→ accused/appellants.

**By Advocate:
Mr. M. Adhikary.**

-Versus-

- 1. The State of Arunachal Pradesh,
Represented by P.P., A.P.**
- 2. Miss Juri Kalita,
D/o U.N. Kalita,
Medical Colony Bomdila,
C/o Himalayan Holiday,
P.O.-Bomdila,
Dist- West Kameng (A.P.)**

→ Respondents.

**By Advocate:
Mr. K. Tado, PP, Arunachal Pradesh.**

BEFORE
THE HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
Date of hearing : 02.08.2016
Date of Judgment & Order : 05.08 .2016

JUDGMENT & ORDER (CAV)

Heard Mr. M. Adhikary, learned counsel for the appellants and Mr. K. Tado, learned PP, appearing on behalf of the State.

2] The prosecution story, in brief, is that on finishing her official work on 18.09.2004 at around 8.00 PM, the prosecutrix boarded a vehicle driven by the appellants/convicts, who were to drop her in the residence of her brother-in-law at Kakaling. The appellants who were drivers were sent by brother-in-law of the prosecutrix to enable her to meet her sick mother who was staying in her brother-in-law's house. The prosecutrix thereafter stated in her complaint that on reaching near the house of her brother-in-law, the appellants told her that the vehicle required some minor repair works at Thinley garage and requested her to bear the slight delay. The appellant Shri Suresh Thapa thereafter drove the vehicle down hill stating that the vehicle could not start by itself. When asked where they were going, the appellants told the prosecutrix that they were going to Dedza. As the prosecutrix began to doubt the intention of the appellants, the prosecutrix started to shout, but the appellants closed all the windows of the vehicle. The appellant Suresh was driving the vehicle and Kalu, who was sitting next to her, closed her mouth with his hand. The prosecutrix struggled and caught the steering wheel and tried to stop the vehicle but after some time the vehicle entered Kutha Link road ner Dhukhumpani area and stopped a little away from the main road. As soon as the vehicle stopped, the prosecutrix tried to run away, but the appellants caught her and dragged her towards the jungle. They forcefully removed her clothes and raped her. It was only in the morning that the prosecutrix reached the home of her brother-in-law.

3] On the basis of the complaint made by the prosecutrix, Bomdila P.S. Case No. 11/2004 under Sections 376/342/506/34 IPC was registered and the investigation started. The prosecutrix was taken for medical examination on 19.09.2004 and the appellants/convicts i.e. Suresh Thapa and Kalu Tamang also gave their confessional statement before the Magistrate under Section 164 Cr.P.C. The clothes of the Prosecutrix and the appellants were sent to the FSL for examination.

4] After the investigation, the I.O. having found a prima-facie case, the I.O. submitted a Charge-Sheet under Section 376 (2) (g)/342/506/34 IPC. The case was committed to the trial Court for trial. The charge under Section 376 (2) (g) and Section 342 IPC was framed against the accused appellants.

5] After recording the evidence of 7 prosecution witnesses and 3 defence witnesses, the statements of the accused appellants were recorded under Section 313 Cr.P.C. The learned Addl. Sessions Court, West Sessions Division, Bomdila thereafter passed its impugned judgment and order dated 09.01.2015 in Sessions Case No. 15/2012 (WSD/BDL) convicting the appellants under Section 376 (2) (g) and sentencing them to undergo R.I. for 6 years and a fine of Rs.10,000/- each, I.D. six months imprisonment.

6] Mr. Adhikary, learned counsel for the appellants has made a challenge to the impugned judgment and order dated 09.01.2015 passed by the learned Addl. Sessions Judge, West Sessions Division, Bomdila and submits that even though the prosecutrix did not turn up for whole night in the house of her brother-in-law there was no commotion or any attempt to find the prosecutrix by her brother-in-law. The appellants counsel submits that the examination of the prosecutrix by the Doctor shows that no rape had been committed. He submits that there was no sign of injury on the vagina, even though, there was some injury in the inner thigh of the prosecutrix. The appellants counsel submits that though she was in the vehicle the whole night with the appellants, she did not raise any hue and cry to attract the attention of any person who might be passing by. He also submits that the evidence shows that when the prosecutrix went to the house of her brother in law, she took bath and went to sleep for some time. He, thus, submits that the conduct and behavior of the prosecutrix suggests that nothing happened against her own will and volition during the previous night.

7] The appellants counsel submits that the P.W. 7, i.e. the Magistrate, did not state in his evidence that the prosecutrix had told him that she had been raped. The learned counsel for the appellants submits that the learned Trial Court could not have relied upon the confession made by the appellants before the Magistrate, inasmuch as, in Para-52 of the impugned judgment, it is stated that such confessional statement were not available in the record. The appellants counsel also submits that penetration is sine qua non to prove rape and in the present case, there is no evidence that there was penetration on the private parts of the prosecutrix.

8] Learned PP, Mr. Tado submits that the documents exhibited and the evidence adduced clearly shows that the appellants had committed gang rape upon the

prosecutrix. The learned PP submits that as per law laid down by the Apex Court, the sole testimony of the prosecutrix is enough to convict the culprits, if it inspires the confidence of the Court. The learned PP submits that the evidence having clearly proved that the appellants had committed rape, the impugned judgment and order dated 09.01.2015 passed by the Addl. Sessions Court, West Sessions Division, Bomdila in Sessions Case No. 15/2012 (WSD/BDL) should be up-held and the appeal should be rejected.

9] I have heard the learned counsels for the parties. On perusal of the records and the evidence adduced, I find that the prosecutrix has stated in her complaint that the appellants had threatened to kill her if she shouted. The physical examination of the prosecutrix by the Doctor opined that there were multiple bruises injuries on both thighs and more on the right thigh, though there is no sign of any injury on the vagina of the prosecutrix. The examination of the vagina of the prosecutrix also shows that her hymen was absent. This could have been due to many reasons and is not conclusive that rape was the cause. The examination of the appellant Suresh Thapa and Kalu Tamang by the Doctor is to the effect that the seminal stain in the dirty undergarments of the appellants were to be analysed. The seizure list, P. Ex. 4, shows that the Tata Sumo in which the prosecutrix was taken was seized and that the wind shield was completely broken. The two left side windows were also completely broken. Scattered broken glass pieces were found inside the vehicle floor and seats. The seizure list, P. Ex.7, also shows that the appellants under garment (Panti), light rose colour, having a embroidered flower on front outside portion was torn. There was also suspected pubic hair and blood semen stains. Further, one coloured jean trouser had semen stains in the frontal region.

10] The evidence of the prosecutrix is reproduced below:-

"I know the accused persons standing in the dock since 2000 as my sister got married to Shri Tsering Wange my brother in law. I know Suresh Thapa and the other accused is working with a friend of my brother in law as a driver. On the next day of Biswakarma on 18.09.2004 I was working with my brother in law at Himalyan Holiday, Tour & Travels Private Co at Bomdila. My sick mother was sent to my sister at Kakling. My brother in law asked this accused person to drop me at Kakling in his own vehicle. These two accused persons in the pretext that they will put the seat have taken the said vehicle in the garage called Thinley which is located after crossing the house of my

brother in law where my sick mother was staying. I was of the impression that this accused persons will dropped me back at the said house after having put the seat at said garage. There they took wine and meat at garage. They offer me a glass of wine forcefully which I did not take but kept in my hand. One lady was there in said garage and she was serving the alcohol. There in the garage I did not feel uneasy but after having put the seat when we left the said garage they told me that it is not possible to get the vehicle started hence start with motion these two accused persons took the vehicle down the road instead of going back to my brother in law's said house. They started misbehaving me while moving down the road for which I forcefully handle the steering of the vehicle and while doing so the said vehicle got stuck on the drain for some time. I tried to stop the vehicles coming from opposite direction but those vehicles were found to be the vehicles of the army personal. And also these alleged accused persons scared me by saying that they are all army personal and are in mass. I with a believe that these accused persons shall not be able to misbehave me in that beasy road as it was not midnight but may be it was 8 to 9 pm. I was thinking that once I reach town area I will give them slap and shout for help. Later on they managed to take out vehicle from the said drain and was moving towards Dukum Pani. After reaching Dukum Pani they diverted the vehicle towards a Kaccha road. Somewhere on this road again the said vechicle stuck up but there was a house nearby the place where the said vehicle got stuck up. It was isolated place. And no one was there in the said house. There inside the vehicle and even outside the said vehicle that accused Suresh Thapa with the help of other accused Kalu Tamang raped me. Before I was raped I even tried to run away and was running towards main road but I could not as they caught hold me and threatened to kill me. After commission of the rape by Suresh Thapa I managed to run towards main road. They came after me and again forcefully took me down the main road towards jungles and I was again raped thereby Kalu Tamang. They assaulted me. So I gave up resisting as I thought that if I resist they may kill me also. Once again the said vehicle got stuck on the road and the vehicle cap side won. These two accused persons tried to pull out the vehicle but could not. Hence we had to stay there in the vehicle till morning. In the morning a truck came which helped the accused persons to pull out the said vehicle. Thereafter, I was dropped in the place of my brother in law. When I reached the place of my brother in law I started breaking the glasses of the said vehicle out of frustration. When I was breaking the said vehicle accused

Suresh Thapa was present but accused Kalu Tamang was already gone by then. I entered the house of brother in law and narrated the whole incident to my sick mother and my sister. I was made to take bath by my mother and sister as my clothes were dirty. Any my brother in law went out to nab these accused persons which he did and I lodged the FIR against these accused persons in the same morning. The Police officer recorded my statement then and there. I was taken to the office of Magistrate at Bomdila. P/Exh.8 (b) is my signature. This FIR was written by my brother in law on my behalf. I read the FIR before I put my signature on it. I was on the impression that these accused persons will be kept in the jail since after lodging of the FIR but this has not happened. My mother from suffering from cancer. I feel that my mother would have lived for longer had this incident not happened in my life. I cannot come to this Court to give my deposition time and again since now I married and having two children. I have come to this Court without knowledge of my husband as he does not want meet to attend the Court in connection with this kind of case. So my humble submission is that these accused persons punished as per law”.

11] With regard to the appellant’s counsel contention that the conduct and behaviour of the prosecutrix, on reaching her brother in law’s house the next morning, by taking a bath and going to sleep suggests that nothing happened, is belied by the evidence given by the prosecutrix in her cross examination. In her cross examination she states as follows:-

“Complaint could have been lodged after escaping from the P.O. but had an apprehension that these accused might fled away so I wanted that they should go back to my place to drop me. Moreover for me the place of occurrence is far from Dokum Pani for which I needed a vehicle to drop me. The vehicle that helped them to pull out our vehicle was fetched by them from the main road. I did not go to main road with them to fetch this said vehicle. I was nervous and shocked by that time so I did not know how many people came to help them and even if you asked me the type of the vehicle that was fetched I would not able to recollect. I even did not tell the people who came to help the accused persons about the incident that had happened with me. I did not tell these people about the incident as I had an apprehension that these people might also do the same thing to me which these accused persons have done. An these accused persons also did not try

to go away living me alone there at P.O. And I was dropped by the accused persons there at my place in the morning. The accused Suresh Thapa of my brother in law. The police personal came to my brother in law house after one or two hours from the time I reached. I took bath and went to sleep for some time”.

12] A reading of the evidence adduced by the prosecutrix in her cross examination suggests that the prosecutrix had kept her wits about her, so that the appellants could be caught and that she would be taken back from a deserted place to a safe place. The evidence also shows that prosecutrix took her bath and went to sleep only after the Police had arrived in the house. Thus, in my considered opinion, the submission of the appellants counsel suggesting that nothing happened cannot be accepted by the Court. To the appellants counsel submission, that the Magistrate, PW.7 in his evidence did not state that the prosecutrix had told him that she had been raped, the evidence of PW. 7 is to the following effect and are as follows:-

“In the year 2004, I was posted at Bomdila as a Circle Officer. On 22.09.2004 I have recorded the confessional statement of Ms. Juri Kalita u/s 164 Cr.P.C. as a Judicial Magistrate First Class. The same was recorded on the prayer of the Police and on the instruction of CJM, recorded by me in original is available in the record and same has been exhibited as P.Exh.-12 and P.Exh.-12 (a) to (b) are my signatures on it. In the confession, she had revealed that she was raped by two persons namely Suresh Thapa and Kalu”.

“The word rape and forceful sex were not recorded in my recording statement of the Victim”.

13] The extract by the exhibit P.Exh.-12 is reproduced below:-

“Both of them hold and over powered me and played with my body and took away my chastity in tears”.

14] With respect to the submission of the appellants counsel that the learned Trial Court could not have relied upon the confession made by the appellants before the

Magistrate, which was recorded under Section 164 Cr.P.C., this Court is in agreement with the learned counsel for the appellants.

15] In Paragraph 52 & 53 of the impugned Judgment and order, the learned Trial Court has stated as follows:-

"52 It is pertinent to mention here that these accused persons here in this Court revealed that they made confession before the Magistrate. This fact of making confession before the Magistrate by these accused persons were kept hidden in the file as the same are not exhibited here in this Court by the prosecution though some of the PWs have mentioned".

"53 Since the said confessional statement of these accused persons bear the seal and signature of a public servant, this Court has to take judicial notice of the same and presumed that they have confessed".

It is settled law that unless documents are exhibited, the said documents do not become admissible in evidence. The confessional statement of the appellants made under Section 164 Cr.P.C., wherein, they had stated that they had raped the prosecutrix, could not have been considered by the learned Trial Court for the reason stated above.

16] With regard to the submission of the counsel for the appellants that no rape had occurred as there was no penetration, the evidence of the prosecutrix is to the effect that the appellants had raped her. This implies that penetration occurred. Also the Doctors Physical examination of the prosecutrix also states that there were bruises on the inner portion of both thighs, more on the right thigh. The FSL report also tends to support the fact that rape had occurred, inasmuch as, the FSL reports states that the Panti (Ex. No. Sero-27204) and Jean (Ex. No. Sero-27304) of the prosecutrix, the under pants of both the appellants (Ex. No. Sero-27604 and 27704) and the vaginal swab (Ex. No. Sero-279/04) gave positive test for human semen.

17] The evidence of D.W. 1, who was the ex-business partner of the brother in law of the prosecutrix is to the effect that the appellants were working under him as drivers. D.W. 1 states that the brother-in-law of the prosecutrix requested that his

driver drop the prosecutrix at his house. The Driver accordingly picked up the prosecutrix and when reached the house of brother in law of the prosecutrix, the prosecutrix was not willing to get down from the vehicle, but requested the driver to teach her how to drive the vehicle. The vehicle was taken down towards Dokum Pani and on the way, the prosecutrix dashed the vehicle into a drain. It was only in the morning that the vehicle could be pulled out with the help of a Truck. D.W. 1 also states that the prosecutrix did not try to escape from the vehicle at any time and in fact came back to house of her brother in law in the morning with the appellants.

18] The evidence of D.W. 2 & D.W. 3, who are the appellants, is similar. They stated that the prosecution did not want to get down from the vehicle on reaching her brother-in-law's house as she wanted to learn driving. While driving the vehicle, she dashed the same into a drain. The vehicle could not be pulled out and the same was pulled out with the help of a Truck in the morning. The appellants also submitted that on reaching the house of the brother-in-law, the prosecutrix and her brother-in-law started assaulting them and damaged the vehicle. The evidence of the appellant No. 2 in his cross examination is to the following effect:-

"The magistrate did not torture us before recording of the confessional statement. I went to hospital where medical examination was done to me. I took some liquor (beer) in that night. I cannot say if the victim girl will say that she has been raped by me just because she hates me. The examination done to us by the medical officer is not denied".

The evidence of D.W. 3, i.e., the appellant No. 2, in cross examination, is as follows:-

"We took liquor on that day. It was the dark at night when we asked him to go back home in any one of the vehicle that was going to Bomdila. May be due to fear she did not want to go in those vehicle. No police personnel were there inside the chamber of the Magistrate. The Magistrate did not torture me while recording my c/statement. Medical examination was done to me by the medical officer. The victim lady was taken for medical examination in connection with this rape case. The previous alleged abortion done by the victim lady is not connected in this case. This is not the fact that I have deposed false deposition to defense myself. I cannot say if the said victim would publicly say that she is raped by me just because she hates me due to the enmity in between my master and her brother in law".

19] The evidence of brother in law of the prosecutrix i.e., PW. 54 is to the following effect:-

"On the next early morning at about 8 AM driver Suresh Thapa and my sister in law came to my house. But Kalu Tamang was not come. Then I've enquired my sister in law as to where she had been in the whole night, on that she started crying and I also found that her clothes were torned. Suresh Thapa who also came with my sister in law suddenly fell on my feet and begging apology had confessed that after having alcohol and due to influence of alcohol he did some misdeeds with my sister in law. Then asked about accused Kalu Tamang who has not come along with them on which accused Suresh Thapa told that we had just dropped him in his house accordingly we went to his house and found him in the bathroom, and Kalu Tamang was trying to hide his garment. And after coming back from Kalu Tamang house with his garments, my family already reported the matter to the police".

20] The evidence of Doctor, PW. 3, is to the effect that there was injury in both the inner portion of the thighs of the prosecutrix. Vaginal swab had been collected by him and the same was handed over to the I.O. of the case for further analysis. The Doctor has also stated that he examined the appellants and the under garments of the appellants were handed the same over to the Police for further analysis. The Doctor also stated that the appellant No. 2 had bruises in the left side of eye and blood stain on his pant Zipper. The evidence of the I.O., PW. 6 is to the effect that during investigation, he recorded the statement of the witnesses, visited the place of occurrence and collected the seized items for examination by the FSL. The statement of the I.O. is to the effect that he requested the Magistrate for recording the confessional statement of the appellants under Section 164 Cr.P.C. However, he did not collect the statement so recorded by the Magistrate. The I.O. also states that he filed the Charge-Sheet without enclosing the confessional statement of the appellants.

21] On perusal of the evidence on record, I find that there has been no delay in filing the FIR. In fact, the evidence of the appellant No. 2 i.e. D.W. 2 is to the effect that the prosecutrix was taken to her brother-in-law's house. She went inside the

house in an angry mood and came back few seconds later and smashed the vehicle. Thereafter, the prosecutrix and her brother in law started assaulting the appellant No. 2. The above evidence of appellant No. 2 gives credence to the fact that the appellant No. 2 had raped the prosecutrix.

22] The extract of the evidence of PW. 2 is reproduced below:-

"On received her home she went inside the home in anger mood to be come back after few second and smashed the said vehicle. The victim girl and Tsering Wange started assaulting us".

23] The evidence of D.W. 2 is also to the effect that after the vehicle got stuck in the drain, the appellants requested her to go back home in the evening by a Truck, which she did not listen. This evidence given by the DW. 2 implies that there were Trucks moving nearby when the vehicle got stuck in the drain. If that was the case, the appellants could have easily asked the help of a Truck driver in the same evening to pull out the accident vehicle. No reasons have been given by the appellants as to why they did not ask the help of the Truck Driver in the evening of the accident itself but asked the help from a Truck Driver only in the next morning.

24] On going through the evidence adduced by the witnesses and the prosecutrix, I find that there is no reason to doubt the evidence given by the prosecutrix that she was raped by the appellants. Though, there are minor discrepancies in the evidence viz-a-viz complaint submitted by the prosecutrix, I find that statement/evidence of the prosecutrix inspires confidence.

25] The examination of the appellants under Section 313 Cr.P.C. is basically to the effect that rape had not taken place.

26] In the case of **Narendra Kumar-vs- State (NCT OF DELHI)** reported in (2012) 7 SCC 171, the Apex Court has held at Para-20 is as follows:-

"20 It is a settled legal proposition that once the statement of the prosecutrix inspires confidence and is accepted by the Court as such, conviction can be based only on the solitary evidence of the prosecutrix and no corroboration

would be required unless there are compelling reasons which necessitate the court for corroboration of her statement. Corroboration of testimony of the prosecutrix as a condition for judicial reliance is not a requirement of law but a guidance of prudence under the given facts and circumstances. Minor contradictions or insignificant discrepancies should not be a ground for throwing out an otherwise reliable prosecution case”.

27] The Apex Court has also held in the case of **O.M. Baby (DEAD) by LRs-vs-State of Kerala** reported in (2012) 11 SCC 362, that absence of injuries or marks of violence on person of prosecutrix may not be decisive for proving that rape had not been committed. The absence of injuries or marks of violence on the prosecutrix, except the injuries in the inner portion of her thighs, in the opinion of this Court, does not imply that rape was not committed, inasmuch as, there can be passive resistance on knowing that there was futility in violent physical resistance.

28] In view of the fact that there were semen stain and injury on the inner side of the prosecutrix, coupled with the evidence given by the prosecutrix witnesses and the defence witnesses, this Court finds that appellants had gang raped the prosecutrix.

29] In view of the above reasons, this Court finds no infirmity with the impugned judgment and order dated 09.01.2015 passed by the Addl. Sessions Court, West Sessions Division, Bompala in Session Case No. 15/2012 (WSD/BDL).

30] The appeal is accordingly rejected.

31] Send back the Lower Court records.

JUDGE

Talom