

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

Crl. A. No.04 (AP)2017

***Shri Rajen Das,
S/o Shri Suren Das,
Vill-Jalukbari,
P.O./ P.S. Tezu,
Dist-Lohit,
Arunachal Pradesh***

.....Convicted accused.

**Shri Suren Das,
S/o Late D. Das,
Vill-Jalukbari,
P.O./ P.S. Tezu,
Dist-Lohit,
Arunachal Pradesh.**

.....Appellant.

Advocates for the Appellant:

Mr. M. Pertin, Sr. Adv.

Mr. D. Tatak, Adv.

-VERSUS-

- 1. The State of Arunachal Pradesh,**
represented through the learned Public Prosecutor, Arunachal Pradesh.
- 2. The prosecutrix, (name withheld),
Vill-Jalukbari,
P.O./ P.S. Tezu,
Dist-Lohit,
Arunachal Pradesh.**

.....Respondents.

Advocates for the respondents:

Mr. K. Tado, learned Public Prosecutor, Arunachal Pradesh,

:::BEFORE:::

HON'BLE MR. JUSTICE AJIT BORTHAKUR

Date of hearing - **08.11.2017.**

Date of judgment - **08.11.2017.**

JUDGMENT & ORDER (ORAL)

This appeal under Section 374 (2) Cr.PC has been preferred against
the judgment and order, dated 16.06.2014, passed in Sessions Case

No.33/L/2012 (Tezu) under Sections 448/376 IPC passed by the learned Sessions Judge, East Sessions Division, Tezu, Arunachal Pradesh, whereby the accused, namely, Rajesh Das has been held guilty and sentenced to undergo S.I. for one year under Section 448 IPC and also to undergo R. I. for 7 years and to pay a fine of Rs.30,000/-, in default, to suffer S.I. for 6 months under Section 376 IPC.

2. The instant appeal has been preferred by one Suren Das, on behalf of his convicted son, namely, Rajesh Das.

3. The appellant's case, precisely, is that, on 29.05.2012, the prosecutrix, who is aged about 17 years, lodged an FIR before the Officer-in-Charge, Tezu P.S. alleging that on 28.05.2012 at around 07.00 PM, while she was alone at home, all on a sudden, the accused Rajesh Das trespassed into her house through the backside and attempted to rape her forcibly. When the prosecutrix resisted such approach of the accused, the latter assaulted her by means of a dao. The accused took the prosecutrix to the nearby jungle by gagging her mouth and committed rape on her. The accused bite her on her chin causing injury. She struggled to get rid of him and to call her mother who was out of station, but in vain.

4. Based on the above FIR, Tezu P.S. Case No.26/2012, under Sections 448/324/376 IPC was registered and the Officer-in-Charge, namely, SI Rajnarayan Rai himself took up the investigation into the case and after completion of investigation submitted the Charge-Sheet u/s 448/324/376 IPC against the convicted accused. As the offence under Section 376 IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, First Class, Tezu committed the case under Section 209 Cr.P.C., to the Court of Sessions Judge, East Sessions Division, Tezu, after observing necessary formalities u/s 207 Cr.P.C. On appreciation of the evidence, placed before the Court and hearing the learned counsel of both the sides, the learned Sessions Judge having found prima-facie grounds to proceed, u/s 324/448/376 IPC framed charges accordingly against the accused vide order, dated 29.08.2012. The Charges were read over and explained to the convicted accused, to which he pleaded not guilty and claimed to be tried. During the trial, the prosecution examined 8 (eight) witnesses and exhibited 6 number of

documents and further, 4 materials exhibits. On closing the evidence of the prosecution side, the learned Sessions Judge recorded the statement of the accused u/s 313 Cr.P.C vide order, dated 07.08.2014. The accused pleaded not guilty and inclined to examine witnesses in defence. Accordingly, the defence examined two witnesses. Thereafter, on hearing the learned counsel of both the sides and appreciation of evidence on record, the learned Sessions Judge held the accused guilty of the charges u/s 448/376 IPC and sentenced him as stated above.

5. Being aggrieved by the above impugned judgment and order, the instant appeal has been preferred on the grounds, *inter-alia*, that the prosecutrix and the accused had old love affairs; that the trespass of the accused into the dwelling house of the prosecutrix was improbable as at about 07.00 PM, the prosecutrix-girl was stated to be alone at home would definitely not keep the back door unlock and had there been any force applied on her, she would have certainly raised alarm and thereupon, the neighbours would have rushed for her help as their house is situated in the heart of the village and that the learned Sessions Judge, East Sessions Division, Tezu failed to appreciate, as a whole, the evidence led by the prosecution and the defence from proper perspective, as there are material contradictions. Hence, prayed to set aside the impugned judgment and order of conviction of the accused.

6. Now, the question that arises is as to whether the impugned judgment and order, dated 16.06.2014, passed by the learned Sessions Judge, East Sessions Division, Tezu in Session Case No. 33/ L/ 2012 is liable to be set aside in view of the grounds cited in the instant memo. of appeal.

7. Heard Mr. Muk Pertin, learned Sr. counsel, assisted by Mr. D. Tatak, learned counsel appearing for the appellant and Mr. K. Tado, learned Public Prosecutor, for the State of Arunachal Pradesh.

8. Mr. M. Pertin, learned Sr. counsel appearing on behalf of the convicted accused submits that actual fact of the instant case, is that both the prosecutrix and the accused had been in deep love and when the mother

of the prosecutrix came to know about their intimacy, went to the house of the accused on 28.05.2012 evening with a proposal to settle their marriage, but on failure, on the following day, morning, reported the cooked up story of an incident to the Village Headmen and having not received any response from him filed the false FIR on 29.05.2012 at 11.00 AM. According to Mr. Pertin, without proper investigation into the alleged incident, Police submitted the Charge-Sheet against the convicted accused. Mr. Pertin, learned Sr. counsel, further submits that the prosecution case rests on circumstantial evidence. Pointing out the evidence that the prosecutrix did not raise any hue and cry, when she was allegedly attacked by the accused, coupled with finding of no injury on her front and backside of body indicate that the alleged act was consensual between them, who were major, without any element of application of force. This presumption, Mr. Pertin, learned Sr. counsel submits, is reinforced by the seizure memo vide Ext. 4 which contains a relevant sentence in the handwriting of the accused indicating that both maintained love affairs and pursuant thereto, the alleged occurrence might have occurred. According to Mr. Pertin, the prosecution has failed to show that the investigating officer had drawn up the sketch map of the place of occurrence and had it been drawn up, it would have come to light that there is no jungle as alleged near the house of the prosecutrix.

9. Mr. M. Pertin, learned Sr. counsel further submits that mere presence of bleeding in the vagina of the prosecutrix as the Doctor had found on her examination, without forensic examination of such swab does not prove that she was raped. In this regard, Mr. Pertin has placed reliance on the decision of the Supreme Court rendered in the case of ***Pratap Mishra and Others- vs- State of Orissa, reported in AIR 1977 SC 1307***. Mr. Pertin drawing attention of this Court to another decision of the Hon'ble Apex Court rendered

in the case of ***Kuldeep K. Mahato-vs-State of Bihar, reported in (1998) 6 SCC 420*** submits that the conduct of the prosecutrix in the alleged fact situation is highly doubtful as there was sufficient opportunity to her to run away from the clutch of the accused and to raise alarm, but she voluntarily did not avail the same. In the same context, Mr. Pertin has also referred to the decision of the Apex Court rendered in the case of ***State of Rajasthan-vs-Kishanlal, reported in (2002) 5 SCC 424*** and submits that the house of the victim is situated near Tezu town and Tezu Police Station and whatever may be the evidence laid by the Prosecution, the same appears to be improbable, inasmuch as, the alleged incident that allegedly took place in the evening hours of 28.05.2012 was reported to the Police belatedly on the following day i.e. on 29.05.2012 at about 11.00 AM. Mr. Pertin submits that every rape case is proved by circumstantial evidence only as normally there cannot be any eye witness to such incident committed in secrecy and as such, having regard to the fact of not finding of any injury on the person of the prosecutrix indicates invariably the consensual act between the prosecutrix and the convicted accused in view of the abundance of evidence that both were known to each other and the accused also had visiting terms with the family of the prosecutrix and as such, the learned Sr. counsel submits to give at least the benefit of doubt to the accused by setting aside the impugned judgment and order of conviction.

9. Mr. K. Tado, learned Public Prosecutor, appearing for the State respondent submits that the commission of the offence of rape; pre supposes an act without consent. Mr. Tado further submits that if there is corroboration between the statement of the victim-woman and her evidence, no further corroboration needs to be looked for. In the instant case, Mr. Tado submits that the evidence of the prosecutrix being corroborated by the Doctor's evidence, and as she withstood the tests of cross examination of the defence, the learned trial Court's judgment should be affirmed and further, the punishment awarded to the accused, in the backdrop of the facts proved in the case, should be enhanced to meet the ends of justice from R. I. of 7 years to 10 years. Mr. Tado learned Public Prosecutor also submits that although the defence took the plea of *elibi*, the same has not been

substantiated, it reinforces the prosecution evidence implicating the accused with the offences beyond all reasonable doubt.

10. It is pertinent to mention that for the purpose of punishment for rape, it is necessary to prove that the accused had sexual intercourse with a woman under the circumstances mentioned in 6 clauses of section 375 IPC. Penetration is sufficient to constitute the offence of rape.

11. The evidence of PW. 1, the prosecutrix, reveals that in the evening of 28.05.2012, while she was alone at home, the accused entered into her house and went to the Kitchen, where she was cooking dinner and then he picked up one 'dao' from the Gas stove table and threatened to kill her, if she shouted. When she shouted, the accused cut the cloth stand to put her in fear and when she again tried to shout, the accused gagged her mouth with his right hand and pulled out her wrapped cloth (mekhela) and threw it off leaving only the skirt she wore. Thereafter, the accused dragged her for about 10 minutes to the backside of her house towards the nearby jungle. The accused slapped her, on way to the nearby jungle and there too, she was beaten up on her right cheek. Then the accused pushed her to the ground and after pulling down her wearing skirt and the underwear lied on her and forcibly penetrated his male organ into her vagina and thus, committed sexual intercourse for about 5-10 minutes. Thereafter, the accused ran away towards her house and she followed him shouting 'mother'- 'mother'. Then the accused turned back and assaulted her with his sleeper asking not to shout, lest people would hear the voice. At that moment, her mother (PW.2) arrived home from the village 'Namghar' (prayer hall). After hearing her mother's voice, the accused fled from the spot. She reported the occurrence to her mother (PW. 2) and then she (PW. 1) along with her mother (PW.2) went to the house of the accused and complained to his father, but the accused's father, without listening to their complaint properly, asked them to leave his house, failing which he threatened them to cut into pieces and further, informed them that the accused was not at home. Thereafter, they came back home. On the following day morning, at about 05.00 AM, they reported the incident to the Gaon Burah (Village-Headman) viz. Tanu Ram Das (PW.5) for taking necessary action, but they were advised

to lodge an FIR with the Police as the case was of serious nature. Accordingly, she lodged the FIR vide P. Ext. 1, whereupon she was sent to Tezu Hospital for medical examination and later on to get her statement recorded by a Judicial Magistrate. She recognized P. Ext. 2 her statement, given before the Magistrate. She produced M. Ext. 1, the colored sleeper which the accused left near the place of occurrence at the time of commission of the crime. The Police seized the same along with one dao, M. Ext. 2 and the Skirt M. Ext. 3, worn by her at the time of the occurrence on being produced before the Police and thereupon, Police seized those materials by P. Ext. 3, the seizure memo. In the meantime, PW. 3, who is her brother, also showed some sentence written by the accused in his copy, which she (PW. 1) handed over to the Police. She recognized M. Ext. 4, her brother's note book, which was seized by the Police.

12. Her cross examination (PW. 1), inter-alia, reveals that she admitted the defence suggestion to the effect that the accused visited her house prior to the incident, through the front door of the house and enquired her about her family members, to which she replied that her mother had gone to 'Namghar', brother had gone to the market and further, she asked him to go away as there was nobody at her house. The I.O. of the case PW.8 SI Ramakanta Rai visited the place of occurrence.

13. PW. 1, the prosecutrix, has supported her statement, dated 20.09.2012, given before the learned Judicial Magistrate, under section 164 Cr.P.C. vide P. Ext. 2 in material particulars.

14. Her (PW. 1) above evidence is corroborated by her mother (PW.2) and the Gaon Burah of the village (PW. 5) Thanu Ram Das. The evidence of PW. 2 shows that she has corroborated the evidence of her daughter, the prosecutrix (PW. 1) deposing that at about 07.30 PM, when she came back home to take her daughter (PW. 1) to the 'Namghar' (prayer hall), on the way, nearby her house, she found her daughter rushing back to their house from the nearby jungle, crying very loudly and saw the accused running away from the nearby jungle area. She made an attempt to apprehend him in vain. Apart from the other evidence, stated by the prosecutrix (PW. 1), she (PW. 2) stated that they approached the Gaon Burah with a request to convene a meeting of the villagers, but the same was not done and therefore, the

incident was reported to the Police. PW. 5 identified P. Ext. 4, the seizure memo, wherein P. Ext. 4 (b) is his signature. In cross examination, he stated that he knows that the aforementioned materials were seized in connection with the incident.

15. Apart from the above corroborated testimony of PW. 1, PW. 2 & PW. 5, it is noticed that the medical evidence of PW. 4 Dr. Sophia Shullai, the Doctor, who examined the prosecutrix on 29.05.2012 at about 11.30 AM, i.e. within about ½ hour of lodging the FIR, corroborated the evidence of the prosecutrix (PW. 1). For better appreciation of the Doctor's evidence (PW. 4), the findings are extracted as herein below:-

"1. External: Scratch mark on right cheek just near the right angle of the mouth.

2. Internal: Genital examination; I have found that there was a injury in the hymen at 6 O' clock position. It was bleeding at the time of examination. Examination was painful. There was injury on posterior to hymen".

16. The Doctor (PW. 4) held the opinion that there was a **forceful sexual intercourse with the victim girl** vide P. Ext. 5, the Medical report, prepared by her. In cross examination, the Doctor (PW. 4) admitted a defence suggestion to the effect- 'YES there was a sign of forceful sexual intercourse with the victim'. It was further elicited in cross examination that the age of the prosecutrix was between 17-19 years as per ossification test.

17. Thus, it is seen that the evidence of the Doctor (PW.5) is consistent with the evidence of the material witnesses, namely, PW. 1, PW. 2 & PW. 5 and thereby, the substratum of the prosecution case. Here, it may be kept in mind that the consent in the context of Section 375 IPC, has to be understood in terms of Section 90 IPC. Therefore, in the attending facts, this Court finds that there was no consent of the prosecutrix to the accused's sexual intercourse with her.

18. In the case of State of ***Maharashtra -vs- Chandra Prakash Kewalchand Jain, reported in (1990) 1 SCC 550***, the Apex Court

observed that a woman who is the victim of sexual assault, is not an accomplice to the crime, but is a victim of another person's lust and, therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice.

19 PW. 3, the sister of the prosecutrix in her evidence stated that in the relevant evening, when she was returning home from a shop with her mother (PW. 2), she found PW. 1 crying and was having bite injuries on her right cheek. She has also corroborated the evidence of PW. 1 as the latter reported to her. The evidence of PW. 1 is further corroborated by PW. 6 Jamuna Hazarika & PW. 7 Mamoni Joshi, who revealed that when they took PW. 1, the prosecutrix, to the Hospital, on her way, to their quarry, the prosecutrix told her that the accused had raped her. PW. 6 has recognized P. Ext. 3 (b) and PW. 7 recognized and 3 (c), their signatures respectively on the seizure memo P. Ext. 3, whereby the Skirt of the prosecutrix was seized by the Police. The evidence of PW. 7 further reveals that she has no personal knowledge about the incident. It is seen from the cross examination of PW. 8, SI Ramakanta Rai, the I.O., that he admitted the defence suggestions that the prosecutrix could not attack the accused in her defence or to scratch on the face of the accused, out of fear, as the accused was showing a 'dao' to her and that there was no eye witness to the occurrence and further, that the prosecutrix sustained bite mark on her cheek when she came to the Police Station. These material defence suggestions to PW. 8, the I.O., in the opinion of this Court lend credence to the prosecution case beyond doubt.

20. I have gone through the evidence of DW. 1, namely Lina Das and DW. 2 Sunil Rajbangsi and it is found that an attempt has been made that in the relevant evening of the incident, the accused in fact, away was at a Temple and that there is no jungle in their village nor any bamboo grove. However, no independent witness has been examined by the defence to substantiate this plea of *ellibi* so made, which was not raised by the convicted accused in his statement, recorded u/s 313 Cr.P.C. and as such, rejected. Having regard to the evidence of young age of the convicted accused who was a college student aged about 21 years, this Court is of the opinion that

the quantum of punishment imposed by the learned Court below on him shall meet the ends of justice to both the sides.

21. For the reasons, set forth above, this Court is of the opinion that no interference in the impugned judgment and order of the learned Trial Court is warranted and accordingly, **the appeal stands dismissed.**

Send back the LCRs along with a copy of this judgment and order.

JUDGE

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