THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Criminal Appeal No. 40 of 2017

Prem Rai *alias* Sambhu Rai
S/o Mr. Kewal Rai,
R/o Tumin, Rajatar,
Singtam, East Sikkim. .... Appellant

versus

State of Sikkim .... Respondent

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

Appearance:

Mr. K. T. Tamang, Legal Aid Counsel for the Appellant.

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

J U D G M E N T
(07.06.2019)

Bhaskar Raj Pradhan, J

1. The Appellant was the driver of the taxi hired by the victim (P.W.7) and her two friends P.W.1 and P.W.2, all three girls, on 15.05.2016 to go sightseeing in an around Gangtok. However, pursuant to First Information Report (FIR) (exhibit-6) lodged by the victim before the Officer in-charge of Sadar Thana, Gangtok, Sikkim Police Inspector, Ton Tshering Lepcha, Station House Officer (SHO) Phodong, Police Station,

North Sikkim and the Investigating Officer (P.W.23) (Investigating Officer) registered a regular criminal case against the Appellant for commission of rape, penetrative sexual assault on a minor as well as for voluntary causing hurt. The victim had alleged that the Appellant while taking them around sightseeing had become violent with the victim's friend when they desired to return as it was getting late. The Appellant started demanding money and thereafter asked the victim's friend to get off. By the time she was losing her senses and she could neither hear nor speak. She alleged that she was kidnapped by the Appellant *"brutally beaten, slapped, hit by a rod, pulled by my hair and raped in the car."*

2. The investigation culminated in the charge-sheet filed on 24.08.2016 against the Appellant for commission of penetrative sexual assault and voluntarily causing hurt.

3. On 19.09.2016 the learned Special Judge, POCSO Act, 2012, North Sikkim at Mangan charged the Appellant for three indictments. Firstly, for voluntarily causing hurt on P.W.2 and the victim by beating them brutally punishable under Section 323 of the Indian Penal Code, 1860 (IPC). Secondly, he was charged for assaulting or using criminal force against P.W.2 and the victim intending to outrage their modesty punishable under Section 354 IPC. Thirdly, he was charged for committing penetrative sexual assault on the victim

punishable under Section 4 of the Protection of Children from Sexual Offences, Act, 2012 (POCSO Act).

4. On 07.11.2016 the learned Special Judge framed two more charges. He was charged for committing rape on the victim punishable under Section 376 IPC. He was also charged for using criminal force against the victim with the intention of disrobing her and in fact, disrobing her punishable under Section 354B IPC. The Appellant pleaded not guilty to all the charges and claimed trial.

5. The Appellant has been convicted under Section 323 IPC for voluntarily causing hurt to the victim and P.W.2. He was also convicted under Section 354, 354B, 376 (1) of the IPC as well as Section 3(a)/4 of the POCSO Act for commission of the said offences on the victim by the learned Special Judge.

6. The Appellant was sentenced in the following manner:

- *To undergo rigorous imprisonment for a period of eight years and to pay a fine of Rs.30,000/- for the offence(s) under Section 376(1) of the IPC and Sections 3(a)/4 of the POCSO Act, 2012. In default to pay the fine, to undergo simple imprisonment for a further period of six months;*

- *To undergo simple imprisonment for a period of 5 years and to pay a fine of Rs.20,000/- for the offence under Section 354 IPC. In default to pay the fine, to undergo simple imprisonment for a further period of six months;*

- *To undergo simple imprisonment for a period of three years and to pay a fine of Rs.25,000/- for the offence under Section 354B IPC. In default to pay the fine, to undergo simple imprisonment for a further period of six months; and*

- *To undergo simple imprisonment for a period of one year for the offence under Section 323 IPC.*

7. The learned Special Judge directed that the period of imprisonment shall run concurrently and that the imprisonment already undergone shall be set off. The fine imposed was directed to be applied towards the payment of compensation to the victim. Considering the nature of the case the learned Special Judge also deemed it appropriate to recommend the award of compensation of Rs.1 lakh to the minor victim to be paid out of the Victim Compensation Fund.

8. The Appellant is aggrieved by the impugned judgment and the order on sentence both dated 26.08.2017.

9. Heard Mr. K. T. Tamang, learned Legal Aid Counsel for the Appellant and Mr. S. K. Chettri, learned Additional Public Prosecutor for the Respondent.

10. Mr. K. T. Tamang at the outset conceded that the minority of the victim had been established by the prosecution. The learned Special Judge has also held that the prosecution has been able to prove that the victim was a minor at the time of the incident. The minority of the victim not being in dispute this Court shall examine the evidence let by the prosecution to appreciate if the learned Special Judge had come to the correct conclusion in convicting the Appellant and sentencing him accordingly.

11. The victim as well as her two friends - P.W.1 and P.W.2 identified the Appellant in Court. The cross-examination of these witnesses reflects that the identification of the Appellant

as the driver of the taxi hired by them on 15.05.2016 is not disputed. The prosecution has cogently proved that it was in fact the Appellant who had driven the victim and her two friends P.W.1 and P.W.2 on the fateful day.

12. The victim gave a detailed narration of what transpired that day on her, P.W.1 and P.W.2. On the date of the incident they had got up late. They wanted to visit local tourist points in and around Gangtok. They came out of the hotel (xxx name of the hotel withheld) and hired a taxi of the Appellant. They visited few places including a monastery. P.W.2 got out and brought some local *'momos'* for them. The Appellant got some chips and water. He then suggested that they should visit seven sister falls located near Gangtok. He somehow convinced them and they started proceeding towards the said water fall. On the way they came across another water fall. They stopped the vehicle and clicked some photographs and thereafter proceeded further. It was already dark by then. After some distance they were caught in a terrible traffic jam. As it was late they told the Appellant that they wanted to go back. He however, moved further and drove the vehicle rashly. By the time she was feeling nauseous probably due to the *'momos'* and water that she had consumed. She could hear the Appellant and P.W.2 arguing seriously about the matter. She did not remember what happened after that but she could say that the vehicle was still moving. After sometime when she

woke up she realized that only she and the Appellant were in the vehicle. The Appellant had reclined her seat backwards and her underwear was missing. The Appellant was smoking on his seat. She somehow managed to get out of the vehicle but it was already dark. The Appellant came out and caught her by her hand and hair. He dragged her back to the car. Once she was inside the Appellant forced himself on her and put his penis into her vagina. There was some penetration also. He was also slapping her. She kept on kicking him but to no avail. She was also crying with pain. After he raped her he started driving again. She did not remember which direction they were proceeding but on the way some people stopped their vehicle. They had come looking for her. She was then taken to some police station.

13. The defence cross-examined the victim. It was suggested that they had purchased liquor that day before proceeding to seven sister water fall. It was suggested that she was drunk on the relevant day. Both the allegations were denied by the victim. The defence also suggested that the Appellant had gone to another shop to buy mineral water as the shop where P.W.2 went out to get *'momos'* did not have mineral water. It was suggested that the water which was brought by the Appellant was properly sealed. These suggestions were also denied by the victim. The defence suggested that the victim had consented to get physical with the Appellant which was

also denied by her. The detailed narration of facts by the victim (P.W.7) constituting the core of the offences alleged have not been assailed by the defence.

14. P.W.1 and P.W.2 also deposed about what transpired on the relevant day. P.W.1 remembered the date of the incident. P.W.2 only remembered that it was during April-May, 2016 when the incident took place. Their deposition corroborates the evidence of the victim of having hired the Appellant's taxi for sightseeing in and around Gangtok and travelling to a monastery and to the water falls in the North District. Their depositions also corroborate the victim's testimony that when it started getting dark they asked the Appellant to turn and drop them back to the hotel. They corroborate the victim's deposition that the Appellant got agitated and was reluctant to turn back. P.W.1 deposed that when they insisted the Appellant became angrier and punched P.W.2 on her face. P.W.2 deposed that when he got agitated he kept on proceeding towards the second water fall. She got angry and started discussing with him. The Appellant became aggressive and even hit her on her face due to which she started bleeding. Both P.W.1 and P.W.2 deposed that thereafter the Appellant made them get out of the vehicle and sped away with the victim. They somehow managed to reach a nearby house/hotel with some people in it. They narrated the incident to them. The police arrived thereafter and took them for medical

treatment to a hospital. Later that night the victim and the Appellant were brought by the police to the Phodong, Police Station.

15. The cross-examination of P.W.1 and P.W.2 by the defence also leads this Court to believe that the Appellant denied only certain details of how the events transpired but not the fact that the Appellant was the driver who drove them on 15.05.2016 and that the incident did in fact occur. The defence had suggested to P.W.2 that she had sustained injury because of the fall while walking in the dark which was denied by her.

16. The testimonies of the victim, P.W.1 and P.W.2 narrate what transpired on that day in great detail. Most of it remained unassailed.

17. The father (P.W.2) of P.W.1 confirmed that he was running the hotel where the victim and P.W.2 had stayed when they came during May, 2016. He also confirmed that on 15.05.2016 all the three of them had gone out sightseeing. He was in touch with her daughter on her mobile. He deposed that around 9-9.30 p.m. he could talk to her. P.W.1 told him that she and her friends had hired a taxi for sightseeing and were at some unknown place. The driver of the vehicle was about to physically assault her and her friends. P.W.1 also told him that the driver had taken away the victim and had abandoned P.W.1 and P.W.2 at the same place. P.W.1 could

not tell him her exact location. The phone got disconnected. He kept trying but could not talk to her. After sometime he did speak to her and P.W.1 informed him that she was at Phodong. He told her to take shelter in nearby houses. He then went to Sadar Police Station, Gangtok and informed the police. The Sadar Police Station contacted the Phodong police. In the meantime he received a phone call from an unknown number. It was from a local resident of Phodong who told him that P.W.1 and P.W.2 had taken shelter in his place. He gave the phone to the Police Officer at the Sadar Police Station. After that he was instructed by the said Police Officer to go to Phodong Police Station. He proceeded to Phodong Police Station along with his friend who had accompanied him to Sadar Police Station. They took two vehicles with them. On the way they came across the vehicle of the Appellant. When it was stopped they saw the Appellant and the victim in it. The victim seemed panicky. She told him that she had been sexually assaulted by the Appellant. They brought the Appellant and the victim to the Phodong Police Station where he met P.W.1 and P.W.2. Later they came back to Sadar Police Station. The FIR in the matter was prepared by the victim in his presence and filed at Sadar Police Station. During cross-examination he admitted that he had not mentioned about the victim telling him that she was sexually assaulted by the Appellant to the police after being confronted with his statement recorder under

Section 161 of the Code of Criminal Procedure, 1973 (Cr.P.C.). He also admitted that in the said statement there is no mention about his daughter informing him that the victim had been taken away by the Appellant. Except these two contradictions the father's deposition stands firm.

18. Mohan Pradhan (P.W.6) was working in a hotel (xxx name of the hotel withheld) located at Tumlong between Phensong and Phodong, North Sikkim. One night while he and the hotel owner were closing the hotel two (xxx ethnic identity withheld) girls came there crying for help. When they inquired from them they told them that they had been left at a lonely place by their taxi driver. He deposed that the girls told them they had hired a taxi. The driver had made them come towards Phodong and abandoned them there after some arguments between them. The girls also told them that their friend had been taken away by the Appellant in his vehicle. They contacted the Sadar Police Station. After sometime police personnel from Phodong Police Station came and took the girls to the Phodong Police Station. During cross-examination he admitted that when they inquired from the (xxx ethnic identity withheld) girls if they had consumed alcohol they denied but they did tell them that their friend who was in the vehicle had consumed duet (alcohol) and that she was drunk.

19. Chudup Bhutia (P.W.22) was the owner of the hotel (xxx name of the hotel withheld). He deposed that two girls had

come one night fully drunk. This was about a year ago. One of them had an injury on her forehead. He allowed them to come in and offered them food and clothes. They told him that they had been abandoned by a taxi driver when they did not agree to go further with him. They also told him that they had one more friend who wanted to go further with the driver and as such did not come with them. He testified that on verification they told him that their friend had taken alcohol. They somehow managed to contact their guardian. He informed the Sadar Police Station about the matter. Later some police personnel came and took the girls with them. At this stage the learned Prosecutor sought permission to declare him hostile. Permission was granted and he was cross-examined by the learned Prosecutor. He then admitted he had not stated to the police that the two girls had told him their friend wanted to go further with the Appellant. No suggestion, however, was made by the prosecutor that he had lied about it. He was also cross-examined by the Appellant's Counsel. On such cross-examination he admitted the two girls had told him that since their friend and the Appellant had consumed alcohol they, most probably, had fallen in love. He admitted that he had gone to Kolkata the following morning of the incident and returned only after 10-12 days. He admitted that he had never seen the Appellant before the day of his examination in Court. He admitted that the girls had told him that their friend and

the driver had consumed alcohol which he had mentioned in his statement to the Police. He admitted that the two girls did not tell him about their friend being forcefully taken by the Appellant or of being assaulted by him. The deposition of Chudup Bhutia (P.W.22) regarding the two girls telling him that since their friend and the Appellant had consumed alcohol they, most probably, had fallen in love cannot be believed. However, his evidence, to the extent it finds corroboration from the statement of Mohan Pradhan (P.W.6) and other witnesses can be relied upon.

20. Ash Bahadur Rai (P.W.14) was posted at the Phodong Police Station during May, 2016. He deposed that on 15.05.2016 at around 11 p.m. the Police Station received information from Sadar Police Station, Gangtok about three girl tourists from (xxx name of place withheld) having come towards Phodong in a taxi and being left stranded by the driver. The two girls were reportedly at the hotel (xxx name of hotel withheld) along with the police team. On reaching there they saw the two girls. They told them that their friend had been taken away by the concerned driver i.e. the Appellant. They accordingly, brought the two girls to the Phodong Police Station. Later they were handed over to their guardians after executing a Handing/Taking Memo (exhibit-23).

21. The Senior Medical Officer (P.W.10) at the STNM Hospital examined P.W.2 on 16.05.2016 at around 9.55 a.m. On

examination an incised cut injury on her left temporal area was detected and dressed. The injury was simple in nature. The Medical Slip (exhibit-17) and the Medico-Legal Examination Report (exhibit-18) prepared by the Senior Medical Officer (P.W.10) and proved by him confirm the said injury on P.W.2.

22. Section 53A of the Cr.P.C. provides for examination of person accused of rape by a doctor. A strict compliance of the said provision coupled with the keen observations of the doctor would ensure the establishment of truth. The Appellant was also examined by Senior Medical Officer (P.W.12) at the STNM Hospital on 16.05.2016. He found no injury on him. However, some smell of alcohol was noticed in his breath. The Medical Slip (exhibit-19) prepared by the Senior Medical Officer (P.W.12) and proved by him confirms this fact.

23. On 16.05.2016 at around 10.34 a.m. Dr. O.T. Lepcha, (P.W.9) examined the Appellant a few hours after the alleged sexual assault and prepared a Medico-Legal Examination Report (exhibit-16). On the Appellant's examination he noted the following injuries:-

> ***"Injuries over the body:***
>
> 1. *Oval shaped reddish blue contusion (? bite mark) over the right lateral aspect of chest just below the (R) clavicle measuring 3 x 1.5 cm.-[on being inquired he states it was a kiss mark.]*
>
> 2. *Linear shaped contusion 4 x 0.8 cm just above injury no.1 4 cm above.*

3. No other injuries over the body.

Genitals:

1) Pubic hair normal, no matting seen.
2) Smegma absent.
3) No sign of any injuries over the penile shaft.
4) Penile shaft normal, no organomegaly.

Opinion:

*From the given history, physical examination, there is nothing to state that the person is incapable of sexual intercourse.***"**

24. During cross-examination Dr. O. T. Lepcha (P.W.9) clarified that the fact that the contusion at serial no.1 was reddish blue would suggest that it was sustained within 12 hours immediately preceding the medical examination. This clarification would lead the contusion directly to the time of the alleged incident.

25. The Appellant's physical capability of performing sexual act was answered in the affirmative by Dr. O. T. Lepcha (P.W.9). He noticed two injuries on the Appellant as indicated above. The absence of smegma noticed by Dr. O. T. Lepcha (P.W.9) in the examination of the Appellant within twenty four hours of the alleged incident would have been an indicator to his sexual activity but the Dr. O. T. Lepcha (P.W.9) did not venture an opinion based on that. The injuries on the Appellant do indicate physical contact.

26. Section 164A of the Cr.P.C. provides for medical examination of the victim of rape. The victim was also

examined on 16.05.2016 at around 11.15 a.m. The Gynaecologist (P.W.15) deposed that when he examined the victim he found four fresh bruise marks purple in colour in front part of her neck which seemed to have been sustained within the preceding twelve hours. Apart from that he did not detect any injury on her person including her private part. On her genital examination he found there was no fresh injury. There was an old healed hymeneal tear and the hymen admitted one finger. No bleeding or injuries were seen in the anal/perianal area. He collected her vaginal wash and forwarded it for pathological examination for presence of spermatozoa. Later, the concerned cytopathology report was received which indicated that no spermatozoa was detected in the vaginal wash. The Gynaecologist (P.W.15) therefore, gave the final opinion on 20.05.2016 stating that no clinical evidence of *"recent forceful sexual intercourse"* as the laboratory report received did not show spermatozoa in the sample examined. During cross-examination he admitted that there was nothing to suggest that they had been recent forceful vaginal penetration. He deposed that normally spermatozoa is detected up to twenty four to thirty six hours however, no spermatozoa was detected in the vaginal wash. On the suggestion of the defence he also admitted that had there been any sexual intercourse with the victim she would have certainly sustained some bruises in the vagina and the

neighbouring areas. He honestly admitted that he did not conduct blood test on the victim in order to verify if she had consumed any sedatives or alcohol.

27. The fact that no spermatozoa were detected was also confirmed by the Pathologist (P.W.8) through his report (exhibit-15) dated 16.05.2016.

28. The day after the incident, on 16.05.2016 at the Kabi outpost, certain seizures were made from the Appellant in the presence of two witnesses. They were the vehicle, its key, its R.C. book and other documents along with one grey colour ladies underwear with black strap and one pair of ladies slippers by the I.O. The I.O. deposed that the underwear of the victim and her slippers were seized from the concerned vehicle of the accused along with its documents. He deposed that the underwear was packed and sealed after the seizure.

29. Purna Bahadur Bishwakarma (P.W.3) and Ashim Rai (P.W.6) deposed that while they were travelling in their vehicles to Phodong they were stopped by the police at the Kabi police outpost and requested to stand as witnesses. Except for some minor variations both of them testified that the police had seized the vehicle, one ladies underwear (panty) and ladies slipper from the said vehicle. Seizure Memo (exhibit 5) dated 16.05.2016 records the seizures.

30. The incident is of the late evening of 15.05.2016. The seizure is dated 16.05.2016 at around 7.00 p.m. from the Kabi

outpost. The I.O. has deposed about how the seizure was affected. The two seizure witnesses corroborate him. It is incontrovertible that the vehicle was the one involved in the incident of 15.05.2016. The victim did identify her underwear as well as her slippers which were found in the vehicle and seized at the Kabi outpost. The victim and her friends P.W.1 and P.W.2 were not locals familiar with the area. However, they did depose about going to the North District and ultimately being brought to the Phodong Police Station. The seizure of the victim's underwear and the slippers cannot be doubted.

31. The I.O. deposed that he seized the Appellant's boxer shorts which he was wearing as underwear from the STNM Hospital in the presence of two witnesses. The Medico-Legal Examination Report (exhibit-16) of the Appellant also records that one checked printed undergarment was handed over to the police by Dr. O.T. Lepcha (P.W.9) - the Medico-Legal Consultant at the STNM Hospital. Seizure Memo (exhibit-28) dated 16.05.2016 records the red and white boxer shorts of the Appellant were seized at the STNM Hospital. Dr. O. T. Lepcha (P.W.9) did not depose about the boxer shorts but exhibited the Medico-Legal Report (exhibit-16) of the Appellant which records the fact. The seizure was in the presence of Laku Tshering Lepcha (P.W.18) and Palzor Wangyal Bhutia (P.W.19) both from the STNM Hospital. Both the witnesses identified their signature on the Seizure Memo (exhibit-28) but

hesitated to identify the boxer shorts. Unmistakably, the boxer shorts were of the Appellant.

32. The I.O. also deposed that he seized the blood samples of the Appellant and the victim (P.W.7) as well as her vaginal wash from STNM Hospital. He said that the victim's blood sample was collected on 18.05.2016 and the Appellant blood sample was seized on 07.06.2016, both from the STNM Hospital. Seizure Memo (exhibit-28) dated 18.05.2016 records the seizure of the blood sample and the vaginal wash of the victim from STNM Hospital in the presence of Laku Tshering Lepcha (P.W.18) and Palzor Wangyal Bhutia (P.W.19). They identified their signatures on the Seizure Memo (exhibit-28) but not the items that were seized. The Gynaecologist (P.W.15) confirmed that the vaginal wash was collected and sent for examination.

33. Seizure Memo (exhibit-30) dated 07.06.2016 records the seizure of blood sample of the Appellant at the STNM Hospital and handed over by Dr. O. T. Lepcha (P.W.9). One of the witnesses to the Seizure Memo (exhibit-30), Rinzing Bhutia of the Police Department, was not examined. Laku Tshering Lepcha (P.W.18) identified his signature thereon but the blood sample was not drawn in his presence. Dr. O.T Lepcha (P.W.9) was examined. He said nothing about the seizure of the blood samples of the victim as well as the Appellant. Even the victim did not depose about the collection of her blood sample and

her vaginal wash. The seizure of the blood samples of the victim and the Appellant as well as the vaginal wash of the victim have not been convincingly established by the prosecution.

34. The Appellant boxer shorts, the victim's underwear and her vaginal wash collected by the Gynaecologist (P.W.15) and their alleged blood samples were forwarded to the Regional Forensic Science Laboratory (RFSL), Saramsa for analysis. The RFSL report (exhibit-21) was received. Pooja Lohar (P.W.13) is the Scientific Officer in the Biology division of the RFSL, Saramsa (Scientific Officer) who examined the underwear of the victim, the boxer shorts of the Appellant, the alleged blood samples of both the victim and the Appellant and the vaginal wash of the victim. She opined that human semen was detected in both the victim's underwear as well as the Appellant boxer shorts. No blood, semen or body fluid was detected in the vaginal wash of the victim.

35. Since the prosecution failed to establish the collection of blood samples of the victim as well as the Appellant, the RFSL report to that extent cannot help the prosecution. However, the seizure of the victim's underwear from the vehicle and its identification by her is unquestionable. The seizure of the Appellant's boxer shorts is also evident. The Scientific Officer detected human semen on both the victim's underwear as well as the Appellan't boxer shorts. Mr. K. T. Tamang submitted

that since there was a gap between the alleged incident and the seizures it cannot be said with certainty that the semen detected in the victim's underwear was that of the Appellant. He further submitted that the prosecution had failed to establish that blood sample had been collected from the Appellant and the blood group of the Appellant was the same as the blood group in the semen detected in the victim's underwear. The learned Special Judge was also hesitant to rely upon the seizure of the underwear and the RFSL report as admittedly it was lying in the vehicle of the accused for 19-20 hours and the vehicle itself was lying in open space at the Kabi out post. Although the defence has cross-examined the I.O. and suggested that the vehicle was lying in the open space at Kabi outpost for about 19-20 hours however, no suggestion was made that the underwear had been tampered with. The victim's deposition that her underwear was missing when she woke up in the vehicle remained undisputed. Admittedly, the Appellant was the only male in the vehicle where the incident took place. It is established that the underwear found in the vehicle was of the victim and quite obviously the semen detected therein was of the Appellant. It is true that the prosecution failed to prove that the blood group of human semen detected in the underwear was the same as that of the Appellant. However, it would be too farfetched to presume that the prosecution or anybody else, without any proven *animus*

against the Appellant, would have planted the victim's underwear with human semen and then the victim's underwear in the vehicle of the Appellant between the time of his arrest and the seizure. The boxer shorts which were worn by the Appellant when he was arrested and examined at the STNM Hospital were also detected with human semen which obviously was his own.

36. Mr. K. T. Tamang submitted that the victim's testimony required corroboration as it is seen that she had suppressed about consuming alcohol. He would rely upon the judgments of the Supreme Court in re: ***Ramdas v. State of Maharashtra***[1]***,*** ***Tameezuddin v. State (NCT of Delhi)***[2] and ***Mohd. Ali v. State of U.P.***[3]

37. The *ratio decidendi* of the three judgments cited by Mr. K. T. Tamang is that conviction in a case of rape can be based solely on the testimony of the victim. The testimony must be truthful and there should be no shadow of doubt over her veracity. It cannot, however, be held that every victim's evidence must be accepted even if the story is improbable and belies logic. The testimony of a victim of rape has to be placed on a higher pedestal than even an injured witness, but when the Court finds it difficult to accept the victim's version because it is not irreproachable, search for direct or circumstantial evidence to lend assurance to her testimony must be undertaken.

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[1] **(2007) 2 SCC 170**
[2] **(2009) 15 SCC 566**
[3] **(2015) 7 SCC 272**

38. The defence has taken the plea that the victim, P.W.1 and P.W.2 had consumed alcohol which fact had been suppressed. The Medico-Legal Examination Reports of P.W.1 (exhibit-20) and P.W.2 (exhibit-18) both dated 16.05.2016 records that their breath did not smell of alcohol. However, during cross-examination, the I.O. admitted that he had mentioned in his charge-sheet about the place and the shop from where alcohol was purchased by the Appellant and the two friends of the victim. He admitted that the shop owners name is Rita Devi Karki (P.W.5) whose statement he had also recorded. He admitted that Rita Devi Karki (P.W.5) had revealed that on 15.05.2016 at around 4.30 p.m. one Nepali boy and two (xxx ethnic identity withheld) girls had come to a shop and bought two half bottles of duet (alcohol). He also admitted Rita Devi Karki (P.W.5) had disclosed that from the total amount of Rs.280/- for the said alcohol only Rs.100/- was paid by the Nepali boy and Rs.180 by the two (xxx ethnic identity withheld) girls. The I.O. admitted that no sedative or other chemical substance were found in the blood of the victim on forensic examination which could substantiate the claim of the victim that she was served sedative through mineral water which made her unconscious. Rita Devi Karki (P.W.5) was examined by the prosecution. She did not recognise the Appellant nor remember seeing him earlier. She also did not remember what she had stated to the police although she admitted having

given a statement. She did not remember the (xxx ethnic identity withheld) girls who had come to her shop. However, during cross-examination she remembered that two (xxx ethnic identity withheld) girls had bought some duet/gin from her shop during and around the time when her statement was taken by the police. The Gynaecologist (P.W.15) who examined the victim and prepared the Medico-Legal Examination Report (exhibit-24) did not mention in his deposition that he had noted in his report that there was no breath smell of alcohol. The admission made by the I.O., Mohan Pradhan (P.W.6) as well as the deposition of Rita Devi Karki (P.W.5) does give an impression that on that particular day the Appellant and the victim's friends had purchased alcohol and that the victim had not been sedated but had consumed alcohol as argued by Mr. K. T. Tamang. Even if it is presumed that the victim had consumed alcohol the otherwise detailed testimony of the victim, P.W.1 and P.W.2 cannot be discarded. Further, the victim's deposition is corroborated by both oral as well as material evidence.

39. Mr. K. T. Tamang next submitted that where medical evidence goes so far that it completely rules out all possibilities of ocular evidence being true, ocular evidence may be disbelieved. He relied upon the judgment of the Supreme Court in re: ***Abdul Sayeed v. State of M.P.***[4]. The same proposition of law was followed by the Supreme Court in re: ***Bhajan Singh Alias***

[4] **(2010) 10 SCC 259**

***Harbhajan Singh v. State of Haryana*[5], *Gangabhavani v. Rayapati Venkat Reddy & Ors.*[6], *Dayal Singh v. State of Uttaranchal*[7], *Radhakrishna Nagesh v. State of Andhra Pradesh*[8], *Solanki Chimanbhai Ukabhai v. State of Gujarat*[9]** and ***Punjab Singh v. State of Haryana*[10]**.

40. It is settled preposition that where prosecution witness's testimonies are totally inconsistent with medical evidence it amounts to a fundamental defect in the prosecution case and if not reasonably explained may discredit the case of the prosecution. Opinion of the medical witness should be tested by the Court and it may not be the last word on it. If the opinion given by a medical witness is not consistent and probable, the Court does not necessarily have to go by it. It would not be correct to accord undue primacy to the opinion of medical witness to exclude eye witnesses account tested independently. When eye witness account is credible medical opinion cannot be accepted as conclusive. Eye witness account must be carefully assessed and evaluated for its credibility. Though, ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when the medical evidence makes the ocular evidence inprobable that becomes a relevant factor. If the medical evidence completely rules out all possibilities of ocular evidence being true, ocular evidence may

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[5] **(2011) 7 SCC 421**
[6] **2013 CRI. L.J. 4618**
[7] **(2012) 8 SCC 263**
[8] **(2013) 11 SCC 688**
[9] **(1983) 2 SCC 174**
[10] **(1984) Cri. LJ 921 (SC)**

be disbelieved. There is always a possibility of some variations in the exhibits, medical and ocular evidence. However, not every minor variation and inconsistency would tilt the balance in favour of the accused. When contradictions are of serious nature and destroys the substantive case of the prosecution it may provide advantage to the accused. The expert opinion must be given a great sense of acceptability but the Court cannot be guided by every such opinion even if it is perfunctory, unsustainable and are the result of a deliberate attempt to misdirect the prosecution.

41. Mr. K. T. Tamang vehemently argued that the solitary ocular testimony of the victim is completely negated by the victim's Medico-Legal Examination Report (exhibit-24). He submitted that the nature of the allegation of rape alleged would necessary result in injuries on the victim's genitals and more so on the *labia majora*.

42. The learned Special Judge has held that the medical evidence which proved the injuries on the person of the victim goes on to support her claim that criminal force has been used on her and that it also makes the evidence more credit worthy. Although the Gynaecologist (P.W.15) had stated in cross-examination that there was nothing to suggest there had been forceful vaginal penetration the learned Special Judge noticed that the case was not full of penetration and therefore opined that partial penetration also amounts to rape. Relying upon

the judgment of the Supreme Court in re: ***Om Prakash v. State of Uttar Pradesh***[11] the learned Special Judge held that in cases involving rape, it is no ground to disbelieve the trustworthy testimony of the victim and if found credit worthy it would be sufficient to prove the case of rape.

43. In re: ***Aman Kumar v. State of Haryana***[12] the Supreme Court held:

> ***"7.*** *Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212 : 1979 SCC (Cri) 252] .] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of*

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[11] **(2006) 9 SCC 787**
[12] **(2004) 4 SCC 379**

> *hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.***"***

44. In re: ***Yerumalla Latchaiah v. State of A.P.***[13] a three judge bench of the Supreme Court while passing an order of acquittal held:-

> ***"3.*** *In the present case, age of the victim was only eight years at the time of alleged occurrence. Immediately after the occurrence, she was examined by Dr. K. Sucheritha (PW 7) who has stated in her evidence that no injury was found on any part of the body of the victim, much less on private part. Hymen was found intact and the doctor has specifically stated*

[13] **(2006) 9 SCC 713**

> *that there was no sign of rape at all. In the medical report, it has been stated that vaginal smears collected and examined under the microscope but no sperm detected. The evidence of the prosecutrix is belied by the medical evidence. In our view, in the facts and circumstances of the present case, the High Court was not justified in upholding the conviction.***"**

45. Mr. K. T. Tamang relied upon the above observation to buttress his argument that in view of the medical evidence of the victim the ocular evidence must be discarded.

46. The difference in the facts of the present case and the facts of in re: ***Yerumalla (supra)*** where the doctor had categorically stated in her evidence that no injury was found on any part of the body of the victim much less on private part must be noticed. It is also important to keep in mind that in re: ***Yerumalla (supra)*** the victim was 8 years old and the doctor had also found that the hymen was intact. The doctor had specifically stated that there was no sign of rape at all. Further, that vaginal smear collected and examined under the microscope did not detect any sperm.

47. In the present case the Gynaecologist (P.W.15) who examined the victim did find four bruise marks purple in colour, in front part of her neck which seemed to have been sustained within the preceding twelve hours. Dr. O. T. Lepcha (P.W.9) who examined the Appellant a few hours after the incident noted that even he had oval shaped reddish blue contusion (like bite mark) over the right lateral aspect of the chest just below the clavicle measuring 3 x 1.5 cm. It is his

evidence that on inquiry the Appellant told him that it was a kiss mark. Dr. O.T. Lepcha (P.W.9) also noticed linear shaped contusion measuring 4 x 0.8 cm about 4 cm above the oval shaped reddish blue contusion on the Appellant. The Appellant was given an opportunity to explain this circumstance appearing against him during his examination under Section 313 Cr.P.C. However, he offered no explanation but merely stated that he was medically examined without any reason. The contusions on the Appellant and the bruise marks would thus date back to the time of the alleged sexual assault.

48. The Gynaecologist (P.W.15) opined that there was no clinical evidence of *"recent forceful sexual intercourse"* as the laboratory report received did not show spermatozoa in the sample examined. However, the Gynaecologist (P.W.15) has provided no material to indicate if the victim was asked whether she had washed herself during the interregnum between the sexual assault and the medical examination the next day. The absence of spermatozoa in the vaginal wash of the victim thus cannot cast doubt on the credit worthiness of her evidence.

49. A Textbook of Medical Jurisprudence and Toxicology by Jaising P. Modi, 24th edition, Chapter 31 states that**:**

> ***Page 637.-*** ***"****Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim. It is a charge made by the investigating officer, on a complaint by the victim. The only statement that can be made by the medical officer is whether there*

*is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.***"**

Page 639.- ***"****To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with the emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda, with or without the emission of semen, or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally, the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case, the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed.***"**

Page 639.- ***"****The ingredients that are essential for proving a charge of rape are the accomplishment of the act against her will or without her consent. The issue that the assailant had used force and victim offered resistance could be instances of proof that the act was against her will or without consent. As a measure of normal human conduct, the attempts have been to prove that the resistance offered by the woman was up to her utmost capability, and that every means, such as shouting, crying, biting, or beating had been tried to prevent the successful commission of the act, but it will be doubtful authority to lay down that if signs of resistance are not shown, there could have been no rape, for after all, the act is regarded as rape even if the woman has yielded out of fear, duress or complete exhaustion. The fact that there were no injuries on the private parts of the victim does not prove that there was no rape or that the girl was a consenting party.***"**

Page 664. - "Different objectives of clinical examinations of the victim and the accused of rape*.- While examining the victim, one searches for corroborative evidence to support or rebut the allegations of sexual assault. In the case of the accused, the medical officer should be able to answer the following questions: (i) is the accused physically capable of performing the sexual act?; and (ii) Is there any evidence to corroborate or rebut the physical contact with the victim?*

Medical Examination of the Victim and the Accused in Cases or Rape.- *As the offence of rape is committed in privacy and direct evidence of rape may not be available, corroboration of the testimony of the complainant is sought from medical evidence. A charge of rape*

*is very easy to make and very difficult to refute, and in common fairness to the accused, the courts insist on corroboration of the story of the complainants. Sometimes rape is clearly proved or admitted, and the question is whether the accused committed the rape. At other times, the association of the accused and the complainant is admitted, and the question is whether the rape was committed. Where rape is denied, the sort of corroboration one looks for is medical evidence showing injury to the private parts of the complainant, injury to the other parts of her body, which may have been occasioned in struggle, seminal stains on her clothes or the clothes of the accused, or on the places where the offence is committed.***"**

50. It is seen that besides the deposition of the victim about penetration there is no direct medical proof. The question which arises for a definite conclusion is whether to accept the deposition of the victim as truthful? The FIR lodged by the victim is a little exaggerated but understandably so. There is no evidence of the victim being brutally beaten and hit by a rod. The victim did not depose about being badly beaten and hit by a rod although she said so in the FIR. The defence also did not bring out the exaggeration in her cross-examination. Otherwise the victim has been consistent that she was raped right from the time she lodged the FIR. The victim was 17.5 years of age at the time of the commission of the offence and therefore capable of understanding what rape means. The prosecution has been able to prove that P.W.2 was hit by the Appellant while they were in the car before they were made to get off from the vehicle. The injury on her forehead corroborates the deposition of P.W.2 as well as P.W.1 about the

physical conflict. It is certain that the Appellant and P.W.2 had got into a verbal as well as physical conflict before she got off the vehicle. The victim has also been consistent about the fact that she was nauseous while in the vehicle. Whether it was due to alcohol consumption or sedation has not been cogently proved by the prosecution. That however, may not be as relevant. The prosecution has also been able to prove that there were bruise marks on the victim's neck and contusions on the Appellant's chest both of which dated back to the time of the offence. The seizure of the victim's underwear and the Appellant's boxer shorts and the presence of human semen on both are also proved. There was but only the Appellant with the victim at the time of the offence. The sequence of events till the time P.W.1 and P.W.2 alighted from the vehicle is clearly established. Except for minor discrepancies the testimony of the victim is consistent. The Appellant has virtually admitted the evidence of the victim as there is not even a denial of having committed the sexual assault upon the victim during her cross-examination. The core ingredients of the offence alleged remains intact. The sixth description of Section 375 IPC makes it clear that if rape is committed on a woman who is less than 18 years of age consent has no relevance. Even if this Court was to accept the defence version made probable by the prosecution evidence that the victim had consumed alcohol and also ignore the fact that she was a minor, in view of the

fifth description of Section 375 IPC her intoxication and her inability to understand the nature and consequences of her consent (which evidence is also available) would still drag the act back to rape if even slight penetration is proved. The evidence of the victim is however, clearly of the Appellant putting his penis into the victim's vagina with some penetration also. The surrounding circumstances have been adequately corroborated by the deposition of the prosecution witnesses. There is no reason to doubt the truthfulness of the victim's deposition. The story of what transpired that day as narrated by the witnesses is not improbable. The evidence of the victim is not totally inconsistent with the medical evidence. It is settled that ocular testimony of a witness has greater evidentiary value vis-a`-vis medical evidence. The medical evidence does not completely rule out all possibilities whatsoever of the commission of rape by the Appellant. There is no direct contradiction between the ocular and medical evidence. It must be noted that explanation 1 to Section 375 IPC clarifies that for the purpose of the section, *"vagina"* shall also include *labia majora.* This was not a case of alleged use of blunt forceful blows by the Appellant while committing rape. Partial penetration within the *labia majora* of the vulva or pudendum is sufficient to constitute the offence of rape, depth of penetration being immaterial. The lack of injury on the genital of the victim cannot be considered as conclusive proof

that the Appellant had not raped the victim. More so when the injuries on the victim as well as the Appellant does reflect signs of resistance. The learned Special Judge has rightly relied upon the evidence of the victim.

51. In the circumstances, this Court is of the view that the prosecution has been able to establish that the Appellant had committed penetrative sexual assault as defined in Section 3 (a) of the POCSO Act and rape as defined in Section 375 (a) of the IPC. The prosecution has also been able to prove that the Appellant had voluntarily caused hurt both on the victim as well as on P.W.2.

52. Section 3(a) of the POCSO Act and Section 375 (a) of the IPC are identically worded except the words *"woman"* in Section 375 is replaced by the word *"child"* and *"the child"* in Section 3(a) of the POCSO Act. Whereas the POCSO Act is gender neutral Section 375(a) relates to rape committed on a woman. As per Section 6(10) of the IPC a woman denotes female human being of any age. If the victim is a child i.e. a person less than 18 years of age Section 3(a) of the POCSO Act would be attracted, consent notwithstanding.

53. Mr. K. T. Tamang submitted that in view of Section 42 of the POCSO Act the learned Special Judge could not have punished the Appellant both under Section 4 of the POCSO Act as well as under Section 376 (1) of the IPC as the punishment under 376 (1) is greater in decree then Section 4

of the POCSO Act. To appreciate this argument better the provisions are extracted below:

Section 4 of the POCSO Act	**Section 376(1) of the IPC**
4. Punishment for penetrative sexual assault.- Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine. [emphasis supplied]	**376. Punishment for rape-(**1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine. [emphasis supplied]

54. A perusal of the two provisions extracted above reflects that the quantum of punishment prescribed is identical. Both the provisions provide that the term shall not be less than seven years, but may extend to imprisonment of life, and shall also be liable to fine. However, Section 376 (1) IPC provides that the punishment shall be rigorous. Section 4 of the POCSO Act only provides for imprisonment leaving the discretion to the Court to either impose rigorous or simple imprisonment. This is clear on reading Section 2(2) of the POCSO Act and Section 53 of the IPC. Section 42 mandates that the offender found guilty of such offence punishable under the POCSO Act and also under Section 376 IPC shall be liable to punishment under either of the acts *"as provides for punishment which is greater in degree"*. Thus this Court is of the view that the punishment under Section 376 (1) IPC which mandates

compulsory imposition of rigorous imprisonment with hard labour is greater in degree than the one provided under Section 4 of the POCSO Act. If the ingredients of both the offences i.e. penetrative sexual assault under the POCSO Act and rape under Section 376 IPC are brought home the convicted person cannot be punished for both the offences. He can be punished only for one of such offences i.e. the graver of the two. Consequently, the learned Special Judge could have punished the Appellant only under Section 376 IPC and not under Section 4 of the POCSO Act. Resultantly, the sentence under Section 4 of the POCSO Act is set aside. However, it must be clarified that in the present case the learned Special Judge has imposed one sentence for both the offences. Therefore, the above view would not change the final quantum of sentence imposed. Consequently, the sentence of imprisonment of eight years and payment of fine of Rs.30,000/- under Section 376(1) IPC is upheld.

55. Mr. K. T. Tamang further submitted that as the offences charged amounted to *"the same transaction"* the sentence under Section 354 and 354B IPC could not have been awarded.

56. A perusal of the charges framed for the assault on the victim as well as the deposition of the victim reflects that charges were framed for use of criminal force on the victim

intending to outrage her modesty (Section 354 IPC) and for disrobing her (Section 354B IPC). The victim deposes that while in the car the Appellant removed her underwear first, dragged her back into the vehicle after she went out used criminal force and raped her. It is apparent that the acts alleged against the Appellant were committed in the same transaction, one after the other ultimately leading to rape.

57. The ingredient of Section 354 IPC is assault or use of criminal force on a woman with the intention to outrage or knowing it to be likely that he will thereby outrage her modesty. The ingredient of Section 354B IPC is assault or use of criminal force to any woman with the intention of disrobing or compelling her to be naked. Whereas to constitute the offence under Section 354 IPC the assault or use of criminal force on a woman must be with intention to outrage her modesty or having knowledge that it would to constitute the offence under Section 354B IPC the assault or use of criminal force must be with intention of disrobing or compelling her to be naked. Section 354B IPC is graver of the two crimes. The assault or use of criminal force on a woman with the intention of disrobing or compelling her to be naked may amount to outraging her modesty as well. Thus commission of the offence under Section 354 and 354B IPC were preparatory acts towards the commission of rape in the same transaction in the present case.

58. In view of Section 220 Cr.P.C. the Appellant could have been charged and tried at one trial for the offences he was charged with. However, in view of Section 220 (5) Cr.P.C. Section 71 of the IPC and Section 42 of the POCSO Act it is clear that if the alleged act of penetrative sexual assault, assault or criminal force to woman with intent to outrage her modesty and assault or use of criminal force to woman with intent to disrobe were committed in the course of the same transaction, the offender may not be punished for more than one of such his offences, unless it be so expressly provided. Thus, the sentence of the Appellant under Section 354 and 354B IPC cannot be upheld and is set aside.

59. The learned Special Judge has sentenced the Appellant for commission of two separate offences under Section 323 IPC on the victim as well as P.W.2 by imposing a singular sentence of simple imprisonment for a period of one year. The learned Special Judge was required to examine and sentence the Appellant, if mandated, for the two offences separately. As the punishment prescribed under Section 323 IPC is for a term which may extend to one year without a minimum term the sentence of one year imposed is taken as sentence of six months for each of the two offences. The offence of voluntarily causing hurt upon the victim was in the course of the same transaction while committing rape. Thus, the Appellant was not required to be sentence for the offence under Section 323

IPC. The sentence for voluntarily causing hurt on the victim is set aside. Consequently, for the commission of voluntarily causing hurt upon P.W.2 the Appellant is sentence to undergo six months of simple imprisonment.

60. The rest of the directions passed by the learned Special Judge are maintained.

61. The appeal is partly allowed and disposed of on the above terms. The Appellant is in jail. He shall continue there and serve the rest of the sentence.

62. A copy of this judgment may be sent to the Court of the learned Special Judge, North District, Mangan. A certified copy of the judgment may be furnished to the Appellant.

(Bhaskar Raj Pradhan)
Judge
07.06.2019

Approved for reporting: yes.
to/ Internet: yes.