

Serial No. 01
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. A. No. 7 of 2019

Date of Decision: 26.06.2023

Shri. Kadar N. Marak

Vs.

State of Meghalaya & 2 Ors.

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Deb, Adv.

For the Respondent(s) : Mr. R. Gurung, GA with
Ms. S. Shyam, GA

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| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

J U D G M E N T

1. The uncontroverted facts of the case leading to the filing of this criminal appeal under Section 374 Cr.PC wherein, the impugned Judgment and Order dated 07.11.2017 passed by the learned Sessions Judge, East Garo Hills, District, Williamnagar in Sessions Case No. 14/2009 was assailed goes in this manner:

2. That on 06.01.2009, Shri. Kalnesh Sangma proceeded to Songsak village along with his wife to collect C.I. Sheet subsidy as provided under the MLA Scheme, from the residence of the local MLA. On reaching Songsak bazar, he instructed his wife to wait for him at the bazar while he proceeded towards the house of the MLA. It appears that he did not come to fetch his wife from the bazar and had proceeded home on his own. The next day, he came to look for her and was informed that she was at the residence of Libing Sangma and his wife. On reaching home, his wife narrated to him that about 6:30 pm or so on the previous day while she was in the bazar, she was raped by two persons.

3. The said Kalnesh Sangma then lodged an FIR before the In-Charge, Songsak AD Camp, East Garo Hills District on 09.01.2009 with a report that his wife was raped by Shri Kadar M. Marak (the appellant herein) and Shri Koeli Sangma, both of Songsak, Agalgre.

4. On receipt of the said FIR, the police registered the FIR as Williamnagar P.S. Case No. 3(01)2009, under Section 376 IPC and investigation was carried out. The Investigating Officer after completion of the investigation, filed the charge sheet on 13.05.2009 finding a prima facie case under Section 376 IPC well made out against Shri Kadar N. Marak. As to the accused, Koeli Sangma, the I/O has opined that he may not have

committed the offence but has only witnessed the same, therefore, he may be considered as an approver.

5. The Trial Court on consideration of the charge sheet has, however, framed charges against the two accused persons under Section 376 IPC and on their denial by pleading not guilty to such a charge, directed that they face trial.

6. In course of trial, about 8(eight) out of the 10(ten) cited witnesses were examined and on conclusion of the recording of evidence, the accused/appellant Kadar Marak as well as Koeli Sangma were examined under Section 313 Cr.PC. The reply to the questions put by the court on the incriminating evidence against them was duly recorded. The argument of the prosecution and the defence was heard and the learned Sessions Judge vide Judgment and Order dated 07.11.2017 has thought it fit to convict the appellant herein, who was sentenced to undergo rigorous imprisonment of 7(seven) years with fine of ₹ 1000/-, in default thereof to undergo further simple imprisonment for another 2(two) weeks, while the other accused person Shri. Koeli Sangma was given the benefit of doubt and was set free.

7. Referring to the evidence as well as the materials available on record, Mr. S. Deb, learned counsel for the appellant has submitted that the

police investigation has proceeded on the basis of an unverified rumor that someone has been raped and, in the process, one of the two young men who were seen having tea with the alleged victim has been convicted for an offence which may or may not have occurred in the first place.

8. Let us first look into the evidence tendered by the informant, the husband of the victim, who was examined as PW-3. This witness as regard the allegation of rape, has deposed that he knew both the accused persons. He confirmed that on the said day, he and his wife went to Songsak Bazaar. At about 3:00 pm, he went to the house of the MLA to collect the CIG sheets and left his wife at the bazar. When he came back, he could not find his wife so he went home alone. The next day, he learnt that his wife was given shelter at the house of Libing Sangma and his wife and they returned home. On reaching home, his wife narrated the incident which happened the previous day that she was forcefully raped by Kadar N. Marak and Koeli Sangma, the two accused persons. In his cross-examination, he has stated that the victim, at the time of the occurrence, she had screamed and shouted for help and the police heard her. Thereafter he filed the FIR.

9. The PW-1 and 2 respectively are the manager and worker of the tea stall where they saw the two accused persons and the victim drinking tea at the said stall. However, at about 4:00 pm to 5:00 pm they left the tea stall

and these witnesses never knew what happened thereafter.

10. The learned counsel for the appellant has submitted that from the evidence of the FIR maker and the two witnesses who saw the accused persons and the victim at the tea stall, nothing could be confirmed or ascertained that they knew or saw the incident of rape. The testimony of the PW-3, the husband of the victim, is just hearsay evidence which could not be corroborated.

11. Then, leading this Court to the evidence of the PW-4, Shri Libing Sangma, the learned counsel has submitted that this witness has only confirmed the fact that the victim was given shelter for the night at his home when she appeared there at about 7:00 pm. This witness has deposed that the victim has told him she came with her husband to the market when her husband went to collect the CI sheet and did not return till then. She has, however, never related to him anything about the said incident of rape.

12. The Doctor who has examined the victim was examined as PW-5. In his evidence, he has stated that on examination, he could not find any external injuries or swelling or tear on the private parts, hence he could not determine if there was any forceful penetration.

13. PW-6 is the uncle of PW-7 who is the owner of a tea stall at the

Songsak bazaar. These witnesses have deposed that on the said day, the victim came to the tea stall at about 6:00 pm and even as she said that her sister owns a tea stall at the said bazaar, she did not say anything about the incident.

14. The PW-8 is the Investigating Officer who has investigated into the incident. According to his version of the story, he has stated that the two accused persons must have called the victim to have tea at the said tea stall and on reaching the same, they must have taken the victim to the back of the shop and raped her there. It was further stated that the accused Kadar Marak/appellant confessed to have committed the offence, while the co-accused Koeli Sangma was a witness to the same but he did not commit the act. Hence, no evidence was found against him and instead he was proposed to be examined as an approver.

15. The learned counsel has submitted that while appreciating the evidence of all the witnesses, it is very apparent that the witnesses had contradicted each other and that there is no direct evidence to prove that the alleged rape had occurred or that the appellant was the perpetrator.

16. As far as the appellant is concerned, it is to be noted that he is an uneducated person who may have been intimidated by the court's

atmosphere when at the time of recording of his statement under Section 164 Cr.PC by the learned Magistrate, he has made the so called confession that since he was drunk he may have committed the sin (sic rape). This statement was, however, retracted by the appellant himself in his 313 statement wherein, he has denied that he has raped the victim. Infact, he has stated that he is familiar with the alleged victim and has known her earlier since she used to come to the market very often. On the alleged day of the incident, he along with the co-accused had tea with the alleged victim at the tea stall and came out together. After that, they left to their separate places.

17. As to the exculpatory confession of the co-accused who, in his statement before the Magistrate under Section 164 Cr.PC is said to have stated that he saw the appellant raped the alleged victim, the said confession was later retracted in his statement under Section 313 Cr.PC and as such, coupled with the fact that a confession of a co-accused has no evidentiary value against another co-accused, more so, in this case when such so-called confession has been retracted.

18. The learned counsel has submitted that the learned Sessions Judge while passing the impugned judgment has come to the conclusion that the appellant is guilty of the offence of rape against the victim based only on the statement of the alleged victim recorded under Section 161 as well as the one

recorded under Section 164 Cr.PC. The fact that the alleged victim has also narrated to her husband the incident and how it happened was also one of the factors which has swayed the learned Sessions Judge to come to such conclusion, which is erroneous, not based on the well settled principle of evidence.

19. It is also the submission of the learned counsel that unfortunately, the alleged victim had died during the course of the proceedings before the court and her evidence could not be recorded at the trial. Therefore, reliance on unsubstantiated evidence, the impugned judgment and order was passed causing prejudice to the appellant. The same is liable to be set aside and quashed and the conviction overturned accordingly.

20. Mr. R. Gurung, learned GA while submitting on behalf of the State respondent has laid stress upon the statement of the alleged victim recorded under Section 161 and 164 Cr.PC to say that the factum of rape, particularly by the appellant has been lucidly explained by the alleged victim since she has narrated how the incident occurred, first by the invitation of the appellant and the co-accused to have tea at the said tea stall and soon after that how she was forcibly taken to a vacant stall and there she was raped by the appellant.

21. The learned GA has also submitted that the factum of the said act of rape was confirmed by the appellant himself when in his statement under Section 164 of the code he has stated that he was drunk and unfortunately he had committed the offence of rape. This was further corroborated by the co-accused who, in his statement under Section 164 has stated that he was a witness to the act of rape perpetrated by the appellant upon the victim.

22. Another contention canvassed by the learned GA is that given the fact that the victim had died in the midst of the trial, therefore, her statement under Section 161 and 164 Cr.PC can be treated as a dying declaration under Section 32 of the Evidence Act and such statement duly corroborated by the evidence of the PW-3, the maker of the FIR, who, in his evidence has deposed that the victim has narrated to him how the entire episode occurred.

23. This Court has duly noted the above submission and contention of the parties in support of their respective case. What is essential is to consider the whole spectrum of the prosecution's case to come to a definite finding as to whether a case for conviction has been made out.

24. Taking into account the quality of evidence tendered as briefly enumerated above, what can be understood is that the first time that the alleged incident of rape was made known was when the alleged victim has

narrated the same to her husband on 07.01.2009. The husband in turn then lodged the FIR on 09.01.2009. In the body of the FIR it was specifically mentioned that on 06.01.2009 at about 6:30 pm, the wife of the informant was forcibly taken behind the shop by the appellant and the co-accused where the appellant raped her.

25. In course of investigation, when the Investigating Officer took down the statement of the alleged victim under Section 161 Cr.PC, she gave one version of the story by saying that after the two boys called her to have tea, one of them, that is, the taller boy dragged her to an abandoned shop and there he raped her. The other boy witnessed this but he ran away from the place of occurrence. In her statement under Section 164, she said that two persons forcibly took her behind the shop and raped her. After they had raped her, both of them ran away from the scene.

26. What is conspicuous in the above statements made by the alleged victim is the absence of the names of the alleged perpetrators. It must be remembered that this was after she had first narrated the incident to her husband, the complainant, who in his FIR has given the names of the alleged perpetrators of the crime. This inconsistency cannot be taken lightly as it is expected that the victim who is said to be familiar with the accused persons should know their names.

27. Though the PW-1 and PW-2 have confirmed that they saw the two accused persons along with the alleged victim having tea at their stall, yet they could not tell what happened thereafter. Infact, all the relevant prosecution witnesses have no direct knowledge as to whether the alleged victim was raped or not. The evidence of PW-4 who has given her shelter at his home on that day, has clearly stated that the alleged victim did not show any signs that she was raped.

28. The only piece of evidence relied upon by the prosecution and believed by the learned Trial Court is the statement of the alleged victim under Sections 161 and 164 Cr.PC. Since the alleged victim had died without being able to depose in court, her previous statements was said to be a dying declaration, thus attracting Section 32 of the Evidence Act.

29. Indeed, on a perusal of the impugned judgment at para 20 of the same, it is seen that the learned Sessions Judge had based the conviction solely on the ground that the alleged victim had categorically and without any contradiction stated in her statement under Section 161 and 164 Cr.PC that she was forcibly taken behind the shop by the appellant herein who had then raped her.

30. It is well settled that the statement made under Section 164 Cr.PC is

not a substantive piece of evidence, since the same was recorded in the absence of any defence or contradiction to it by the accused. The same can be introduced in evidence only for the purpose of corroboration or contradiction but not as standalone evidence. The same is true when it comes to reliance on the statement made under Section 161 Cr.PC. More often than not, the corroboration would come from the attesting evidence of the other witnesses and contradiction of the same would follow, perhaps in the cross examination of the maker of the statement when such statement was sought to be introduced in course of evidence.

31. Apparently, in this case, since the alleged victim had already expired in the midst of the trial, there could be no corroboration or contradiction of her statement made under Section 161 and 164 Cr.PC respectively. What has been suggested is that the said statement could be used as a dying declaration as provided under Section 32 of the Indian Evidence Act, 1872. Here too, the prosecution has not advanced any argument in this regard and even if the proposition is accepted at this stage, it is trite law that a dying declaration has to fulfill the criteria of a direct nexus between the act alleged and the cause of death as a consequence thereto. In the case in hand, there is no evidence that the alleged victim died because she was raped. On the contrary, it is said that she died a natural death. Therefore, the element of

a dying declaration under such circumstances has no significance.

32. Even if the said statement made by the alleged victim before the police and before the Magistrate is taken at face value, the fact that she has made contradictory statement when in one instance she has stated that she was raped by one person and in another statement, she said that two persons had raped her, this, cannot be said to be minor discrepancy. The fact that she has also failed to give the names of the said perpetrators in the statements abovementioned would also show that she is not aware of who had actually raped her, if at all. Granted, that the two accused persons are familiar to her since she voluntarily went with them to have tea and naturally would have had conversations with them at the tea stall, therefore, to say that if she was raped by them, she would not be able to identify them is a bit farfetched.

33. It is a well settled principle of law that a person accused of rape cannot be convicted even on the basis of the sole testimony of the victim unless such testimony is absolutely trustworthy, unblemished and of sterling quality, which is not the case here.

34. As to the said confession of the appellant in his statement under Section 164, records would show that he has retracted the same and as such, no evidentiary value can be placed on the so-called confession.

35. In the light of the available evidence and materials on record, the prosecution has not been able to convince this Court that the conviction of the appellant was based on evidence beyond reasonable doubt. Infact, glaring inconsistency and contradiction has been noticed as far as the evidence is concerned, which should give the appellant/accused the benefit of doubt.

36. Accordingly, this Court finds that the conviction and sentence of the appellant is not warranted and the same is liable to be set aside and quashed.

37. The impugned judgment and order dated 07.11.2017 is hereby set aside and quashed. The appellant is directed to be set free with all liabilities against him discharged accordingly, unless, he is wanted in any other case.

38. Let authentic copy of this judgment be supplied to the appellant, free of costs.

39. The Trial Court records are directed to be returned.

40. The Crl. Appeal No. 7/2019 is hereby allowed and disposed of. No costs.

Judge

Meghalaya

26.06.2023

"Tiprilynti-PS"