

Serial No.06
Regular List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.34/2022 with
Crl.M.C.No.80/2022

Date of Order: 20.06.2023

Donbor Syngkli Vs. State of Meghalaya & anr

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Appellant : Mr. N. Syngkon, Adv with
Ms. L. Phanjom, Adv

For the Respondents : Mr. R. Gurung, GA with
Ms. A. Thungwa, GA
Ms. S. Shyam, GA

i) Whether approved for reporting in Law journals etc.: Yes

ii) Whether approved for publication in press: Yes/No

JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appeal arises out of a judgment of conviction of October 19, 2022 and the consequent sentence passed on the same day imposing 15 years of rigorous imprisonment together with a fine of Rs.50,000/- for the appellant being found to have committed an offence punishable under clauses (a) and (f) of Section 376(2) of the Penal Code, 1860.

2. Two principal grounds have been urged on behalf of the appellant. The appellant claims that since the act complained of took

place in the year 2007 and prior to the 2013 amendment to, inter alia, Sections 375 and 376 of the Penal Code, it is the previous definition of “rape” in Section 375 of the Penal Code as it stood then that would govern the matter. The further case of the appellant is that he has been wrongly found guilty under clause (a) of Section 376(2) of the Penal Code.

3. There is no dispute as to the age of the minor girl who is said to have been nine years of age at the time of the incident.

4. Since only limited grounds have been raised, the discussion herein is confined to such grounds.

5. The first information report was lodged by the mother of the survivor at Jowai Police Station on November 6, 2007. The young girl was medically examined shortly thereafter and the medical opinion was that there was no sign of injury and no sign of recent sexual intercourse. Since the incident complained of apparently took place on September 20, 2007 and the complaint had been lodged nearly two months thereafter, it is possible that even if there had been some injury, any sign thereof would have disappeared by such time. However, the vaginal orifice was found to be dilated and the hymen of the girl-child was found missing. The girl-child blamed the appellant herein on such account.

6. In the deposition of the survivor at the trial she used the following words to indicate what the appellant had inflicted on her:

“... Thereafter, the accused pull me towards him as I was sitting near him. The accused has already taken off his pants under his blanket and the accused took my hand and made me touch his private part. I tried to get out but the accused was pulling and grasping me and the accused catch hold of my hand and made me touch his private part in an up and down movement. Then the accused tried to insert his penis on my private parts and was moving. I tried to resist and was fighting against him so he rub his penis on my anus and other parts of the body. Then he ejaculated I cried and my younger sisters who are sitting in the corner watching TV in the same room saw me crying...”

7. Previously, in her statement recorded under Section 164 of the Code of Criminal Procedure, 1973 the survivor had asserted as follows:

“... Then I go to him and sat near him but (*he*) asked me to get inside the blanket and I said I am alright with sitting and force me to get inside the blanket to sleep with him. At that moment he took off his pants and asked me to touch his private part. At first I did not do it but he threaten me so I touch his thing and he tried to move and put his thing somewhere my private parts, the thing hit my stomach, my anus and I feel the pain and after sometime something like fluid comes out from my uncle...”

8. The appellant submits that there was no allegation that the appellant inserted his penis into the survivor's vagina or anus. In such circumstances, according to the appellant, no case of rape had been made out.

9. The appellant says that even before the incident took place and sometime at the turn of the century, a non-governmental organisation by the name of Sakshi had approached the Supreme Court for enlarging the definition of “rape” in Section 375 of the Penal Code. The petitioner before the Supreme Court asserted that penetration should not be confined to merely the vagina of the woman or the girl and penetration into the

vagina, urethra or anus of a woman or a girl must also be considered rape even if the penetration may be by the finger and not by the penis. Certain other directions were also sought for the conduct of trials pertaining to rape.

10. In the resultant judgment reported at (2004) 5 SCC 518 (*Sakshi v. Union of India*), a two-Judge Bench considered the suggestions of the NGO and, ultimately, only made provisions for rape trials to be held in camera and for the victims not to be brought into contact with the alleged rapists at the trials. As to the change in law, particularly the definition of “rape” as suggested by the petitioner before it, the Supreme Court left it to Parliament to take a call.

11. The appellant submits that it would be evident from the definition of “rape” in Section 375 of the Penal Code prior to its 2013 amendment that it was imperative that the penis of the rapist enters the vagina of the survivor for the offence of rape to be constituted. The appellant contends that even if the allegations of the survivor in the present case are taken at face value, the act complained of would not constitute rape within the definition of that word in Section 375 of the Penal Code at the relevant time. To boot, the appellant asserts that the attempt by certain persons to enlarge the scope of the definition was repelled by the Supreme Court by leaving it open to Parliament to consider the matter.

12. The judgment cited may not be of any relevance in the present case, particularly since the Supreme Court did not interpret the existing definition of rape in the pre-amended Sections 375 and 376 of the Penal Code or the related provisions.

13. It is apparent on a plain reading of Section 375 of the Penal Code as it stood prior to the amendment of 2013 that the offence of rape could only be committed by a man upon such man having sexual intercourse with a woman in certain circumstances described in the relevant provision. For the present purpose, what is relevant is the circumstance indicated under *Sixthly* in Section 375 of the Penal Code and the Explanation to such provision. For the present purpose, Section 375 of the Penal Code may be reduced to indicate what is relevant in this case:

“375. *Rape*.— A man is said to commit “rape” who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions:—

...

Sixthly.— With or without her consent, when she is under sixteen years of age.

Explanation.— Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.”

14. Pursuant to the 2013 amendment of the Penal Code, the new definition of rape makes insertion not only by the penis but also by any object or a part of the rapist’s body into the vagina, urethra or anus of the woman for the offence to have been committed. New clauses (c) and (d)

pertain to manipulation of the body of a woman and application of the mouth of the rapist and even include forcing a woman to do so with any other person an offence.

15. Prior to the amendment, the specific orifices of mouth, urethra, vagina or anus were not indicated in so many words. Although the expression “sexual intercourse” is no longer there in the initial part of the definition of rape, the previous Section 375 of the Penal Code made it very clear that it was only upon sexual intercourse being committed in certain circumstances that the offence of rape would have been committed. Correspondingly, the Explanation indicated penetration but did not specify whether penetration had to only be in the vagina or could even be elsewhere.

16. Since the entire definition of rape in the previous Section 375 of the Penal Code hinged on the expression “sexual intercourse” committed by a man, it has per force to be understood to imply intercourse involving the penis of the offender. However, in the Explanation referring only to penetration and not specifying whether the penetration had to be in the mouth or in the urethra or in the vagina or anus of the woman, as long as a person indulged in sexual intercourse using his penis and penetrated any of the several orifices, it would amount to rape within the meaning of previous Section 375 of the Penal Code.

17. In this case, the survivor was a nine-year-old girl who clearly indicated in both her statements that the appellant herein put “his thing” near the survivor’s private parts and in the anus and ejaculated. She also asserted that she felt pain and this would have been the case if there was an element of insertion whether into her vagina or into her anus. The girl also claimed that the appellant herein was responsible for her ruptured hymen.

18. Even if the ruptured hymen of the survivor is taken out of consideration since the survivor did not explicitly indicate penetration of the appellant’s penis inside her vagina, though she complained of the appellant rubbing his penis on her private parts, the fact that the survivor experienced pain indicates that there must have been some degree of penetration or insertion into the anus, at least, if not in the vagina of the survivor. If so much is established, the act of rape is found to have been completed in accordance with Section 375 of the Penal Code as it stood prior to the 2013 amendment.

19. It is such statement of the survivor which has been analysed and interpreted in great detail in the impugned judgment of conviction before the trial court reached the conclusion indicated at paragraph 76 thereof:

“76. It is distinctly clear that ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 IPC nor the Explanation attached thereto requires that there should necessarily be complete penetration of the

penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape, it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376 IPC. That being so, it is quite possible to commit legally the offence of rape even without causing any injury to the genitals or leaving any seminal stains.”

20. The trial court also found that the survivor’s account of the incident was believable and that there was a natural manner in which she expressed herself even when in court. In such circumstances, since the presence of the appellant and the survivor on the same bed and under the same blanket was established by corroboration of other witnesses and the girl-child, who was nine years of age at the time, describing the incident to the best of her ability and expression, merely because there may have been some details that were left out, whether or not on account of the trauma or shame that the girl may have felt, the fact that the survivor claimed that the appellant’s penis was rubbed on her private parts and anus and she felt pain would be indicative of penetration. Since the slightest amount of penetration would amount to rape and the previous Section 375 did not indicate which part of the woman’s body was required to be penetrated, a meaningful reading of such definition would imply that as long as it was the penis which was involved in the

penetration whether it was vagina or the anus or the urethra or the mouth, the slightest degree of penetration would amount to rape.

21. The trial court, however, fell into error in convicting the appellant herein under clause (a) of Section 376(2) of the Penal Code. There is no doubt that the appellant herein was a police officer at that time and had confessed to being so. However, for an offence under the relevant clause being committed, the act ought to have been within the limits of the police station where the police officer was appointed or in the premises of any station house to which such police officer was appointed or on a woman in his custody or in the custody of the police officer subordinate to him. In this case, there was no evidence that the offence was committed within the limits of the police station to which he was appointed. Indeed, the offence appeared to be at the home of the appellant. There was also no evidence that the offence was committed at any station house. The offence was also not committed on a woman who was in the custody of the appellant or on a woman who was in the custody of a subordinate of the appellant.

22. Clause (a) of sub-section (2) of Section 376 of the Penal Code would be attracted when a police officer commits rape in his line of duty as police officer or at a place which he is required to attend in connection with his duty. Merely because a person was a police officer would not

attract the relevant clause if none of the three conditions stipulated in the provision was satisfied.

23. Accordingly, the judgment of conviction is modified by finding the appellant herein guilty of commission of the offence under Section 376(2)(f) since there is no dispute that the rape in this case was committed on a woman who was below the age of 12 years.

24. In terms of Section 376 of the Penal Code as it stood prior to its 2013 amendment, the punishment for commission of rape was “rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine: ...”

25. The proviso to the provision permitted a sentence of imprisonment of either description for a term not less than 10 years to be imposed for which the court had to indicate adequate and special reasons. However, the norm was that the minimum punishment would be rigorous imprisonment for 10 years and the maximum punishment could be rigorous imprisonment for life.

26. In the present case, the appellant herein was in his late thirties at the time that the trial was completed. Taking this into account and the life expectancy, the trial court deemed it appropriate to sentence the appellant to 15 years’ rigorous imprisonment. Though it is elementary that the sentence that is awarded must be in accordance with the penal provision and no punishment may be invented by a judge, when the

provision itself provides a range between a minimum term and a maximum term, the court is empowered to provide for a term in between. In such circumstances, the sentence of 15 years' rigorous imprisonment appears to be just and reasonable considering the circumstances in which the offence was committed, the nature of the relationship between the appellant and the survivor and the fact that the appellant had threatened the survivor in the event the survivor disclosed the incident to any person.

27. For the reasons aforesaid, the judgment of conviction dated October 19, 2022 is modified by finding the appellant guilty of the offence under Section 376(2)(f) of the Penal Code read with Section 506 (Part II) of the Penal Code. However, the sentence of imprisonment imposed and the fine slapped on the appellant are not interfered with.

28. CrI.A.No.34 of 2022 and CrI.M.C.No.80 of 2022 are disposed of.

29. Let an authenticated copy of this judgment and order be immediately made available to the appellant free of cost.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
20.06.2023
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