

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl.A.No.36/2022

Date of Order: 16.05.2023

Binod Tamang

Vs.

State of Meghalaya

Coram:

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

Appearance:

For the Appellant

: Mr. J. Shylla, Adv with
Mr. M.L. Nongpiur, Adv
Mr. S. Lyngdoh, Adv
Mr. M. Pyrthuh, Adv

For the Respondent

: Mr. B. Bhattacharjee, AAG with
Mr. S. Sengupta, Addl.PP
Mr. A.H. Kharwanlang, Addl.Sr.GA
Ms. A. Thungwa, GA

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

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

Here is a case where over-enthusiasm may have got the better of the trial judge in convicting a person on surmises and conjectures without any direct evidence against him.

2. It is quite possible in this case that the appellant herein may have committed the crime. However, convictions are not made on perceptions or suspicion and the guilt of an accused has to be established by cogent evidence and beyond reasonable doubt.

3. The complaint in this case was filed on June 6, 2018 by the father of the alleged survivor who was said to be all of eight years old at the time of the incident. The father could not name or identify the accused in the complaint, but indicated that a Nepali man who used to come regularly to his shop to buy goods had taken his daughter in the afternoon of June 6, 2018 on the pretext of buying some goodies for her, but the daughter did not return within reasonable time and, much later, the daughter returned around dusk and she had blood streaming down her legs.

4. In course of the medical examination that was conducted immediately thereupon, no external injuries or bruises were discovered. The medical examiner received the case on the allegation of sexual offence having been committed on the eight-year-old girl. In the little girl's description of the incident, what is recorded in the medical examination report is that the unknown accused had committed the crime, but the girl did not describe the nature of the crime.

5. A statement of the survivor was recorded by a Judicial Magistrate under Section 164 of the Code of Criminal Procedure, 1973. The survivor, in course of such statement, claimed that she was lured to accompany the accused upon being offered chips and biscuits. She narrated that she went with him and the accused took her to the jungle and

he “kept all the chips and biscuits in a plastic”. She continued that when the two of them reached the jungle, she opened the packet of chips and both of them ate the chips. She claimed that the accused, thereafter, “told me to lie down and I lied down on the ground and he lied down on top of me.” She also indicated that the accused “opened my pants and I asked him as to why he opened my pants and then he shut my mouth with his hands. Then he inserted his penis (victim by sign language pointed towards her vagina) but it could not enter so he inserted his two fingers ... He also put his penis in my mouth. ...”

6. Though the survivor went on to add that by the time that she reached her house and was spotted by her mother, there was blood running down her legs, yet, the girl did not indicate any penetration or pain or of feeling blood oozing out in course of what, according to her, was committed on her by the accused in the jungle.

7. Again, in course of her statement during the medical examination, the survivor claimed that the accused person was known to her as he regularly came to their house. The accused apparently called her to go with him to buy biscuits etc.; whereas, in her statement to the Magistrate, she referred to the accused luring her away from the survivor’s father shop. It is possible and more than likely that the shop and the residence were the same, but these little things have to be

ascertained to the hilt, particularly since the very identity and name of the appellant herein were not known to the survivor or her parents.

8. At the time of the trial, neither the victim nor the de facto complainant father could be traced out. The evidence was recorded in the absence of these two principal persons before there was a transfer of the original trial judge. A fresh attempt was made by the State to trace out the survivor and her father, but it failed.

9. Of the several witnesses who were called by the prosecution, the State heavily relies on the statements of the investigating officer and of the medical examiner, who checked on the little girl on the same day as the incident. The State also seeks to suggest that there can be no doubt that the survivor made the statement under Section 164 of the Code before the Judicial Magistrate and the appellant herein did nothing to detract from the description of the incident by the survivor.

10 In course of his deposition at the trial, the investigating officer indicated that he was led to the alleged place of occurrence by the survivor where he found a packet of an unopened noodles and an opened bag of chips lying around. The investigating officer claimed to have collected such material. However, such material was not produced at the time of the trial and the excuse proffered was that in course of the relevant

malkhana being cleaned in 2019, such insignificant material may have been thrown out.

11. The investigating officer went on to recount that it was more than a year after the incident that the identity of the accused could be established and the accused could be arrested upon the mother of the survivor discovering the appellant herein in a market and immediately reporting the matter to the police.

12. Much emphasis is laid by the State on the test identification parade which was conducted and on Section 9 of the Evidence Act, 1872. The State asserts that on all three occasions that the survivor was required to peep into the area where the parade was conducted through a small hole, she identified the appellant herein despite the appellant being required to change clothes and his position on each occasion.

13. The State also relies on a judgment reported at (2010) 5 SCC 63 (*Ram Babu v. State of Uttar Pradesh*) for the enunciation of the law pertaining to identification of an accused at a parade in paragraph 14 of the report.

14. There can be no dispute with the proposition and it goes without saying that once an identification parade is found to have been conducted with due precaution, the evidence with regard thereto may be used by the court for the purpose of corroboration. It is just the same as a

statement under Section 164 of the Code may be treated, particularly of a survivor in a case like this.

15. However, it is the deposition of the survivor in course of the trial and the opportunity that an accused gets to cross-examine the survivor at the trial that really has to be regarded as the primary evidence. Likewise, the testimony of an ocular witness and the cross-examination of such witness will also go a long way in determining the matter. In this case, since the survivor and the de facto complainant could not be traced out, the accusation could not be brought out in course of the trial for the appellant herein to have an opportunity to deal with the same.

16. There is, no doubt, a statement of the appellant herein apparently recorded under Section 161 of the Code where the appellant claimed that the appellant had indeed visited the shop of the survivor's father on two occasions on the relevant date. According to the appellant, he was accompanied by another Nepali person by the name of Solti and they had two rice beers before going out for marketing and returning to the shop to have another rice beer. After such drinking, according to the appellant's statement, he asked the shop-owner's daughter to accompany the appellant to buy some goodies for her. The appellant claimed that his companion was also with him and that in a short while the girl was

returned to the shop after the goodies were purchased and made over to her.

17. What the State seeks to insinuate is that once the appellant has confessed to his presence at the place of occurrence at or about the same time as the incident is alleged to have occurred and the evidence showed that the little girl had been sexually assaulted, it was for the appellant to establish that it was not him who committed the alleged offence or that the incident did not take place during his short interlude with the survivor.

18. Clearly, the State demands too much of an accused in a criminal trial. Usually, it is for the accused to remain tight-lipped and allow the prosecution to prove the commission of the offence by the accused beyond reasonable doubt. In such exercise, the prosecution cannot expect the accused to play any role or come to the prosecution's aid. However, when certain circumstances arise which call for an answer from the accused as, say, in a situation covered by Section 103 of the Act of 1872, that the accused is called upon to discharge the onus.

19. In the present case, there was no accusation that was made on the face of the accused for the accused to question the maker of such accusation. It is true that the appellant herein was identified in course of the TI parade, but that does not establish beyond reasonable doubt that the appellant herein committed any crime or sexually assaulted the survivor.

There was no other witness who had seen the incident and had come to depose at the trial. No one even deposed to say that he or she had seen the appellant herein accompanying the survivor to the jungle or even coming out therefrom.

20. Furthermore, in course of the statement allegedly rendered by the appellant herein to the investigating officer, he claimed that a person by the name of Solti was with him. In the context of the appellant volunteering such information, if Solti had been brought to depose at the trial and Solti denied that he accompanied the appellant and the alleged survivor to the jungle, there may have been a possibility of drawing some kind of adverse inference against the appellant. But since the prosecution made no such attempt, the appellant's statement in such regard is, if not deemed to be accepted, at least, gone un rebutted.

21. In a scenario as the present, there is no need to question the integrity or the credibility of the statements made by the disinterested medical examiner, the dispassionate Judicial Magistrate who recorded the statement of the survivor or the investigating officer. All three of them, at best, truthfully narrated what was told to them. However, none of the three witnesses could have testified as to the contents of the statements made by the survivor to them individually, whether in course of the

medical examination or in course of the recording of the statement under Section 164 of the Code or otherwise in course of the investigation.

22. The matter may be viewed from a slightly different perspective. If a person wanted to frame another and made a wild accusation against such other and even identified such person in course of a TI parade, it would be unwise to convict the other without the accused having to face the accusation of the accuser. Nothing herein should be seen to giving a clean certificate to the appellant herein; the emphasis here is only that the degree of proof that is necessary was absent in this case and the material before the trial court could not have prompted the trial court to accept that the guilt of the appellant herein had been established beyond reasonable doubt for him to be convicted of the charges that were levelled.

23. In the light of the above, CrI.A.No.36 of 2022 is allowed. The judgment of conviction dated September 15, 2022 is set aside, as is the consequent order of sentencing passed on the same day. The appellant will be set free immediately upon being acquitted of all the charges.

24. Let authenticated copies of this order be immediately made available to the parties.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
16.05.2023
"Lam DR-PS