
(2002) 05 SIK CK 0001

In the Sikkim High Court

Case No : Criminal Appeal No's. 10 to 12 of 2001

Puran Tirwa (Bishwakarma)

APPELLANT

Vs

State of Sikkim

RESPONDENT

Date of Decision : 28-05-2002

Acts Referred:

Citation : (2004) CriLJ 4416

Hon'ble Judges : Ripusudan Dayal, C.J

Bench : Single Bench

Advocate : N. Rai, N.L. Lepcha and S.S. Hamal, for the Appellant; N.B. Khatiwada, Addl. P.P. and J.B. Pradhan, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Ripusudan Dayal, C.J.—All these appeals challenge the Judgment and Order of the learned Sessions Judge, East & North, Sikkim at Gangtok convicting them under Sections 366 and 376 read with Section 34 of Indian Penal Code and sentencing each of them u/s 376 with rigorous imprisonment for a period of 10 years and a fine of Rs. 2000/- and in default of payment of fine to undergo further rigorous imprisonment for six months and u/s 366 of Indian Penal Code to undergo rigorous imprisonment for 4 years and a fine of Rs. 1000/- and in case of default of payment of fine to undergo further rigorous imprisonment for six months. Substantive sentences of imprisonment were directed-to run concurrently.

2. All the appellants and one Sukbir Tamang are taxi drivers and stood trial before the Sessions Judge in Criminal Case No. 15 of 1998. However, before the case could be decided by the learned Sessions Judge, Sukbir Tamang absconded. The victim is Ms. Luki Subba who is a resident of Makha. Prosecution case is that on 22nd July, 1998, the victim Ms. Luki Subba came from her house at Makha to the house of her aunty (Phupu) at Singtam Bazar and while she was returning from Singtam Bazar to her home, all the appellants and Sukbir Tamang stopped their vehicle and offered to take her towards Makha. The victim told them that

she did not have the passenger fare and would, therefore, prefer to walk. But the four accused persons gave the victim girl a free lift. When they reached near Kali Khola, they stopped the vehicle on the pretext of washing it and also closed the hood. Then appellant Puran Tirwa came inside the vehicle and pulled out her clothes and forcibly committed sexual intercourse with her. All her attempts to resist failed, as the other accused persons held her hands and feet when the appellant Puran Tirwa committed forcibly sexual intercourse with her. Thereafter, she managed to escape and ran towards Manpari Busty. After she had just crossed over the bridge towards Manpari Busty, appellant Puran Tirwa took her inside the Tata truck forcibly and when she tried to scream, he closed her mouth with his palm. Thereafter, the accused persons drove her further and on reaching near the Military camp, the Tata truck stopped and there Puran Tirwa again committed sexual intercourse with her forcibly. Then accused Sukbir Tamang, who later absconded came and forcibly laid her on the second seat of the Tata truck and committed sexual intercourse with her. When she tried to resist, the other persons held her by her hands and feet. Thereafter, the driver of the vehicle, namely, Man Bahadur Tamang, called her to the front seat and outraged her modesty. After sometime, the victim asked the driver to stop the Tata truck, as she wanted to urinate. The driver stopped the truck and then she got down and went a little further where she pretended to urinate. In the meantime, one Gypsy vehicle came and the victim stopped that vehicle and made a request for a lift and she was offered the lift by the owner of the vehicle who happened to be her Phupa (father's sister's husband). Then she got into the Gypsy vehicle and spent the night in the house of her Phupa. On the next day, that is, 23rd July, 1998, Til Bahadur Subba, P.W. 2, the father of the victim made a complaint to the Officer-in-Charge, Singtam Police Station to the effect that his daughter Luki Subba had gone to her aunty at Singtam, and when she was returning home after having failed to meet her aunty, the appellant Puran Tirwa and three boys told her that their vehicle would go to Makha and deceitfully took her in their vehicle and forcefully raped her on the way. The FIR was scribed by Nilakantha Rai, C.W. 5. According to the prosecution, the victim was aged less than 16 years at the relevant time. She was medically examined on 23rd July, 1998 by Medical Officer, Singtam District Hospital, Dr. Manoj Kumar Sarda, P. W. 10, who reported in his report Exhibit 3 as under :

1. Seminal fluid stains on the inner aspect of thigh and inguinal fold;
2. Bruise over labia majora and inguinal region; Tender to touch;
3. Per Vaginal Examination, superficial bruise tenderness. Vaginal swab taken. Sperms not detected.
4. Hymen-lateral tear.
5. No marks of abrasion over breast.

Dr. Sarda referred the case to the Medico Legal Specialist for opinion. Consequently, on the same day Dr. K. B. Gurung. the Medico-Legal Specialist, S.

T. N. M. Hospital, P. W. 8 examined her and gave his opinion that there was clinical evidence of penetration of the hymen. All the accused persons were arrested on 23rd July, 1998, but they were not medically examined.

3. I have heard Shri N. Rai, Advocate on behalf of appellant Puran Tirwa and Shri S. S. Hamal, Advocate on behalf of the other appellants, namely, Man Bahadur Tamang and Rama Shankar Prasad. I have also heard Shri N. B. Khatiwada, Additional Public Prosecutor on behalf of the State. It is submitted on behalf of the appellants that the evidence on record is full of infirmities and is not credible at all to prove the prosecution case. It is also submitted on behalf of the appellants that the prosecution has failed to prove that Luki Subba was aged less than 16 years. According to the learned counsel for the appellants, no offence was committed by the appellants and even if the prosecution is held to have proved the commission of the act of sexual intercourse by any of the appellants, it would appear from the evidence that the victim girl was a consenting party. On the other hand, learned Additional Public Prosecutor has tried to support the Judgment and Order of the learned trial court.

4. It is well settled that a conviction for the offence of rape can be based on the sole testimony of the prosecutrix if it is reliable, unimpeachable and does not suffer from any infirmity.

5. The appeal came up for hearing initially on 8th October, 2001 when the Court noted that neither the Police had done its work well nor the prosecution. It was noticed that the age of the victim Luki Subba was of material consideration and Til Bahadur Subba, P.W. 2, the father of the victim had deposed that he did not know the date of birth of the victim and he had given the birth certificate to the Police which was subsequently returned to him by the Police. The Court noted that it was the duty of the prosecution to place complete and true facts before the Court and not to conceal anything. Therefore, the Court directed the production of birth certificate and also other evidence relating to birth such as an extract from the Register of births and Deaths and also the school certificate of the school where the victim had studied. The Court also noticed that as per the evidence of Til Bahadur Subba, P. W. 2 he had gone to the Police Station on 23rd July, 1998 to lodge the FIR of the incident after having received a message from the Makha outpost. It was not clear from the record as to how the Police came to know about the occurrence which made the Police call Til Bahadur Subba. The Court considered it necessary that the relevant general diary entry be produced and proved. The Court directed the learned Sessions Judge, East & North to record evidence in the light of the observations made in the Order. Thereafter, opportunity was granted by the learned Sessions Judge, East & North to the prosecution to produce further evidence, but even then, things did not improve. It has not come on record as to how the police came to know of the occurrence as a result of which they called Til Bahadur Subba to ask him to lodge the FIR. No birth certificate or other reliable evidence has also come on record to prove that the victim girl was aged less than 16 years.

6. As regards the age of Luki Subba, Til Bahadur Subba (P.W.2), father of Luki Subba, has stated in his examination-in-chief that at the relevant time her age was 14 to 15 years. But, in his cross-examination, he admitted that he did not know her date of birth. He also stated in his cross-examination that the Police had taken the birth certificate of the victim girl but returned the same to him subsequently. The birth certificate did not come on record, even after the learned Sessions Judge, East & North gave opportunity to the prosecution to produce further evidence consequent upon the Order of this Court dated 8th October, 2001, as stated earlier. Ossification test was conducted on 28th July, 1998. According to the report of the Radiologist, the approximate age of the victim girl was between 14.9 and 15.8 years at the relevant time. This report was proved by Dr. K. Giri, P. W. 14, the Consultant Radiologist at S. T. N. M. Hospital. He has deposed that the report Exhibit P5 was prepared by the Radiologist Dr. M. K. Pradhan who is presently at Kathmandu, Nepal after resigning from the Hospital. In the cross-examination, he has stated that six months" margin was allowed on the report Exhibit P5 and if six months" margin was allowed, then the approximate age of the victim girl could be up to 16.3 years. Thus, according to the report of the Radiologist, the age of the victim girl might be more than 16 years at the time of the alleged occurrence. Other evidence on record is the statement of Krishna Parsad Dahal, C. W. 4 who is the Head Master of Makha Secondary School. According to his evidence, Luki Subba had been admitted in the school in the year 1988, but in the School Admission Register he could not find any entry regarding her admission. He has at the same time stated that in the Students" Attendance Register for Class IV, the name of Luki Subba is found at Serial No. 14 and her date of birth has been mentioned as 17th April, 1983. However, in the cross-examination, he admitted that the School Admission Register is the authentic record to show the students birth dates and not the Attendance Register. Thus, the prosecution could not produce any authentic record from the school to prove that Luki Subba was less than 16 years at the time of the alleged occurrence. Another witness produced by the prosecution on this aspect of the case is Hari Bhakta Subedi, C. W. 6 who was deposed that he prepared the horoscope, Exhibit CIO, in respect of Lilawati, daughter of Kali Bahadur Subba; but the victim girl is Luki Subba, daughter of Til Bahadur Subba and not Lilawati daughter of Kali Bahadur Subba. Therefore, this evidence is also of no help to the prosecution. As such, the prosecution has failed to prove that Luki Subba was aged less than 16 years at the time of the alleged occurrence.

7. As regards the medical evidence as to the occurrence, Luki Subba was examined by Dr. Monoj Kumar Sarma, P. W. 10 on 23rd July, 1998 and his report is Exhibit P3 referred earlier. In his cross-examination, he has stated that he sent the vaginal swab for chemical examination but the report came that no spermatozoa was detected. He also stated that Luki Subba told him that a piece of wood had entered into her vagina when she had a fall. But he could not say when such piece of wood had entered into her vagina. He found no stitches or old stitch marks around the vagina of the victim girl. He could not find any sign

of struggle on the body of Luki Subba. He could not say how old was the tear of hymen. He referred the matter to the Medico-Legal Specialist for opinion. Dr. K. B. Gurung, P. W. 8 is the Medico-Legal Specialist at S. T. N. M. Hospital and he gave his opinion that there was clinical evidence of penetration of hymen. According to him, this opinion is based on the report Exhibit P3 prepared by Dr. Manoj Kumar Sarda, P. W. 10 and also on his examination of the victim girl. He did not notice any stitch or any mark of stitch on the vagina of the girl. He admitted that lateral tear of hymen can be caused if external object like wooden stick penetrates through it. According to him, tear of hymen was around 2 to 3 days old.

8. The sole eye witness of the occurrence is Luki Subba who has deposed that while she was returning to her house from the house of her Phupa, four accused persons stopped their vehicle and offered to take her towards Makha. Then, she told them that she would prefer to walk as she did not have the passenger fare. But the accused persons told her that they would give her a free lift, since they knew her. When they reached near Kali Khola they stopped the vehicle on the pretext of washing it. They closed the hood and kept her inside the vehicle. She further deposed that while the others pretended to wash the vehicle, Puran Tirwa came inside and pulled out her clothes and forcibly committed sexual intercourse with her. All her attempts to resist failed as the other accused persons held her hands and feet when Puran Tirwa forcibly committed sexual intercourse with her. Further, she has stated that thereafter she managed to escape and ran towards Manpari Busty and when she had just crossed over the bridge towards Manpari Busty, Puran Tirwa came in a Tata truck which stopped near her and Puran Tirwa held her by her hand and forcibly took her inside the Tata truck. When she tried to scream, Puran Tirwa closed her mouth with his palm. Thereafter, they drove her further and stopped the truck near the Military camp and then Puran Tirwa once again forcibly committed sexual intercourse with her. After Puran Tirwa had satisfied his lust, the accused Sukbir Tamang came and forcibly laid her on the second seat of the truck and forcibly committed sexual intercourse with her. When she tried to resist, the other persons held her by her hands and feet. Thereafter, the driver of the vehicle Man Bahadur Tamang called her to the front seat and outraged her modesty. After sometime, she asked the driver to stop the vehicle saying that she wanted to urinate. The driver stopped the truck after which she got down and went a little further where she pretended to urinate. In the meantime, one Gypsy vehicle driven by the owner of the vehicle, who was her Phupa came and she asked for the lift and got into the Gypsy and spent the night in the house of her Phupa. Thus, according to her examination-in-chief two persons, namely, Puran Tirwa and Sukbir Tamang committed the sexual act with her. However, in the cross-examination, she has stated that altogether three persons committed the act on her in the Tata truck. In the cross-examination, she also stated that she could not tell, apart from Puran Tirwa who were the two other persons who had committed sexual intercourse with her in the Tata truck. She even stated subsequently that she did not exactly remember whether Sukbir

Tamang committed sexual intercourse with her. Thus, she stated in her chief that two persons including Sukbir Tamang raped her in the Tata truck but gave a materially different version in her cross-examination by saying that three persons, Sukbir Tamang not being necessarily one of them, committed the act with her. It may be noted that according to the complaint Exhibit P3 lodged by her father with the Police, the number of rapists was four. In the cross-examination, she also stated that once she had fallen from the tree and her vagina was injured as stump had pricked the same and at that time she had been hospitalised. She also stated that at that time she had even lost her consciousness and as such, she did not remember whether there was bleeding in her vagina. According to her, the accident had occurred about a year prior to the incident of rape. She also stated that she had been known to Puran Tirwa for a long time. She also admitted that Police did not seize her wearing apparels in connection with the case. She also stated in the cross-examination that on the date of incident she did not stay in the house of her Phupu during the night at Manpari Busty. This is directly contrary to what she had stated in the examination-in-chief that she had spent the night in the house of her Phupa. Her Phupa is Gaj Bahadur Subba, P.W. 4. He has stated that it was around 5.45 p.m. when he was proceeding from Singtam Bazar to Dalep Busty in his private Maruti Van accompanied by his son Mohendra Subba, P.W. 3 and when they reached near Gamon bridge near Shirwani, he heard one girl shouting for help. Thereupon, he stopped his vehicle. The girl asked him for lift and accordingly he gave her the lift in his vehicle and took her to his house where she spent the night. He has stated in his cross-examination that the girl was not known to him on the relevant day. It is difficult to believe his statement that he did not know on the relevant day that the girl was his own niece, and even then he gave her the lift in his vehicle and took her to his house where she spent the night. He also stated in his cross-examination that when the girl asked him for help, she complained that some boys were teasing her. It is not understandable as to why, if she had been raped forcibly, she did not say so to her own Phupa, but merely stated that she was being teased by some boys. Mohendra Subba, P.W. 3 has stated that one evening at around 6 p.m., he was proceeding to Dalep Busty from Singtam Bazar in a Maruti Van which was driven by his father P.W. 4 and when they reached near the Shirwani bridge one girl shouted, whereupon they halted their vehicle and asked her as to why she was shouting and the girl then replied that some persons inside the Tata truck were trying to catch her forcibly. Thereafter, they offered a lift to her in their vehicle and she spent the night in their house. In the cross-examination, he even stated that he had not seen the girl who had shouted for help on the relevant day. It is not at all clear as to why both P.W. 3 and P.W. 4 tried to conceal the fact that Luki Subba was related to them. It is, however, admitted by both that Luki Subba did not tell them that she had been subjected to forcible sexual assault. All this makes the case of the prosecution doubtful.

9. Another factor which makes the case of the prosecution doubtful is that Til

Bahadur Subba, P.W. 2, father of the victim girl Luki Subba, has stated that on the date of lodging the report Exhibit P3, he had received a message from Makha outpost that he should immediately rush to Singtam Police Station. Initially, he stated that he did not make any report to the Police about the incident. Subsequently on cross-examination by the Public Prosecutor, he stated that he had given oral report initially and on the suggestion of the O/C Singtam he gave written report also. Written report was prepared by Nilakantha Rai, C.W. 5. It is not clear as to how the Police came to know about the occurrence which made the Police to send message to Till Bahadur Subba. P.W. 2 to rush to the Singtam Police Station even when no information of the occurrence is proved to have been given to them by anyone. This is significant in view of the case of the appellants that Police falsely implicated them as they refused to give their vehicle to the Police free of charges. The circumstances in which the Police called Til Bahadur Subba to the Police Station have not been brought on record by the prosecution despite a further opportunity having been given to the prosecution to produce evidence on this aspect of the case, consequent upon the Order passed by this Court on 8th October, 2001.

10. As a result of the aforesaid discussion, I am of the opinion that it would be unsafe to rely upon the evidence produced by the prosecution and so the appellants are entitled to benefit of doubt. As such, the appellants are entitled to acquittal.

11. In the result, all the three appeals are allowed, the judgment and Order of the learned trial Court is set aside and the appellants are acquitted of the offences u/s 366/ 376 read with Section 34 of Indian Penal Code. They are in custody. They be set at liberty forthwith.