Serial No. 01
Supplementary List

HIGH COURT OF MEGHALAYA
AT SHILLONG

Crl. A. No. 11 of 2023

Date of Order: 22.05.2024

Shri Faster Bareh Aged about 35 years R/o. Jalaphet Pyrung Village, PS. Khliehriat, East Jaintia Hills, Meghalaya.	Vs.	State of Meghalaya Rep. by Chief Secretary, Government of Meghalaya.

Coram:

Hon'ble Mr. B. Bhattacharjee, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. M. Lyngdoh. Adv.

For the Respondent(s) : Mr. J. Thabah, GA.
Ms. S. Shyam, GA.

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 (ORAL)

This appeal under Section 374(4) CrPC has been filed against the

impugned Judgment and Order dated 17.04.2023 and the Order of Sentence of even date passed by the learned Sessions Judge, East Jaintia Hills District, Khliehriat, in Sessions Case No. 11 of 2022 convicting the appellant under Section 376 IPC and sentencing him to five years rigorous imprisonment with fine of ₹ 10,000/- (rupees ten thousand) only.

1. The fact of the case in brief is that on 15.06.2012, a written FIR was lodged by the PW-2(sister of the survivor) before the Officer -In-Charge, Khliehriat Police Station, alleging that on 14.06.2012 at around 8:30 PM the survivor was raped by the appellant at a place called Satad Jalaphet. On the basis of the said FIR, the Khliehriat PS Case No. 99(6)12 under Section 376 IPC was registered and investigated into. During the course of investigation, a prima facie case under Section 376 IPC was found well established against the appellant and accordingly a charge sheet vide CS No. 139/13 dated 20.11.2013 under Section 376 IPC was filed. On 09.03.2022, charge under Section 376 IPC was framed against the appellant and the matter proceeded for evidence. The prosecution examined 5(five) witnesses and exhibited 4(four) documents and 1(one) paper mark in support of its case. Thereafter, the statement of the appellant was recorded under Section 313 CrPC and 1(one) witness was examined as defence witness by the appellant. After hearing the parties, the learned trial court vide impugned Judgment and Order dated 17.04.2023 convicted the appellant and sentenced him to undergo rigorous imprisonment for 5(five) years and also imposed a fine of ₹ 10,000/-.

2. Assailing the conviction, Mr. M. Lyngdoh, learned counsel submits

that the FSL report, which is contradictory to the prosecution version of the case and the medical opinion of PW3, was purposely omitted by the prosecution in spite of the fact that the Director, FSL, Shillong was named as a witness in the list of witness attached to the charge sheet. Referring to the evidence of PW-1, the survivor, the learned counsel submits that even the statement of the survivor is contradictory on many accounts and does not make out a case of rape. The learned counsel submits that the appellant and the survivor were in a relationship at the time of the alleged incident and the survivor of her own free will accompanied the appellant on the day of the alleged incident. There is nothing in evidence to show or project that the appellant applied any force on the survivor or committed any crime. He contends that the PW2, who was against the relationship between the appellant and the survivor, filed a false FIR to harass the appellant. The learned counsel further submits that the survivor during the course of investigation declined to get her statement recorded under Section 164 CrPC inspite of several efforts by the investigating agency which clearly establishes that she was not at all interested in pursuing the accusation against the appellant. He submits that the learned trial court has adopted only prosecution version of the evidence and totally ignored the evidences which were in support of the appellant. He contends that the reason and finding recorded by the trial court is not tenable in law and the impugned judgment and order of conviction of sentence is liable to be set aside and quashed.

3. On the contrary, Mr. J. Thabah, learned GA appearing for the State

respondent submits that the FSL report was never been exhibited before the trial court and the question of considering the same does not arise. He contends that if according to the appellant the FSL report was in his favour, he could have sought production of the same and got it exhibited before the trial court, but he failed to do so and as such, the appellant cannot raise any plea basing on the FSL report. The learned GA submits that in a case of sexual offence against women, the evidence of survivor alone is sufficient to convict the accused and in the instant matter, the survivor has clearly stated that she was raped by the appellant against her will. He contends that the medical report of survivor (Exhibit-P2) also supports the case of the prosecution and there is no reason for this Court to interfere with the impugned judgment and order of conviction. The learned GA places reliance on the decision of the Apex Court reported in *(2020) 10 SSC 573, Ganesan Vs. State represented by its Inspector of Police* and *(2011) 2 SCC 550, State of Uttar Pradesh Vs. Chhotey Lal*. to impress upon the Court as to who can be said to be a sterling witness and the weightage which the evidence of survivor should be received in a criminal trial.

4. Heard learned counsels appearing for the parties.

5. Before embarking upon the evidences recorded during the course of the trial, it is imperative to notice that the appellant throughout the trial did not deny his presence with the survivor on the day of the alleged incident and also at the place of occurrence. However, he did not admit to have committed the crime, instead maintained that he was in a relationship

with the survivor and the survivor accompanied him on that particular day of alleged incident of her own will.

6. The above stand adopted by the appellant makes the question of minority of the survivor a very crucial factor in this case. It is revealed from the materials on record that the prosecution all along during the course of the trial maintained that the survivor was 17(seventeen) years old and was a minor at the time of the incident. The prosecution began its argument before the trial court by contending that the survivor was a minor and hence, the question of consent or no consent has no bearing in the facts and circumstances of the case and the sixth description of Section 375 IPC would be applicable in the case. The learned trial court by an elaborate discussion came to a finding that the claim of survivor's minority lacks proof thereof to attract the sixth description of Section 375 IPC and the sixth description has no application in the case. The finding of the trial court in respect to the issue of minority of the survivor is not disputed by the prosecution before this Court and hence the finding is accepted as correct and final.

7. The PW-1, the survivor, in her deposition stated that on the date of incident she was in the shop of her sister and the appellant and his friend (PW-4) was present inside the shop. At around 8:00 to 8:30 PM, when she closed the shop and was about to go home, the appellant offered to drop her home which she refused and at that point of time the appellant grabbed her hand and pulled her inside his car. Then the appellant locked the door of the car and drove towards her house but without stopping near her

house, drove towards the jungle and she screamed. On reaching the jungle, the appellant's friend got down from the car and the appellant raped her inside the car. She further deposed that after committing the rape, the appellant offered to drop her to her house, but she told him that she was scared of her family as it was late at night already. At that point of time, the appellant told her that he would drop her to her aunt's place at Jowai but his family members called him and instead the appellant dropped her at her sister's place. In her cross examination, she stated that she did not attempt to flee from her car but was crying inside the car begging the appellant to drop her home. Then again, she stated that the appellant had dropped her to her house. She also stated that the family members of both sides have settled the matter and she did not want to proceed with the case further.

8. The PW-2, the complainant, in her deposition before the trial court stated that on the day of incident while she was at home at around 8:00 to 8:30 PM, her sister i.e. the survivor, did not reach home from shop and she went to her shop for searching her sister and on reaching the shop, she found it closed and on inquiry from the nearby shopkeeper, she came to know that her survivor sister and the appellant went together in a vehicle. She also deposed that the survivor was 17 years old at the time of the incident and the date of birth of the survivor was on 16.07.1995. In her cross, she admitted that the family of both sides have settled the matter in her house.

9. The PW-3, the medical expert, in his deposition stated that on

15.06.2012 he examined the survivor and found no external injuries in her body except for bruise on her right-side face. With regard to genital examination, he stated that no external injury except for tear on the hymen and posterior wall of the vagina. He opined that injuries as described were of recent forceful sexual intercourse. He also exhibited the medical report as Exhibit-P2. The same witness has also conducted medical examination of the appellant and found that there was no injury mark on his body.

10. The PW-4, who was accompanying the appellant on the day of incident and was present at the place of occurrence, in his deposition stated that on the day of the incident he was there along with the appellant inside the shop of the survivor and all of them including the survivor entered into the vehicle of the appellant after the survivor had closed her shop and proceeded towards Myntdu. On reaching Myntdu, the vehicle was stopped and he came out from the vehicle to attend nature's call leaving behind the appellant and the survivor inside the vehicle. After 15 to 20 minutes, when he entered inside the vehicle, the survivor told the appellant to drop her to Jowai and they went to drop her to Jowai. In his cross examination, he stated that he did not see the appellant forced the survivor to enter into his vehicle and the survivor entered into the vehicle of her own will. He also stated that when they reached Jowai, the family members of the survivor called her over phone asking her to come home but she refused to return back home and wanted to stay with the appellant.

11. The PW-5, the Investigating Officer of the case, in her deposition stated that immediately after the FIR, the survivor girl was taken for

medical examination and collected the medical report of the survivor as well as seized the exhibits that was preserved by the attending medical officer vide Exhibit-P4. After the medical examination, statement of the survivor and the complainant was recorded under Section 161 CrPC. She also visited the place of occurrence on the leading of the survivor. On her return from the place of occurrence, she made a prayer to the court to record the statement of the survivor under Section 164 CrPC but the survivor said that she was not feeling well and that she would give her statement on the next day. The appellant came along with his friend (PW-4) and surrendered himself at the police station. The appellant also brought his vehicle. The appellant and his friend's statements were recorded under Section 161 CrPC. She then forwarded the seized biological exhibits to FSL, Shillong for examination and opinion. She further stated that inspite of repeated reminder to the survivor to come and give her statement but she failed to come.

12. The sole defence witness in his deposition stated that the appellant was in a love relationship with the survivor but because of the complainant (PW-2), who is the sister of the survivor did not approve the relationship, she filed the rape case against the appellant. In his cross examination, he stated that the appellant is his own nephew.

13. An analysis of the above evidence would show that on 14.06.2012 the appellant and the PW-4 were present in the shop of the survivor and all of them, including the survivor, travelled together by the vehicle of the appellant after the closure of the shop of the survivor. Although the

survivor has stated that the appellant had pulled her inside the vehicle, but she did not specifically speak of use of any force against her will. The PW-2 stated that when she went looking for the survivor on the night of the incident, she was told by nearby shopkeeper that the survivor and the appellant went together in a vehicle. Nowhere she stated that the shopkeeper saw any use of force by the appellant on the survivor. The PW-4, the only eyewitness, also in his deposition stated that the survivor got into the vehicle of the appellant of her own will. It appears that the learned trial court has not given much importance to this aspect of the matter. The learned trial court declined to give much weightage to the part of the evidence of PW-4 which was supporting the defence and taken into consideration only the portions favoring the prosecution case on the ground that the PW-4 happens to be a friend of the appellant. The noticeable fact is that the prosecution did leave out the said witness and also did not lend any discredit to his evidence. The prosecution never sought to declare the said witness a hostile witness. Under the circumstances, the learned trial court should have appreciated the evidence of PW4 in its entirety and not by attaching lesser importance to certain part of it.

14. The evidence of PW-1, the survivor, reveals that after the incident, the appellant wanted to drop her to her house but she responded by saying that she was scared of her family as it was late at night already. The prosecution did not give any logical explanation to the said part of the evidence as to under what situation the survivor found her family scarier

than the appellant at that horrific and terrible point of time. There can be no denial to the fact that a forceable sexual assault brings in humiliation, feeling of disgust, tremendous embarrassment, sense of shame and trauma, and therefore, most unlikely of a mature woman, just immediately after the incident when still under the control of the offender, to choose a place of suitable destination as an alternative to her home as she was scared of her family members. A traumatized survivor would definitely try to break free or run free instantly from the control of the offender. It is unimaginable of a survivor of sexual assault to find the company of the offender safer than her own family members. Thus, the above fact would undoubtedly exhibit that the survivor's conduct during the ordeal was not that of an anguished and horrified survivor but one of a submissive and consensual person.

15. That apart, the refusal of the survivor to get her statement recorded under Section 164 CrPC inspite of the several requests of the investigating authority projects her reluctance to pursue the allegation made against the appellant. Even her evidence before the trial court that the matter has been settled between the family members of both sides would go to show the hesitancy of the survivor to press the case against the appellant. The above conduct of the survivor is nothing but an indication of her disinclination to see that the appellant is convicted for the act allegedly committed by him.

16. Furthermore, it is seen that the learned trial court has recorded and referred to the statement of the survivor recorded under Section 161 CrPC to record a finding that the survivor remained consistent in the core spectrum of her statement right from her 161 statements to her evidence

before the trial court on the incriminating part of the evidence. The learned Trial Court in its judgment and order of conviction has referred to the statement made by the survivor under Section 161 Cr.P.C. before the investigating authority to record reasons for its findings. Section 162 Cr.P.C. puts a clear embargo on the admissibility of statement made by any person to a police office in the course of investigation. For ready reference, the provision of Section 162 Cr.P.C. is reproduced below: -

"162. Statements to police not to be signed: Use of statements in evidence. -

(1) *No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:*

Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

(2) *Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of section 27 of that Act.*

Explanation. - An omission to state a fact or circumstances in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact."

17. The Apex Court in *Parvat Singh v. State of M.P., (2020) 4 SCC 33* has held that as per the settled proposition of law a statement recorded

under Section 161 Cr.P.C. is inadmissible in evidence and cannot be relied upon or used to convict the accused. As per the settled proposition of law, the statement recorded under Section 161 Cr.P.C. can be used only to prove the contradictions and/or omissions.

18. It follows that statement under Section 161 Cr.P.C. cannot be used by a Court to justify the reasons while recording its finding in a criminal trial. The statement under Section 161 Cr.P.C may be used at the stage of recording evidence in a trial in accordance with the proviso attached to Section 162 (1) Cr.P.C. In the instant case, none of the prosecution witnesses was ever confronted with their statement recorded under Section 161 Cr.P.C. at the time of recording of evidence by the Trial Court and hence, the use of the statement of the survivor made before the investigating officer by the Trial Court is against the settled proposition of law.

19. There is no quarrel with regard to the proposition of law cited by the learned GA by placing reliance on the decisions of *Ganesan Vs. State represented by its Inspector of Police* (supra) and *State of Uttar Pradesh Vs. Chhotey Lal*. (supra). There is no doubt that the testimony of survivor can be made sole basis of conviction in a case involving sexual offence against woman. However, such testimony must be reliable and trustworthy and must inspire the confidence of the court.

20. In the present matter, the conduct of the survivor of not preferring to return home to her family members immediately post incident and

taking help of the appellant for an alternative destination and ultimately reaching the place of her sister casts a serious doubt about the prosecution story of the case. The conduct of the survivor, particularly when it is established before the trial court that the survivor was not a minor at the time of the incidence, has a crucial bearing in the case. There is also no clear evidence of survivor being forcibly taken into the vehicle of the appellant. The overall picture which emerges from the evaluation of the entire evidence on record does not inspire the confidence of this court to hold that there was absence of consent on the part of the survivor in the matter. The appellant, therefore, is entitled to benefit of doubt.

21. In view of the above, the impugned Judgment and Order of conviction dated 17.04.2023 and the Order of Sentence of even date passed by the learned Sessions Judge, East Jaintia Hills District, Khliehriat, in Sessions Case No. 11 of 2022 is set aside and quashed. The appellant is set at liberty forthwith if not required in connection with any other case.

22. The criminal appeal stands allowed.

23. Let authenticated copy of this judgment be furnished to the respective parties forthwith.

Judge

Meghalaya
22.05.2024
" Mr. N. Swer, Stenographer Gr-II "