

THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE A. MUHAMED MUSTAQUE, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 31 of 2024

Chenga Thsering Bhutia,
Aged about 55 years,
S/o Tenthok Bhutia,
R/o Melli Gumpaa Tashi Gaon,
Melli Aching, West Sikkim.
A/P State Central Prison, Rongyek,
Sikkim.

... Appellant

versus

State of Sikkim.

... Respondent

Appearance:

Mr. D.K. Siwakoti, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Thinlay Dorjee Bhutia, Public Prosecutor and Mr. Yadev Sharma,
Additional Public Prosecutor for the Respondent.

Judgment Reserved on : 26.06.2026
Judgment Pronounced on : 10.07.2026
Judgment uploaded on : 10.07.2026

J U D G M E N T

(A. Muhamed Mustaque, C.J.)

On 19.04.2023, a ninety year old woman was found screaming by her son, examined as PW-8, who resided in close proximity to the house of his youngest brother, where the victim, their mother, was residing at the time of the incident. On the following day, on 20.04.2023, an FIR

alleging the commission of the offence of Rape was registered at Gyalshing Police Station based on the information provided by the grandson (PW-3) of the victim, who is also the nephew of PW-8. The Appellant has been convicted for offences punishable under Sections 376(2)(j) and 450 of the Indian Penal Code, 1860 (IPC), and has challenged the said conviction and sentence before this Court.

2. The Trial Court held the Appellant guilty for the offences of rape and house trespass in order to commit an offence punishable with imprisonment. For the offence under Section 376 (2)(j) IPC, the Appellant was sentenced to undergo rigorous life imprisonment for the remainder of his life without eligibility for clemency/parole during the period of his imprisonment along with a fine of Rs. 30,000 (Rupees Thirty Thousand). For the offence under Section 450 of IPC, he was sentenced to undergo rigorous imprisonment for a term of ten (10) years and to pay a fine of Rs. 10,000 (Rupees Ten Thousand). Both sentences were directed to run concurrently.

3. The victim was physically frail and weak, required assistance to walk and have food and was incapable of giving any statement owing to the advanced stage of dementia, which rendered her unable to recognize even her own family members. She was found to be mentally incapable of undergoing either examination or cognitive assessment and was unable to comprehend or respond to any questions put to her. The Specialist (Psychiatry) (PW-1), the Medical Officer (PW-2) and the Special Educator (PW-9), affirmed her mental state and physical condition.

4. This case presents a peculiar situation wherein the Investigation Officer was unable to record the statement of the victim due to her

severely deteriorated mental and physical condition. The victim subsequently passed away on 21.06.2023. Consequently, the prosecution was deprived of the direct testimony of the victim. The only eyewitness to the incident was PW-8. The Trial Court primarily relied upon his testimony which was corroborated by the statements of the victim's youngest son (PW-4), the ward panchayat (PW-6), the victim's grandson (PW-3) and the forensic evidence, to convict the Appellant.

5. The principle question arising for consideration is whether the testimony of the PW-8 is reliable and if so, whether the prosecution has successfully established the essential ingredients constituting the offence of rape. The PW-8 deposed that he found the Appellant on top of the victim and he described what he witnessed as the commission of rape. However, he did not describe the precise nature of the sexual act on the victim. According to PW-8, he had gone to feed grass to his cows and he heard his mother crying out "Aiya Aiya". At that time, all other family members had gone to the dispensary for a medical check-up, leaving his mother/victim alone at home. Upon rushing to the house after hearing his mother scream, he found the Appellant with his trousers lowered below his knees, on top of his mother and allegedly committing rape on her. He further noticed that his mother's Bakkhu (traditional dress) had been pushed up and that she was naked from the waist down.

6. The first issue concerns the identification of the Appellant, followed by the reliability of PW-8's testimony. The evidence clearly establishes that the Appellant and PW-8 belonged to the same village and were previously acquainted which is an undisputed fact. Immediately after witnessing the incident, PW-8 attempted to contact PW-6, although the latter did not initially answer his call. Thereafter,

when PW-6 returned the call, PW-8 narrated the entire incident to him. The following morning, PW-8 also informed PW-4 and PW-3, whereupon PW-3 subsequently lodged the FIR.

7. The immediate conduct of PW-8 in informing PW-6 and thereafter his family members assumes significance, particularly as he was the sole ocular witness. His conduct is relevant under Section 8 of the Indian Evidence Act, 1872 and is corroborated by the independent testimony of PW-6 who confirmed that PW-8 narrated the incident to him immediately after its occurrence. PW-6 being the Ward Panchayat and an independent person with no apparent motive corroborated the said version. Furthermore, the report received from the Central Forensic Science Laboratory, Bhopal confirmed upon forensic examination that semen of the Appellant was found on the Victim's apparel (M.O-VIII). On the basis of the forensic evidence and the testimonies as referred to above, the Trial Court concluded that the Appellant was present at the scene inside the victim's house and the commission of rape was proved with the offence of house trespass consequently following.

8. The next issue requiring determination is whether the facts proved on record constitute the offence of rape. This is a very complex question in this matter but this Court afforded sufficient opportunity to the Learned Counsel for the Appellant to distinguish the acts alleged against the Appellant. The Learned Counsel submitted that, at best the evidence established only an attempt to commit rape punishable under Section 511 of IPC and did not establish the completed offence of rape and would hence attract lesser punishment.

9. The Learned Public Prosecutor, on the other hand, submitted that the surrounding circumstances, coupled with the ocular and forensic evidence, clearly established the offence of rape.

10. A significant distinction exists between the law governing rape before and after the Criminal Law (Amendment) Act, 2013. Following the amendment, penile-vaginal intercourse is no longer an indispensable requirement for constituting the offence of rape. Under clause (c) of Section 375 IPC, 1860, the manipulation of any part of the body resulting in penetration into any part of the body is sufficient to constitute rape. The expression "manipulates" broadly includes the movement or positioning of the body so as to facilitate penetration. This aspect has been considered by the Kerala High Court in ***Santhosh vs. State of Kerala***¹, the Court held that where the body of the victim is manipulated by holding her legs tightly together to simulate a sensation akin to penetration of an orifice, and penetration is made between the thighs so held together, the offence of rape under Section 375 is attracted. The Court further observed that word "manipulation" includes an artificial creation, and such manipulation causes penetration of the crevice, with the muscles engulfing the object to create or simulate the effect of normal penile-vaginal intercourse. Accordingly, it was held in that case the appellant committed the offence of rape by engaging in a penetrative sexual act between the thighs of the victim held together, which amounted to manipulation of the victim's body for sexual gratification and culminated in ejaculation. Thereafter, in ***Prafulla Mundari alias Pelka vs. State Of Odisha***², the Court observed that rubbing the penis on the victim's vagina or engaging in a penetrative sexual act between her buttocks or thighs amounts to manipulation of

¹ 2021 SCC OnLine Ker 16519.

² 2021 SCC OnLine Ori 2556.

the body for sexual gratification under clause (c) of Section 375 IPC, as it includes manipulating any part of a woman's body so as to cause penetration into any part of her body. The absence of external or internal injuries suggestive of forcible sexual intercourse was held not to be sufficient, by itself, to discard the prosecution case.

11. Accordingly, under the broadened statutory definition introduced by the 2013 Amendment, penile-vaginal intercourse is not mandatory. It is sufficient if penetration occurs into any part of the body as contemplated under Section 375(c) of IPC, which is reproduced below for reference:

“(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person”

12. The difficult question, however, concerns the proof of penetration. Since the victim was incapable of making any statement, the prosecution was deprived of the most direct evidence on this aspect. The report of the Medical Officer (PW-2) did not reveal external injuries and injuries to genital organs, nor did it disclose any medical evidence conclusively establishing penile penetration or sexual intercourse. Nevertheless, semen belonging to the Appellant was detected on the victim's apparel and PW-8 found the Appellant on top of the victim. Ordinarily, herein the victim alone would have been in a position to state whether penetration had occurred. The absence of such testimony therefore requires the Court to determine whether penetration can nevertheless be inferred from the proved circumstances.

13. The question that then arises is whether the Court can presume penetration solely on the basis of the presence of the Appellant's semen

on the victim's clothing. Penetration³, in its ordinary meaning implies penetration of penis into the vagina, which alone constitutes rape. However, after the amendment to Section 375 IPC, penetration is no longer confined to vaginal penetration but extends to penetration into the vagina, urethra and anus or any other part of the body in the manner contemplated under the statute. Nevertheless, proof of penetration, however slight, remains the indispensable ingredient of the offence of rape. The seminal emission is not necessary, nor is injury to the genitals essential. The question, therefore, is not whether ejaculation occurred, but whether penetration, within the meaning of Section 375 IPC, has been established beyond reasonable doubt.

14. In the present case, PW-8 merely stated that he witnessed the Appellant committing rape upon his mother. Significantly, he did not depose that he actually witnessed the Appellant penetrating vagina or any part of the victim's body. The question, therefore, is whether the Court can infer such penetration solely from the surrounding circumstances proved on record and whether the burden of proving those circumstances shifts to the Appellant under Section 106 of the Indian Evidence, 1872, Act once the foundational facts are established by the prosecution.

15. To answer the above question, it is necessary to examine what constitutes the completed offence of rape. The consistent view taken by the Supreme Court as well as various High Courts is that the essential and determinative ingredient of rape is penetration and not merely ejaculation. Even the slightest degree of penetration is sufficient to constitute the offence of rape. The Supreme Court in **Koppul Venkat**

³ Macdonald Critchley (ed.), *Butterworths Medical Dictionary* 1268 (Butterworth & Co. Ltd., Borough Green, Sevenoaks, Kent, Second Edition/ 1978).

Rao vs. State of A.P⁴ held that the *sine qua non* of the offence of rape is penetration. The same principle has consistently been reiterated by various High Courts including, **Murugadoss vs. State by Inspector of Police, All Women Police Station, Tindivanam⁵**, **Juned vs. State of Maharashtra, through Police Station Officer and Another⁶** and **Suresh vs. State of Haryana⁷** all of which held that the *sine qua non* of the offence of rape is penetration and not ejaculation.

16. Following the Amendment of 2013, rape also includes manipulation resulting in penetration as discussed in paragraphs 10 and 11 above. Further, the insertion of any object in the manner contemplated under Section 375 (b) of IPC also constitutes rape. Section 375(b) provides:

“(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person”

17. In the present case, however, the prosecution has never alleged that the sexual assault was committed by the use of any object. The case of the prosecution rests entirely upon alleged penile penetration. The question therefore is whether, in the absence of medical evidence establishing penetration and in the absence of victim’s testimony the Court can nevertheless conclude that penetration occurred during the alleged assault. In our considered view, the answer is in the affirmative, but only where the proved facts and surrounding circumstances are so definite and compelling that they exclude every reasonable hypothesis

⁴ (2004) 3 SCC 602.

⁵ 2014 (3) MLJ (Cri.) 10.

⁶ 2025 SCC OnLine Bom 910.

⁷ 2007 (2) LawHerald 1532.

except that of penetration. The Court must undertake a careful analysis of the proved facts to determine whether the nature of the assault admits of no reasonable inference other than penile penetration. The evidence must establish that the male genital organ was brought into such contact with the woman's genitalia or any part of the body in a manner capable of producing the penile-vaginal effect constituting penetration within the meaning of the relevant provisions. Although penetration may be slight and need not be proved by direct evidence or medical findings in every case, the inference of penetration cannot rest on conjecture or suspicion. It must arise as the only reasonable conclusion flowing from the proved circumstances.

18. The Hon'ble Supreme Court, in ***State of Madhya Pradesh vs. Mahendra Alias Golu***⁸ has distinguished between preparation and attempt to commit rape. The principles laid down therein are relevant to the present appeal:

“...

12. *It is a settled proposition of criminal jurisprudence that in every crime, there is first, mens rea (intention to commit), secondly, preparation to commit it, and thirdly, attempt to commit it. If the third stage, that is, "attempt" is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law still punishes the person for attempting the said act. "Attempt" is punishable because even an unsuccessful commission of offence is preceded by mens rea, moral guilt, and its depraving impact on the societal values is no less than the actual commission.*

13. *There is a visible distinction between "preparation" and "attempt" to commit an offence*

⁸ (2022) 12 SCC 442.

and it all depends on the statutory edict coupled with the nature of evidence produced in a case. The stage of "preparation" consists of deliberation, devising or arranging the means or measures, which would be necessary for the commission of the offence. Whereas, an "attempt" to commit the offence, starts immediately after the completion of preparation. "Attempt" is the execution of mens rea after preparation. "Attempt" starts where "preparation" comes to an end, though it falls short of actual commission of the crime.

14. *However, if the attributes are unambiguously beyond the stage of preparation, then the misdemeanours shall qualify to be termed as an "attempt" to commit the principal offence and such "attempt" in itself is a punishable offence in view of Section 511 IPC. The "preparation" or "attempt" to commit the offence will be predominantly determined on evaluation of the act and conduct of an accused; and as to whether or not the incident tantamounts to transgressing the thin space between "preparation" and "attempt". If no overt act is attributed to the accused to commit the offence and only elementary exercise was undertaken and if such preparatory acts cause a strong inference of the likelihood of commission of the actual offence, the accused will be guilty of preparation to commit the crime, which may or may not be punishable, depending upon the intent and import of the penal laws.*

..."

19. In the facts and circumstances of the present case, the application of Section 106 of the Indian Evidence Act, 1872 enables the Court to draw an inference that the Appellant had attempted to commit rape, particularly when he has offered no explanation as to how his semen came to be found on the victim's clothing. The prosecution has established a prima facie case through cogent ocular and forensic evidence which conclusively establishes that the semen found on the

victim's clothing belonged to the Appellant. These circumstances having been proved by the prosecution, the facts relating to the precise nature of the sexual assault were especially within the knowledge of the Appellant, thereby attracting the application of Section 106 of the Evidence Act. The Appellant alone was in a position to explain what transpired during the incident and how his semen came to be deposited on the victim's clothing.

20. The prosecution, although, has not proved penetration beyond reasonable doubt so as to sustain a conviction for the completed offence of rape. However, the proved circumstances unmistakably establish that the Appellant had commenced the execution of the offence and had proceeded far beyond the stage of mere preparation. Having regard to the advanced age and physical condition of the victim, the evidence does not rule out the possibility that the Appellant was unable to accomplish penetration. In the absence of any explanation from the Appellant, and viewed in the light of the proved ocular and forensic evidence, the only reasonable inference is that the Appellant had attempted to commit rape. The application of Section 106 in the present case does not relieve the prosecution of its burden to prove the foundational facts, rather, it supplements the prosecution case by permitting the Court to draw an adverse inference in respect of facts exclusively within the knowledge of the Appellant.

21. The Supreme Court has held in ***Shambhu Nath Mehra v. State of Ajmer***⁹ that the general rule in criminal law is that the burden of proving the guilt of the accused always rests upon the prosecution, and Section 106 of the Indian Evidence Act is not intended to relieve the prosecution of that obligation. The provision is confined to exceptional

⁹ (1956) 1 SCC 337.

situations where it would be impossible or disproportionately difficult for the prosecution to prove facts that are especially within the knowledge of the accused and which the accused can establish without difficulty. However, the provision cannot be invoked to dilute the settled principle that, except in exceptional cases, the burden of proof remains upon the prosecution. Further, In the ***State of Rajasthan v. Kashi Ram***¹⁰, the Supreme Court held that Section 106 of the Indian Evidence Act, 1872 does not shift the prosecution's burden of proving the guilt of the accused. However, where facts are especially within the knowledge of the accused, his failure to offer a reasonable explanation may be treated as an additional link in the chain of circumstantial evidence, provided the prosecution has otherwise established the incriminating circumstances.

22. In the present case, the prosecution has conclusively established that the Appellant had ejaculated. Ejaculation¹¹ is the emission of seminal fluid and is ordinarily associated with sexual stimulation. The ocular evidence establishes that the Appellant was found above the body of the ninety year old victim, while the forensic evidence conclusively proves that the semen found on the victim's clothing belonged to the Appellant. These incriminating circumstances have been proved beyond reasonable doubt. The Appellant alone was in a position to explain the circumstances in which his semen came to be deposited on the victim's clothing. Yet, instead of offering any explanation consistent with innocence, he chose to deny the entire prosecution case. His silence in relation to facts especially within his knowledge assumes significance under Section 106 of the Indian Evidence Act, 1872. His complete failure

¹⁰ (2006) 12 SCC 254.

¹¹ Macdonald Critchley (ed.), *Butterworths Medical Dictionary* 568 (Butterworth & Co. Ltd., Borough Green, Sevenoaks, Kent, Second Edition/ 1978).

to offer any explanation for these incriminating circumstances furnishes an additional link in the chain of circumstances established by the prosecution.

23. The proved circumstances unmistakably demonstrate that the Appellant had embarked upon the commission of the offence and had proceeded well beyond the stage of mere preparation. The evidence leaves no reasonable doubt that the Appellant was attempting to commit rape when ejaculation occurred during the course of the assault. In the absence of any plausible explanation from the Appellant, the only reasonable inference flowing from the proved facts is that the ejaculation occurred in the course of an attempted act of penetration, thereby constituting an attempt to commit rape. Herein, Section 106 of Indian Evidence Act is invoked not to supply proof of the completed offence, but to reinforce the inference arising from the prosecution's established case.

24. In view of the foregoing observations, this Court is of the considered view that the conviction of the Appellant under Section 376(2)(j) IPC, cannot be sustained and deserves to be set aside. However, the evidence conclusively establishes the commission of the offence of attempt to commit rape. Accordingly, the Appellant is convicted under Section 511 read with Section 376 IPC. Section 511 IPC prescribes punishment extending to one-half of the imprisonment provided for the offence and having regard the gravity of the present case, this Court is of the view that rigorous imprisonment for a period of five (05) years would meet the ends of justice.

25. Accordingly, the Appeal is partly allowed. The conviction of the Appellant under Section 376(2)(j) IPC is set aside and is altered to a conviction under Section 511 r/w Section 376 IPC for attempt to commit rape. The sentence of imprisonment for life for the remainder of his natural life is modified to rigorous imprisonment for a period of 5 (five) years. The sentence for Section 450 IPC is also modified to 5 (five) years. Both sentences shall run concurrently. The period of detention already undergone by the Appellant during the pre-trial stage shall be allowed to set off.

26. Accordingly, the present ***Criminal Appeal No. 31 of 2024*** is disposed of in the above terms.

27. Records of the learned Trial Court shall be remitted back.

28. The Registry is directed to forthwith communicate a copy of this judgment to the learned Trial Court and the Jail authorities concerned for necessary compliance.

(Bhaskar Raj Pradhan)
Judge

(A. Muhamed Mustaque)
Chief Justice

Approved for Reporting : Yes/No
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