

**HIGH COURT OF TRIPURA
AGARTALA**

CRL A (J) NO.23 OF 2015

Sri Nemai Dey alias Pijus,
Son of Late Raicharan Dey,
Resident of East Kanchanbari,
P.O.& P.S. Kumarghat,
District: Unokoti.

---- **Appellant**

Versus

The State of Tripura

Represented by its Secretary Cum commissioner to the
Department of Home, government of Tripura,
P.O. Kunjaban, P.S. New Capital Complex,
District: West Tripura.

---- **Respondent**

For Appellant(s) : Mr. A. Bhowmik, Advocate.

For Respondent(s) : Mr. A. Roy Barman, Addl. P.P.

Date of hearing and
delivery of Judgment
and order : **06.09.2018**

Whether fit for reporting: **Yes**

HON'BLE MR. JUSTICE ARINDAM LODH

JUDGMENT & ORDER(ORAL)

This appeal under Section 374 of Cr.P.C. is directed against the judgment and order of conviction and sentence dated 09.09.2014, passed by the learned Sessions Judge North Tripura District, Kailashahar in Case No. ST 49 (NT/K) of 2013 whereby and whereunder the learned Sessions Judge has convicted and sentenced the accused-appellant to pay a fine of Rs.500/-(rupees five hundred) for commission of offence punishable under Section 448 of IPC, in default to suffer S.I. for 15(fifteen) days and also sentenced to suffer

R.I. for 3 and ½ (three & half) years and to pay a fine of Rs.1,000/- (rupees one thousand), in default to payment of fine, to suffer further imprisonment for 1(one) month, for commission of offence punishable under Section 376 read with Section 511 of IPC.

2. The facts of the prosecution case, in a nut shell is that one Smt. Basanti Pal Choudhury, the mother of the victim prosecutrix lodged an FIR with the O.C., Kumarghat Police Station on 24.11.2013 at 12:05 hours stating inter alia that on 23.11.2013 in the absence of her husband and elder daughter she started for a nearby shop with her younger daughter. The middle daughter of the complainant i.e. the victim girl was cooking rice at home and at that time, the accused Nemai Dey trespassed into the kitchen of the house of the complainant and grabbed the victim girl, laid her on the ground, kissed all over her body, tore her frock, removed her panty and by removing his under-garments the accused tried to lay his body over the body of the victim prosecutrix. The victim struggled hard and raised alarm when the informant-mother on hearing the cries of the victim prosecutrix immediately returned back to the home and found the appellant Nemai Dey to run away.

3. On the basis of the said complaint, the Officer-in-Charge, Kumarghat P.S. registered a Case bearing

Kumarghat PS Case No. 123/2013 under Sections 448/376/511 IPC against the accused-appellant.

4. After completion of investigation, the I.O. found prima facie evidence to file charge-sheet. Accordingly, charge-sheet was filed and the case on being committed, the learned Sessions Judge has framed charge which is reproduced below:

"CHARGE

I Shri G. Debnath, Sessions Judge, North Tripura Judicial District, Kailashahar, do hereby charge you namely Shri Nimai Dey @ Pijush as follows:

Firstly, that you on 23rd November, 2013 at about 1900 hours at Gakulnagar under Kumarghat P.S. committed house trespass by entering into the house of the complainant Smti. Basanti Paul Choudhury W/O Shri Shyamal Paul Choudhury, which was used as a human dwelling and thereby committed an offence punishable under section 448 I.P.C. and within the cognizance of this court.

Secondly, that, you on the same date, time and place made attempt to commit rape on Rumki Paul Choudhury, D/O Shri Shyamal Paul Choudhury of Gakulnagar and thereby committed an offence punishable under Section 376 read with section 511 IPC and within the cognizance of this court.

AND I do hereby direct that you be tried by this Court of Sessions.

*(G. Debnath)
Sessions Judge,
North Tripura Judicial*

5. To substantiate the above charge, prosecution examined as many as 8 witnesses including the prosecutrix and her parents.

6. The I.O. as well as the doctor who treated the victim prosecutrix immediately after the incident were also examined and cross examined.

7. After completion of recording evidence, the learned trial judge examined the accused-appellant under Section 313, Cr.P.C. to which he denied the prosecution evidence and claimed that the allegation made against him as false. However, he denied to adduce any evidence.

8. Being aggrieved by and dissatisfied with the judgment and order of conviction and sentence dated 09.09.2014, the accused-appellant has preferred the present appeal.

9. Mr. A. Bhowmik, learned counsel appearing for the accused-appellant submits that there is no iota of evidence which can substantiate the charge of rape against the accused-appellant. Mr. Bhowmik, learned counsel appearing for the appellant has drawn my attention to the statement of the prosecutrix who has been examined as P.W.2, the deposition of the mother (P.W.1) as well as the father of the victim girl as P.W.3.

10. I have also perused the statement of P.W.6, the doctor who examined and treated the victim prosecutrix on 24.11.2013 and also perused the deposition of the I.O. who was examined as P.W.7.

11. I have given my anxious look to the statement of the victim prosecutrix who was aged about 10 years at the time of incident. She was examined as P.W.2. In her examination-in-chief she has stated that the accused-

appellant forcibly tore her frock, removed her panty and started kissing on her face and breast. The accused-appellant also removed his under-garments and tried to lay his body over her body. She then started struggling to free herself and also raised alarm. Hearing cries, her mother Basanti Paul Choudhury (P.W.1) returned back to her home when the accused-appellant fled away. From her evidence, it is clear that the accused-appellant did not touch her vagina or any parts surrounding the vagina.

12. Section 375 of the Indian Penal Code defines 'rape' which is reproduced here-in-below, for convenience:

"375. Rape.-- A man is said to commit "rape" if he—

- (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
 - (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; or
 - (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; or
 - (d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
- under the circumstances falling under any of the following seven descriptions:

*First.--*Against her will.

Secondly.-- Without her consent.

*Thirdly.--*With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

*Fourthly.--*With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.--With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.--With or without her consent, when she is under eighteen years of age.

Seventhly.--When she is unable to communicate consent.

Explanation 1.--For the purposes of this section, "vagina" shall also include labia majora.

13. From bare reading of the definition, it is crystal clear that to attract the provision of Section 376 IPC, even slightest penetration of penis into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person is enough to commit offence under Section 376 of IPC for which an accused can be held liable to be punished under the said provision.

14. I have perused the evidence of P.W.1, the mother of the prosecutrix who is also the informant of the incident as well as the father of victim prosecutrix i.e. P.W.3 who have deposed in the same voice as that of the victim prosecutrix. The doctor, P.W.6 who examined and treated the victim prosecutrix on 24.11.2013 i.e. the next day of the incident and on examination of the victim girl she stated in her deposition that there was fresh abrasion on her chest (right side) below and lateral side of right breast. There was no fresh injury or any foreign pubic hair in her pubic area. Hymen was intact.

15. The mother of the prosecutrix is a vital witness in this case. She deposed that she was on her way to a nearby shop and when she heard the cries of the victim girl she rushed back. That makes amply clear that she could not go too far from her house since she clearly heard the cries of her daughter, meaning thereby, within a few minutes she returned back to her house when she saw the accused to flee away. According to this Court, within this short period nothing serious could be committed to the body or person of the victim.

16. P.W.7, the I.O. has stated during his examination-in-chief that he has recorded the statement of the victim under Section 161, Cr.P.C. but he did not seize the wearing apparels of the victim. He also did not forward the victim to the Court for recording her judicial confession under Section 164(5) of Cr.P.C. Non-recording of the statement of the victim under Section 164(5) of the Cr.P.C. is one of the weaker parts of the prosecution, particularly, considering the nature of the case in hand.

17. On the basis of the evidence of P.W.6 and P.W.7, this Court finds it difficult to arrive at a finding that the wearing apparels of the victim were at all torn out of the incident.

18. Mr. A. Roy Barman, learned Addl. P.P. appearing for the State-respondent raised a question whether the victim

prosecutrix being aged about 10 years can be said to be a woman.

19. Section 10 of the Indian Penal Code defines "Man", "Woman" which is reproduced herein below:

"10. "Man", "Woman".—The word "man" denotes a male human being of any age; the word "woman" denotes a female human being of any age."

20. In terms of the said definition, this Court is of the view that a girl or woman of any age comes within the purview of definition of Section 10 of IPC and as such, this Court can safely arrive at a finding that the victim-prosecutrix is a woman. Mr. Roy Barman, learned Addl. Public prosecutor in his deliberations would submit that the conviction and sentence passed under Section 376 of IPC may be converted into Section 354 of IPC considering the nature of the evidence put forth during the course of the trial.

21. I have considered the submissions of the learned counsels of both the parties. This Court has already observed and discussed in the preceding paragraphs that to convict and sentence an accused under Section 376 of IPC, a slightest degree of penetration of the penis into the vagina, mouth, urethra or anus of a woman is enough.

22. The learned trial Judge did not consider this aspect of law when he convicted and sentenced the accused under Sections 376/511 of IPC. Learned trial Judge has

considered that the accused-appellant has opened her undergarments and for this reason, learned Sessions Judge has held that he tried to commit rape. But according to this Court, as already observed, the slightest penetration, whichever degree it is, is the essential requirement vis-à-vis *sine qua non* to attract the provision of Section 376 of IPC. From the evidence, it is found to be absent.

23. Having taken into consideration, the statement of witnesses on questions of fact, particularly, the evidence of P.W.2 and P.W.6, the doctor, this Court is of the view that the incident as described, at best, is a case of "fondling" and the offence does not fall within the scope of Section 376 IPC but it will fall within Section 354 IPC.

24. I, therefore, hold that the appellant Nemai Dey alias Pijus is guilty of an offence punishable under Section 354 IPC and not for the offence under Section 376 IPC. His conviction under Section 376 IPC is, therefore, set aside.

25. Accordingly, I modify the sentence, and the accused-appellant is sentenced to suffer R.I. for two years and to pay a fine of Rs.500/- (rupees five hundred), in default to suffer S.I. for three months for the offence punishable under Section 354 of IPC. Further, the accused-appellant is sentenced to pay a fine of Rs.1000/-(rupees one thousand)

for committing offence punishable under Section 448 of IPC, in default he is to suffer S.I. for one month.

26. Fine money, if realized, may be paid to the victim-prosecutrix.

27. It is made clear that the period already suffered by the accused-appellant in Jail or police custody during investigation and trial will be deducted from the total period of sentence as declared by this Court.

28. Accordingly, the appeal stands disposed of in the above terms.

29. Send back the L.C.Rs along with a copy of this judgment with a direction that on receipt of the judgment, the trial Court shall take appropriate course of action to ensure the surrender of the accused-appellant, who is on bail, to serve out the sentence as per judgment of this Court.

JUDGE