

GAHC020007972022



**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CRL.A(J)/10/2022**

SHRI. KEDUKHOYI  
S/O SHRI. DZUVEYI, PERMANENT R/O KOTISU VILLAGE, PHEK -  
797108, NAGALAND,

THROUGH - THE SUPERINTENDENT, DISTRICT JAIL, PHEK - 797108,  
NAGALAND

VERSUS

THE STATE OF NAGALAND  
NAGALAND, KOHIMA

**Advocate for the Petitioner : SENTIYANGER**

**Advocate for the Respondent : GOVT ADV NL**

Date of hearing : 22.05.2024.  
Date of Judgment : 29.05.2024

**BEFORE  
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI  
HON'BLE MR. JUSTICE BUDI HABUNG**

**:: JUDGMENT AND ORDER ::  
[CAV]**

***(B. Habung, J)***

- 1.** Heard Mr. Sentianger, learned Legal Aid counsel for the appellant. Also heard Mr. K. Angami, learned PP for the State of Nagaland.
- 2.** This is a jail appeal preferred under section 374 of the Criminal Procedure Code assailing the impugned judgment and order dated 01.10.2004 passed by the learned Additional Deputy Commissioner (Judicial), Phek, Nagaland in GR No. 27/2003 arising out of Phek PS Case No. 0012/2003 under section 302 & 376 IPC. By the said impugned judgment and order, the accused Shri. Kedukhoyi, has been convicted and sentenced to undergo imprisonment for life for offence under section 302 & 376 of IPC.
- 3.** The brief facts of the case leading to the preferring of this Jail appeal is that on 18.05.2003, a written request for registration of the case was received by the Officer-in-Charge, PS, Phek from one Nuvotso of Kotisu village, inter-alia stating therein that on 17.05.2003, his wife XXXXXXXXXX (Deceased) went to the field and did not return. On search, her dead body was found 1 km away from the village on 18.05.2003 morning at

around 6 am. On finding her dead body it was found that she had been raped and murdered because her dead body was found naked and blood was oozing from her private part and thus, requested for taking necessary action. The case was registered being Phek PS case no. 0012/2003 U/S 302 & 376 IPC and investigated into.

**4.** On completion of the investigation, the IO of the case filed charge sheet against the accused under sections 302 & 376 of IPC.

**5.** At the outset it is pertinent to note that the record of the Trial Court were called for; however, it was reported that despite vigorous search made in the Court and office, the records in connection with above GR case no. 27/2003 corresponding to Phek PS case no 0012/2003 could not be traced out. Finding no alternative, the Trial Court was directed to make an effort to reconstruct the records of the said case. As a result, the Trial Court found out and collected some documents. The collected document includes the copy of FIR, the confessional statement of the accused (convict Shri. Kedukhoyi) and the impugned judgment and order collected from the District Jail, Phek. The said collected documents have been compiled in the paper book.

**6.** The records reveal that the contents of the charges were read over and explained to the accused during consideration of charge, to which the accused pleaded guilty. However, the case had proceeded for trial. To establish their case, the prosecution had altogether examined 5 prosecution witnesses. Upon

completion of the evidence of prosecution witness, the accused was examined under section 313 Cr.P.C where the accused is stated to have admitted his guilt of commission of the alleged offence of murder and rape upon the deceased. The accused did not produce any witness in his defence.

**7.** On completion of the trial, the accused (appellant herein) has been convicted and sentenced to undergo imprisonment for life for offence under section 302 & 376 IPC. The convict did not prefer appeal against the Judgment and sentence. However, later on the convict has made a representation before the Government praying for pre-mature release. But as the said application was not considered, the appellant filed W.P.(Cri)/02(K)/2019 before this Court which was disposed on 04.07.2019 with a direction to the respondent authority to consider the representation submitted by appellant. The said application was accordingly considered and rejected on the ground that a person convicted under section 376 IPC for committing rape is not entitled to be released pre-maturely.

**8.** Being highly aggrieved, the appellant has preferred this jail appeal through the Superintendent of Police with the assistance of the of Legal Aid Counsel amongst others, on the following grounds:

(i) That under the Indian Penal Code, it is legally impossible to rape a woman who has already died, therefore, the conviction is bad in law, so far as conviction u/s section 376 IPC is concerned.

(ii) That necrophilia which is love of the dead which means having sexual intercourse with a dead person is not a criminal offence under the Indian Criminal law. As such, the appellant could not have been convicted under section 376 IPC for performing an act which is not a crime.

(iii) That the mental unsoundness of the accused at the time of commission of the alleged offence was not considered by the Trial Court. That the accused while admitting his guilt has stated before the Magistrate that he was urged by his friend Nekhotuo to kill the deceased. Nekhotuo happened to be there, but vanished immediately from the spot after commission of the offence by the accused. The accused then realized that it was not a real human being but an evil spirit. In this regard the learned counsel for the appellant relied on the classic case of *State of Orissa Vs. Ram Bahadur Thapa* reported in 1960 AIR Ori 161 wherein at para 9 it was held as under:

*"9. The two leading decisions on the question of criminal liability where a person kills what he considers to be ghosts are Waryam Singh v. Emperor, AIR 1926 Lah 554 and Bouda Kui v. Emperor, AIR 1943 Pat 64. In these two cases also, if the assailant had taken special care to ascertain who the person assailed was, he would have easily known that he was attacking a human being and not a ghost. Nevertheless the High Court held that the assailant was protected by Section 79 I.P.C. because, from the circumstances under which the apparition appeared before him and his pre-disposition, it would be reasonably inferred that he believed, in good faith, that he was attacking a ghost and not a human being. There may be slight difference on facts between these cases and the instant case. But on the evidence of the prosecution witnesses it is clear that the respondent is protected by Section 79 I.P.C. The mere fact that had he exercised extra care and attention the incident might have been averted is no ground for denying him the protection of that section."*

(iv) That there was no hearing held on the quantum of sentence which is mandatory under the provision of section 235(2) Cr.PC.

**9.** The learned counsel for the appellant submits that apart from non-availability of documents, there is no record showing that immediately after the incident the police has visited the place of occurrence, seized material evidences etc. Although evidence shows that one Naga dao about 2 ft length was produced by one Dunutso, GB of Kotisu village. But neither the said GB was examined to ascertained from where he had recovered the said daonor the seized dao was sent for FSL examination. The dead body of the deceased is stated to be found with blood and semen stained on her private part, but no blood stain was collected and sent for experts' opinion. He further submits that although doctor is stated to have examined the dead body of the deceased, but no post-mortem examination was conducted over the dead body to ascertain the cause of death.

**10.** The learned counsel for the appellant further submits that the conviction of the accused was solely based on the so-called confessional statement given by the accused and his pleading guilty before the trial court at the time of framing of charges. However, there was no confession before the Magistrate, as the documents exhibited to be the confessional statement was without the signature of the Magistrate who is stated to have recorded the said confessional statement. The contents of the confessional statement are to be proved by the Magistrate who

recorded it, but in the instant case, the contents of the said confessional statement were never proved before the Trial Court. In fact, the said confessional statement itself was not proved. Not only that, even assuming the said document to be a confessional statement recorded by the Magistrate, there is no signature of the accused who gave the confessional statement. Besides, there is also no record showing that the accused was given sufficient time for reflection before recording his confessional statement. There is also no record showing that the accused was properly explained the consequences of making such confessional statement, and if he makes one, the same may be used as evidence against him. There is also no record showing that the accused has not given his confessional statement under threat of the police and that after giving confessional statement he was taken to the judicial custody. Thus, the procedure prescribed under section 164 Cr.P.C was not at all followed while recording the said confessional statement. Therefore, the accused cannot be convicted based on the said so-called confessional statement.

**11.** The learned Legal Aid Counsel for the appellant submits that the prosecution has to prove its own case beyond reasonable doubt. However, in the instant case, except for the so called the confessional statement, the prosecution has miserably failed to prove the case against the accused for the offence charged against him. As such, the impugned judgment, may be interfered with and the conviction of the accused/ appellant sentencing him to undergo life imprisonment for offence under

sections 302 & 376 IPC be quashed and set aside.

**12.** Per contra, the learned PP submits that during the investigation period the appellant had admitted his guilt of commission of the alleged offence before the IO of the case. On such admission, he was forwarded to the learned Magistrate for recording his confessional statement. Accordingly, the learned ADC (Judicial), Phek has recorded the confessional statement of the accused wherein the accused had narrated the details of the incident and confessed his guilt stating that he has committed murder of the deceased by strangulating her and thereafter, he had committed sexual intercourse with her dead body. Under the circumstances, on finding prima facie materials against the accused, the IO laid chargesheet against the accused under section 302 & 376 IPC. During the trial, at the stage of framing of charge, when the accused was read over and explained the charges and asked him as to whether he pleaded guilty or not, the accused pleaded his guilt of the charged offences. However, the learned Trial Court with a view to afford him an opportunity to prove his innocence and to secure the ends of justice had proceeded for trial of the case. Upon consideration of the evidences against him, including his own confessional statement, evidences of the Doctor and his medical examination report exhibited which corroborates the allegation in the FIR, the learned Trial Court found the accused person guilty of the charged offences and accordingly, the accused was convicted and sentenced to undergo life imprisonment for offences under



sections 302 & 376 IPC. The learned PP however, fairly submitted that this is an old case of the year 2002-04, some documents could not be retrieved from the earlier court.

**13.** Heard the submissions of the learned counsel for the parties. We have also considered the available records.

**14.** Upon hearing the parties and on perusal of the record, the question which emerges for our decision is;

***Whether in absence of any other evidence, the accused can be convicted solely based on his so-called admission and unsigned confessional statement?***

**15.** As it is discernible from the records that despite of all efforts made to recover and trace out all the Trial Court's record, the same could not be found out except for few documents viz; the copy of FIR, the so-called confessional statement of the accused and the impugned judgment and order which was collected from the District Jail authority. It is an established principle of law that the prosecution has to prove their case beyond reasonable doubt against the alleged accused. In the instant case although the original records are not available, however, it is discernible from the available records that right from the beginning, the investigation of the case was not properly and adequately done. There is no record of the IO visiting the place of occurrence, drawing of sketch map of the crime scene, recovery or seizure of any other incriminating materials and weapon of offence or any materials including blood

sample for FSL and expert opinion, there is also no record of the IO making any recovery on the basis of the disclosure statement given by the accused or if made whether it was made while inside the custody or thereafter. Although one naga dao, about 2 ft long is stated to have been produced by one Shri Dunutso GB of Kotisu village. But he said the GB was never examined to ascertain from where he had produced the said dao, nor the said dao was sent for FSL report.

**16.** Although the IO is stated to have held inquest, but no any inquest report is available on record nor is there any record of exhibiting the same. Again, as the dead body of the deceased is stated to be found with blood and semen stained on her private part, but no blood stain was collected and sent for experts' opinion. Admittedly, no post-mortem examination was conducted over the dead body of the deceased to ascertain the cause of death of the deceased. These are some of the basic requirements in the death case, however, the same were not done and in absence of any other evidence or the prosecution shows sufficient cause for not producing the above, we are unable to be convinced that it was the accused and the accused alone who caused the death of the deceased and thereafter committed sexual intercourse with her. The prosecution has to prove its own case beyond all reasonable doubt, however, in the instant case, the prosecution has miserably failed to prove its case.

**17.** Further, although the accused has been convicted solely based on his confessional statement, there is no record of the

confessional statement except the unsigned Xerox copy of the purported confessional statement containing the signature of the Police Court, Phek. That probably was the reason, why the Magistrate has not been summoned to prove the said document. The document which has not been signed or proved by the Magistrate, who is purported to have recorded the said confessional statement cannot be treated as the true confessional statement of the accused under the provisions of section 164 of Cr.P.C. As per 164 (4), the confessional statement of the accused person shall be signed by the person making the confession, but in the present case, the accused has not signed the said confessional statement. Non-compliance with provision of section 164 Cr.P.C has caused injury to the accused in his defence on merit and the same cannot be cured at the later stage. In view of the above, we are not in a position to accept the said document to be a true confessional statement of the accused. As such, the same cannot be relied on for conviction of the accused for murder and rape.

**18.** The learned legal aid counsel submits that the appellant has completed about 21 years inside the jail in execution of the sentence without any remission. The application of the appellant for pre mature release was rejected as the offence involved with was section 376 IPC. He further submitted that the sexual intercourse committed after the death of a person does not constitute rape punishable under section 376 IPC.

**19.** It is submitted that in the present case none of the ingredients of the rape under section 375 IPC is present. Be that as it may, since we are concerned with whether based on the confession and admission of the charged offences, the accused can be convicted and sentenced to life imprisonment, we may not require to delve into the ingredients of rape on the deadbody. Similarly, we may also not require to discuss in detail about the cause of death of the deceased, as in any case, if the appeal is dismissed, the discussion on cause of death would be immaterial.

**20.** As observed above, although the accused is stated to have pleaded guilty at the time of hearing on charge; but since the Trial Court has proceeded with the Trial of the case, it was the duty of the prosecution to prove its case beyond reasonable doubt. However, in the present case, the prosecution has miserably failed to prove the case against the accused beyond reasonable doubt for commission of the offences under sections 302 & 376 IPC. Although 5 (five) prosecution witnesses were examined. But they all are official witness and none of them are eye witness. No any circumstantial evidence has also been made out against the accused for commission of the alleged offence. Although in his so called confessional statement the accused had mentioned one boy of same village who used to study at Holy Care School, Phek, but the said boy was never produced before the Court for examination. The accused has also stated to have come across his nephew, Ate and his wife who offered him tea on the way. But no efforts has been made to examine them to

confirm the movement of the accused towards the place of occurrence on the incident day.

**21.** The records also do not show that after completion of investigation, the accused was examined under section 313 of Cr.P.C enabling the accused personally to explain any circumstances appearing in the evidence against him, nor his statement was recorded. Further, section 235(2) Cr.P.C provides that if the accused is convicted, the Judge shall hear the accused on the questions of sentence, and then pass sentence on him according to law. This is a statutory provision without which failure of justice would occasion thereby. However, in the instant case, there is no record of hearing the accused on the quantum of sentences.

**22.** For the reasons stated herein above and in view of the fact that the learned Trial Court has convicted and sentenced the accused to undergo life imprisonment solely basing on the unsigned and unproved confessional statement, we are of the considered view that the finding of the learned trial court is without any substances as it lacks both material and circumstantial evidences to convict the accused for murder and rape. In fact, the prosecution failed to prove the case against the accused beyond reasonable doubt. Hence, we are constrained to interfere with the impugned judgment and order.

**23.** Accordingly, the impugned judgment and order dated 01.10.2004 whereby the accused has been convicted and sentenced to undergo life imprisonment is hereby quashed and

set aside.

**24.** The appellant be set at liberty and released, forthwith, if not required in any other case.

**25.** The appeal stands allowed and disposed of. No order as to cost.

**26.** Before parting with the records, we express our appreciation to the learned Legal Aid Counsel for the appellant, Mr. Sentiyaner for his able assistance. He is entitled to the legal aid fee as prescribed.

**JUDGE**

**JUDGE**

**Comparing Assistant**