HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Dated: 24th June, 2016

SINGLE BENCH: HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl. A. No. 23 of 2015

APPELLANT: Sandeep Tamang,
S/o. Late Siddarth Tamang,
R/o Adarshgoan, Lower Namphing,
South Sikkim.
[Presently State Central Prison at Rongyek, East Sikkim.]

RESPONDENT: State of Sikkim.

Appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

APPEARANCE:

Mr. B.K. Gupta, Legal Aid Counsel for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal is directed against the Judgment and Order on Sentence, passed by the Learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act,

2012), South Sikkim at Namchi, in Sessions Trial (POCSO) Case No. 06 of 2014, both dated 28.02.2015.

2. The grounds put forth in the Appeal, *inter alia*, are that the Learned Trial Court failed to appreciate that PW6, an Analyst-cum-Assistant Chemical Examiner, at the Regional Forensic Science Laboratory (RFSL) has admitted in her cross-examination that semen or human body fluid could not be detected in the vaginal swab of the Victim. That, the Learned Trial Court also failed to consider that PW7 Dr. Sandhya Rai - the Medical Officer, has stated that on examining the Victim, she found no visible injury on the body of the Victim including her private parts. That, PW12-Dr. M.P. Sharma, has stated that when the Victim was examined she did not personally complain about the sexual assault by the Accused or anyone else. Learned Counsel for the Appellant also expostulated that the Victim was not sixteen years on the night of occurrence i.e. 07.06.2014, since, **Exhibit 3** - the Birth Certificate of the Victim, reveals her date of birth to be 29.3.1998, thereby making her sixteen years and two months at the time of the alleged incident and, therefore, takes the offence out of the umbrella of Section 376(2)(i) of the IPC. That in consideration of the facts detailed hereinabove, the benefit of doubt ought to have been extended to the Appellant, hence the impugned Judgment and Order on Sentence be set aside and the Appellant be acquitted of the offences charged with.

3. Learned Additional Public Prosecutor in his submissions urged that the Learned Trial Court had arrived at a correct

finding based on the statement made by the Victim and the evidence on record, therefore the impugned Judgment and Order on Sentence requires no interference.

4. I have heard the rival submissions put forth by Learned Counsel at length and given due and anxious consideration to the same. I have also carefully perused the records of the Case including the evidence, impugned Judgment and Order on Sentence.

5. The question that falls for determination, firstly, is whether the Victim was indeed a child as per Section 2(d) of the POCSO Act, 2012 and under sixteen years of age for the offence to fall within the ambit of Section 376(2)(i) of the IPC.

6. In order to reach a finding on the above question, a narration of the facts is essential. An F.I.R. – **Exhibit 4**, was lodged by PW2 - brother-in-law of the Victim, (his wife being the sister of the Victim), on 8.6.2014 at 0800 hrs. to the effect that on 7.6.2014 at around 6 p.m., the Victim - PW1, along with her friend-PW3, had come to his house and thereafter PW1 informed him that she was going to deliver some articles to her friend and both left the house. At around 12:30 a.m., PW3 returned alone to his house and informed PW2 that PW1 had been lured by one Sandeep Tamang, the Appellant, who later sexually assaulted PW1. That, at 6 a.m. the next morning when he went to search for her, he found her and on enquiry came to learn that she had been sexually assaulted, upon which he lodged **Exhibit 4**. On the basis of **Exhibit 4**, the police drew up

formal F.I.R. – **Exhibit 5** and registered Temi P.S. Case No. 16(06)14 dated 08.06.2014, under Section 376 IPC read with Section 4 of the POCSO Act, 2012 against the Appellant and commenced investigation. On completion thereof, Charge Sheet was filed against the Appellant under Section 376/341 IPC read with Section 4 of the POCSO Act, 2012.

7. The Learned Trial Court on hearing the Counsel for both parties found *prima facie* materials against the Accused and framed Charges under Section 376 IPC and Section 4 of the POCSO Act, 2012. On a plea of "Not Guilty" by the Appellant, thirteen witnesses of the Prosecution were produced and examined, including the I.O. of the Case. On due consideration of the evidence furnished before it, the Learned Trial Court convicted and sentenced the Accused as follows;

> *"7.....*
> *.....Considering the serious nature of the offences involved and in view of Section 42 of the POCSO Act, 2012 the convict is sentenced as follows for having committed offences punishable under Section 4 of the POCSO Act, 2012 and 376 of the IPC, 1860:-*
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> > *To undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.50,000/- (Rupees Fifty thousand) only. In default to pay the said amount of fine he shall undergo Simple Imprisonment for a further period of six months.*
>
> *....."*

8. Hence, turning to address the issue of the age of the Victim, the Prosecution has relied on **Exhibit 3** – the Birth

Certificate of the Victim, which records her date of birth as 29.3.1998, her parent's name being recorded as Aita Bir Subba and Nil Kumari. It is pertinent to mention here that in the statement of PW1 recorded under Section 164 Cr.P.C., she has stated that her mother's name is Man Kumari Subba, thereby leading to an anomaly. The parents of the Victim find no place in the list of Prosecution witnesses. The I.O. - PW11, admits that *".....It is true I have not arrainged the parents of the victim as witnesses to prove the actual age of the victim. It is also true I have not arrainged as a witness the authority who issued the birth certificate of the minor victim to prove it....."* Thus, his evidence establishes that apart from non inclusion of the parents of the Victim to prove the age of the Victim, the authority who issued **Exhibit 3** was also not furnished as a Prosecution witness. According to PW1, she is a student of the eighth standard but she has not disclosed the name of the school, neither has PW2, PW3 or the I.O. for that matter enlightened the Court on this aspect. Therefore, a doubt arises as to whether she is really a school going girl, if she is, then, the next question that arises would be as to why the I.O. has not furnished any document from the School to establish that she was a student there or to produce the school admission register to substantiate the details given in **Exhibit 3.** That apart, Law envisages that if a document is alleged to be signed or to have been written wholly or in part by any person, the signature or handwriting or so much of the document as is alleged to be in that person's handwriting, must be proved to be in his handwriting. A perusal of **Exhibit 3**, would show that the document has been exhibited and marked but the evidence on record is silent about the contents and

signature thereof, which have remained unproved, contrary to what has been enjoined by Section 67 of the Indian Evidence Act, 1872.

9. That having been dealt with, another doubt that arises is with regard to the truthfulness of the seizure of **Exhibit 3**. PW10 appears to be one of the witnesses to seizure of MO-I, MO-II and MO-VII seized vide **Exhibit 11** from the house of PW2. **Exhibit 11** reflects seizure of **Exhibit 3** as well, but this witness makes no reference to **Exhibit 3** neither has he identified the document. Later in time, however, when PW13 another witness to the **Exhibit 11** was examined, this witness claims that the police seized **Exhibit 3** when seizures of MO-I, MO-II and MO-VII were made. The I.O.-PW11, nonchalantly in his evidence states *".....The clothes of the minor Victim which she was wearing on the night of the incident such as her jeans pant(MOI), T-shirt, black half pant(tight)(MOVII) and her red panty(MOII) were also seized by me from the house of the informant vide Exhibit-11, seizure memo. Exhibits 11(a) and 11(b) are the signatures of the concerned seizure witnesses. Exhibit-11(c) is my signature. Vide Exhibit-11, I also seized the birth certificate(exhibit-3) of the minor victim wherein the date of birth has been indicated as 29.3.1998....."* He has failed to identify the signatures of the witnesses on **Exhibit 11** as per Law, besides which it is unfathomable as to why the birth certificate of PW1 would be in the house of PW2, when she does not reside there or go to school from there, nor is it the Prosecution case that she had brought **Exhibit 3** with her to the house of PW2. Besides which on examining **Exhibit 11**, Serial No.5 appears to have been inserted subsequently at a latter

point in time which is evidently why PW10 appears to be oblivious of its existence. Thus, the seizure and authenticity of **Exhibit 3** is shrouded in mystery and since the Prosecution has failed to comply with the requisite provisions of Law, this document merits no consideration. Consequently, in view of the above lapses, the Prosecution has failed to establish that the Victim was either eighteen years or sixteen years of age at the time of the offence.

10. The first question having been answered, what remains to be addressed now is whether the Appellant has committed rape on the Victim. For this, we may again briefly walk through the evidence furnished by the Prosecution. The Victim has stated that she met the Appellant and his friend when she was with PW3 on the bridge near Manpari Busty, South Sikkim and they all struck up a conversation. Following this the Appellant and his friend accompanied PW1 and PW3 up to some distance, she alleges that the Appellant then gave her something to chew on which she became nauseous. By the time they reached near *Khan garage*, allegedly the P.O. PW3 and friend of the Appellant had been asked to leave by the Appellant, after which he committed the offence on her. Bearing this in mind, if one is to revert to **Exhibit 8**, the police have recorded as follows;

> *"..... Brief facts of the case (as known to the police at this moment): Above named minor girl was reportedly sexually assaulted by Sandeep Tamang, last night. Accordingly opined (sic) whether she has sustained any fresh injuries in her private parts or not / also opined (sic) that she was sexually assaulted or not... ....."*

11. The examination of the Victim vide **Exhibit 8** was carried out on 8.6.2014. The above reflects that PW1 had not told the police in the first instance that the Appellant had given her something to chew which made her unwell. On the reverse side of **Exhibit 8**, it is evident that the Victim has failed to put forth any such history even to PW7, who examined her on the day following the alleged incident. This story of PW1, being given something to chew has arisen only when she made her statement to the Magistrate under Section 164 of the Cr. P.C., 1973 on 24th of June, 2014, several days after the incident and, therefore, this statement clearly is an afterthought to strengthen the Prosecution Case, when even investigation has revealed no such event.

12. It is not the case of PW1 that she had raised any alarm at the relevant time. Also, it is rather strange that PW-3 was accompanying her on the bridge and when told to go away by the Appellant, obediently obliged. At that time, PW1 did not reveal to PW3 that she was unwell neither is there any evidence to point to the fact that PW1 made an effort to accompany PW3 back to the house of PW2, since it is no one's case that the Appellant had physically restrained PW1 using force. With regard to the Victim not having reached home at night, the evidence of PW2 is to the effect that on the following morning at around 4 a.m. he went towards *Khan garage* with his neighbour, where he was told by some police patrolling personnel that they had seen one female in a disoriented and intoxicated state near the bridge. That, after a few moments they met the Victim. What is

rather surprising is that the police personnel reportedly had seen PW1 in a disoriented/intoxicated state but despite being on duty had apparently not deemed it essential to take steps, nor were these police personnel brought forth as Prosecution witnesses.

13. The evidence of PW3 also does not inspire confidence since according to her, both she and PW1 met the Appellant and his friend-PW5 and after much insistence by the Accused, she and PW5 went back to the bridge, while PW1 did not return for a long time. If this was the case why she did not raise an alarm is anyone's guess, and why she did not return to the house of PW2 and not inform him of the seemingly untoward situation, is also questionable. The evidence of PW3 and PW5 categorically reveal that PW1 was with the Appellant of her own accord and at no point raised an alarm or sought their help. Another aspect that makes its way into the Prosecution case is that when all four of them were walking together, PW1 insisted on going ahead with the Appellant and PW5 saw them in one jeep. After PW1 returned, she told PW5 that she was destroyed but instead of taking steps PW5 allegedly remained with PW1 the whole night. Neither PW1, PW2 or PW11 have corroborated the evidence of PW5 that he remained with PW1 that night. The I.O. has not revealed why and where the Victim remained out the whole night, since the Appellant was apparently not with PW1 the next morning, neither does the investigation reveal as to where the Appellant had gone after the alleged incident or where PW11 located the Appellant leading to his consequent arrest. Added to this is the fact that PW7 – the lady doctor, who first examined the Victim on 8.6.2014, found no visible injuries over the body

of the Victim, nor did she find any signs of struggle. The evidence of this doctor does not corroborate with the evidence of PW12 - the male doctor, who examined the Victim on 9.6.2014 and found two small fresh lacerations on both sides of the labia minora of the Victim. The Prosecution evidence nowhere discloses that after the medical examination on 8.6.2014, the Victim did not step out of her house till the second medical examination was conducted on 9.6.2014. Besides which it may be pointed out here that the evidence of PW6 – the Analyst-cum-Assistant Chemical Examiner, did not find any human blood or semen or any human fluid on any of the exhibits forwarded to the Regional Forensic Science Laboratory for analysis.

14. Hence, considering the entire gamut of facts and circumstances and apparent anomalies in the evidence on record, the Prosecution story of rape appears to be improbable. The evidence does not substantiate the Prosecution case, either with regard to the age of the Victim or the alleged rape.

15. In the end result, I am of the considered opinion that the Prosecution has failed to prove its case at all and the Appellant is acquitted of the offences under Section 4 of the POCSO Act, 2012 and under Section 376 of the IPC.

16. The impugned Judgment and Order on Sentence of the learned Trial Court is set aside.

17. Appeal allowed.

18. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence be reimbursed to him.

20. Before parting with the Judgment, it is observed that the Charge is framed rather unhappily by the learned trial Court and the method of imposition of Sentence leaves much to be desired, nevertheless since these points are not in issue herein, it would not be necessary to delve into its legality.

21. Copy of this Judgment be sent to the Learned Special Court below for information and compliance.

22. Records of the Learned Trial Court be remitted forthwith.

(Meenakshi Madan Rai)
Judge
24.06.2016

Index : Yes / ~~No~~
Internet : Yes / ~~No~~

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