HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Dated: 29th April, 2016

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

Crl. A. No. 16 of 2015

APPELLANT: Niti Raj Subba, aged about 65 years,
Son of Late Garjaman Subba,
Resident of Singtam Bazaar,
East Sikkim,
P.O. & P.S. Singtam.
Presently at Rongyek State Jail.

VERSUS

RESPONDENT: State of Sikkim.

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

APPEARANCE:

Mr. Nar Bahadur Khatiwada, Senior Advocate with Mrs. Gita Bista, 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 challenges the Judgment dated 18.06.2015 and the Order on Sentence, dated 19.06.2015, passed by the Learned Special

Judge, Protection of Children from Sexual Offences Act, 2012 (hereinafter POCSO) at Gangtok, in Sessions Trial Case No. 21 of 2014, convicting the Appellant under Section 8 of the POCSO and sentencing him to undergo simple imprisonment for three years and to pay a fine of Rs.5000/- (Rupees Five thousand) only, with a default clause of imprisonment.

2. The facts in a nutshell are that on 09.05.2014, the minor Victim (aged about 10 years at the relevant time), had gone for a walk with her younger brothers at around 6 a.m. to a nearby temple. The Appellant (aged about 65 years), who had recently shifted to the locality, lured the boys by giving them Rupees ten each, after which they ran home from the temple leaving the Victim, P.W.-1, behind. The Appellant, thereafter, forced the Victim to insert her hand into his trousers and fondle his genital. He gave her Rs.50/- (Rupees fifty) only, after the act, warning her not to disclose the matter to anyone. Later, at her home she narrated the incident to her mother, P.W.-3, who brought it to the knowledge of her husband, the Victim's father, P.W.-2, resulting in the lodging of the Complaint, Exhibit-3 before the Sadar Police Station at Gangtok. Based on the FIR, investigation was launched and on completion thereof charge-sheet was submitted against the Appellant under Section 376/511 of the Indian Penal Code, 1860, read with Section 8 of the POCSO and Section 14 of the Foreigner's Act, 1946.

3. The Learned Trial Court after hearing the parties framed charge against the Appellant under Section 7 of the POCSO punishable under Section 8 of the same Act. The Prosecution examined 15 witnesses and based on the evidence of the Prosecution

witnesses, the impugned Judgment and Order on Sentence was pronounced.

4. In Appeal, it has been argued that there are anomalies and inconsistencies in the statements of the witnesses with regard to the time that the children went for a walk inasmuch as P.W.-1, the Victim, stated that she went around 7 a.m., while according to her the father, P.W.-2, it was around 6 a.m., who has stated as much in Exhibit-3. The Victim has deposed that they went to the Shiva Mandir located near their house, where they met the Accused contrary to what her brother P.W.-4 has stated, *viz*, that the Appellant was standing on the road near the temple. That apart, in her Statement under Section 164 of the Cr.P.C. 1973, Exhibit-1, before the Learned Chief Judicial Magistrate, the Victim has stated that when they reached the temple, they saw the Accused Niti Raj Subba inside the temple. It was urged that the question of Rs.50/- (Rupees fifty) only, being given by the Appellant to the Victim had not been stated in her Section 164 Cr. P.C. Statement recorded by the Learned Chief Judicial Magistrate. That, the Victim's father stated that, the Victim returned home with his other son, whereas the Victim herself stated that after the Accused offered Rs.10/- (Rupees ten) only, to her brother, he refused the money and ran from the place while her younger brother followed him. It was also put forth that the mother of the Victim was not able to identify the currency notes seized by the police, while P.W.-12, the witness to the seizure of the currency notes, was unaware of the place from where the currency notes were seized. P.W.-14, witness to the seizure of the currency notes, does not support the Prosecution case, neither does the evidence of the I.O. being fraught with contradictions, substantiate the Prosecution case. That, one "Julie aunty" and one

"police aunty" mentioned by the Victim in Exhibit-1 were not listed as prosecution witnesses, neither was the Magistrate, who recorded the statement of the Victim under Section 164 Cr.P.C. 1973, examined as a witness, on the basis of which an adverse inference can be drawn against the Prosecution under Section 114(g) of the Indian Evidence Act, 1872. Accordingly. the impugned Judgment and Order be set aside.

5. *Per contra*, it was argued by the Additional Public Prosecutor, that the impugned Judgment and Order on Sentence of the Learned Trial Court requires no interference, the same having been passed by the Learned Court after careful consideration of the evidence on record which unerringly points to the guilt of the Appellant, who had violated a mere child and hence the Appeal be dismissed.

6. I have carefully considered the rival contentions canvassed by Learned Counsel. I have also carefully perused the entire records of the case including the documents, evidence on record, the impugned Judgment and Order on Sentence.

7. The question for consideration before this Court is whether the Learned Trial Court erred in convicting the appellant under Section 8 of the POCSO.

8. For this purpose, it would be beneficial to firstly refer to Section 7 of the POCSO, which reads as hereunder:-

> "***7. Sexual Assault***.- *Whoever, with sexual intent touches the vagina, penis, anus or breasts of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which*

involves physical contact without penetration is said to commit sexual assault."

The scope of the provision being manifest, the Section requires no further elucidation. Section 8 is the penal provision for Section 7.

9. From a careful examination and analysis of the evidence on record, it is clear that P.W. 1 in her deposition before the Court stated that she with her two younger brothers had gone for a morning walk at around 7 a.m. to the Shiva Mandir located near their house where they met the Accused. This fact of "walk" has been supported by P.W.-4, the Victim's younger brother aged 7 years, who stated that as usual one morning in the year 2014, he along with his younger brother and the Victim had gone to the temple. Be it noted at this juncture that the Victim and her brother were examined only after questions were put to them in terms of Section 33 of the POCSO and Section 118 of the Indian Evidence Act, 1872, consequent to which it was found that they were not prevented from understanding the questions put to them despite their tender age, they having given rational answers thereof. Although, P.W. -3, the Victim's mother, did not accompany her children, she was aware as per her evidence, that her children had gone for a walk to the nearby temple on the said morning. P.W.-2, the Victim's father, testified that his children had gone for a walk to the Mandir in Manbir Colony. The evidence discussed hereinabove establishes the fact that the children had indeed gone for a walk to the Mandir that relevant morning. The minor anomaly with regard to the time of the walk being 6 a.m. or 7 a.m. deserves no

consideration, as it is not germane to the matter at hand, the matter primarily pivoting around the sexual assault.

10. Dealing with the evidence of P.W.-4, it is apparent that he was present with the Victim only up to the point when they saw the Accused near the Temple and when he offered P.W.-4, Rs.10/- (Rupees ten) only. According to the witness, he refused to accept the same and ran back home, his younger brother following after sometime. His sister also returned home and his younger brother was carrying a ten rupee note given by the Accused, while the Victim had a Rupees fifty note also given by the Accused. The witness has withstood the cross-examination and not vacillated from his evidence-in-chief.

11. Coming to the evidence of the Victim, according to her the accused called them i.e. herself and her brothers to the place where he was standing, near the temple and gave Rs.10/- (Rupees ten) only, to her younger brother who accepted the same. He also offered Rs.10/-(Rupees ten) only, to her other brother, which he refused and ran away from the spot, her younger brother following him. On a comparison of the statements of P.W.-2 and P.W.-4, it is evident that the question of contradiction does not arise at all since both witnesses have made substantially the same statements with regard to the incident up to the stage when the money was offered and the brothers ran away from the spot, contrary to what Learned Counsel for the Appellant has urged.

12. In connection with the incident, where the Victim was only present, she has deposed, *inter alia*, "……*I started to follow them at which point the accused caught hold of my hand and restrained me from*

leaving the place. He pulled me to a place beside the temple and opened the zip of his trousers. He then told me to fondle his penis which I refused but he forcibly pulled my hand and made me do the above act. After that, he forcibly placed Rs.50/- in my hand and told me that I should repeat the same act on other days also and not to tell anyone of it. Thereafter I pulled my hand away and ran away from the place. I was frightened and reached my home where my mother enquired from me as to what had happened since I was unable to have the tea that she gave me. I then narrated the incident to my mother and handed over the Rs.50/- to her……."

13. It is evident, thus on pain of repetition, that P.W.-1 was only present when the said incident occurred, her examination-in-chief has withstood the grueling cross-examination. Both P.W.-3 and P.W.-4, have said that after she returned home she looked despondent and as per P.W.-3, the Victim refused to eat tea and biscuits given by her. On her recurrent questioning as to what was ailing her, the Victim narrated that the Accused had accosted her near the temple where she had gone for a walk with her brothers and forced her to insert her hand into his trousers and fondle his genital, telling her that water would come out from the same. Being afraid of him, she complied with his instructions. The Victim also told P.W.-3, that after the incident the Accused put Rupees fifty, in her hand, for herself and Rupees ten for her brother.

14. The evidence of the Victim before the Court, where she and her brother deposed that they met the Accused on the road near the temple, which it is argued is contrary to her Section 164 Cr.P.C. Statement, wherein she stated that she saw the Appellant inside the temple is hardly a material contradiction, as the witness cannot be

expected to make the exact same statements before the Court and under Section 164 Cr.P.C. 1973.

15. On a comparison of the evidence of both the witnesses, P.W.-1 and P.W-4, the evidence does not vary and the Victim has told P.W.-3 about the circumstances in which the fifty rupee note was given to her. Assuming that there are minor anomalies in the evidence of the witness, which in the same breath I have to opine, do not exist, the same are not substantial enough to vitiate the Prosecution case. In this context a decision of the Hon'ble Apex Court in the ***State of Punjab vs. Ramdev Singh***[1], may be beneficially referred to. It was held by the Hon'ble Apex Court at Paragraph 15 as follows;

> *"**15.** The High Court was not justified in reversing the conviction of the respondent and recording the order of acquittal. An unmerited acquittal does no good to the society. If the prosecution has succeeded in making out a convincing case for recording a finding as to the accused being guilty, **the Court should not lean in favour of acquittal by giving weight to irrelevant or insignificant circumstances or by resorting to technicalities or by assuming doubts and giving benefit thereof where none reasonably exists.** A doubt, as understood in criminal jurisprudence, has to be a reasonable doubt and not an excuse for a finding in favour of acquittal. **An unmerited acquittal encourages wolves in the society being on the prowl for easy prey, moreso when the victim of crime are helpless females or minor children. The Courts have to display a greater sense of responsibility and to be more sensitive while dealing with charges of sexual assault on women, particularly of tender age and children."***

1. AIR 2004 SC 1290

16. On the question of the evidence of the Victim requiring corroboration, useful reference may be made to the decision of the Hon'ble Apex Court in ***Aman Kumar & Another vs. State of Haryana***[2], wherein it was held at Paragraph 5, as follows;

> *"**5**. It is well settled that a prosecutrix complaining of having been a victim of the offence of rape is not an accomplice after the crime. There is no rule of law that her testimony cannot be acted upon without corroboration in material particulars. She stands on a higher pedestal than an injured witness. In the latter case, there is injury on the physical form, while in the former it is both physical as well as psychological and emotional. However, if the court of facts finds it difficult to accept the version of the prosecutrix on its face value, it may search for evidence, direct or circumstantial, which would lend assurance to her testimony. Assurance, short of corroboration as understood in the context of an accomplice, would suffice."*

Based on the above extract, there is no reason to disbelieve P.W.-1.

17. That apart, P.W.-5 has also supported the evidence of P.W.-2 and P.W-4, with regard to the presence of the Accused at the temple. According to her on the morning of the incident, she and her husband had gone for a walk towards the helipad area. On their return they saw the Accused near the Shiva Mandir at Manbir Colony washing his hands. Later, she was informed by P.W.-3 (mother of the Victim) about the incident.

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2. (2004) 4 SCC 379

18. Although, it was urged by the Appellant that the Victim's mother in her cross-examination has deposed that during the course of the inquiry and investigation by the police, they had seized one high-neck sweater, M.O.-I from her possession, however, P.W.-7, in her cross-examination has admitted that the Victim was not wearing M.O.-I at the time of seizure. On this aspect, while considering the evidence of P.W.-5 and P.W.-7, there is no denial of the fact that they were present at the time of preparation of the seizure memo, Exhibit-5. The minor anomaly i.e. that P.W.-5 has stated that the police had seized M.O.-I worn by the Victim and P.W.-7 has said that at the time of seizure the Victim was not wearing M.O.-I, does not prejudice the Prosecution case at all, since in the first instance it is not relevant to the matter at hand. Evidently, the police have seized the sweater only by way of abundant caution, it has no connection to the facts of the case at hand. The evidence of Doctor, P.W.-9, is not relevant for the present purposes since it is no one's case that there was any physical sexual assault upon the person of the child.

19. The non-identification of the Rupees sixty by P.W.-3, was another argument raised by Learned Counsel, however, on careful examination of P.W.-3, it is apparent that the Victim handed over Rupees sixty to her and thereafter, she had carried it to the Police Station where the Police seized it from her. This emerges from the evidence of P.W.-1 and P.W.-3. Another attempt to defend the Appellant was made by canvassing the argument that the Complaint, Exhibit-3, was lodged by the Victim's father, P.W.-2, on account of enmity with the Appellant. According to Learned Counsel for the Appellant, the Appellant owed money, amounting to Rs.38,000/- (Rupees Thirty Eight Thousand) only, to the Victim's father, who runs a ration shop from where the Appellant used to take groceries

on credit and had not paid the same. That, thereafter, instead of continuing buying his ration from P.W.-2's shop, he was making his purchases from another shop which raised the hackles of P.W.-2. This argument has no legs to stand since this is not reflected in the cross-examination of either P.W.-2 or for that matter P.W.-3. In my considered opinion the allegation is merely a frail attempt to foist a motive on P.W.-2.

20. In conclusion thereof, in view of the foregoing discussions and taking into consideration the entire gamut of facts, circumstances and the evidence on record, I am of the considered opinion that the impugned Judgment and Order on Sentence brooks no interference. It would be pertinent to point out that the Appellant has also failed to take advantage of the provision of Section 30 of the POCSO, which reads as follows:-

> *"**30.** Presumption of culpable mental state.- (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state **but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.***
>
> *(2) ……"*

21. Consequently, the Appeal is dismissed.

22. No order as to costs.

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

Sd/-

(Meenakshi Madan Rai)
Judge
29.04.2016

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