HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Dated: 14th September, 2016

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

Crl. A. No. 12 of 2016

APPELLANT: Manbir Kami @ Bishwakarma
Son of late Harka Bahadur Biswakarma,
Resident of Pasting Lingtam,
P.O. & .S. Rongli,
East Sikkim.
[Presently at Central Prison, Rongyek, East Sikkim]

RESPONDENT: State of Sikkim.

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

APPEARANCE:

Mr. N.B. Khatiwada, (Sr. Advocate) Legal Aid Counsel with Mrs. Gita Bista, Legal Aid Counsel for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal is preferred against the Judgment and Order on Sentence dated 31.7.2015, passed by the Learned Special Judge, (POCSO), North Sikkim at Mangan, in Sessions Trial (POCSO) Case No. 02/2015, State of Sikkim vs. Manbir Kami @ Biswakarma, vide which

the learned Special Court convicted the Appellant under Section 3, punishable under Section 4 of the Protection of Children from Sexual Offenses Act, 2012 (for brevity 'POCSO Act, 2012') and sentenced him to undergo rigorous imprisonment of seven years and to pay a fine of Rs.5000/- (Rupees five thousand) only. He was further convicted under Section 5(m) of the POCSO Act, 2012, punishable under Section 6 of the same Act and sentenced to undergo rigorous imprisonment for ten years. Both Sentences of fine bore a default stipulation.

2. It is the case of the Appellant as expostulated by learned Senior Counsel, that no such offence had been committed by him and the anomalies in the Prosecution case stand witness to this. That, the Victim P.W.-1, in her examination in chief, *inter alia*, deposed that the Accused had opened her underwear and committed sexual intercourse on her, to the contrary, the evidence of P.W.-17 Dr. M.P. Sharma, who examined the Victim, found her hymen intact with no signs of perineal laceration, neither were there signs of struggle or of penetrative sexual assault. Thus, the evidence of the Doctor belies not only the evidence of P.W.-1, but also of P.W.-2 Jeewan Gurung, allegedly the eyewitness to the incident. That, it is also unimaginable that the child was not crying or seeking help when a man of 42 years was sexually assaulting her. P.W.-2 has nowhere stated that the Victim was crying or seeking any help when he allegedly reached the place of occurrence. Although, P.W.-5 Mingma Lhamu Tamang deposed that P.W.-1 had informed her of the sexual assault committed on her by the Appellant, the Victim nowhere discloses that she told P.W.-5 of the incident. It was also urged that P.W.-9 Passang Tamang, has merely stated that the Victim narrated to him that the Appellant had 'attempted' to commit sexual assault on her. P.W.-12, another doctor who

examined the Victim, found laceration on the vagina but referred the Victim to the Gynaecologist P.W.-17, and admitted that laceration could be produced either by blunt force or by falling on a hard surface. It was vehemently urged that the alleged act is said to have been committed around 1430 hours on 4.9.2014 in a Kiosk along a village footpath, which in itself is incongruous as people would be frequenting the area and no person would commit an offence of sexual assault in the light of day in such an open place. The Investigating Officer (for short 'I.O.') has failed to send any body fluids of the Victim and the Appellant to the Regional Forensic Scientific Laboratory at Saramsa to establish the offence. That, although P.W.-2 has alleged that the Appellant offered him Rs.1000/- (Rupees one thousand) only, pleading with him not to reveal the incident, this unbelievable allegation is not buttressed by seizure of any money and the Appellant being employed on Muster Roll would not have had the amount in his possession. Hence, the conviction is erroneous, made with a wrong appreciation of the materials on record, ignoring the established principles of law. It is, therefore, prayed that the impugned Judgment and Order on Sentence be set aside and quashed.

3. The learned Additional Public Prosecutor, *per contra*, argued that the Victim herself has specifically stated that the act was committed. Taking the assistance of Section 29 of the POCSO, he urged that the Section requires the Special Court to presume the commission of such an offence unless it is established to the contrary. P.W.-2, who reached the place of occurrence has supported the case of the Victim P.W.-1, having witnessed the Appellant committing the offence on the minor Victim. That, on being seen, the Appellant requested P.W.-2 not to disclose the offence to anyone and at the same time offered him Rs.1000/- (Rupees one thousand)

only, to conceal the incident. Placing reliance on **Exhibit-7,** the Medical Report of the Victim, and the evidence of P.W.-12, the Doctor of Rongli, Primary Health Centre, who examined the Victim on the morning following the incident, it was urged that laceration was found on the Victim's vagina and she was referred to the Gynaecologist, who also found laceration therein. Therefore, there is no question of the offence not having been committed.

4. To buttress his submissions, learned Additional Public Prosecutor has placed reliance on ***Sri Narayan Saha and Another vs. State of Tripura***[1]***,*** drawing the attention of this Court to Paragraphs 6, 9 and 10, wherein it was held that the prosecutrix of a sex offence cannot be put on a par with an accomplice when she is in fact a victim of the crime. That, the Indian Evidence Act, 1872 nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. That, it was held that the doctor's evidence is of no consequence in view of the unimpeached evidence of the victim and that there was no reason as to why any woman would falsely implicate any person and considering the intervening period of about seven years of the occurrence and recording of evidence minor discrepancies are of no consequence. It was submitted that the same applies to the facts and circumstances of the instant case.

5. Attention of this Court was also drawn to the decision of the Hon'ble Apex Court in ***Krishan vs. State of Haryana***[2]***,*** wherein it was held that although no injuries were found on the person of the victim, nor were there signs of recent forcible sexual intercourse or

1. (2004) 7 SCC 775
2. (2014) 13 SCC 574

injuries on her body, the findings of the medical expert clearly established that there was rape committed against the victim. Hence, in the instant case, according to learned Additional Public Prosecutor, merely because no signs of injury were found on the Victim, it does not absolve the Appellant from the offence.

6. Relying on ***Hem Raj s/o Moti Ram vs. State of Haryana***[3], it was contended that in the said matter it has been reiterated that in a case involving the charge of rape if it inspires confidence it can be relied sans corroboration. Here, the injury on the genital of the victim indicates violation of the victim conclusively is suggestive of the fact that the act was committed. That, the Hon'ble Apex Court in ***O.M. Baby (Dead) by Legal Representative vs. State of Kerala***[4], held that the absence of injuries on the body of the victim, may not be decisive, particularly, in a situation where the victim did not offer any resistance on account of threat or fear meted out to her. In the instant case, the Appellant was an adult while the Victim was around 9 years old at the time of the offence and has testified that a threat was held out to her by the Appellant. Hence, the Judgment and Sentence of the learned Trial Court warrants no disturbance.

7. I have heard the submissions of learned Counsel at length. I have also carefully perused the entire records of the case including the evidence of the witnesses.

8. In order to assess as to whether the Conviction and Order on Sentence was correctly handed out by the learned Trial Court, it is

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3. (2014) 2 SCC 395
4. (2012) 11 SCC 362

necessary to briefly discuss the facts of the case. On 5.9.2014 at around 0100 hours, the Rongli Police Station received **Exhibit-2**, a written F.I.R., from P.W.-2 Jeewan Gurung, a teacher in Lingtam Primary School, informing therein that on 4.9.2014 at around 1430 hours when he was returning home to Lingtam after school, on the way in a Kiosk, he saw the Appellant sexually assaulting P.W.-1 the Victim. A case was duly registered being Rongli P.S. Case No. 21(09)2014, dated 5.9.2014 under Section 376 IPC and Section 4 of the POCSO Act, 2012 against the Appellant. Investigation revealed that the Victim was returning home via a shortcut through the jungle, half way, at a Kiosk, the Appellant came and asked P.W.-1 to sit next to him. He then made her lie down on the concrete bench, pulled down her under garment, opened his trousers, and apart from touching the vagina of the Victim, sexually assaulted her. P.W.-2 passing through at the relevant time saw the incident at which time the Appellant also saw P.W.-2 and sought forgiveness offering P.W.-2 money not to disclose the incident. P.W.-2, then informed the Panchayat and both of them went to the Lingtam Picket Post where they lodged **Exhibit-2**. Thereafter, the said two persons went to the house of the Victim and apprised the guardian of the Victim of the incident. The Appellant was produced before the concerned Police Station and forwarded to Rongli Primary Health Centre (PHC) for medical examination and later arrested. The Victim was medically examined on 5.9.2014 at Rongli PHC and referred to District Hospital at Singtam. Thereafter, on completion of investigation, Charge Sheet was submitted against the Appellant under Section 376 of the IPC, 1860 read with Section 4 of the POCSO Act, 2012. 18 witnesses including the I.O. of the case were examined before the learned Trial Court and on examination of the entire evidence on record, the learned Trial Court passed the impugned Judgment and Order on Sentence.

9. Now what requires consideration is whether the Prosecution has been able to establish that the Appellant committed the offence as charged.

10. The Victim at the time of her evidence being recorded in the Court was aged about 10 years and was found competent to testify. Her evidence indicates as follows;

> *"……*
>
> *….. the accused opened my underwear that I was wearing at that time. The accused then committed sexual intercourse on me. The accused then asked me not to narrate the incident to anybody promising to give me sweets.*
>
> *At that time, one Gurung Sir of my School suddenly arrived there. The accused fell at the feet of Gurung Sir for forgiveness promising not to commit such acts in future. Thereafter I went home. I, however, did not disclose the incident to anybody as the accused had warned me not to do so.*
>
> *……"*

The above extract reveals no indication of the fact that P.W.-2 witnessed the alleged sexual intercourse, going by her deposition, by the time P.W.-2 arrived there, the Appellant had asked her not to narrate the incident to anyone promising to give her sweets. Although, under examination, the allegation that the Appellant committed sexual intercourse has not been demolished, it is ponderable as to what she actually understands by the said term keeping in mind her age and in view of the fact that the Doctors P.W.12 and P.W.-17, who examined her after the incident have found no signs of penetrative sexual assault. Obviously, if a child of 9 years had been sexually assaulted by a grown adult by way of penetrative sexual assault, she would have been grievously injured, as also the

Appellant himself. In *Modi's Textbook of Medical Jurisprudence & Toxicology, Twenty-first Edition, 1988* at Page 375, it has been held that the following signs would be visible on the genital of a victim of rape:

> *"…….*
>
> *During the examination the following points may be noted:-*
>
> *1. …….*
>
> *2. …….*
>
> *3. Bruising and laceration of the external genitals may be present with redness, tender swelling and inflammation.*
>
> *4. In nubile virgins the hymen, as a result of complete sexual intercourse, is usually lacerated, having one or more radiate tears, (more so in posterior half) the edges of which are red, swollen and painful, and bleed on touching, if examined within a day or two after the act. These tears heal within five or six days, and after eight to ten days become shrunken and look like small tags of tissue. Frequent sexual intercourse and parturition completely destroy the hymen, which is represented by several small tags of tissue, which are called carunculae hymenealis or myrtiformes.*
>
> *In cases where the hymen is intact and not lacerated, it is absolutely necessary to note the distensibility of the vaginal orifice in the number of fingers passing into vagina without any difficulty. The possibility of sexual intercourse having taken place without rupturing the hymen may be inferred, if the vaginal orifice is capacious enough to admit easily the passage of two fingers.*
>
> *The circumference of the hymen can also be measured by a measuring cone. 9 to 10 cms circumference of hymen is considered the least necessary for coitus – Practitioner, Sept. 72 291. In girls under fourteen years of age the vaginal orifice is usually so small that it will hardly allow the passage of the little finger through the hymen. It is often difficult to distinguish between an indentation in a fimbriated hymen and a tear, unless the hymen is stretched by a finger tip, glass rod or Brittan's hymenscope which also give excellent transillumination of hymen, when a tear is found to extend upto the vaginal wall. Med. Sc. Law, Aug. 1963, 118-120.*
>
> *The fourchette and posterior, commissure are not usually injured in cases of rape, but they may be torn, if the violence used is very great indeed. The extent of injury to the hymen and genital canal depends upon the degree of disproportion between the genital organs of both parties and the violence used on the female.*

> *In small children the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of fourchette and perinaeum.*
> *……."*

None of the above injuries have been detected on the genital of the victim. The story of penetrative sexual assault as narrated by P.W.-2 is a little incongruous, since, if such was the case undoubtedly the Victim would either have cried out in pain or would be crying out in pain or on seeing P.W.-2 would have run to him for assistance and comfort. It is no ones case that the Victim sought such help. P.W.-2 also has an added version to his narration of the incident, that of the Appellant offering him Rs.1000/- (Rupees one thousand) only, to conceal the incident. This does not find place in the evidence of P.W.-1, neither have the police made a seizure of Rs.1000/- (Rupees one thousand) only, allegedly offered to P.W.-2.

11. P.W.-5 Mingma Lhamu Tamang and P.W.-6 Chetram Gurung, are witnesses to whom the incident was allegedly narrated by P.W.-1 and P.W.-2 respectively, however, on perusal of the evidence of P.W.1, she does not state that she narrated the incident to P.W.-5 nor has P.W.-2 stated that he narrated the incident to P.W.-6, raising a suspicion on this aspect of the Prosecution case.

12. On referring to **Exhibit-7**, relied on strongly by the Prosecution, P.W.-12 Dr. Tsewang N. Sherpa has recorded the following on examining the Victim;

> *" ……*
> *1. OS – slightly open*
> *2. vaginal (sic) lacerated.*
> *Patient refer (sic) Gynaecologist and medico legal specialist for further examination and export (sic) opinion.*
> *……."*

The Gynaecologist P.W.-17, who examined the Victim, *inter alia*, deposed before the learned Trial Court as follows;

> *"……*
>
> *On general examination, the patient was conscious and afebrile. On per vaginal examination, hymen was intact, no signs of perrineal (sic), vulval and vaginal laceration present. No signs of struggle present. No signs of sexual penetrative act was found ……*
>
> *……"*

13. P.W.-12, infact sent P.W.-1 to P.W.-17 for further examination as he himself was not a Gynaecologist, after reaching a finding that there was a laceration on the vagina. The Gynaecologist P.W.-17, however, found no vaginal injuries at all and his deposition withstood the cross examination. It would be worthwhile noting that there was no change in the gait of the child alleged to have been sexually assaulted. Had there been penetrative sexual assault there is no doubt that the child would have suffered physical pain and would possibly be febrile, but P.W.-5 sister of P.W.-1, P.W.-3 Panchayat Member and P.W.-9 Passang Tamang, who appear to have interacted with the Victim after the incident have nowhere stated that P.W.-1 was in any physical discomfort or complained of such.

14. While referring to the Judgments relied on by the Additional Public Prosecutor, it is clear as held in ***Sri Narayan Saha and Another vs. State of Tripura*** supra, this Court has not taken into consideration any minor discrepancies that appear in the evidence of the Victim. While referring to ***Krishan vs. State of Haryana*** supra, the facts therein differ from the instant case, since the finding of the medical established commission of rape on her. The evidence of P.W.-12 and P.W.-17 does not reach such a conclusion. In ***Hem Raj s/o Moti Ram vs. State of Haryana*** supra, the case of the victim was

consistent inspiring confidence without corroboration. Similarly, in the matter at hand no corroboration has been sought for the offences meted out on the Victim. In ***O.M. Baby (Dead) by Legal Representative vs. State of Kerala*** supra, it was held that the absence of injury on the body of the victim is not conclusive that the offence was not committed on the victim. However, in the case at hand, neither are there injuries on the body of the Victim nor are there injuries on the genital as deposed by the Gynaecologist. There is no history of trauma subsequent to the incident or any physical discomfort to enable this Court to reach the finding that there was penetrative sexual assault.

15. The learned Trial Court despite the evidence of the Doctors on record, has surprisingly convicted the Appellant of the offence under Section 3 and Section 5(m) of the POCSO Act, 2012, when the opinion of the Doctors is to the contrary nor is there physical evidence on the Victim of penetrative sexual assault. It is recorded in the impugned Judgment at Paragraph-82, *inter alia*, that;

> *"……*
>
> *82. …… Even a slight penetration against the desire of woman/girl is sufficient to constitute the offence of rape and rupture of hymen is not necessary for constitution of crime and chances of false implications are remote as nobody would like to do it by placing family reputation at stake.*
>
> *……"*

However, the question of even "slight penetration" does not arise in view of the foregoing evidence. The child at no stage volunteered information of the alleged incident and her Section 164 Cr.P.C. Statement appears to have been recorded in unholy haste. She was taken to the Magistrate on 5.9.2014 and her statement

recorded on the same day, no window period for rethinking being extended to her. However, in view of Section 29 of the Act, since the Victim has deposed that there was sexual assault on her, I am of the considered opinion that the act of the Appellant amounts to an offence under Section 7 punishable under Section 8 of the POCSO Act, 2012 and not under Section 3 and Section 5(m) of the said Act.

16. The impugned Judgment and Order on Sentence of the Learned Trial Court is accordingly set aside, and fine, if any, paid by the Appellant consequently be reimbursed to him duly retaining the amount below.

17. The Appellant is convicted of the offence under Section 7 of the POCSO Act, 2012, of which Section 8 is the penal provision and is sentenced to undergo Simple Imprisonment of three years and to pay a fine of Rs.2000/- (Rupees two thousand) only. In default thereof, to undergo Simple Imprisonment of two months. The period of imprisonment undergone by him be set off under the imprisonment imposed today.

18. The Appeal is allowed to the above extent.

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

20. Records be remitted forthwith.

Sd/-
(Meenakshi Madan Rai)
Judge
14.09.2016

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

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