THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 20th SEPTEMBER, 2016

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.19 of 2015

Appellant : Kumar Ghimirey,
S/o Shri Nim Das Ghimirey,
R/o Lower Namphing,
South Sikkim.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : The State of Sikkim

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

Appearance

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

Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Being aggrieved by the Judgment and Order on Sentence, both dated 31-10-2014, passed by the Learned Special Judge (POCSO Act, 2012), South Sikkim at Namchi, in Sessions Trial (POCSO) Case No.04 of 2014, convicting the Appellant under Sections 9/10 of the Protection of Children from Sexual Offences Act, 2012 (for short

"POCSO Act"), sentencing him to undergo simple imprisonment of seven years and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, with a default clause of imprisonment, and also convicting him under Section 341 of the Indian Penal Code (for short "IPC") and sentencing him to undergo simple imprisonment for a period of one month, this appeal has been preferred.

2. The facts in a nutshell, are that, on 20-02-2014 at about 1700 hours, P.W.2 a resident of Lower Namphing, South Sikkim, lodged Exhibit 3 the FIR, informing therein that the Appellant had attempted to sexually assault his seven year old daughter, P.W.1, at around 1330 hours, in a jungle. Based on Exhibit 3, Temi Police Station Case was duly registered on the same date under Sections 376/511 of the IPC and taken up for investigation.

3. Investigation revealed that on the relevant day, P.W.2 was out of his house on account of his carpentry works. P.W.3 the mother of the victim after sending her children to school went to the nearby fields to collect fodder. At around 1 p.m. while she was still at the fields she heard P.W.1 crying noisily and went to ascertain the cause. The victim thereupon narrated the incident to her. Other students returning from school also narrated the incident to P.W.3 as they had seen the Appellant absconding from the area. The Appellant for his part on the fatal day at around 0930 hours saw the victim P.W.1, going to her school. At around 1230 hours he hid in the

jungle below his house waiting for the victim as he was aware that she would employ the same route to return. When the victim thus returned, the Appellant dragged her about 50 ft. into the jungle, undressed her and tried to sexually assault her. To muffle her cries the Appellant clamped her mouth with his hand on which he was bitten by the victim, who then escaped. P.W.6 and other students of her school, saw P.W.1 crying and running away from the spot. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376/511/341/342 of the IPC read with Section 4 of the POCSO Act.

4. The Learned Trial Court framed Charge against the Appellant under Section 341 of the IPC read with Section 5 of the POCSO Act punishable under Section 6 of the same Act and under Section 376(2)(i) of the IPC. Trial commenced on a plea of "not guilty" by the Appellant. In a bid to prove its case beyond a reasonable doubt the Prosecution produced ten witnesses. On conclusion of the Prosecution evidence, the Appellant was duly examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") where he once again denied the allegations against him and claimed to have been falsely implicated in the case. The final arguments of the parties were heard and the Learned Trial Court on analysis of all of the above arrived at the conclusion that the Appellant had committed the offences, as already detailed hereinabove, and convicted and sentenced him accordingly.

5. Before this Court, Learned Counsel for the Appellant expostulated that although it is the Prosecution case that the victim was dragged for about 50 ft., her medical examination does not fortify this allegation. That P.W.6 has nowhere stated that the Appellant was running away and, in fact, when P.W.6 met P.W.1 while returning from school, she found her crying and on enquiry, P.W.1 told her that a drunkard had dragged her, thus the Appellant was neither identified as the assailant nor did P.W.1 tell P.W.6 that he had sexually assaulted her. P.W.9 the Doctor who medically examined P.W.1 has under cross-examination admitted that the cause of *"mild erythema"* on the labia majora of the victim could be due to fungal or some other infection. That, P.W.1 in her Section 164 Cr.P.C. statement, had stated that the Appellant had raped her, while before the Learned Trial Court, she deposed that the Appellant had only rubbed his genital on hers, thereby leading to contradictory evidence and raising a suspicion about the authenticity of her allegation. Hence, the benefit of doubt ought to be extended to the Appellant. It is prayed that the impugned Judgment and Order on Sentence dated 31-10-2014 be set aside and the Appellant be acquitted.

6. *Per contra*, the arguments advanced on behalf of the State-Respondent was that on perusal of the evidence of P.W.1, there is no denying that the Appellant had committed the offence on her. The victim has specifically stated that not only did the Appellant rub his genital against hers after removing both their clothes but also tried

to insert his genital into hers which is sufficient by itself, without corroboration, to make out an offence under the provisions of Law, under which the Appellant has been convicted and sentenced. To fortify his submission with regard to the sexual assault and the evidence of the victim, reliance was placed on ***State of Himachal Pradesh*** vs. ***Suresh Kumar alias DC***[1] wherein it was held that the statement of the victim requires no corroboration, the relevant portion of which are as under;

> **"20.** This Court observed as follows in *State of Rajasthan* v. *Om Prakash* [(2002) 5 SCC 745] at p.753: (SCC para 13)
>
> > "*13.* The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In *State of Punjab* v. *Gurmit Singh* [(1996) 2 SCC 384], referring to *State of Maharashtra* v. *Chandraprakash Kewalchand Jain* [(1990) 1 SCC 550] this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.**"**

Hence, the prayers of the Appellant require no consideration.

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1. (2009) 16 SCC 697

7. Having heard Learned Counsel for the parties at length, I have given due consideration to the same. I have also carefully perused the documents and evidence on record.

8. It would be beneficial now to analyse the evidence on record to reach a finding as to whether the conviction handed out by the Learned Trial Court was correct or not.

9. P.W.1 is the victim aged about 9 years. She deposed before the Learned Trial Court after she was examined and found competent to testify. According to her, while she was returning from school on 20-02-2014 all alone, the Appellant who was hiding behind a tree at a secluded place, tried to induce her to accompany him to the bushes, offering her sweets. When she refused he dragged her there, removed her undergarment, removed his clothes and rubbed his penis against her vagina. He even tried to insert his genital into hers, but could not do so. She struggled to escape, bit his hand, managed to free herself and ran home. Enroute she met one Tika "didi", Smita "didi", Sukmit "didi" who saw her crying and she narrated the incident to them. At home she told her mother (P.W.3) about it. Her evidence withstood the gruelling cross-examination.

10. The testimony of P.W.2 the father of the victim, extended only to the lodging of Exhibit 3 pertaining to the incident, after his wife P.W.3 informed him thereof.

11. The evidence of P.W.1 with regard to her having narrated the incident to P.W.3 was duly confirmed by P.W.3. She has added that after P.W.1 narrated the incident to her she along with some of her co-villagers went in search of the Appellant, in vain. According to her, Exhibit 2 the original Birth Certificate of her daughter indicating her date of birth to be "20-08-2004" was duly seized by the Police. At this juncture, I deem it appropriate to point out that the age of the victim is not in dispute. P.W.4 was evidently in the house of P.W.3 when P.W.1 narrated the incident to P.W.3.

12. P.W.5 and P.W.6 both attend the same school as that of P.W.1. As per P.W.5 when she was returning home she saw P.W.1 coming out from the bushes at a lonely place, crying and told her that the Appellant had forcefully taken her to the bushes and tried to rape her. This witness saw the Appellant in the bushes trying to run away. P.W.6 supported the evidence of P.W.5 stating for her part that while she was also returning from school, she and her friends met P.W.1 enroute at a lonely place crying. On enquiry she told them that one drunkard had dragged her. When they looked around they saw one person running away. It may be pointed out that one of the arguments raised by Counsel for the Appellant was that the identity of the Appellant was not disclosed by P.W.1 to P.W.6 as she only stated that a "drunkard" had dragged her despite knowing the Appellant, thereby raising a doubt in the Prosecution story of the Appellant as the perpetrator of the crime. This argument, however,

appears to be untenable to me as the victim has specifically identified the Appellant in her evidence.

13. P.W.9, the Gynaecologist at Namchi District Hospital examined the victim on 24-02-2014 vide Exhibit 8 stated that; **"***On her medical examination I found that there was mild erythema on both sides of her labia majora (½ x ½ cms). They were fresh. There was no other injury or abnormality***"**, and admitted under cross-examination that **"***It is true such type of mild erythema can be caused due to fungal infection or some other kind of infection on the private parts of females.***"**

14. In the first instance, it cannot but be observed that the offence was committed on 20-02-2014 while the victim was examined by the Gynaecologist only on 24-02-2014. P.W.10 the I.O. of the case alleges that he forwarded P.W.1 to the Primary Health Centre (PHC) for her medical examination, ofcourse no date is revealed but Medical Report pertaining to Temi PHC finds no place in the documents of the Prosecution nor has any Doctor who allegedly examined the victim at the PHC been furnished by the Prosecution, thus belying the evidence of P.W.10 on this aspect. P.W.8 the Doctor at Temi PHC appears to have examined only the Appellant vide Exhibit 6. In fact Exhibit 7 indicates that the SHO Temi Police had requested P.W.8 to opine whether Exhibit 2 the Birth Certificate of the victim was authentic or not and no more. The above would reflect the lackadaisical attitude of investigation.

15. Now, coming to the legal aspect of the matter. The Learned Trial Court has firstly framed Charge under Section 341 of the IPC. No serious arguments were put forth by the Learned Counsel for the Appellant on this count. The evidence of the victim is categorical that she had been pulled to the bushes the Appellant's presence there has been vouched by P.W.5. It may be true that no mark of injury was found on P.W.1 to prove this but it is quite likely that by the word "dragged" she infact meant that she was bodily pulled by the Appellant, a boy of 19 years, obviously with commensurate physical strength, the meaning of which was lost in translation. It is not necessary to delve into a detailed discussion on this point as the conviction under this Section not been assailed by the Appellant on the one hand, while on the other the evidence of P.W.1 suffices to establish the fact.

16. Coming to the provisions of the POCSO Act. Charge was framed under Section 5 of the Act which defines aggravated penetrative sexual assault for which the penal provision is Section 6, although it must be mentioned that the Learned Trial Court failed to specify in its Charge that the offence committed was under Section 5(m) of the POCSO Act, being an offence committed on a child below twelve years, however, this too being unassailed requires no further discussion. It is, however, being highlighted by way of future guidance for the Learned Trial Court, inasmuch as Section 211 of the Cr.P.C. elucidates the requirements of a Charge and ought to be

complied meticulously with by the Learned Trial Court for obvious reasons. Nevertheless, moving on with the matter, the Learned Trial Court after duly analysing the entire evidence on record convicted the Appellant under Section 9 of the POCSO Act which deals with aggravated sexual assault for which the penal provision is Section 10 instead of aggravated penetrative sexual assault under Section 5(m) of the POCSO Act punishable under Section 6 of the POCSO Act.

17. While bearing the above in mind, it is imperative that firstly the definition of sexual assault under Section 7 of the POCSO Act be looked into. Section 7 reads as follows;

> **"7. Sexual assault.—**Whoever, with sexual intent touches the vagina, penis, anus or breast 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.**"**

18. On the other hand, Section 9 of the POCSO Act under which the Appellant was convicted defines aggravated sexual assault, the relevant portion of which is as follows;

> **"9. Aggravated Sexual Assault.—**…….....
>
> (m) whoever commits sexual assault on a child below twelve years; or
>
> ……..
>
> is said to commit aggravated sexual assault.**"**

The above definitions are reflective of the fact that when sexual assault as defined under Section 7 of the POCSO Act is committed on a child below twelve years it tantamounts to aggravated sexual assault by reason of the age of the victim as specified in Section 9 of the POCSO Act.

19. Since the Charge was framed under Section 5(m) "Aggravated penetrative sexual assault", we may walk through the definition therein;

> **"5. Aggravated penetrative sexual assault.—** .....
>
> (m) whoever commits penetrative sexual assault on a child below twelve years; or
>
> .....
>
> is said to commit aggravated penetrative sexual assault.**"**

Thus, penetrative sexual assault assumes an aggravated form when it is committed on a child below twelve years.

20. For better understanding, on this count, it would do well to firstly understand what penetrative sexual assault is. This finds place in Section 3 of the POCSO Act which reads as;

> **"3. Penetrative sexual assault.**−A person is said to commit "penetrative sexual assault" if**−**
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
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> (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
>
> (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
>
> (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.**"**

21. Consequently, on the touchstone of the above definitions, in order to assess as to whether it was only "aggravated sexual assault" or "aggravated penetrative sexual assault", the evidence of the minor victim has to be revisited. She has stated **"***He then removed my undergarment(panty). He also removed his clothes and rubbed him pishab garney(penis) against my pishab garney(vagina). He tried to insert his pishab garney in my pishab garney but could not do it. I struggled and bit him on his hand. I somehow managed to free myself. After freeing myself I started running towards my house.***"** Under cross-examination all that has emerged is **"***It is not a fact that the accused did not rub his penis against my pishab garney.***"** She has not been confronted with the fact as to whether he had tried to insert his genital into hers, consequently that aspect of her evidence has not been demolished.

22. *For "rape" partial penetration of the penis within the labia majora of the vulva or pudendum with or without emission of semen or even an attempt of penetration is quite sufficient for the purpose of the law.* [Page 2073 of the Ratanlal & Dhirajlal The Indian Penal Code Thirty-second Edition 2010]. This has been reiterated in ***Das Bernard*** vs. ***State***[2] at Paragraph 8. In ***Rajendra Datta Zarekar*** vs. ***State of Goa***[3] the Hon'ble Apex Court held at Paragraph 15 as follows;

> **"15.** .....
>
> "37. We feel that it would be quite appropriate, in this context, to reproduce the opinion expressed by Modi in *Medical Jurisprudence and Toxicology* (21st Edn.) at p. 369 which reads thus:

2. 1974 CRI.L.J.1098
3. (2007) 14 SCC 560

> "Thus to constitute the offence of rape it is not necessary that there should be complete penetration of penis with emission of semen and rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of the law. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. In such a case the medical officer should mention the negative facts in his report, but should not give his opinion that no rape had been committed. *Rape is crime and not a medical condition. Rape is a legal term and not a diagnosis to be made by the medical officer treating the victim. The only statement that can be made by the medical officer is that there is evidence of recent sexual activity. Whether the rape has occurred or not is a legal conclusion, not a medical one.*"
>
> ....."

23. Concomitant to the evidence of P.W.1 is that of P.W.9 the Doctor, which indicates that *"mild erythema"* existed on both sides of the labia majora of the child which were fresh. In Exhibit 8 the Medical Report of the victim, he has stated as follows;

> **"**Nature of Injury : Simple, Grievous (sic) Based on clinical findings application of blunt force into the Labia majora cannot be ruled out.**"**

24. The finding *supra* reveals that despite the victim having been examined only on the fourth day of the incident, the above injury was detected on the genital of the victim. It is necessary to explain here that *'erythema'* as per Shorter Oxford English Dictionary, Sixth Edition Volume 1 at Page 861 is **"***redness of the skin, usually in patches, as a result of injury or irritation***"**. It is not the case of the

Appellant that in the interim the victim was again assaulted sexually by any other person. Investigation has also not put forth any such finding, leading to the inevitable conclusion that the act of the Appellant had resulted in the injury, which indicates that there was penetration to the extent of the injury as revealed in the labia majora. Although P.W.9 has stated that *"mild erythema"* can be caused by fungal or other infection he has not confirmed that the injury on the victim was indeed due to fungal infection. Section 3 of the POCSO Act clearly lays down that for an offence of penetrative sexual assault, all that is essential for the assailant to do is to penetrate his penis to any extent into the vagina, mouth, urethra or anus of a child. The very fact that there was an attempt at insertion means there was penetration to some extent into her vagina and is borne out by the evidence on record.

25. Having regard to the entirety of the facts and circumstances, the evidence on record and the discussions *supra*, I cannot bring myself to agree with the finding of the Learned Trial Court that the offence was one under Section 9 punishable under Section 10 of the POCSO Act. It is undoubtedly commission of an offence under Section 5(m) of the POCSO Act punishable under Section 6 of the POCSO Act. The Appellant is convicted accordingly, duly altering the conviction imposed by the Learned Trial Court under Sections 9/10 of the POCSO Act. Accordingly, he is sentenced to undergo rigorous imprisonment for a period of ten years and to

pay a fine of Rs.5,000/- (Rupees five thousand) only, under Section 5(m) punishable under Section 6 of the POCSO Act, in default of fine to undergo simple imprisonment of six months. For the offence under Section 341 of the IPC the sentence of the Learned Trial Court is upheld. The sentences of imprisonment shall run concurrently.

26. Before concluding, it is pertinent to mention here that Charge framed by the Learned Trial Court also included a Charge under Section 376(2)(i) of the IPC. The Learned Trial Court has, however, been remiss in giving a go-by to this Section by not adverting to it in his discussions and has failed to clarify such exclusion. Learned Trial Court concluded that the offence was one under Section 9 of the POCSO Act punishable under Section 10, which provides for lesser penalty than for an offence under Section 5(m) punishable under Section 6 of the POCSO Act, which for its part entails equivalent penalty as Section 376(2)(i) of the IPC. It was incumbent upon the Court to explain as to why no conviction was made under Section 376(2)(i) of the IPC. The fate of this Section is inconclusive in the Judgment of the Learned Trial Court. Infact framing of Charge under Section 376(2)(i) of the IPC is bereft of logic being superfluous, the offence already being covered under Section 5(m) of the POCSO Act.

27. Appeal fails and is accordingly dismissed.

28. In terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2013, a sum of Rs.1,00,000/- (Rupees one lakh) only, be made over to the victim by the Sikkim State Legal Services Authority (for short "SSLSA").

29. No order as to costs.

30. Copy of this Judgment be sent to the Learned Trial Court along with Records of the Court, and to the Member Secretary, SSLSA forthwith for information and compliance.

(Meenakshi Madan Rai)
Judge
20-09-2016

Approved for reporting : **Yes**

Internet : **Yes**

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