THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 7th OCTOBER, 2016

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

Crl.A. No.32 of 2015
(Jail Appeal)

Appellant : Nar Bahadur Subba,
Aged about 73 years,
S/o Late Sanja Man Subba,
R/o Middle Rumbuk,
Sombaria,
West Sikkim.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance

Mr. S. S. Hamal, Advocate (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.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal seeks to assail the Judgment and Order on Sentence of the Learned Special Judge (POCSO), West Sikkim at

Gyalshing, in Sessions Trial (POCSO) Case No.09 of 2014, both dated 25-05-2015, in which the Appellant was sentenced to undergo ten years rigorous imprisonment and to pay a fine of Rs.5,000/- (Rupees five thousand) only, under Section 5(l) and Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") with a default clause of imprisonment.

2. The facts leading to the instant matter are that, P.W.1 the Panchayat President of Rumbuk GPU on 11-06-2014, at 1800 hours, lodged an FIR, Exhibit 1, before the Sombaria Police Station, informing therein that the victim P.W.2, aged about eleven years was repeatedly sexually assaulted by the Appellant who belonged to the victim's locality. P.W.1 had been informed of this by P.W.5 Pranita Rai teacher of the school which P.W.2 attended. Pursuant to the FIR, Sombaria P.S. Case was registered on the same date, under Section 376 of the Indian Penal Code (for short "IPC") read with Section 4 of the POCSO Act against the Appellant and investigation taken up.

3. Investigation revealed that the victim a resident of Rumbuk, Sombaria, West Sikkim, was a student in a Government School. The Appellant aged about 72 years was known to her as he used to frequent her house to buy local alcoholic brew. Three/four months prior to the lodging of Exhibit 1, the victim was first raped by the Appellant after she returned from school. On the relevant day, the Appellant came to her house and took her to his house where he

committed the act, after which he gave her Rs.10/- (Rupees ten) only. The second incident occurred in her own house when her mother was attending to some chores outside the house while the victim was in the kitchen, where the Appellant entered and again sexually assaulted her, threatening to beat her if she told anyone about the incident. The third incident was on 01-06-2014 while she was on the road above her house where the Appellant met her and once again took her to his house. He then raped her and after the act, he again gave her Rs.10/- (Rupees ten) only. Although she noticed some stains on her undergarment and trousers she washed the clothes and did not disclose to anyone about the incident due to the threat of physical assault held out to her by the Appellant. In June, 2014, teachers of the victim's school counselled the students to report any kind of sexual or physical abuse. The victim emboldened thus shared her agony with P.Ws 3, 4, 10, 13 and 14 all being her school mates. This information was related by the said P.Ws to P.Ws 5 and 6, teachers in the school. The Principal was thereafter informed of it, who for his part discussed it with the Complainant, P.W.1, she being the Panchayat of the area and the President of the School Management Committee, following which Exhibit 1 was lodged by her. The Medical Report of the victim indicated an abrasion about 0.5 cm and 0.1 cm over the left side of labia minora with redness and tenderness. Charge-sheet was submitted against the Appellant on

completion of investigation, under Sections 376/506 of the IPC read with Section 4 of the POCSO Act against the Appellant.

4. The Learned Trial Court framed Charge under Section 5(l) and Section 5(m) of the POCSO Act punishable under Section 6 of the said Act. On a plea of "not guilty" by the Appellant, the trial was set in motion. The Prosecution examined nineteen witnesses to substantiate its case beyond all reasonable doubt after which the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), where he reiterated his innocence. The final arguments of the parties were heard and the Learned Trial Court after duly analysing the evidence on record convicted and sentenced the Appellant as aforesaid which has resulted in the instant Appeal.

5. The arguments canvassed by Learned Counsel for the Appellant are that although the Prosecution alleges penetrative sexual assault on the victim, the Medical Report Exhibit 9 fails to supports this allegation. The evidence of the victim in the Court is at variance with her statement under Section 164 of the Cr.P.C. Besides Exhibit 9 the Medical Report of the victim, Exhibit 10 the Pathology Report, Exhibit 11 another Medical Report of the victim and Exhibit 12 the Medical Report of the Appellant do not substantiate the allegation that the Appellant had committed the offence as charged. Added to the above infirmities is the fact that P.W.1 in her evidence

has admitted that the victim did not personally narrate the incident to her nor did she have any personal knowledge of the same. The victim also did not confide the matter with P.W.9, her mother, who is unaware of the incident. Besides, the daughter-in-law of the Appellant used to reside in his house, therefore, the question of the offence being committed in his house does not arise. That, it is a settled principle of Law that where two views are possible, the one in favour of the Appellant ought to be accepted and has to be applied in the facts of instant matter. In view of the arguments set forth hereinabove, it is urged that the Appellant be acquitted of the offences charged with.

6. *Per contra*, it was the vehement argument of Learned Additional Public Prosecutor that the evidence of the victim P.W.2 suffices to establish that the Appellant was indeed guilty as charged and the conviction and sentence ought not to be dislodged. That, the abrasion on the labia minora of the victim categorically indicates that the Appellant had committed penetrative sexual assault. That, although the mother may not have been aware of the incident, her evidence would point to the fact that P.W.2 was afraid of her and, therefore, failed to confide in her about the incident. While arguing that the offence amounted to penetrative sexual assault the attention of this Court was drawn to the decision in ***Das Bernard*** vs. ***State***[1]

1. 1974 CRI.L.J. 1098

wherein it was, *inter alia*, held that ***" ..... for the offences of rape to be committed it is not necessary that there should be complete penetration. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is quite sufficient under law. In Medical Jurisprudence by R. M. Jhala and V. B. Raju (P. 320) it is mentioned that "In case of girls under 12 years where examination of hymen may not prove useful, examination of labia majora gives conclusive evidence. The narrowness of the canal makes it inevitable for the male organ to inflict blunt, forceful blow on the labia. ....."*** On this point, reliance was also placed on the decision of ***Rajendra Datta Zarekar*** vs. ***State of Goa***[2]. Resisting the argument of Learned Counsel for the Appellant that the evidence of the victim stands uncorroborated, the decision of the Hon'ble Apex Court in ***Mohd. Imran Khan*** vs. ***State Government (NCT of Delhi)***[3] was relied on wherein it was held that —

> **"22.** It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. ....."

That, the observation therein ought to set at rest any apprehensions of the Appellant on this count. To further fortify this

2. (2007) 14 SCC 560
3. (2011) 10 SCC 192

aspect, reliance was also placed on the decision of ***State of Himachal Pradesh*** vs. ***Suresh Kumar alias DC***[4].

7. I have heard the submissions of Learned Counsel at length and given anxious consideration to the submissions. The documents on record including the evidence of the witnesses have been meticulously examined by me.

8. The question that arises for consideration before this Court is whether the Appellant indeed committed the offence as charged?

9. It is evident from the deposition of P.W.2 the victim, that the Appellant had committed the offence of penetrative assault on her. On pain of repetition, as already seen from the above decisions, complete penetration is not necessary to complete the offence of rape, it is sufficient if there is penetration as described in the case of ***Das Bernard*** *(supra)*. The cross-examination of the victim has not resulted in any contradiction of her evidence-in-chief. It may be reiterated that it is not necessary for the victim's evidence to be corroborated by any other witnesses, firstly, for the fact that such offences would be committed in secrecy and thereby lacking in witnesses and secondly, as pointed out in ***Mohd. Imran Khan*** *(supra)* the evidence of the victim requires no corroboration and she is to be placed on higher pedestal than an injured witness and the Indian Evidence Act, 1872, nowhere requires for such

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4. (2009) 16 SCC 697

corroboration. She is not to be treated as an accomplice to the crime. Despite the fact that there was no witness to the offence, if we examine the evidence of P.W.3 one of the students in the school where the victim was also studying, she has stated that the victim had told her and P.W.4 another student, that she was pregnant as she had been raped by the Appellant on three occasions. P.W.3 states that she along with P.W.4 informed P.W.5 a teacher, of the said statement of the victim. The evidence of P.W.3 is supported by the evidence of P.W.4 as well as P.W.5 who admits that P.W.3 and P.W.4 informed her of the incident. P.W.6 another teacher was informed by P.W.5 of the incident as told to her by P.W.3 and P.W.4. P.W.7 also a teacher of the same school, on hearing of the incident from P.W.5, called P.W.2 to verify the same and P.W.2 personally narrated to them that the Appellant had committed sexual intercourse on her. P.W.8 the other teacher of the school supports the evidence of P.W.7 that after hearing the narration of P.W.5 they summoned P.W.2 who informed them that the Appellant had indeed committed sexual assault on the victim.

10. What is preposterous about the cross-examination of P.Ws 7 and 8 is that the Court has allowed such a question to be asked to the witnesses, of which the response is recorded as, ***"It is true that I am not well acquainted with the character of the victim."*** The Court has to bear in mind that the victim is a mere child of 11 years and there is no question of analysing her character, she being an innocent victim of a depraved

and horrendous crime by the Appellant, even otherwise, it is now settled law that the character assassination of a victim finds no place in offences of rape. Section 33 of the POCSO Act specifically lays down that the questions to the victim shall be put through the Court which shall not permit aggressive questioning or character assassination of the child. Courts dealing with such matter are required to be sensitive and should prevent further traumatisation of the victim who have already suffered emotional upheavals and physical torment.

11. That, having been said, P.Ws 10, 13 and 14 are also minor witnesses studying in the same school with the victim and have deposed that the victim had told them that she had been raped by one *Eating Bajey*. Except for the cross-examination of P.W.14 where she admits that the victim only told them that the Appellant held her hand and took her to his house, the evidence of P.W.10 and P.W.13 have withstood the cross-examination and they have affirmed that ***"It is not a fact that the victim did not personally tell us that she was raped by somebody."***

12. Dr. Tukki D. Bhutia was examined as P.W.16 and according to her, examination of the victim, revealed the following;

> "……
>
> As per the victim, she was sexually assaulted by above mentioned person at his own residence at Rumbuk at around 12 pm, on 01.06.2014. He had promised her to give Rs.10/- in return. She attend her menarche about 3 months before and also has the history of 3 months amenorrhea, urine pregnancy test was done and was found to be negative.

> On examination:- patient conscious, cooperative, well oriented with time place and person. Vital – stable. Chest and CVS – NAD, P/A soft – NAD, breast development – normal, no visible external injuries over the body.
>
> On local Examination:- Labia majora – normal, labia minora – abrasion present over about 0.5 cm x 0.1 cm over the left side. Redness present, tenderness present. Hymen – intact, fourchette normal. 3 vaginal, perineal and paraurethral swabs taken and sent for histopathological examination. Final opinion reserved till reports are available. ....."

The doctor has, therefore, recorded a positive finding of injury on the labia minora. Undoubtedly in her cross-examination she has opined that it was "non- penetrative sexual assault" but it may be pointed out here that her opinion that it was non-penetrative sexual assault is only a medical opinion and not a legal opinion. It is clear that when we look into the legal aspect of it, Section 3 of the POCSO Act defines "penetrative sexual assault" while Section 5 defines "aggravated penetrative sexual assault". The Sections read as follows;

> **"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
>
> (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."
>
> .....
>
> **"5. Aggravated penetrative sexual assault.—**……

> ……..
>
> (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or
>
> (m) whoever commits penetrative sexual assault on a child below twelve years; or
>
> ……..
>
> is said to commit aggravated penetrative sexual assault.**"**

Thus, the requirement of penetrative sexual assault is penetration of the genital or any other object by the assailant to any extent into the genital of the victim.

13. The fact that there is an abrasion on the victim's labia minora would undoubtedly indicate penetrative sexual assault on the anvil of the definition of the offence as laid down in Section 3 *supra*. In ***Das Bernard*** *(supra)* it was held as follows;

> **"8.** …….. The medical evidence on the point of sexual offence is that the hymen was not ruptured, and that it was intact. There was congestion of the inner side of the labia majora at the level of vaginal opening at the left side. The posterior commissure and fourchette were infact. The congestion of the vaginal wall outside the hymen and underneath the labia majora was reddish and that showed that it was a fresh injury. The Medical Officer, from all these facts, drew the conclusion that an "attempt to sexual intercourse has most probably been made to the extent of applying force (erected penis) up to the level of hymen." The hymen having been found intact, the fact of complete penetration within the vaginal walls has to be ruled out. Of course, for the offences of rape to be committed it is not necessary that there should be complete penetration. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is quite sufficient under law. In Medical Jurisprudence by R. M. Jhala and V. B. Raju (P. 320) it is mentioned that "In case of girls under 12 years where examination of hymen may not prove useful, examination of labia major gives conclusive evidence. The narrowness of the canal makes it inevitable for the male organ to inflict blunt, forceful blow on the labia. Such a blow invariably leads to contusion, because of looseness and vascularity. The interesting feature of such contusion is its vividness specially on the side it forms the inner wall of vagina. Against the pink background of the mucous membrance dark red contusion is visible even on initial inspection. This is also

> an important point to be remembered in post-mortem examination with history of rape. Apart from this, the contusion gives rise to pin and is tender on palpation. Sometimes specially in the case of young girls, such contusion is accompanied by laceration of vulva. Such tear, because of uneven and excessive force invariably used in acts of rape, is eccentric and more often in lower half. This is because of relatively increased stretching power of the upper half of vagina or increased rigidity of the lower part." **"**

14. Therefore, the mere fact that the hymen was not ruptured and the fourchette was normal does not mean that there was no sexual assault. It is clear that not only was there abrasion in the labia minora but there was also redness and tenderness present. The related question that would arise is, what is abrasion? Abrasion as defined in ***A Textbook of Medical Jurisprudence and Toxicology by Jaising P Modi Twenty-fourth Edition at page 523*** is —

> **"Abrasions.—**Abrasions are injuries involving loss of the superficial epithelial layer of the skin, and they do not leave a scar on healing. For an abrasion to occur, there must be pressure of an object and it should move on the skin to form an abrasion.
>
> ....."

It goes on further to explain that abrasions are blunt impact injuries. Consequently, the injury on the labia minora is undoubtedly by the action of the Appellant whose medical examination, as per P.W.18, reveals there was nothing to indicate that he was incapable of performing the sexual act.

15. The argument of the Appellant that there is variance in the deposition of the victim in her evidence before the Court and in her

statement under Section 164 of the Cr.P.C. is not borne out by the records which have been carefully examined by me.

16. In view of the gamut of facts and circumstances discussed hereinabove and on due consideration of the evidence on record, I am of the considered opinion that there is no requirement of dislodging the impugned Judgment of conviction and Order on Sentence handed out by the Learned Trial Court.

17. Before concluding, it may be remarked here that although Charge was framed against the Appellant under Section 5(l) and Section 5(m) of the POCSO Act, reproduced hereinabove, which are two distinct offences, however, while sentencing, the imprisonment handed out by the Learned Trial Court was a joint sentence of ten years for both offences. The impugned sentences read as,

> **"4.** .....
>
> Rigorous imprisonment of 10 years and to pay a fine of Rs.5,000/- (Rupees five thousand) only under Section 5(l) and 5(m) of the Protection of Children from Sexual Offences Act, 2012. In default of payment of fine, the convict shall undergo simple imprisonment of 2 (two) months.
>
> ....."

18. In my considered opinion, the offences being distinct and separate there ought to have been distinct periods of imprisonment and fine handed out under each of the Sections. Accordingly, the Appellant is sentenced to undergo rigorous imprisonment of ten years under Section 5(l) of the POCSO Act and to pay a fine of Rs.5,000/- (Rupees

five thousand) only, in default thereof to undergo simple imprisonment of three months. He shall also undergo ten years rigorous imprisonment under Section 5(m) of the POCSO Act and pay a fine of Rs. 5,000/- (Rupees five thousand) only, in default of payment of fine imposed undergo simple imprisonment of three months. The sentences of imprisonment shall run concurrently. The sentences meted out to the Appellant by the Learned Trial Court stands modified to the above extent.

19. Appeal fails and is accordingly dismissed.

20. 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").

21. No order as to costs.

22. 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.

Sd/-
(Meenakshi Madan Rai)
Judge
07-10-2016

Approved for reporting : **Yes**

Internet : **Yes**

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