



HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Dated: 19.04.2016

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

Crl. A. No. 26 of 2015

APPELLANT: Budha Singh Tamang,
Aged 28 years,
Son of Janga Bahadur Tamang,
Resident of Payung Busty,
Melli,
South Sikkim.
[Presently at State Central Prison, Rongyek.]

VERSUS

RESPONDENT: State of Sikkim

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

APPEARANCE:

Mr. S.S. Hamal, 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) Being aggrieved by the Judgment and Order on Sentence of
the Learned Special Judge, Protection of Children from Sexual



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

Offences Act, 2012 (hereinafter 'POCSO'), South Sikkim at Namchi dated 31.08.2015, in Sessions Trial (POCSO) Case No.1 of 2015, this Appeal assails both.

(2) A conspectus of the facts unfolded is that the Victim's mother on 05.12.2014, as per the narration of her Victim daughter reported at the Melli Police Station that the Appellant had on the same morning around 11:00 a.m. sexually assaulted her daughter when she was alone in her house. The Melli Police Station registered the case and took up investigation which revealed that the Appellant (aged about 28 years) was known to the Victim (aged about ten years). That, previously on **02.12.2014** when the Victim was alone in her house, the family having gone to attend to their chores, the Appellant came to the house of the Victim in the afternoon and finding her alone attempted to rape her. On the Victim protesting and biting his hand, he fled the place and the matter remained unreported on account of a threat held out to the Victim by the Accused. On **05.12.2014**, the Appellant went to the house of the Victim and asked the Complainant for a hacksaw blade, who directed him to look for it inside her house. Once inside, finding the Victim alone, he grabbed her from behind and molested her. She somehow escaped and reported the matter to her mother, while the Appellant fled. The Victim was subjected to medical examination and on completion of investigation *prima facie* case was found against the Appellant under Section 376/354A/511 IPC read with Section 8 of the POCSO.

(3) The Learned Trial Court framed charges against the Appellant, *viz*, for the incident of 02.12.2014 under Section 5(m) of the POCSO punishable under Section 6 of the Act, Section 376(2) [*sic* 376(2)(i)]



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

and Section 354B of the IPC, 1860 (hereinafter IPC). For the Offence committed on 05.12.2014, charge was framed under Section 9 (m) of the POCSO, punishable under Section 10 of the Act and Section 354 of the IPC. The Prosecution examined seven witnesses. Based on the evidence, the Learned Trial Court convicted the Appellant and pronounced the Order on Sentence under Section 9(m)/10 of the POCSO Act, 2012 read with Section 354 of the IPC, 1860 for commission of offence on 02.12.2014 and 05.12.2014.

(4) It was argued by Learned Counsel for the Appellant that the Learned Trial Court has erroneously sentenced the Appellant for the offence under Section 9(m)/10 of the POCSO and under Section 354 of the IPC, committed on 02.12.2015 in its Order on Sentence dated 31.08.2015, when no charge was framed under the Sections *supra* for the offence on 02.12.2014, the charge for the said date being only under Section 5(m)/6 of the POCSO and Section 376(2) and Section 354B of the IPC. The second leg of his argument was that the Learned Trial Court failed to appreciate that there were glaring material contradictions in the deposition of the Prosecution witnesses which pivots only on preponderance of probability of commission of the offence under Section 9(m)/10 of the POCSO and Section 354 of the IPC. That, the impugned Judgment is based on the evidence of the alleged Victim (PW-2), who is not a trustworthy witness being a child witness. Fortifying this point, he placed reliance on *Aman Kumar & Another vs. State of Haryana*¹, wherein it was, *inter alia*, held that the prosecutrix is not an accomplice after the crime of rape and that there is no rule of law that her testimony cannot be acted upon without corroboration. However, if the court of facts finds it difficult

 1. (2004) 4 SCC 379



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

to accept the version of the prosecutrix on its face value, it may search for corroboration. It was next contended that the evidence of the Victim is not corroborated by medical evidence, hence the impugned Judgment of conviction and Order on Sentence be set aside.

(5) Learned Additional Public Prosecutor while making his submissions, conceded that the Learned Trial Court, while framing charge for the offence on 02.12.2014 has not framed any Charge under Section 9(m)/10 or under Section 354 simpliciter but in its Order on Sentence has proceeded to convict the Appellant under these provisions of Law and, therefore, submits that an Order be passed in the interest of justice. With regard to the argument advanced by the Appellant that the evidence of the minor Victim was not reliable, he submits that there are a plethora of judgments of the Hon'ble Apex Court which lays down that if the evidence of the prosecutrix is found to be reliable then it requires no corroboration and conviction can be based on her statement alone.

(6) I have heard Learned Counsel on their rival contentions. I have also perused the entire records of the matter including the impugned Judgment and Order on Sentence. The points that fall for determination before this Court would be;

- 1. Whether the evidence of the minor victim was trustworthy?**
- 2. Whether the Learned Trial Court was justified in sentencing the Appellant for the offence on 02.12.2014 under Section 9(m)/10 of the POCSO Act,**



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

2012 and Section 354 IPC simpliciter, when no charges were framed under these Sections for the said date?

(7) While addressing the first question above, the provisions of Section 118 of the Evidence Act, 1872 is to be taken into consideration. The Section provides that all persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease whether of body or mind or any other cause of the same kind. The "Explanation" to the Section is not relevant for the present purposes. In the matter at hand, it is apparent that questions were put to the child by the Learned Trial Court to test her competence to testify and on giving rational answers thereof, was satisfied that she was competent to give evidence. Law is clear that the evidence of a child witness must be evaluated with abundant care, caution and circumspection, however, the real test for either accepting or rejecting the evidence of a child is to see how consistently they narrate the story as told in the first instance.

(8) In this regard, the Hon'ble Apex Court in *RajKumar vs. State of Madhya Pradesh*² relying on the Judgment of *State of M.P. vs. Ramesh*³, held as follows;

"19. This Court in *State of M.P. vs. Ramesh*, after considering a large number of its judgments came to the conclusion as under: (SCC p.792, para 14)

"14. In view of the above, the law on the issue can be summarized to the effect that the deposition

 2. (2014) 5 SCC 353

3. (2011) 4 SCC 786



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

of a child witness may require corroboration, but in case his deposition inspires the confidence of the court and there is no embellishment or improvement therein, the court may rely upon the evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that a child has been tutored, the court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not can be drawn from the contents of his deposition."

(9) The Judgment *supra*, thus lays down the principles for evaluation of the evidence of a child witness. In *Aman Kumar's* case *supra* relied on by the Appellant, it was, *inter alia*, held that "*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.*"

(10) On careful examination of the evidence of the minor Victim, she has been unwavering, consistent and cogent despite being subjected to gruelling cross-examination scant regard being paid to her tender years. Based on the anvil of the principles enunciated above, I do not find any reason to disbelieve the minor Victim, who had to face the trauma of a depraved act.

(11) Coming to the second question, Paragraph 30 of the impugned Judgment reads as follows;

"30. To sum up, though the Prosecution case under Sections 5(m)/6 of the POCSO Act, 2012 and Sections 376(2)/354B of the IPC, 1860 has not been proved, its case under Sections 9(m)/10 of the POCSO Act, 2012 read with Section 354 of the IPC, 1860 (on two counts)



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

has been clearly established. It is amply clear that the accused sexually assaulted the minor victim, aged about 11 years on 02.12.2014 and 05.12.2014.

Accordingly, the Accused is convicted of the offences under Section 9(m)/10 of the POCSO Act, 2012 read with Section 354 of the IPC (*on two counts*)."

(12) The Sentence, therefore, meted out was;

"7.

- For the offence under Sections 9(m)/10 of the Protection of Children from Sexual Offences Act, 2012 (*committed on 02.12.2014*) the convict is sentenced to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.25,000/- (*Rupees Twenty five thousand*) only. In default to pay the said amount of fine he shall undergo Simple Imprisonment for a further period of six months;
- For the offence under Sections 9(m)/10 of the Protection of Children from Sexual Offences Act, 2012 (*committed on 05.12.2014*) the convict is sentenced to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.25,000/- (*Rupees Twenty Five Thousand*) only. In default to pay the said amount of fine he shall undergo Simple Imprisonment for a further period of six months;
- For the offence under Section 354 of the IPC, 1860 (*committed on 02.12.2014*) he is sentenced to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.25,000/- (*Rupees Twenty Five Thousand*) only. In default to pay the said amount of fine he shall undergo Simple Imprisonment for a further period of six months; and
- For the offence under Section 354 of the IPC, 1860 (*committed on 05.12.2014*) he is sentenced to undergo Simple Imprisonment for a period of five years and to pay a fine of Rs.25,000/- (*Rupees Twenty Five*



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

***Thousand* only. In default to pay the said amount of fine he shall undergo Simple Imprisonment for a further period of six months.**
....."

(13) It follows that the Learned Trial Court did not find the Appellant guilty of the offence of 02.12.2014 under Section 5(m)/6 of the POCSO read with Section 376(2) and Section 354B of the IPC, instead finding him guilty of the offence under Section 9(m)/10 of the POCSO Act, 2012 read with Section 354 of the IPC on 02.12.2014 also and sentenced him accordingly.

(14) In this regard, reference may be made to Section 222(2) of the Code of Criminal Procedure, 1973 (hereinafter Cr. P.C.) which provides as follows:-

"222. When offence proved included in offence charged.-(1).....

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(3)....."

(15) The above Section itself is self explanatory and requires no further elucidation. It must be pointed out here that Section 9(m)/10 of the POCSO, provides for punishment of five years which may extend to seven years with fine, while Section 354 IPC simpliciter provides punishment which shall not be less than one year but which may extend to five years, and shall also be liable to fine.

(16) To the contrary Section 5(m)/6 of the POCSO, provides higher period of imprisonment being not less than ten years but which may



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

extend to imprisonment for life, while Section 376(2) of the IPC provides for punishment of rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine, while Section 354B of the IPC provides for punishment for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

(17) In other words, the gravity of an offence under Section 9(m)/10 of the POCSO is less than that under Section 5(m)/6 of the POCSO and therefore, although no charges were framed under Section 9(m)/10 of the POCSO and Section 354 of the IPC, against the Appellant for the offence on 02.12.2014, no error on conviction and sentencing has arisen when the Learned Trial Court has convicted and handed out Sentence under Section 9(m)/10 of the POCSO and under Section 354 of the IPC in view of the provisions of Section 222(2) of the Cr. P.C.

(18) Nevertheless, it may be appropriate to point out that Section 216 of the Cr. P.C. clothes the court with powers to alter or add to any charge at any time before judgment is pronounced, therefore, the Learned Trial Court also had recourse to this Section, which was not invoked. However, if one peruses the provision of Section 215 of the Cr. P.C., it is clear that no error in stating either offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars be regarded at any stage as material, unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice.



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

(19) The Appellant has not been misled with regard to the charges against him in view of the gravity of the offence committed on 02.12.2014 and charge framed giving him sufficient opportunity of defence, therefore, failure of justice is not in question. Besides, Paragraph 30 of the Judgment specifies that the case of the Prosecution **under Section 9(m)/10 of the POCSO read with Section 354 of the IPC (on two counts) has been clearly established.** It is also stated therein *"It is amply clear that the accused sexually assaulted the minor victim, aged about 11 years on 02.12.2014 and 05.12.2014."* The two counts as mentioned above clarify the position with regard to the conviction. Although, to keep confusion at bay, the Learned Court could have been specific and ordered that he found the Convict guilty of the offence under Section 9(m)/10 of the POCSO read with Section 354 of the IPC on 02.12.2015 and for the same offence on 05.12.2015.

(20) In view of the entire discussions hereinabove, the impugned Judgment and Order on Sentence of the Learned Trial Court requires no interference.

(21) Appeal dismissed.

(22) Before parting with the Judgment, it may be pointed out that the Protection of Children from Sexual Offences Act, 2012 is a special Act for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest of well being of the children. Bearing this in mind, Chapter 8 Section 33 (7) requires as follows;

"33. Procedure and powers of Special Court. –

.....



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

(7) The special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:

Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation. – For the purposes of this subsection, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

....."

(23) In the matter at hand, it is seen the Learned Trial Court has not taken any protective measures as required by Law and has disclosed the name of the Victim et al without recording reasons for such disclosure.

(24) The Learned Trial Court may also peruse the provisions of Section 228-A of the IPC in connection with which in *Premiya alias Prem Prakash vs. State of Rajasthan*, it was held as follows;

"3. We do not propose to mention the name of the victim.

"2. ... Section 228-A IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, the High Court or the lower court, the name of the victim should not be indicated."



Crl. A. No. 26 of 2015
Budha Singh Tamang vs. State of Sikkim

We have chosen to describe her as “the victim” in the judgment. (See *State of Karnataka v. Puttaraja* [(2004) 1 SCC 475], at SCC pp. 478-79, para 2 and *Dinesh v. State of Rajasthan* [(2006) 3 SCC 771])”

(25) Henceforth, the Learned Trial Courts dealing with cases under the POCSO Act, 2012 and offences under Sections 354A to 354D, 370, 370A, 372, 373, 375, 376 or Section 509 of the IPC, 1860, shall abide strictly by the mandate of Law.

(26) No order as to costs.

(27) Records of the Learned Trial Court be remitted forthwith.

Sd/-
(Meenakshi Madan Rai)
Judge
19.04.2016

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

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