



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 22<sup>nd</sup> SEPTEMBER, 2016

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

Crl.A. No.31 of 2015  
(Jail Appeal)

**Appellant** : Singh Bir Subba,  
Aged about 36 years,  
S/o Aita Ram Subba,  
R/o Denchung,  
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. 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. Dissatisfied with the Judgment and Order on Sentence  
passed by the Court of the Learned Special Judge (POCSO Act, 2012),  
South Sikkim at Namchi, in Sessions Trial (POCSO) Case No.01 of  
2013, both dated 31-05-2014, this Appeal has been preferred.



2. Convicting the Appellant under Section 8 of the POCSO Act and under Sections 354/341 of the IPC, the sentences ran as follows;

- (i) U/s.8 of the POCSO Act - Simple imprisonment for a period of four and a half years and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, with a default stipulation.
- (ii) U/s.354 of the IPC - Simple imprisonment for a period of four and a half years and a fine of Rs.50,000/- (Rupees fifty thousand) only, with a default stipulation.
- (iii) U/s.341 of the IPC - Simple imprisonment for a period of one month.

All the sentences were ordered to run concurrently.

3. In Appeal, it is urged by Learned Counsel for the Appellant that, the victim P.W.1 was a tutored witness who admitted that Exhibit 1, the FIR, was lodged after due consultation with her family members thus raising doubts of false implication of the Appellant. That, falsity in the deposition of P.W.2, the mother of the victim, was not taken into consideration by the Learned Trial Court inasmuch as P.W.2, *inter alia*, deposed that when she saw her daughter, immediately after the alleged incident, her clothes were covered in mud, but no other Prosecution evidence was forthcoming on this aspect. Taking shelter under Section 84 of the IPC, it was submitted that P.W.6 the Psychiatrist who examined the Appellant deposed that the Appellant had a history of alcohol dependence since the last three to four years with a history of repeated falls, alcohol

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withdrawal, seizure and occasional abnormal behaviour, including visual and auditory hallucinations. On his examination of the Appellant, P.W.6 found him to be a case of delirious (*delirium tremens*) and that he was detoxified with lorazepam and antibiotic. Thus, reasonable doubt is created as to whether the Appellant had the knowledge or intention that he was committing the offences as charged, which if it had occurred then in all probability it was under *delirium tremens*. It was also argued rather feebly that the FIR was lodged belatedly and hence, in view of the aforesaid facts and circumstances, the impugned Judgment and Order on Sentence ought to be set aside.

4. It was the argument of Learned Additional Public Prosecutor that the question of the FIR being lodged belatedly does not arise since the FIR itself reflects that the incident occurred on 06-07-2013 at around 05.30 p.m. in a village called "Denchung", South Sikkim. The distance between Denchung and the Jorethang Police Station, where Exhibit 1 was lodged, is about 10 kms. Being a village, it stands to reason that it would have not been possible for the victim and her family to reach the Police Station the same evening, apart from which the time of the incident which occurred in the late evening must be considered. It was further argued that registration of the FIR has been duly proved and the Apex Court in ***Bable alias Gurdeep Singh*** vs. ***State of Chhattisgarh through PS OP Kursipur***<sup>1</sup>

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1. (2012) 11 SCC 181



has ruled that once registration of the FIR is proved by the Police, taken on record by the Court and the Prosecution establishes its case beyond a reasonable doubt the Court can ignore the evidentiary value of the FIR. With regard to the argument of the Appellant being under *delirium tremens*, it is contended that he cannot claim the *Exception* under Section 84 of the IPC, as it is evident that prior to the offence, the Appellant had no history of insanity or *delirium tremens* nor were there signs attendant to or after the offence. The Appellant has failed to produce any Medical Report. Reliance was placed on ***Sudhakaran vs. State of Kerala***<sup>2</sup> and ***Elavarasan vs. State represented by Inspector of Police***<sup>3</sup>. Learned Additional Public Prosecutor also drew the attention of this Court to the decisions of the Hon'ble Apex Court on ***Krishna Mochi and Others vs. State of Bihar***<sup>4</sup>, ***Mohd. Imran Khan vs. State Government (NCT of Delhi)***<sup>5</sup> and ***State of Himachal Pradesh vs. Suresh Kumar alias DC***<sup>6</sup>. That, the statement of the victim could not be demolished and taking into consideration the facts and circumstances made out by the evidence of the victim, the Judgment of the Learned Trial Court requires no interference and hence, the Appeal be dismissed.

5. The arguments of Learned Counsel were heard at length and given careful consideration. I have also meticulously examined the evidence and documents on record and perused the Judgment cited at the Bar.

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2. (2010) 10 SCC 582    3. (2011) 7 SCC 110    4. (2002) 6 SCC 81    5. (2011) 10 SCC 192    6. (2009) 16 SCC 697

6. The conspectus of the facts unravelled were that, on 07-07-2013 at around 0900 hours, the victim P.W.1 lodged Exhibit 1 before the Jorethang Police Station, South Sikkim, informing therein that on the previous day at around 1730 hours, while she was returning home, after picking vegetables from a nearby forest, the Appellant appearing suddenly waylaid her, assaulted her physically and tore her clothes. Remarking that the Appellant did not have good intentions and was involved in such acts previously, she sought legal action against him.

7. Based on Exhibit 1, Jorethang Police Station registered FIR No.50/2013 dated 07-07-2013, under Sections 354/341 of the IPC and commenced investigation. Investigation so conducted confirmed the allegations of the victim as made out in Exhibit 1. It also transpired that the Appellant had held both her hands and legs and pushed her to the ground. She screamed for help, but none was forthcoming. He gagged her by inserting a portion of his T-Shirt which he had removed, into her mouth to stop her from screaming and fondled her breasts and touched her body with sexual intent. She somehow escaped from his clutches. That, the Appellant was earlier involved in Jorethang P.S. FIR Case No.20/2007 dated 02-10-2007.

8. On completion of investigation, Charge-sheet was submitted against the Appellant under Sections 341/354 of the IPC read with Section 8 of the POCSO Act.



9. Charge was framed by the Learned Trial Court under Section 8 of the POCSO Act read with Sections 341/354 of the IPC. As the Appellant claimed trial after pleading "not guilty" to the Charges, the Prosecution furnished and examined eight witnesses to substantiate its case. Thereafter, the examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") followed as did the arguments. On analysis of the evidence on record, the Learned Trial Court reached the finding that the Appellant had committed the offences as charged and sentenced him as aforesaid.

10. The question that arises for consideration is whether the Appellant had committed the offences as charged?

11. To determine this, it would be essential to carefully examine the evidence of the Prosecution Witnesses. The victim was aged 15 years at the time of the offence and 16 years when she deposed before the Learned Trial Court having been found competent to do so. There is no dispute about her age, the same having been duly established by Exhibit 3, her Birth Certificate. According to her, on the evening of the incident, she had gone to the field located in a secluded place, for getting some vegetables. On her return homewards, she sensed someone following her and turned around to find the Appellant behind. He suddenly grabbed her by her hair causing her to fall, then climbed on her and opened his vest. He

attempted to insert his vest into her mouth to preclude her from screaming and put his hands all over her body including her breasts and genital. She managed to kick him and escape, during which process, the Appellant tore her T-Shirt, chased her and threatened to catch her later when she would be going to school. She informed P.W.2 her mother of the incident and on the following morning, lodged Exhibit 1 duly scribed by P.W.3, her brother, on her narration. Her evidence-in-chief remained uncontroverted. She admitted that Exhibit 1 was lodged by her after consultation with the family members, this by itself, in my considered opinion, does not tantamount to the incident being false as alluded to by the Appellant, as the victim was a minor and it was imperative that she inform and consult her family before taking the step. So far as the reliability of her evidence is concerned, one may beneficially refer to the decision in ***Mohd. Imran Khan*<sup>5</sup> (supra)** where the Hon'ble Apex Court opined as follows;

**"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 Indian 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. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the

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evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

12. On the anvil of this decision and the facts narrated by the victim, I see no reason to doubt her version of the incident. There is no eye-witness to the instant incident. All that the Court can rely on is the evidence of the victim. It was held in ***State of Himachal Pradesh***<sup>6</sup> (*supra*) that corroboration of the evidence of a victim in such matters is not required. The Hon'ble Apex Court held that -

"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





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reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury."

**21.** "7. In *Panchhi v. State of U.P.* [(1998) 7 SCC 177], it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others." [as observed in *Mohd. Kalam v. State of Bihar*, p.259, para 7]

Relying on the aforesaid decision, in *Mohd. Kalam v. State of Bihar* [(2008) 7 SCC 257], this Court has observed that the evidence of a child cannot be rejected outrightly and the same must be evaluated with great circumspection. The aforesaid law laid down by this Court is squarely applicable in the facts and circumstances of the present case."

The above observation has now been reiterated in a catena of decisions which for brevity are not being reproduced herein. Suffice it to say that, it is now established Law that for an offence under Section 376 of the IPC the testimony of the victim needs no corroboration. This would thus be applicable in the facts of the case at hand.

**13.** The evidence of P.W.1 has been duly corroborated by P.W.2 her mother both having stated that the T-shirt of P.W.1 was torn due to the act of the Appellant. The T-Shirt, M.O.I, was seized in the presence of P.W.4 by the Police and identified by the witness. As per P.W.2, the Panchayat of the Ward and the other villagers assembled and advised them to take the victim to the Jorethang Police Station. The fact of Exhibit 1 having been scribed by P.W.3 on the narration of P.W.1 and then lodged at the Police Station is duly

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confirmed by P.W.3. P.W.5 for his part being the Officer-in-Charge of the Jorethang Police Station received Exhibit 1 on 07-07-2013 at around 0900 hours from P.W.1 upon which he registered the case and endorsed it to P.W.8 the Investigating Officer (for short the "I.O.") for investigation.

**14.** The evidence of P.W.6 has been strongly relied upon by Learned Counsel for the Appellant to absolve the Appellant of the offence. According to P.W.6, a Psychiatrist, on examining the Appellant, he found the following;

"..... The accused Singh Bir Subba, aged about 35 years was produced before me with the (sic) history of alcohol dependence since the last three to four years. He also had the (sic) history of repeated falls, alcohol withdrawal seizure and occasional abnormal behaviour including visual and auditory hallucinations etcetera. He had also been brought in connection with an incident which had reportedly occurred on the previous day i.e., 06.07.2013. On his examination I found that it was a case of delirious (*delirium tremens*). He was detoxified with lorazepam and antibiotic. ...."

**15.** No cross-examination of this witness was conducted. The I.O. substantiated the evidence of P.W.6 to the extent that the Appellant was found to be an alcoholic exhibiting withdrawal symptoms pursuant to which P.W.6 was consulted at the STNM Hospital. At the same time, it must be noted that no records pertaining to the mental health of the Appellant exist save the opinion of P.W.6 given after commission of the offence.

**16.** In ***Surendra Mishra*** vs. ***State of Jharkhand***<sup>7</sup> the Hon'ble Apex Court held as follows;

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7. (2011) 11 SCC 495

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"13. In law, the presumption is that every person is sane to the extent that he knows the natural consequences of his act. The burden of proof in the face of Section 105 of the Evidence Act is on the accused. Though the burden is on the accused but he is not required to prove the same beyond all reasonable doubt, but merely satisfy the preponderance of probabilities. The onus has to be discharged by producing evidence as to the conduct of the accused prior to the offence, his conduct at the time or immediately after the offence with reference to his medical condition by production of medical evidence and other relevant factors. Even if the accused establishes unsoundness of mind, Section 84 of the Penal Code will not come to its rescue, in case it is found that the accused knew that what he was doing was wrong or that it was contrary to law. In order to ascertain that, it is imperative to take into consideration the circumstances and the behaviour preceding, attending and following the crime. Behaviour of an accused pertaining to a desire for concealment of the weapon of offence and conduct to avoid detection of crime go a long way to ascertain as to whether, he knew the consequences of the act done by him."

17. While examining the evidence on record including the documents therein there is no whiff whatsoever to indicate that the Appellant had a history of unsound mind or *delirium tremens*, a medical condition which has been explained in Dr. K. S. Narayan Reddy's Medical Jurisprudence and Toxicology, 1<sup>st</sup> Edition, 2000, at Page 495, as hereunder;

**"(B) Delirium Tremens :** It usually occurs in a chronic drunkard. (a) one to two days after sudden withdrawal of alcohol, (b) due to heavy drinking, (c) injuries, infections, and shock act as precipitating agents. This is the commonest type of psychosis in the chronic alcoholic. The patient becomes sleepless, restless and irritable and then develops disorders of perception and coarse muscular tremors of face, tongue and hands. Disorientation and hallucinations of sight and hearing are common. He may be incited to commit suicide, homicide or violent assault. Symptoms usually last for 3 to 7 days. Such persons are not criminally responsible."



**18.** The Appellant has failed to establish that he was suffering from any of the above symptoms at the time of the incident. The behaviour and utterances of the Appellant would indicate that he was perfectly aware and conscious of his words and actions. No medical records of the Appellant exist to indicate follow up treatment with regard to the above prognosis of his mental state. Section 30 of the POCSO Act gives the Appellant sufficient scope to prove his lack of *mens rea*, but no steps in this direction were taken by the Appellant. The contention that the act was committed when he was delirious has not been established by any credible evidence whatsoever. The fact that he was of sound mind is evident by the threat he held out to the victim after she escaped from his clutches.

**19.** Whether the offence is sexual assault or not can be gauged by running through the provisions of Section 7 of the POCSO Act which defines sexual assault which, for convenience is being reproduced below;

**"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."

The penal provision for Section 7 is Section 8 of the POCSO Act which reads as follows;

**"8. Punishment for sexual assault.**—Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine."



**20.** The evidence of P.W.1 suffices to establish that it was indeed an offence under Section 7 of the POCSO Act. Although it was the consistent refrain of Counsel for the Appellant that the Appellant ought to be absolved in terms of Section 84 of the IPC, the foregoing discussions on this count do not need reiteration. Suffice it to say that Exhibit 6, case summary of the Appellant recorded by P.W.6, does not support the submissions of the Learned Counsel to bring it under the *Exception* of Section 84 of the IPC. P.W.6 has treated him only on the day after the incident and Exhibit 6 does not reflect as to who gave the details of his alcohol dependence to P.W.6.

**21.** In the end result, considering the facts, circumstances, evidence on record as well as the foregoing discussions, the impugned Judgment and Order on Sentence of the Learned Trial Court warrants no interference.

**22.** Appeal fails and is accordingly dismissed.

**23.** 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").

**24.** No order as to costs.

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25. 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**  
22-09-2016

Approved for reporting : **Yes**

Internet : **Yes**