THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 10th AUGUST, 2016

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

Crl.A. No.01 of 2016

Appellant : Bishal Tamang,
S/o Mangal Singh Tamang,
R/o Ruchal Gaon Taza,
Rorathang,
East Sikkim.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : The State of Sikkim

Appeal under Section 374 of the Code of Criminal Procedure, 1973 against conviction under Section 6 of the Protection of Children from Sexual Offences Act, 2012

Appearance

Mr. N. Rai, Senior Advocate (Senior Legal Aid Counsel) with Ms. Malati Sharma and Ms. Bindu Gurung, Advocates for the Appellant.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal has been preferred against the Judgment and Order on Sentence, both dated 29-10-2015, in S. T. (POCSO) Case No.01 of 2015, by which the Learned Special Judge, POCSO, North

Sikkim at Mangan, convicted the Appellant under Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), punishable under Section 6 of the same Act, and sentenced him to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default stipulation, duly setting off the period of detention undergone.

2. On 06-12-2014 at around 2130 hours a written FIR, Exhibit 1, was lodged by P.W.1, the mother of the minor victim P.W.2, aged about five years, before the Pakyong Police Station, East Sikkim, to the effect that the Appellant belonging to the same village had sexually assaulted P.W.2 at her house. Based on Exhibit 1, Pakyong Police Station Case No.54/2014 dated 06-12-2014, under Section 376 of the Indian Penal Code (for short "IPC") read with Section 4 of the POCSO Act, was registered against the Appellant and investigated into. It transpired that, the Appellant aged about twenty-three years, an unemployed youth, a permanent resident of Ruchal Gaon, Taza, East Sikkim, the neighbour and distant relative of P.W.1, was at her house on 06-12-2014. At around 1800 hours, when P.W.1 was attending to household chores, he was playing with P.W.2. After a while, the Appellant took P.W.2 to a dark corner of the Courtyard and sexually assaulted her. On hearing P.W.2 screaming P.W.1 rushed out to find out the cause and found the Appellant standing beside P.W.2, who on enquiry by P.W.1, only cried in response, prompting P.W.1 to open P.W.2's trousers where she saw semen on

the underwear and genital of P.W.2. On confronting the Appellant, he confessed to the offence, on which P.W.1 immediately informed P.W.4, the father of the victim, on the mobile phone. With the assistance of their co-villagers, the Appellant was taken to Rorathang Out Post and later to Pakyong P.S. where P.W.1 lodged Exhibit 1 around 2130 hours.

3. The victim was medically examined at PHC Pakyong and STNM Hospital, Gangtok and the undergarments of both P.W.2 and the Appellant were seized, the penile swab of the Appellant and the vaginal and vulval wash of the minor victim were also collected. P.W.16, the Obstetrician and Gynaecologist at STNM Hospital in Exhibit 20, the Medicolegal Examination Report of the victim, opined that, there was injury by blunt force in the genital area of the victim, but there was no evidence of penetration. The results of the Forensic Examination from P.W.13, the Analyst at RFSL, Saramsa, tested positive for the presence of human semen on the undergarment of the victim and the frock of the victim as well in the undergarment and penile swab of the Appellant. Finding a *prima facie* case under Sections 376/511 of the IPC read with Section 8 of the POCSO Act, Charge-Sheet was submitted against the Appellant.

4. Before the Learned Trial Court, Charge was framed against the Appellant on 11-06-2015 under Section 3(m) (*sic,* no such Section exists in the POCSO Act) punishable under Section 4 of the

said Act and under Section 5(m) of the POCSO Act punishable under Section 6 of the said Act. The Prosecution furnished and examined seventeen witnesses to establish its case beyond reasonable doubt, pursuant to which the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."). On the basis of the evidence on record and due analysis thereof, the Learned Trial Court convicted the Appellant as aforesaid.

5. Before this Court, the Appellant urges that the Learned Trial Court framed Charge under Section 3(m) of the POCSO Act when no such Section exists under the Act. It failed to consider that the victim had admitted that the Appellant had not assaulted her on the relevant day, apart from which the Court ought to have considered that the victim is a mere child of five years and is too young to understand the meaning of the term "*chara garyo*"(sexual intercourse), which establishes that P.W.2 was tutored. It was also contended that P.W.1 and P.W.4 have stated in their evidence that the incident took place on 05-12-2014 whereas Exhibit 1 indicates that the incident took place on 06-12-2014 and, therefore, the material contradiction points to the fact that the FIR was fabricated. Assuming that the incident took place on 05-12-2014, as per the evidence of P.W.1 and P.W.4, there is an unexplained delay of twenty-four hours in lodging the FIR which is fatal to the Prosecution case. Reliance was placed on ***Thulia Kali*** vs. ***State of Tamil Nadu***[1]

1. AIR 1973 SC 501

wherein it was, *inter alia*, held that **"***..... Delay in lodging the first information report quite often results in embellishment which is a creature of afterthought.***"** On the point of delay in lodging of the FIR, assistance of the decision in ***Mehtab Singh and Another*** vs. ***State of U.P.***[2] and ***Ramesh Baburao Devaskar and Others*** vs***. State of Maharashtra***[3] was also taken. While placing reliance on ***Birappa and Another*** vs. ***State of Karnataka***[4] wherein it was opined that, where the Prosecution story rests only on a single witness the evidence of the witness must inspire full confidence, it was argued that in the case at hand, the child was too young to understand the import of the offence and hence, the Prosecution story fails to inspire confidence. It was also canvassed that the FIR was forwarded belatedly to the Magistrate, as evident from the endorsement on the FIR which is dated 08-12-2014, almost forty-eight hours after the incident, with no explanation for the delay. On this count, reliance was placed on ***State of Rajasthan*** vs. ***Teja Singh and Others***[5] wherein it was, *inter alia*, held that –

> **"4.** ..... As a matter of fact, the explanation put forth by the learned counsel in regard to the delay in the FIR reaching the Court is not tenable because assuming that there were some Court holidays that cannot be a ground for the delay in the FIR reaching the Magistrate, because requirement of law is that the FIR should reach the concerned Magistrate without any undue delay. We are of the opinion that the explanation given by the prosecution regarding the delay in the FIR reaching the Magistrate is neither convincing nor acceptable.**"**

2. AIR 2009 SC 2298
3. 2008 CRI.L.J. 372 (SC)
4. (2010) 12 SCC 182
5. 2001 CRI.L.J. 1176 (SC)

6. In the second limb of his argument, the contention of Learned Senior Counsel was that the evidence of P.W.11 the Doctor who examined the Appellant at 11 a.m. on 06-12-2014 has deposed during cross-examination that a child of around seven years has a small vagina and, therefore, penetration by a full grown adult penis into a small vagina is very difficult and in such an event there is a possibility of the adult sustaining injury on his genital. That, in the absence of any injury on the genital of the Appellant, penetration is ruled out besides, the genital of P.W.2 would have also been severely injured. Adverting to the evidence of P.W.14 Dr. O.T. Lepcha, it was further contended that this Doctor has also stated that there was no sign of injury over the genital of the Appellant, supported by the evidence of P.W.16 the Doctor who examined P.W.2, on 07-12-2015 and on local genital examination found only a superficial abrasion on the Posterior Commissure with no active bleeding and hymen intact. Referring to ***Modi's Textbook of Medical Jurisprudence and Toxicology, Twenty-first Edition, 1988***, it was put forth that when the child is under fourteen years of age, had penetration occurred, the injuries would be as described in the Book but the Doctors hereinabove have not found any of the stated injuries on P.W.2. That, while discussing the evidence of P.W.16, the Learned Trial Court held in Paragraph 63 of the impugned Judgment as follows;

> **"**63. It is seen in her evidence that there was Clinical examination of the victim which shows injuries by the blunt force on her genital area, which cannot be lost sight of though it was found that there was no recent

> sign of penetrative injury. It is settled position of law there cannot be penetrative injury to the victim of age of 5 years when an adult male attempted to commit sexual assault and penetration is sign-qua-non (*sic*, *sine qua non*) to hold the conviction of the accused under the offence of the POSCO (sic, POCSO) Act.**"**

The above is a categorical indication that the Trial Court also was of the opinion that there was no penetration, but Paragraphs 88 and 90 of the assailed Judgment are clearly contradictory inasmuch as in Paragraph 88, it has held that the Doctor, who examined the prosecutrix, did not find any sign of recent sexual intercourse, while in Paragraph 90, the Learned Trial Court has arrived at the finding that there was sufficient evidence regarding the penetrative sexual assault committed by accused upon the victim, leading to the conclusion that the Learned Trial Court failed to appreciate the evidence in its proper perspective. That if the matter is to be considered on merits, after duly analysing the evidence on record, it cannot be said that the offence was committed and, therefore, the Appellant is entitled to an acquittal.

7. *Per contra*, clearing the air with regard to the date of offence and the alleged belated lodging of Exhibit 1, Learned Additional Public Prosecutor in his arguments expostulated that the incident undoubtedly took place on 06-12-2014 at around 06.30 p.m. and the evidence of P.W.11 would establish that the Appellant was examined on the night of the incident itself. That, in the Section 164 Cr.P.C. Statement of P.W.1, she has categorically stated that the

incident was of 06-12-2014. Before the Court although she and P.W.4 may have stated it was 05-12-2014, it is only a minor confusion and does not strike at the root of the Prosecution case. While explaining the delay of a few hours in lodging Exhibit 1, the attention of this Court was drawn to the decision in ***State of H.P.*** vs. ***Gian Chand***[6] wherein it was held that–

> **"12.** Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, where it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case. ……."

It was clarified that P.W.1 and P.W.4 went with the victim and the Appellant to Rorathang Out Post, from where they were directed to the Pakyong P.S. In view of the distance to be covered, the FIR came to be lodged at 09.30 p.m. at Pakyong P.S. while the incident occurred around 6.30 p.m. and hence, the question of delay does not arise.

8. In the next leg of his arguments, Learned Additional Public Prosecutor urged that P.W.16 the Senior Medical Officer(Gynaecologist) at STNM Hospital has opined that, there was a superficial abrasion on the Posterior Commissure of the victim's

6. (2001) 6 SCC 71

genital, revealing sexual assault. Placing reliance on ***Dr. Subrahmanyam's Medical Jurisprudence Toxicology 2011*** it was urged that normally the Posterior Commissure and the fourchette are intact and crescent shaped, but it is usually lacerated by sexual intercourse on children and rarely in adults. Thus, the abrasion found by the Doctor clearly indicates that there was penetration by the Appellant. It is his submission that the offence under Section 5(m) of the POCSO Act does not envisage a total penetration, but it merely requires penetration of the genital of the Appellant to any extent into the vagina of the victim. Relying on the decision in ***Parminder alias Ladka Pola*** vs. ***State of Delhi***[7], it was contended that merely because P.W.16 has stated that there was no penetrative injury on the prosecutrix and the hymen was found intact cannot wish away the offence since the version of P.W.1 of the offence has been adequately corroborated, with no reason to dislodge the theory. In fact, the Hon'ble Apex Court in ***Parminder***[7] case *supra* has held as follows;

> **"11.** Section 375 IPC defines the offence of "rape" and the Explanation to Section 375 IPC, states that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape. This Court has accordingly held in *Wahid Khan* v. *State of M.P.* [(2010) 2 SCC 9] that even the slightest penetration is sufficient to make out an offence of rape and depth of penetration is immaterial. ……."

On the question of evidence of P.W.16, reliance was placed on ***Madan Gopal Kakkad*** vs. ***Naval Dubey and Another***[8] wherein the Apex Court held that –

7. (2014) 2 SCC 592
8. (1992) 3 SCC 204

> **"34.** A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of the symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the expert's opinion is accepted, it is not the opinion of the medical officer but of the Court.
>
> .....
>
> **44.** In interpreting the above explanation whether complete penetration is necessary to constitute an offence of rape, various High Courts have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial. Reference may be made to (1) *Natha* v. *Emperor* [AIR 1923 Lah 536]; (2) *Abdul Majid* v. *Emperor* [AIR 1927 Lah 735]; (3) *Mst. Jantan* v. *Emperor* [AIR 1934 Lah 797]; (4) *Ghanashyam Misra* v. *State* [AIR 1957 Ori 78]; (5) *Das Bernard* v. *State* [1974 CriLJ 1098]. In re Anthony [AIR 1960 Mad 308] it has been held that while there must be penetration in the technical sense, the slightest penetration would be sufficient and a complete act of sexual intercourse is not at all necessary. In Gour's *The Penal Law of India*, 6th Edn. 1955 (Vol.II), page 1678, it is observed, "Even vulval penetration has been held to be sufficient for a conviction of rape."**"**

9. He further contended that semen was detected on the victim's frock, thereby clearly establishing that the Appellant was guilty of the offence as Charged. Reliance was placed on ***Radhakrishna Nagesh*** vs. ***State of Andhra Pradesh***[9]. At the same time attention was also invited to the evidence of P.W.13 the Analyst at RFSL, Saramsa who detected semen on the undergarment not only of the victim, but also that of the Appellant. The statement of the

9. (2013) 11 SCC 688

victim dispels all doubts with regard to the fact of the incident which is to be read along with the evidence of P.W.16 and P.W.13. Hence, the findings of the Learned Trial Court requires no interference.

10. I have carefully considered the submissions put forth by Learned Counsel and perused the entire evidence and documents on record. I have also carefully perused the Judgments cited at the Bar.

11. The question, therefore, that falls for consideration by this Court is whether the Appellant is guilty of having committed the offence under Section 5(m) of the POCSO Act or was he wrongly convicted by the Leaned Trial Court?

12. In order to answer this question, it would be essential to carefully traverse the evidence of the Prosecution Witnesses. P.W.1 the mother of the victim, in her evidence has narrated that the Appellant and the P.W.2 were in the Courtyard of her house at around 06.30 p.m. and when P.W.1 was about to have her meal, P.W.2 cried out "*ama ama*" (mother). On hearing the cry of P.W.2, P.W.1 rushed out to the corner of the Courtyard where P.W.2 was crying and shivering while the Appellant was standing nearby. P.W.1 found sticky substance on the wearing apparels of P.W.2 and on enquiry from P.W.2 as to how the substance came to be therein, P.W.2 informed her that the Appellant had committed sexual intercourse with her. P.W.1 along with her husband, P.W.2, the Appellant and their co-villagers went to Rorathang P.S. where the Appellant was

handed over to the P.S. Later, the Rorathang P.S. handed over the Appellant to the Pakyong P.S. for necessary action, where P.W.1 lodged Exhibit 1. According to P.W.1, the victim was taken to the STNM Hospital the same night and admitted for medical treatment. She identified M.Os I, II and III as the clothes worn by the victim on the night of the offence. The statements made by the witness in her examination-in-chief have withstood the cross-examination. The evidence of P.W.1 is duly corroborated by the evidence of P.W.2 who has stated that **"***On the relevant day me and accused was (sic) playing with each other in the courtyard of our house. On the relevant day the accused asked me to go to some distance at the courtyard and "chara garyo"*.**"** That, the Appellant threatened to kill her if she disclosed the incident to anyone. Needless to add that the cross-examination has not been able to dislodge the statements made by her. The evidence of P.W.1 and P.W.2 leave no doubt of the occurrence of the incident.

13. While considering the evidence of P.W.16, the Doctor on examination of the victim found as follows;

> **"**……..
>
> The child had passed her urine after the incident, the undergarment which she was wearing at the time of the incident was changed and was handed over to the police. On examination child was conscious, well oriented. Small bruise was on the chin sustained during the incident.
>
> ……
>
> Temperature pulse rate was normal, gait was normal, per abdomen was soft/NAD, heart lungs NAD.

> Local genital examination, superficial abrasion on the posterior commissure, no active bleeding seen, hymen was intact, no other injuries seen. Wash from the external area was taken and was sent to the Pathology Department.
>
> .....
>
> 1. Clinical examination of the victim shows injuries by the blunt force on her genital area.
>
> 2. There was no recent sign of penetrative injury.**"**

Her examination thus revealed a superficial abrasion on the Posterior Commissure which could be caused by sexual intercourse on children as held in ***Dr. Subrahmanyam's Medical Jurisprudence Toxicology 2011***. The abrasion on the Posterior Commissure was obviously the result of blunt force used in the genital area of the victim, although no signs of recent penetrative injury were detected.

14. At this juncture, it would be beneficial to refer to Section 3 of the POCSO Act which is extracted hereinbelow for convenience;

> **"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.**"**

Thus, this Section elucidates penetrative sexual assault. Aggravated penetrative assault under which the Appellant is booked is defined under Section 5 of the POCSO Act, Section 6 is the Penal provision. The aggravated form of the offence is on account of the P.W.2 being a child below twelve years of age. On the anvil of the definition as postulated in Section 3 and considering the evidence of P.Ws 1, 2 and 16 along with P.W.13 who has clearly said that there was semen found on the victim's undergarment, her wearing apparels as well as the undergarment of the Appellant and the penile swab of the Appellant, no further evidence is required to establish that the offence was indeed committed by the Appellant. It is true that P.W.14 has said that there was no sign of injury over the genital of the Appellant as also the evidence of P.W.11 who has said that penetration into the vagina of a child by a full grown adult penis is very difficult and would render injury to the adult genital, but in the instant matter, the question is not of complete penetration, we are only concerned with penetration to "any" extent and the abrasion in the Posterior Commissure of P.W.2 in indicative of such an act. Even for an offence of rape under Section 375 of the IPC, the slightest degree of penetration of the vulval by the penis with or without emission of semen is sufficient to constitute the offence.

15. Concomitant to the above discussions, we may carefully consider Section 29 of the POCSO Act which reads as follows;

> **"29. Presumption as to certain offences**.– Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.**"**

It may be said that this is a rather harsh provision of Law which leaves no room for the accused to defend himself, but I hasten to point to the provisions of Section 30 of the same Act which provides as hereunder;

> **"30. Presumption of culpable mental state.**–(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
>
> *Explanation*.–In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

Section 30 thereby extends sufficient opportunity to the accused to establish beyond a reasonable doubt that he had not committed the offence.

16. Therefore, in consideration of the facts and circumstances and the evidence on record and bearing in mind that the child had no motive to implicate the Appellant nor was there any acrimony between the Appellant and the parents of the victim P.W.1 and P.W.4,

it is clear that the Appellant had committed the offence under Section 5(m) of the POCSO Act punishable under Section 6 of the same Act.

17. Coming to the question of the Exhibit 1 being fabricated, there is no evidence to establish this allegation. The offence reported in Exhibit 1 is duly supported by Exhibit 11 which establishes that the Appellant was examined on 11 a.m. on 06-12-2014. Exhibit 2 the formal FIR clearly lays down that the date of occurrence was 06-12-2014 and the time was 1830 hours, whereas the information was received at the P.S. on 06-12-2014 at 2130 hours. The distance from the place of occurrence is said to be 24 kms. from the Pakyong P.S. and, therefore, the delay of a few hours in lodging the FIR has been clearly explained and requires no further discussion. There is no dispute with regard to the age of the victim which has been duly proved by Exhibit 5 the Birth Certificate. On the question of the belated despatch of the FIR to the Magistrate, it is an admitted fact that Pakyong entails a travelling distance of about 30 kms. from Gangtok and the Exhibit 1 was lodged in the night of 06-12-2014, which could have resulted in the delay which in any event cannot be termed as "undue delay".

18. Hence, in consideration of the entire discussions hereinabove, the evidence on record and the findings herein, the impugned Judgment and Order on Sentence of the Learned Trial Court brooks no interference.

19. Appeal fails and is accordingly dismissed.

20. No order as to costs.

21. Copy of this Judgment be sent to the Learned Trial Court along with Records of the Court, forthwith.

Sd/-
(Meenakshi Madan Rai)
Judge
10-08-2016

Approved for reporting : **Yes**

Internet : **Yes**

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