THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 31st May, 2017

Single Bench: HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl. A. No. 30 of 2015

Appellant : Nim Tshering Lepcha,
Aged 61 years,
Son of late Mingu Lepcha,
Resident of Gnon Sandung,
Lower Dzongu,
North Sikkim.

[presently 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, Legal Aid Counsel for the Appellant.

Mrs. Pollin Rai, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant having been found guilty of the offence under Section 3, punishable under Section 4 of the Protection of

Children from Sexual Offences Act, 2012 (hereinafter "POCSO Act") and under Section 341 and Section 506 Part II of the Indian Penal Code, 1860 (for short "IPC") by the Court of the learned Special Judge, POCSO, North Sikkim at Mangan, in S.T. (POCSO) Case No. 01 of 2014, vide the impugned Judgment dated 20.11.2014, was convicted and sentenced as follows;

> 1. To undergo rigorous imprisonment for ten years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, under Section 4 of the POCSO 2012 with a default clause of imprisonment;
>
> 2. Simple Imprisonment for one month under Section 341 of the IPC and
>
> 3. Seven years rigorous imprisonment and a fine of Rs.2000/- (Rupees two thousand) only, under Section 506 Part II of the IPC, also with a default stipulation.

The periods of imprisonment were ordered to run concurrently. Dissatisfied and aggrieved by the Conviction and Order on Sentence, the instant Appeal assails both.

2. The primary thrust of the argument of learned Counsel for the Appellant was that Exhibit 1, the FIR, was filed belatedly on 15.5.2014 by the guardian of the Victim, the alleged incident having taken place on 9.5.2014 and the delay remains unexplained. It was next contended that the evidence of PW-8, the Doctor who first examined the Victim, detected only redness in the vaginal area and PW-15, a Gynaecologist, who subsequently examined the Victim

found no vulval penetration and therefore does not substantiate the Prosecution case. The Victim's evidence and statement under Section 164 Cr.P.C. do not inspire confidence. That the case being based entirely on circumstantial evidence, the learned Trial Court failed to appreciate that the Prosecution has not led any reliable evidence against the Appellant to establish the offences with which he is charged. In view of the above infirmities, the impugned Judgment of the learned Trial Court deserves to be set aside.

3. *Per contra*, learned Assistant Public Prosecutor urged that the delay has clearly been explained by the Victim PW-7, as well as her guardian PW-1 and delay in lodging an FIR in such cases deserve latitude from the Courts in view of the sensitivity of the issue. Reliance was placed on ***(2009) 1 SCC 42 : State of Himachal Pradesh vs. Prem Singh*** and ***(2001) 6 SCC 71 : State of Himachal Pradesh vs. Gian Chand,*** to drive home this point. That, the evidence of PW-8, indicates that there was redness in the genital area which is therefore, proof of penetration while the evidence given by PW-15, the Gynaecologist, who examined the Victim on 15.5.2014, several days after the incident, on local examination found that the vulva was red and inflamed. PW-10, the Expert at the RFSL, Saramsa found blood on the undergarments of the minor Victim leading to the conclusion that rape had been committed for which attention of this Court was invited to the decision in ***State of H.P. vs. Asha Ram : (2005) 13 SCC 766*** and ***Madan Gopal Kakkad vs. Naval Dubey and***

Another : (1992) 3 SCC 204. The Victim's age has remained undisputed thereby bringing her under the protection of the umbrella of the POCSO Act. Besides, the Victim's evidence is sufficient to convict the Appellant in terms of Section 29 of the POCSO Act, hence, the Judgment of the learned Trial Court be left undisturbed.

4. The rival contentions of the learned Counsel were heard in *extenso* and due consideration given thereof. I have also carefully considered the evidence and all documents on record and perused the impugned Judgment and Order on Sentence.

5. The question which is required to be determined is; Whether the Appellant deserved a conviction under the above Sections of Law? In order to appreciate this, it would be essential to briefly advert to the facts of the case.

6. On 15.4.2014, PW-1, the guardian of the Victim, lodged Exhibit 1, informing therein that the Victim, aged about seven years, who had been living with her for the past two years and was studying in Class-II in a neighbouring Primary School, was sexually assaulted by the sixty year old Appellant on 9.5.2014, when she had gone to collect milk from the house of another person at around 1800 hours and was returning home to PW-1. The Appellant who was known to the Victim waylaid her near the Primary School, on

the pretext of giving her some "Cho" (Prasad-devotional food offering), forced her into his greenhouse and raped her. After the incident, he threatened to kill her if she divulged the incident to any one and left the greenhouse from the rear entrance. Meanwhile, PW-1 accompanied by PW-2 and PW-3 ventured out in search of the Victim as she had left the house at 4:00 p.m. and it was 6:00 p.m., added to which it was raining heavily. They found her in the greenhouse, where, she disclosed that she had taken shelter from the rain but did not reveal the incident to them fearing fatal consequences as per the threat held out by the Appellant. On the evening of 13.5.2014, however, she complained of pain in her genital and on enquiry by PW-1, she narrated the entire incident to her. PW-1 then found that the genital of the Victim was swollen and reported the incident to the Mangan Police Station on 15.5.2014.

7. Based on Exhibit 1, Mangan Police Station Case No. 22(05)2014 dated 15.5.2014 under Section 376/341/342/506 IPC read with Section 4 of the POCSO Act was registered and endorsed for investigation. Apart from sending the Victim and the Appellant for medical examination, investigation also involved collection of the vaginal swab of the Victim and her blood sample as also the Appellant's blood sample, which were forwarded for chemical analysis to the Regional Forensic Scientific Laboratory (RFSL) at Saramsa, East Sikkim. The statements of the Victim and PW-1 were recorded under Section 164 Cr.P.C. On completion of investigation

Charge-Sheet was submitted against the Appellant under the aforesaid Sections of Law.

8. The learned Trial Court framed Charge against the Appellant under Section 3, punishable under Section 4 of the POCSO Act and Section 341/506 of the IPC. In order to establish its case beyond reasonable doubt, the Prosecution examined 15 witnesses, on completion of which the Appellant was examined under Section 313 Cr.P.C. The Appellant sought to and was permitted to examine one witness.

9. Besides the Victim herself, there is no other witness to the offence. It is now to be gauged as to whether the offence was indeed committed by the Appellant. Before the learned Trial Court, the evidence of PW-1, PW-2 and PW-3 were consistent, they having gone out in search of PW-7, the Victim, together that fateful evening. They have substantiated each other's evidence to the effect that they knew the appellant and found the Victim in the greenhouse, carrying a bottle of milk and crying, but on enquiry she informed that she was inside the greenhouse on account of the heavy rain. PW-7 identified the Appellant and narrated the same facts as put forth by the PWs 1, 2 and 3. However, she being the Victim and being privy to the entire act testified that although she refused to accompany the Appellant to the greenhouse after having met him below the School she attended, despite his allurement of

giving her "Cho", he forcefully dragged her to the greenhouse and told her he would have sexual intercourse with her. He then laid her on the floor of the greenhouse, took off both their trousers and inserted his genital into her's. When she screamed, he closed her mouth, threatened to remove her tongue and kill her if she disclosed the incident to anyone. At that time, she heard PW-1 calling out to her, on hearing PW-1 the Appellant made good his escape from the greenhouse. After sometime PW-1, PW-2 and PW-3 entered the greenhouse and took her back home, but due to fear she did not narrate the incident to them. After a few days, when she had severe pain in her genital, perforce she informed PW-1 of the incident who washed her genitals with water. According to the Victim, there were blood stains in her underwear and half pants due to the sexual intercourse by the Appellant. These facts on cross-examination were not demolished.

10. It would now be appropriate to examine the evidence of PW-8, Dr. Dawa Doma Bhutia, who examined the Victim in the first instance on 15.5.2014, having been brought with an alleged history of sexual assault. On examination of the patient, she found redness in the vaginal area and referred the Victim to the STNM Hospital for gynaecological examination. Thereafter, according to PW-8, on 17.5.2014, the Victim's blood sample was duly collected by one Dr. Prabhat on the instructions of the Police. The said Doctor is not a Prosecution witness. She admitted under cross-examination that in

case of sexual assault, injuries can be found in the vulva, hymen, vagina and perineum but in Exhibit-9, she had only mentioned the vaginal area as she found redness there but no injuries in the genital. Simultaneously, we may consider the evidence of PW-15, the Gynaecologist at STNM Hospital, who examined the Victim also on 15.5.2014 at around 6:10 p.m. and prepared Exhibit-22. According to this witness;

> "…….*On local examination, the vulva was red and inflamed and vulva opening admits one finger with difficulty. No bleeding was present, hymen partially present (hymen partially present means that the part of the hymen of the minor victim was absent), edges not swollen or bleeding. .....On clinical examination it does not suggest forceful recent vulval penetration (recent means within 48 hours)*....."

She admitted under cross-examination that if a full grown adult penis is inserted in the vagina of a small child, there would be injuries in her genital. It had been vehemently argued by learned Counsel for the Appellant that if the clinical examination does not suggest forceful recent vulval penetration, the evidence of the Victim is belied. However, in my considered opinion, after careful examination of the evidence of PW-8 and PW-15, it is apparent that they have examined the Victim on the 7th day of the incident, the incident having occurred on 9.5.2014. Obviously, the body would have initiated its healing process but we cannot lose sight of the fact that despite the belated examination, the vulva of the Victim still exhibited redness indicating soreness besides PW-1 had found it to

be swollen. Although, the evidence of PW-14, the Pathologist, who received the victim's vaginal wash sample found no motile or non motile spermatozoa therein, the result would indeed be negative as the vaginal wash sample was collected only on 15.5.2014, the incident having occurred on 9.5.2014 and the Victim's genital had been washed and cleaned by PW-1. That, having been said when we consider the evidence of PW-10, the Analyst-cum-Assistant Chemical Examiner at the RFSL, Ranipool, East Sikkim, she has clearly stated;

> *".....Human blood could be detected in Exhibit BIO 73 (A), BIO 73 (B) and BIO 73 (G) and all of it gave positive for blood group (A)."*

The aforesaid Exhibits were marked in the learned Trial Court as follows;

1. BIO 73 (A) as **M.O II** white coloured panty of victim with blue border.
2. BIO 73 (B) as **M.O III** white coloured half pant.

BIO 73 (G) was the blood sample of the Victim and found to be of Blood Group 'A', the same Blood Group detected in the inner garments of the Victim. M.O II and M.O III. Admittedly, both articles belong to the Victim and the evidence of PW-4 and PW-5 lends support to the Prosecution case on this aspect they being the seizure witnesses. While revisiting the evidence of PW-15, she has clearly stated under cross-examination that *"....It is very very rare for a child of seven years to have mensuration (sic 'menstruation')...",* thereby

indicating that the blood on M.O II and M.O III was not on account of the menses of the Victim but due to the forceful penetration by the Appellant. Pausing here for a minute, we may take the assistance of the observations of the Hon'ble Apex Court in ***Madan Gopal Kakkad's*** case (supra) that slightest penetration of the penis into the vagina without rupturing the hymen would constitute the offence of rape. In any event, I see no reason why the Victim would be lying about such an incident.

11. Section 3 of the POCSO Act deals with penetrative sexual assault and the Section explains it to mean penetration of the penis of a person to any extent, into the vagina, etc. of the child. The important words being "to any extent". From the evidence as already discussed hereinabove, it goes without saying that there has been a vulval penetration and although PW-15 found no forceful recent vulval penetration, meaning thereby no penetration 48 hours prior to the examination was detected but we are to consider the evidence on the anvil of the fact that the incident was of 9.5.2014 and not 15.5.2014. There is no speck of doubt that the Appellant has committed the depraved offence on the unsuspecting and innocent child, traumatising and scarring her psychologically for life. The mere absence of spermatozoa in her inner garments cannot negate the Prosecution case, nor would the absence of grave injuries in her genital be fatal to the Prosecution case, as her evidence is consistent and unwavering. The evidence of PW-7,

already discussed, also clearly establishes an offence by the Appellant under Section 341 and Sections 506 of the IPC. The delay in the lodging of the Exhibit-1 has been explained as the reluctance of PW-7 to divulge the incident to PW-1, the distance of the place of occurrence to the Police Station, the road conditions due to heavy rains, all factors that evidently played a role in the delay and do not reek of any embellishments.

12. Apart from the above, we may usefully refer to the provisions of 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."

Thus, when PW-7 asserts that the incident had occurred, there being no reason for her to concoct such a lurid incident, the Court has to presume that the incident occurred.

13. It goes without saying that the Law also gives the Appellant the equal opportunity to establish his innocence, extending him the option under Section 30 of the Act. The Section is extracted hereinbelow;

> "**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 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."

14. Although, the Appellant examined Dr. Meenakshi Dahal as DW-1, her evidence is of no assistance to the Appellant, neither is Exhibit 'D' the Medical Report of the Appellant exhibited by her of any support.

15. Consequently, in view of the aforesaid discussions, it is clear that the grounds of delay have been lucidly and unerringly explained by the witnesses as already discussed hereinabove. The evidence of PW-1, PW-7, PW-8 and PW-15 are sufficient proof of sexual assault by the Appellant and the evidence of PW-7 reveals criminal intimidation and wrongful restraint. Thus, the evidence on record discussed hereinabove soundly quells all doubts raised by learned Counsel for the Appellant.

16. Consequently, the findings of the learned Trial Court are not perverse and therefore, warrant no interference.

17. Appeal is dismissed.

18. No orders as to costs.

19. Copy of this Judgment be sent to the learned Trial Court along with the records of the Court.

Sd/-

(Meenakshi Madan Rai)
Judge
31-05-2017

Approved for reporting : **Yes**
Internet : **Yes**

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