



IN THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Dated: 21ST FEBRUARY, 2019

D.B.: HON'BLE MR. JUSTICE VIJAI KUMAR BIST, C.J.
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, J.

Crl. A. No. 33 of 2017

Appellant : Lakpa Dorjee Tamang,
S/o Raj Kumar Tamang,
aged about 18 years,
R/o Upper Dorop, Salghari,
South Sikkim.
A/P State Central Prison,
Rongyek, East Sikkim.

Versus

Respondents : State of Sikkim.

Appearance:

Mr. Gulshan Lama, Advocate (Legal Aid Counsel).

Mr. Thinlay Dorjee Bhutia, Addl. Public Prosecutor with
Ms. Pollin Rai, Asstt. Public Prosecutor for the State.

JUDGMENT

Chief Justice

The present appeal arises out of the judgment and order dated 18.09.2017 passed by the learned Special Judge (POCSO), South Sikkim at Namchi in Sessions Trial (POCSO) Case No. 23 of 2015, State of Sikkim vs. Lakpa Dorjee Tamang, whereby the appellant/accused has been convicted under



Sections 3(a)/5(1), 4/6 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO Act') and Section 376(2)(i)/376(2)(n)/354 of IPC, 1860. He has been sentenced to undergo Rigorous Imprisonment of 7 years under Section 3 (a) punishable under Section 4 of the POCSO Act and Rigorous Imprisonment of 10 years under Section 5 (1) punishable under Section 6 of the POCSO Act. He has also been sentenced to undergo Rigorous Imprisonment of 10 years under Section 376 (2)(i) of IPC punishable under Section 376(2) of IPC. He is further sentenced to undergo Simple Imprisonment of 3 years under Section 354 of IPC. Although the appellant/accused has been convicted under Section 376(2)(n) of IPC, however in view of Section 42 of POCSO Act the learned trial Judge has not imposed any separate sentence under Section 376(2)(n) of IPC. It is also directed that all the sentences awarded to him shall run concurrently and the period of imprisonment already undergone by the convict be set off against the period of imprisonment imposed upon him.

2. The prosecution story, in brief, is that on 04.09.2015 mother of the victim, lodged an FIR in Jorethang Police Station stating therein that on the said day the victim had gone to school. During lunch break, Lakpa Tamang of Class VIII took her below the *lapsi* tree situated above the school. There he put his hand on her body and did wrongful act. The complainant



came to know about the incident in the afternoon at 03.30 pm from her youngest daughter and her two friends. When the complainant reached school she saw her daughter with her teacher. School teacher asked the boy about the incident but he said he had not done anything. He threatened the complainant and then left.

3. On the basis of said complaint, FIR No. 49/2015 dated 04.09.2015 under Section 6 of the POCSO Act was registered against the accused in Jorethang Police Station. The case was handed over to SI Chomu Lachungpa for investigation. The minor victim was medically examined by Dr. Sangey Pelzang Tamang. In his report, the doctor has stated that P/A soft, non tender, no fresh injuries seen, no injuries seen over the vulva perineum or breast, old tear at 2 o'clock position and 8 o'clock position in the hymen, no fresh injuries over the hymen. 2nd vaginal wash sent to pathology department of Namchi District Hospital at 10.20 pm on the same day. In the report, the doctor stated that the victim had not taken bath following the incident, her clothes and undergarments were handed over to the police at Jorethang PHC which were sent thereafter for forensic examination. Further clinical examination did not suggest recent forceful penetrative sexual intercourse vaginal and/or anal. The vaginal swab and underwear of minor victim collected during the medical examination were forwarded to the Regional Forensic



Science Laboratory Sikkim, Saramsa, Ranipool, for analysis and report.

4. Statement of victim was duly recorded under Section 164 Cr. P.C. by the Judicial Magistrate, South Sikkim at Namchi on 18.09.2015. The investigating officer after completing the investigation, filed a charge-sheet against the accused under Section 6 of the POCSO Act.

5. The learned Special Judge (POCSO Act) framed five charges. Same were read over and explained to the appellant/accused, to which he pleaded not guilty and claimed trial. Prosecution witnesses were examined. Thereafter the appellant/accused was also examined by the Court under Section 313 of Code of Criminal Procedure, 1973. The learned Special Judge (POCSO Act) after considering materials available and also considering the statement of minor victim as well as witnesses, convicted the appellant/accused.

6. Prosecution has examined as many as 14 witnesses namely, PW 1, PW 2, PW 7 Schoolmates of the victim, PW 3 Dr. Robin Rai, PW 4 the victim, PW 5 victim's mother, PW 6 Pooja Lohar, PW 8 Santosh Baniya, PW 9 Dr. Meenakshi Dahal, PW 10 Dr. Sangay Pelzong Tamang, PW 11 Dr. Nedup Dolma Bhutia, PW 12 Kunti Kumari Subba, PW 13 Chomu Lachungpa and PW 14 Thinlay Gyatso Rai.



7. PW 4 is the minor victim. At the time when her statement was recorded, she was 13 years old. In her statement she stated that she knew the appellant/accused as he was her senior in the Government school, where they were both studying. On 04.09.2015, while she was in school along with her classmates PW 7 and PW 1, the accused asked them to accompany him to the nearby jungle for collecting *lapsi*/sour fruit. When they reached the jungle, the accused took the victim further deep inside while her friends remained behind. Inside the jungle the accused started putting his hands all over her body including breasts and vagina. He then made her lie down on the ground and put his penis into her vagina. Thereafter while they were still in the jungle, PW 1 and PW 7 came looking for them. Thereafter all of them returned back. Later, the minor victim told about the incident to PW 2. She stated that even on earlier occasions the accused had raped her in the jungle, in her house and near the road. He had as such raped her five times. She also stated that she had given her statement to one Judge Madam downstairs. She recognized her initials on the statement given before the Judge. With the permission of the Court two sealed packets were opened. From one of the packets a blue school skirt and a white shirt were taken out. From other packet three sealed packets were taken out. From one of those packets marked BIO-152(A) one pink underwear was taken out. Underwear marked MOI, skirt marked MOII and white shirt



marked MOIII, which the minor victim was wearing at the time of incident. In her cross-examination she stated that she used to often go to the jungle along with her friends to collect *lapsi*. In her cross-examination she further admitted that the appellant/accused and she were not in good terms. She denied that she had been tutored by her mother to give false evidence against the appellant/accused. She further stated that it is wrong that she was deposing falsely to implicate the appellant/accused as she did not have good relation with him. In her cross-examination she reiterated the same fact as she has stated in the examination-in-chief.

8. PW 1 friend of the victim, stated that she knew the appellant/accused who used to study in her school. Sometime during September 2015 the appellant/accused took her, minor victim and PW 7 to collect some *lapsi*/sour fruit in the jungle near to their school. On reaching the jungle PW 7 and she halted at one place while the accused and minor victim went ahead, deep inside the jungle. After some time their another classmate came there and told them that their teacher was calling them. They went back to the school leaving behind the minor victim and the accused at the jungle. After coming back to the school they realized that the teacher had not called them and their classmate had only joked with them. They went back to the jungle in search of minor victim and the accused. It was only



later that the accused and minor victim came out of the jungle. Minor victim's skirt was wet while the accused had removed the sweater that he was wearing.

9. PW-2 is a student of the same school where minor victim used to study. In her statement she stated that the victim is her junior. On 04.09.2015, her three juniors namely PW 1, PW 7 and another friend came to her and told her that the accused and the victim, who had gone deep inside the nearby jungle to collect *lapsi*/sour fruit, were not traced out. All of them went to the jungle looking for the accused and the victim and after some time they saw them. She further stated that they noticed that the victim's skirt was wet on the backside and there were some dirt/leaves on the back of her shirt suggesting that she was made to lie on her back. They all then came to the school. Initially the victim was reluctant to tell anything, later, on her insistence she told her that the accused had raped her in the jungle. This witness stated that she had reported the matter to her teachers.

10. PW 3 Dr. Robin Rai examined the appellant/accused and found that the appellant/accused was capable of having sexual intercourse.

11. PW-5 is the mother of the victim. She stated that she had lodged the FIR before the Jorethang Police Station after she



came to know that the appellant/accused had raped her daughter on 04.09.2015. In her statement she also stated that the date of birth of her daughter is 05.07.2003 but the same has been reflected as 12.07.2003 in her birth certificate which was obtained by her father.

12. PW 6 Pooja Lohar is the Scientific Officer-cum-Chemical Examiner, Government of Sikkim in the Biology Division of the Regional Forensic Science Laboratory (RFSL), Saramsa, East Sikkim who had prepared the forensic report Exhibit-9.

13. PW 7 is the classmate of the victim. She is a minor witness. She recognized the appellant/accused present in the court. She stated the same fact which has been stated by another witness PW-1.

14. PW 8 Santosh Bania is the police officer who was posted as Officer-in-charge of the Jorethang Police Station on 04.09.2015. He proved the Exhibit-5 (FIR). Exhibit-5(a) (signature of the mother of the victim), Exhibit-5(b) (registration/endorsement note) and Exhibit-5(c) (his signature along with his seal).

15. PW 9 Dr. Meenakshi Dahal, Medical Officer, Jorethang Primary Health Centre, before whom the minor victim was produced for medical examination by the investigating officer



on 04.09.2015 at around 1945 hrs. The doctor in her statement stated that on the examination of the victim she found no injury on her person. She referred the victim to the Namchi District Hospital. The clothes of the minor victim were handed over to the investigating officer. She stated that the victim was made to wear another set of clothes which had been brought by the IO. In her cross-examination she has stated that the physique/body of a twelve year old girl is more vulnerable as compared to any adult. She stated that there was no visible injury on the body of the minor victim. She also said that there is nothing in the medical report to indicate that she had also examined the private parts of the minor victim. She admitted that there is nothing to suggest that the minor victim has been subjected to sexual assault. It is her submission that the minor victim did not disclose to her that she had been raped/sexually assaulted by the appellant/accused on four occasions prior to the sexual assault on 04.09.2015.

16. PW 10 Dr. Sangey Pelzang Tamang is the Gynecologist at the Namchi District Hospital, before whom the minor victim was produced on 04.09.2015 at around 10.15 pm with an alleged history of having been sexually assaulted by the appellant/ accused at around 01.30 pm of the same day. He stated that on examination of the victim he did not find any injury on her person including her private parts. However, he



found an old tear at 2 o'clock and 8 o'clock positions of the hymen. He obtained her vaginal-swab/wash and forwarded for pathological examination. The cytopathology report was later received which indicated that no motile or non-motile spermatozoa could be detected in the vaginal-swab/wash. He further stated that in his opinion there was nothing to suggest any recent forceful penetrative sexual intercourse, whether vaginal or anal. In his cross-examination, he has stated that as the minor victim was of tender age she can be regarded as vulnerable. He further stated that no injury in the vaginal/hymen of the minor victim though she was examined within ten hours of the alleged incident. He also stated that old tear of hymen can be caused due to stretching exercises, dancing and sport activities.

17. PW 11 Dr. Nedup Dolma Bhutia is the Pathologist of the Namchi District Hospital, who examined the vaginal wash and swab of the minor victim for detection of spermatozoa.

18. PW 12 is the Principal of the school where the victim was studying. She stated that minor victim was admitted in their school on 12.02.2007 in nursery class. She left the school on 14.02.2008 under Transfer Certificate No. 06 dated 14.02.2008. In her statement she admitted that as per the record maintained in the school, the victim's date of birth as 12.07.2003, this was not contradicted in her cross-examination.



She also stated that Exhibit-13 is the certificate issued by her wherein Exhibit-13(a) is her signature.

19. PW 13 Chomu Lachungpa is the Sub-Inspector, Ranipool Police Station, East Sikkim. She stated that after apprehension of the appellant/ accused, he claimed to be a juvenile aged about 16 years and as such she produced the appellant/accused before the Juvenile Justice Board (JJB). Thereafter, the Juvenile Justice Board sent the appellant/accused to Juvenile Observation Home, Gangtok. Later, on 13.09.2015 she obtained the birth certificate of the accused from his father Raj Kumar Tamang which revealed that the date of birth of the accused is 19.03.1997 and as such he was 18 years 5 months and 15 days at the time of incident. On finding the appellant/accused to be a major on the date of commission of the crime she submitted a petition before the Chief Judicial Magistrate, South with a prayer to release the accused from Juvenile Observation Home, Gangtok for causing his formal arrest. After her prayer was allowed she brought the accused from Juvenile Observation Home, Gangtok and produced him before the Learned Judicial Magistrate, South, who passed the order remanding the accused to judicial custody at Namchi.



20. PW 14 Thinlay Gyatso Rai is Police Sub-Inspector to whom investigation was handed over subsequently. After completing investigation he filed the charge-sheet.

21. Mr. Gulshan Lama, learned counsel for the appellant first submitted that the appellant/accused was juvenile at the time of alleged incident and he should be given the benefit of provision of Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as "JJ Act, 2015"). We have seen the record of the case. The matter was listed before this Court on 09.03.2018. The Court observed that the investigating officer did not care to bring into notice of the Juvenile Justice Board the fact of discovery of date of birth certificate of the appellant which indicated that the said juvenile was more than 18 years of age at the time of commission of offence. Later, however, on 15.09.2015 filed an application before the Judicial Magistrate, South stating that the accused was not a juvenile on the basis of his birth certificate, upon which he was removed from the Juvenile Observation Home and remanded to judicial custody. It was further observed that the mandatory provisions as contemplated under the JJ Act, 2015 were not complied with and as such the Court directed the Juvenile Justice Board, South District at Namchi to examine the case in respect of the age of the appellant and submit a report to this Court. In compliance to that order, the Juvenile Justice Board, South



District at Namchi considered the matter of juvenile afresh and passed the order that the appellant was 18 years 05 months and 15 days on the day of the commission of the incident i.e. on 04.09.2015 and as such was held as major on the date of commission of offence. The said order passed by the Juvenile Justice Board was not challenged by the appellant. Thus, appellant cannot claim the benefit of provision of JJ Act, 2015.

22. Learned counsel appearing for the appellant/accused then submitted that there is no consistency in the statement of the victim under Section 164 Cr. P.C., the statement given before the Court during the trial. He submitted that the appellant has been falsely implicated as the victim herself stated that she was not on good term with the appellant/accused. Since the victim was not on good term with the appellant/accused, the appellant has been falsely implicated. Learned counsel for the appellant referred to the statement of the doctor, PW 9, in which she stated the alleged incident took place around 14.00 hours on 04.09.2015 and the victim was produced before her by the investigating officer at around 19.45 hours of the same day and on examination, she did not find any injury on her person. In her cross-examination doctor stated that there is nothing to suggest that the minor victim has been subjected to sexual assault. He also referred to the statement of doctor, PW 10, who examined the victim at 10.15 pm of the same day. In his



statement, the doctor opined that there was no any injury on her person including her private parts. No injury in the vagina/hymen of the minor victim though she was examined within ten hours of the alleged incident. By referring statements of these two doctors, learned counsel for the appellant submitted that in fact the entire story is false and no rape was actually committed on the victim. He relied on the judgment of the Hon'ble Supreme Court reported in **(2006) 10 SCC 92 Sadashiv Ramrao Hadbe vs. State of Maharashtra and another.**

23. Mr. Thinlay Dorjee Bhutia, learned Addl. Public Prosecutor referred the DNA report prepared by the Regional Forensic Science Laboratory Sikkim, Saramsa, in which it is pointed out that Exhibit number A, one pink underwear of the victim presence of human semen found. He submitted that the statement of the victim with the support of this report is sufficient to prove the case of the prosecution. He further stated that it is a case where the victim is of 13 years of age and as per Section 29 and Section 30 of the POCSO Act, it is the appellant/accused, who has to prove his case, which he could not prove.

24. There is no dispute about the age of victim on the date of commission of offence. On that day admittedly she was a minor. In her statement before the Court she stated that inside the jungle the accused started putting his hands all over her



body including breasts and vagina. He then made her lie down on the ground and put his penis into her vagina. After he raped her, they were still in the jungle when PW 1 and PW 7 came looking for them. She also stated that on earlier occasions the accused had raped her in jungle, as such he had raped her five times. In her statement under Section 164 of Cr. P.C., before the Magistrate, she has stated that the appellant/accused touched her chest area as well as her genital area. He then removed her shirt, skirt and her underwear. He also removed his pant and shirt. He then pulled down his underwear and raped her by putting his penis in her vagina. In her statement she has also stated that the accused had on four other occasions had earlier raped her but she had not informed any one since the accused used to threaten to kill her. This was the fifth time the accused raped her and this fact came to the knowledge of everyone only because of her friends having witnessed it. Thus, it can safely be said that the statements given by her are consistent.

25. Learned counsel for the appellant relied on the statement of PW 9 Dr. Meenakshi Dahal, in which she stated that she found no visible injury on the body of minor victim and there is nothing to suggest that minor victim was subjected to sexual assault. The appellant cannot get any benefit of this statement as this witness also stated that it is true that there is



nothing in the medical report to indicate that private parts of minor victim were examined by her.

26. Learned counsel for the appellant also relied on statement of PW 10. On medical examination of the victim, PW 10 Dr. Sangey Pelzang Tamang, collected the vaginal-swab/wash of the victim and forwarded for pathological examination. The cytopathology report indicated that no motile or non-motile spermatozoa could be detected in the vaginal-swab/wash. He also stated that there was nothing to say any recent forceful penetrative sexual intercourse was found. But there was an old tear of hymen.

27. We find that in the report of Forensic Laboratory Exhibit-9 the presence of human semen was found on the victim's underwear. If we consider this laboratory report with the statement of victim and her friend, as narrated in the preceding paragraphs, then we find the statements of victim as trustworthy. Therefore, merely on the statement of PW 10 the appellant cannot be acquitted. Moreover, Section 29 of the POCSO Act provides that where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the POCSO 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. In this case, the appellant failed



to prove that he has not committed the offence as alleged by the minor victim. Section 30 of the POCSO Act provides that the accused has to establish beyond reasonable doubt that he had no culpable mental state. The appellant has made no effort to rebut the presumption of culpable mental state. The case law referred by the counsel for the appellant does not help the appellant, as at the time of that judgment, the POCSO Act was not in existence.

28. Consequently, the appeal stands dismissed.

(Meenakshi Madan Rai, J)	(Vijai Kumar Bist, CJ)
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