THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 02 of 2018

1. Raj Kumar Darjee alias Vodafone,
Son of late Man Bahadur Darjee,
Resident of Gom Mazitar,
South Sikkim.

2. Jeet Man Rai,
Son of Man Bahadur Rai,
Resident of Kamjor Busty,
Gok Karmatar,
Darjeeling,
West Bengal.

Presently both are lodged at Central Prison, Rongyek, East Sikkim.

.....Appellants

versus

State of Sikkim

..... Respondent

Appeal under Section 374(2) of the Code of Criminal Procedure, 1973.

Appearance:

Mr. Birendra Pourali, Advocate (Legal Aid Counsel) for the Appellant.

Mr. S.K. Chettri, Assistant Public Prosecutor for the Respondent.

Date of hearing : 26.11.2019 & 02.12.2019

Date of judgment : 17.12.2019

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. A joint appeal has been preferred by the two appellants convicted by the learned Special Judge (POCSO),

South Sikkim at Namchi in Sessions Trial (POCSO) Case No. 1 of 2016. The impugned judgment dated 26.07.2017 rendered the appellants guilty under section 5(g) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') and under section 376D of the Indian Penal Code, 1860 (for short 'the IPC'). The appellants were sentenced to undergo rigorous imprisonment of twenty years under section 376D of the IPC and in view of section 42 of the POCSO Act, no separate sentence was imposed under section 5(g) thereof.

2. The learned Special Judge held that the victim was a fifteen year old minor at the time of the incident relying upon her birth certificate (Exhibit-14) as it was not disputed by the defence. The learned Special Judge found the deposition of the victim reliable and that it clearly established the ingredients of the offence. The learned Special Judge held that the evidence of Dr. Sanjay Rai (PW-10) and the medical reports of the appellants (Exhibit-18 and Exhibit-19) established that they were capable of sexual intercourse. The absence of smegma noticed during the appellants' penile examination was held to support the evidence of the victim that they have committed sexual intercourse recently. The learned Special Judge opined that it was not always necessary that there would be injuries on the victim's private part as there was evidence to suggest that she was used to sexual intercourse. The learned Special Judge found that the

green cloth (MO-III) which was sent for forensic examination and examined by Pooja Lohar (PW-9) was detected with semen. According to the victim, the green cloth (MO-III) was used by the appellant no.2 to wipe his penis after he discharged some liquid after the rape. He found that there was semen not only on the green cloth (MO-III) but also on the brown underwear (MO-I) and thus supported the evidence of the victim that she was sexually assaulted by the appellants.

3. Heard Mr. Birendra Pourali, learned counsel for the appellants and Mr. S.K. Chettri, learned Assistant Public Prosecutor for the respondent.

4. Mr. Birendra Pourali submitted that prosecution had failed to establish that the victim was a minor by leading cogent evidence. According to the learned counsel there is no evidence to show how the birth certificate (Exhibit-14) was seized. He submitted that search and seizure of various material exhibits have not been properly proved. He also submitted that the medical evidence led by the prosecution completely belies the allegation that the appellants had committed gang rape on her and therefore her evidence is not reliable. It was argued that the victim's statement was inconsistent and the prosecution had failed to relate the semen detected during forensic examination to any of the appellants.

5. Mr. S.K. Chettri on the other hand submitted that the prosecution has been able to prove that the victim was a minor and that the appellants were guilty. He submitted that failure to find any marks or injuries on the person of the appellants does not lead to an inference that they had not committed the offence and conviction may be based upon the sole testimony of the victim. He cautioned that the Court must be sensitive while dealing with cases involving sexual offences.

6. Eleven witnesses were examined by the prosecution during the trial. Ganga Prasad Sharma (PW-3)-Head Constable at the police station stopped one Ecomet vehicle WB-73D/0558 (for short 'the vehicle') on 12.10.2015 at around 5:30 a.m. when he saw the appellant no.2 with a girl and another boy in it. He knew the appellant no.2. The appellant no.2 tried to cover and hide the girl. Suspecting, he told them to get out and informed Karma Chedup Bhutia (PW-1) who was the officer-in-charge of the police station.

7. The victim was handed over to Alvina Rai (PW-8), the Sub-Centre Head of Childline. The First Information Report (for short 'the FIR') (Exhibit-1) lodged on 12.10.2015 by Alvina Rai (PW-8) confirms the assertion made by Ganga Prasad Sharma (PW-3) and Karma Chedup Bhutia (PW-1). The victim was forwarded to the primary health centre for medical examination

by the Investigating Officer (PW-11) on 12.10.2015 at 12:25 hours. The prosecution did not produce the doctor who examined the victim at the primary health centre in Court. Resultantly, the medical report (Exhibit-24) of the victim after her examination on 12.10.2015 at the primary health centre remains not proved. On the same day at 6 p.m. Dr. Rajesh Kharel (PW-5) examined the victim. Dr. Rajesh Kharel (PW-5) found no external injury on her person. Her hymen was lax which according to him suggested that the victim was used to sexual intercourse. There was no fresh injury on her hymen. Dr. Rajesh Kharel (PW-5) obtained her vulva-vaginal swab/wash and forwarded it for cytopathological analysis. However, Pooja Lohar (PW-9) could not detect any blood, semen or any other body fluid from the swab/wash of the victim.

8. The appellants were sent for medical examination on 13.10.2015 after their arrest. Dr. Sanjay Rai (PW-10) examined them. He did not find any injury on the appellants. He opined that the appellants were capable of performing sexual intercourse. According to Dr. Sanjay Rai (PW-10), smegma was absent from both the appellants.

9. On the basis of the statement of the victim, the Investigating Officer (PW-11) seized a truck no. SK-04D/0531 (for short 'the truck') from the appellant no.1 and the vehicle from

the appellant no.2 which was detained at the Check Post in the presence of Amit Pradhan (PW-7) and Pranab Sharma (PW-2). Seizure memos (Exhibit-3 and Exhibit-4, respectively) were prepared thereafter. Both Amit Pradhan (PW-7) and Pranab Sharma (PW-2) confirmed the seizure of the truck and the vehicle. Both the witnesses also confirmed the seizure of the two underwears from the truck and the vehicle. Amit Pradhan (PW-7) confirmed that the brown underwear (MO-I) was recovered from the truck and the grey underwear (MO-II) from the vehicle, although he could not confirm which belonged to whom. However, seizure memo (Exhibit-3 and Exhibit-4) reflects that the brown underwear (MO-I) was seized from appellant no. 1 and grey underwear (MO-II) from the appellant no.2. This fact has been proved by the Investigating Officer (PW-11) as well. Alvina Rai (PW-8) deposed that on 12.10.2015 at the police station, the victim disclosed to her that she had been sexually assaulted by the driver of a TATA vehicle. She also deposed that she had accompanied the police and the minor victim to the place of occurrence where the victim had been sexually assaulted. A green cloth (MO-III) was found there. It was seized by the police through seizure memo (Exhibit-17) in her presence. Amit Pradhan (PW-7) was the other witness to the seizure of the green cloth (MO-III) vide seizure memo (Exhibit-17). He also confirmed the seizure of the green cloth (MO-III) which was lying on the ground at the place of occurrence. The green cloth (MO-III) and

the two underwear (MO-I and MO-II) were sent for forensic examination. Pooja Lohar (PW-9) detected human semen in the green cloth (MO-III) which gave positive test for blood group 'A'. Pooja Lohar (PW-9) also detected human semen in the brown underwear (MO-I) which belongs to the appellant.

10. The evidence led by the prosecution proves that the victim first travelled in the truck with the appellant no.1 and thereafter in the vehicle with the appellant no.2 after which she was rescued. The prosecution has also been able to establish that there was sexual activity in the night before the apprehension. Therefore, the evidence of the victim became vital.

11. The victim was examined on 27.10.2015 by the learned Judicial Magistrate (PW-4) and her statement under section 164 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') was recorded after being satisfied that she understood the nature of the proceedings and could be a competent witness.

12. The victim deposed before the Court on 11.05.2016. She stated that she was sixteen years old and not studying in any school. She recognised the appellants. She deposed that:

> "I know the two accused persons who are present before the Court. Few months back, I had gone to Siliguri with one Puran daju (my cousin). At

> Siliguri I met accused Vodafone at Big Bazaar shopping complex. After being familiar with him I came to Jorethang in his vehicle on the following day. I had spent the night in my cousin's place at Siliguri. The said accused brought me to Jorethang where I met my aunt. In fact, the handy boy of accused Vodafone was also there when we came to Jorethang from Siliguri. That evening I again met accused Vodafone near Jorethang bridge. He told me that he would drop me to Melli. Accordingly, I boarded his truck and we started proceeding towards Melli. His handy boy was also there. On the way to Melli the accused stopped the truck at one place and asked his handy boy to leave. He then raped me by putting his pishab garney(penis) into my pishab garney(vagina). He did it once. After sometime the other accused came over there in an Ecomate truck. His young handy boy was also with him. Accused Vodafone asked me to get inside that Ecomate truck. The other accused and his handy boy then raped me inside the said truck. Later, while we reached the Melli Checkpost (on Sikkim border) for entering in West Bengal I was spotted by the police. I told the police about the above incidents. ....."

13. The victim was cross-examined by the defence. It transpires that the vehicle arrived at the place of occurrence after half an hour. According to the victim, she spent the night in the vehicle and it is only in the morning hours that she was taken towards the check post where the police found her. She could not recollect from where the green cloth (MO-III) was recovered. The victim had gone to Siliguri looking for a hotel job with the permission from her mother.

14. From the evidence of the victim, it is clear that there were three persons involved. The victim had befriended the appellant no.1 at Big Bazaar shopping complex and after becoming familiar; she voluntarily went to Jorethang with him in

his truck the following day. One handy boy of the appellant no.1 was also there in the truck. The victim met her aunt at Jorethang. Later in the evening she met the appellant no.1 again near the bridge. Appellant no.1 told her that he would drop her. Accordingly, she boarded the truck with the appellant no.1 and the handy boy. On the way, the appellant no.1 stopped the truck, asked his handy boy to leave and thereafter, he committed rape on her. After sometime, the appellant no.2 came there in the vehicle with his handy boy. The appellant no.1 asked her to get inside the vehicle where both the appellant no.1 and his handy boy committed rape on her.

15. Rape is defined in section 375 IPC, as under:

> "**375. Rape.** – A man is said to commit "rape" if he –
>
> (a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (b) Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
>
> (c) Manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
>
> (d) Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,
>
> under the circumstances falling under any of the following seven descriptions:-
>
> First. – Against her will.
>
> Secondly. – Without her consent.

> Thirdly. – With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.
>
> Fourthly. – With her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.
>
> Fifthly. – With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.
>
> Sixthly. – with or without her consent, when she is under eighteen years of age.
>
> Seventhly. – When she is unable to communicate consent.
>
> Explanation 1. – For the purposes of this section, "vagina" shall also include *labia majora*.
>
> Explanation 2. – Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act:
>
> Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.
>
> Exception 1. - A medical procedure or intervention shall not constitute rape.
>
> Exception 2. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

16. There is no medical evidence to support the prosecution version that the victim was raped by the appellants. Forensic investigation, however, detected semen on the green cloth (MO-III) and the brown underwear (MO-I). The discovery of the semen on the green cloth (MO-III) corroborates the evidence of the victim that the appellant no.2 had used it to wipe his penis

after ejaculation. The detection of semen in the brown underwear (MO-I) which was seized from the appellant no.1 connects him to the act of sexual intercourse as deposed by the victim. In the circumstances what is necessary to be examined is whether it amounted to rape and if so, the appellants could be punished for gang rape.

17. If the woman is below the age of eighteen, consent is immaterial. To constitute rape otherwise, consent is vital. If it is a case falling under the POCSO Act, consent is immaterial.

18. Mr. Birendra Pourali's submission that the prosecution has failed to prove that the victim was a minor gathers importance. The victim has stated that she was sixteen years old in answer to the questions put by the learned Special Judge. Besides this statement, there is a birth certificate (Exhibit-14). There is no evidence to show how the birth certificate (Exhibit-14) was procured by the prosecution. The Investigating Officer (PW-11) is silent about it. The prosecution exhibited the birth certificate (Exhibit-14) through the victim. She deposed that it was hers. The defence did not cross-examine the victim on the birth certificate (Exhibit-14) or her age. The birth certificate (Exhibit-14) reflects the date of registration on 07.04.2000 which is much prior to the incident. The difference in the surname of the victim in the birth certificate (Exhibit-14) and

her deposition pointed out in the appeal was not put to the victim during her cross-examination. In any case, both surnames are alternate surnames of the same community. The Investigating Officer (PW-11) identified the birth certificate (Exhibit-14) as the victim's in which her date of birth was recorded as 26.03.2000. The defence denied that the birth certificate (Exhibit-14) which recorded the victim's birth date as 26.03.2000 was the birth certificate (Exhibit-14) of the victim. No other evidence was brought forth by the prosecution to establish the age of the victim.

19. In ***R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple***[1], the Hon'ble Supreme Court elucidated:

> **"20.** The learned counsel for the defendant-respondent has relied on *Roman Catholic Mission* v. *State of Madras* [AIR 1966 SC 1457] in support of his submission that a document not admissible in evidence, though brought on record, has to be excluded from consideration. We do not have any dispute with the proposition of law so laid down in the above said case. However, the present one is a case which calls for the correct position of law being made precise. Ordinarily, an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (*i*) an objection that the document which is sought to be proved is *itself inadmissible* in evidence; and (*ii*) where the objection does not dispute the admissibility of the document in evidence but is directed towards the *mode of proof* alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as "an exhibit",

[1] (2003) 8 SCC 752

> an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken when the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The latter proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the latter case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in a superior court."

20. The defence did not raise any objection when the victim exhibited her birth certificate (Exhibit-14). A suggestion was made to the Investigating Officer (PW-11) that the birth certificate (Exhibit-14) was not of the victim which was denied. The contention of Mr. Birendra Pourali that the prosecution had failed to prove the birth certificate (Exhibit-14) by leading cogent evidence has to be rejected in view of the fact that the defence failed to object to the exhibition of the birth certificate (Exhibit-14) by the victim. It was the victim's birth certificate (Exhibit-14)

and therefore, she would have knowledge about it. If the defence desired to question the veracity of the information in the birth certificate (Exhibit-14), they ought to have objected to its exhibition which would have, if taken at the appropriate point of time, enabled the prosecution tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object thus becomes fatal because by the failure of the defence who was entitled to object, allowed the prosecution to tender the evidence and act on an assumption that the defence is not serious about the mode of proof. The victim's statement that she was sixteen was not even questioned during her cross-examination. In the circumstances, we are of the considered view that the learned Special Judge accepting the birth certificate (Exhibit-14) as that of the victim and holding that the victim was a minor at the time of the offence brooks no interference. However, the prosecution ought to have led cogent evidence both documentary and oral to prove the minority of the victim since it is on the basis of this determination that the Court proceeds to examine the case under the POCSO Act.

21. As the learned counsel for the appellants challenges the impugned judgment on the question of the minority of the victim, it is necessary for us to examine whether the evidence led by the prosecution allows us to believe that the act was consensual. Explanation 2 to section 375 IPC explains that

consent means "*An unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act: provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity*." The evidence of the victim reflects no such communication either by words, gestures or any form of verbal or non-verbal communication. In such circumstances, mere failure to physically resist the sexual act of penetration cannot be regarded as her consenting to sexual activity. That there was penetration in the sexual intercourse with the appellants cannot be doubted. The victim has deposed that both of them raped her. She even described that the appellant no. 1 had inserted his penis into her vagina. When the victim says that she was raped by the appellants there is no reason to doubt the same. More so, her deposition is corroborated by forensic evidence. Mere passive submission and the victim's inability to say no in the given situation cannot be termed as victim's consent. We are of the view that the victim being a minor, the question of consent has no relevance. Even otherwise, the evidence is not suggestive of consent as per Explanation 2 to section 375 IPC.

22. We shall now examine whether the act of rape committed by the appellant no.1 in the truck and thereafter, by

the appellant no.2 in the vehicle amounts to gang rape. Section 376D defines gang rape as under:-

> "**376D. Gang rape**. – Where a woman is raped by one or more persons constituting a group or acting in furtherance of a common intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to life which shall mean imprisonment for the remainder of that person's natural life, and with fine:
>
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
>
> Provided further that any fine imposed under this section shall be paid to the victim."

23. The ingredients of the offence of gang rape are:

(i) a woman is raped;

(ii) (a) she is raped by one or more persons constituting a group; or

(b) she is raped by one or more persons acting in furtherance of a common intention;

24. In ***Hanuman Prasad and Another vs. State of Rajasthan***[2], the Hon'ble Supreme Court while explaining section 376(2)(g) IPC before the insertion of section 376D IPC, held:

> "**10.** The important expression to attract Section 376(2)(*g*) is "common intention". The essence of the liability in terms of Section 376(2) is the existence of common intention. In animating the accused to do the criminal act in furtherance of such intention, the principles of Section 34 IPC have clear application. In order to bring in the concept of common intention it is to be established that there was simultaneously consensus of the minds of the persons participating in the act to bring about a particular result. Common

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[2] (2009) 1 SCC 507

> intention is not the same or similar intention. It presupposes a prior meeting and prearranged plan. In other words, there must be a prior meeting of minds. It is not necessary that preconcert in the sense of a distinct previous plan is necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons which has to be gauged on the facts and circumstances of each case."

25. There is no evidence that the appellants formed a group of one or more persons. The victim had travelled voluntarily with the appellant no.1 and the first act of sexual intercourse with him in the truck was much before the appellant no.2 arrived in the vehicle. There is no evidence led by the prosecution that the appellants were known to each other prior to the incident. That the appellant no.2 also raped the victim in the vehicle along with another is clearly established. The victim, however, deposed that the appellant no.1 asked her to get inside the vehicle of the appellant no.2 after which the appellant no.2 and his handy boy raped her in the vehicle. This circumstance clearly leads us to unflinchingly infer that the appellants were known to each other and that the common intention is clearly reflected by the element of participation in action at the place of occurrence. The two vital ingredients necessary for constituting the offence of gang rape being satisfied, the conviction of the appellants under section 376D IPC cannot be faulted.

26. The appellants have also been convicted for gang penetrative sexual assault on a child under section 5(g) of the POCSO Act. The said provision reads as under:

> "**5. Aggravated penetrative sexual assault**. – (g) whoever commits gang penetrative sexual assault on a child.
>
> *Explanation*. – When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone;
>
> is said to commit aggravated penetrative sexual assault."

27. In view of the fact that we have held that there was common intention between the appellants and the act of rape had been committed by them, the conviction of the appellants for commission of aggravated penetrative sexual assault must also be upheld.

28. The learned Special Judge has sentenced the appellants to undergo rigorous imprisonment for twenty years for the offence of gang rape. That was the minimum sentence prescribed under section 376D IPC. Section 376D IPC mandates that in addition to imprisonment, the appellants must also be imposed fine which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim and that the said fine would be paid to the victim. The learned Special Judge has failed to impose fine although he has sentenced the appellants to rigorous imprisonment for a period of twenty years. This was incorrect. Section 53 IPC provides that fine is a mode of punishment. Section 386 Cr.P.C. provides that in an appeal from

conviction, the appellate court may not enhance the sentence. Thus, in view of the failure of the prosecution to seek enhancement of the sentence, we are precluded from imposing the fine as mandated.

29. Nevertheless, we are of the considered view that the victim must be compensated for the offence of rape committed on her under the Sikkim Compensation to Victims or his Dependents Schemes, 2001 as amended. Since the offence was committed in October 2015, the victim shall be given an amount of Rs.1,00,000/- (one lakh) as compensation by the Sikkim State Legal Services Authority on due verification.

30. We, therefore, uphold the impugned judgment dated 26.07.2017 and the order on sentence dated 28.07.2017 but with the above caveat. Consequently, the appeal is dismissed.

31. We direct the Registry to transmit a copy of this judgment to the Court of the learned Special Judge (POCSO), South Sikkim at Namchi and another to the learned Member Secretary, Sikkim State Legal Services Authority, for compliance.

32. A copy of this judgment shall also be furnished free of cost to the appellants.

33. The record of the learned trial Court be returned forthwith.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

Approved for reporting : **Yes/~~No~~**
Internet : **Yes/~~No~~**

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