



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

Crl. A. No. 02 of 2019

Depesh Tamang,
aged about 19 years,
S/o Norbu Tamang,
R/o Lotus Valley,
Gyalshing, West Sikkim.

At present Rongyek Jail,
Gangtok, East Sikkim.

...Appellant

Versus

State of Sikkim

...Respondent

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, C.J.
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, J.

For Appellant : Mr. Manish Kumar Jain, Legal Aid Counsel.

For Respondent : Ms. Mukun Dolma Tamang, Assistant Public
Prosecutor.

Date of Hearing : 16.03.2020.

Date of Judgment : 23.03.2020.

JUDGMENT

(Arup Kumar Goswami, CJ.)

This appeal is presented against the judgment dated 29.11.2018 and order on sentence dated 30.11.2018, passed by the learned Special Judge (POCSO), West Sikkim at Gyalshing, in Sessions Trial (POCSO) Case No. 01 of 2018, convicting the accused/appellant under Section 5(I) of the Protection of Children from Sexual Offences Act, 2012, for short, 'the POCSO Act', punishable under Section 6 of the POCSO Act and sentencing him to suffer Rigorous Imprisonment for a period of 10 years and to pay a fine of Rs.10,000/-, in default of payment of fine, to suffer Simple Imprisonment for two months.



An FIR was lodged by the father of 'X' (name withheld) before the Station House Officer, Tikjuk Police Station on 31.12.2017 stating that his daughter, aged about 15 years, did not come back after she had gone for tuition and that she had eloped with the accused and they were then traced in Gangtok. It is stated that while investigating, it came to light that the accused had sexually assaulted his daughter several times. On receipt of the FIR, GD Entry No. 138 was registered and subsequently, Gyalshing Police Station Case No. 42 of 2017 under Section 363/376 of the Indian Penal Code, 1860, for short, 'the IPC' read with Section 4 of the POCSO Act came to be registered against the accused (Exhibit-17). After completion of investigation, police submitted charge-sheet under Sections 363/376 of the IPC, read with Section 4 of the POCSO Act against the accused whereupon ST (POCSO) Case No. 01 of 2018 was registered in the Court of Special Judge (POCSO).

3. Statement of 'X' was recorded under Section 164 of Code of Criminal Procedure, 1973, for short, 'Cr. P.C.', before the learned Judicial Magistrate (I/C), West Sikkim at Gyalshing on 29.01.2018. Both 'X' and accused were also medically examined.

4. Upon hearing learned counsel for the parties and on perusal of the materials on record, charge was framed against the accused under Section 376(2)(i) of the IPC and under Section 5(I) of the POCSO Act punishable under Section 6 of the POCSO Act. When charges were read over and explained to the accused, he pleaded not guilty and claimed to be tried.

5. The prosecution examined 16 witnesses while defence adduced no evidence. The accused was examined under Section 313 of Cr. P.C. where he took the plea of denial. The proceedings were held in camera.

6. Mr. Manish Kumar Jain, learned Legal Aid Counsel, has submitted that 'X', who was examined as PW1 did not implicate the accused either in her Section 161 Cr. P.C. statement or under Section 164 Cr. P.C. statement which was exhibited as Exhibit-1 and only in the Court, while deposing she had stated that she and the accused had 'physical relationship' 5/6 times and therefore,



h evidence cannot be relied upon. Her father (PW13) and mother (PW14) also did not implicate the accused of any penetrative sexual assault or sexual assault upon their daughter. In any view of the matter, it cannot be inferred that 'physical relationship' means aggravated sexual assault within the meaning of Section 3 of the POCSO Act, he submits. He further submits that the evidence of PW1 cannot inspire confidence as it would be wholly unrealistic to accept her statement that she did not remember the month, if not the date of having such 'physical relationship', given that she was categorical in stating 05.07.2017 as the date when their affair had developed. Over and above, no material particulars with regard to such 'physical relationship' were given. He submits that learned trial Court had relied upon the evidence of PW1, the Doctor (PW9) who had examined 'X' and the Investigating Officer (PW16) in convicting the accused. He contends that there was nothing in the evidence of PW9 suggesting that there was penetrative sexual assault on 'X' and that statement made by PW9 that 'X' had given history of sexual assault with consent 5/6 times with the accused cannot form the basis of conviction when the evidence of PW1 is wholly untrustworthy. The evidence of PW16 also in no way establishes the guilt of the accused and the statement of PW1 under Section 161 Cr. P.C. as stated by PW16 during cross-examination demonstrates that there was no allegation of sexual offence. Accordingly, he submits that the prosecution has failed to prove the guilt of the accused beyond any reasonable doubt and, as such, the accused is entitled to acquittal.

7. Ms. Mukun Dolma Tamang, learned Assistant Public Prosecutor, submits that on the basis of testimony of PW1 alone, conviction of the accused can be sustained. Further, PW9 had corroborated the evidence of PW1 and, therefore, no interference is called for with the impugned judgment.

8. We have considered the submissions of the learned counsel for the parties and have perused the evidence and the materials on record.

9. A perusal of the judgment of the learned trial Court goes to show that on the basis of evidence of PW1, PW9 and PW16, the learned trial Court had held



t the accused had committed repeated penetrative sexual assault upon PW1.

10. Learned trial Court had put certain questions to 'X' and on receiving the response from the minor witness, learned trial Court observed that 'X' was competent to testify. In her evidence, she stated that she had appeared for Class X examination and that she came to know the accused who used to drive a vehicle of a neighbour from June, 2017. She had met the accused on 05.07.2017 near her house and, thereafter, they developed an affair and started meeting each other quite often. They planned to meet at Darap on 30.12.2017 to go to Gyalshing and accordingly, having met, they left for Rimbi in a truck driven by the accused. They came back to Gyalshing with a load of stone and then the accused had gone to his house, which was near a petrol pump, to change and during that time she waited near the petrol pump. Thereafter, they went to Gangtok and reached the house of the uncle of the accused (PW6) at Bhojoghari. As her phone battery was dead, she took out the SIM card from her phone and put the same in the phone of the uncle of the accused. She received a phone call from her father who enquired her whereabouts and after informing him where she was, she disconnected the phone. As the accused told her that her parents must be worried about her, they decided to go to Sadar Police Station, Gangtok and accordingly, she, along with the accused, his uncle and aunt went to the Police Station on the very same day that they had reached Gangtok. The elder brother of her father was waiting at the Police Station and while they were waiting for her parents to come, the accused was taken for medical examination. After her parents had arrived, they went to Tikjuk Police Station, where her statement was recorded by police. She stated that during the time when she was having an affair with the accused, they had 'physical relationship' for about 5-6 times, but she did not remember the date and month of such physical relationship, though such physical relationship was in the year 2017. She also exhibited her statement



der Section 164 Cr. P.C. as Exhibit-1. She deposed that her date of birth is 14.11.2002 and she had exhibited her Birth Certificate as Exhibit-3.

In her cross-examination, she stated that one Lalita had called her over phone once and had told her that she was already married to the accused, upon which, she told her that since she had feelings for the accused, she wanted to keep relation with him. She reiterated that she and the accused were close to each other and that she stated the truth in Exhibit-1. She also stated that the accused had wanted her to go back home on 30.12.2017, but it was she who had asked him to take her to Gangtok. She stated that the accused had never threatened her or put her under any kind of pressure. She further stated that she harboured a doubt that the accused was having affair with other girls and that he might marry somebody else. She denied the suggestion that she did not have any sexual contact and also the suggestion that as she was infatuated with the accused and as he did not respond favourably to her, she had made the false allegations.

11. PW2 is a friend of PW1 and they were studying together. She stated that on 30.12.2017, she saw PW1 outside the gate of the school and she having asked her to come inside, PW1 said that she was waiting for a person. When PW2 told that her parents will reprimand her if she was found going around with a person, PW1 told her that she would come to the class after some time. During roll call, she told the teacher (PW3) that PW1 was outside the school gate and, on being so told, PW3 had gone out looking for PW1. This witness was not cross-examined.

12. PW3 is the teacher who was referred to by PW2 and he corroborated the statements of PW2. He was also not cross-examined.

13. PW4 stated that the accused used to drive the vehicle of her neighbour and at one point of time, she had rented out a room to the accused, but he left the said room on 08.07.2017. She was also not cross-examined.

14. PW5, in his evidence, stated that the accused used to drive his vehicle for 24 days and during that time, he used to stay in the rented house of PW4.



cross-examination, he, however, stated that he was not sure whether the accused used to stay in the rented house of PW4.

15. PW6 is the uncle to whose house the accused had gone along with PW1. He stated that at around 09.30 pm, he received a phone call from the father of the accused, who enquired of him as to whether the accused and PW1 had come to his house. He, accordingly, had informed him that they had come. Father of PW1 also called him and had requested him to take the accused and the girl to Sadar Police Station, Gangtok and accordingly, he had taken them to the Police Station.

In his cross-examination, he stated that they did not stay in his house for the night and that PW1 had told him that she came with the accused on her own free will. He denied the suggestion that the father of the girl did not call him and had not requested him to take them to the Police Station.

16. PW7 is a witness to the Seizure Memo (Exhibit-4) by which Birth Certificate of PW1 was seized. He denied the suggestion that he did not sign in Exhibit-4.

17. PW8 is another witness to the Seizure Memo, Exhibit-4. He also denied the suggestion that he did not sign the Seizure Memo.

18. PW9 is the Gynaecologist posted at District Hospital, Gyalshing, West Sikkim. She deposed that on 31.12.2017, at around 10.00 am, a girl aged about 15 years was forwarded by the Gyalshing Police Station with alleged history of sexual assault by the accused. The girl stated that she eloped with the accused on 30.12.2017 and she also gave history of sexual assault with consent several times since 5-6 months. She stated that there were old hymeneal tears present at 3, 6 and 9 O' Clock position, which, according to her, was suggestive of injury in the past. Laboratory report did not indicate presence of motile or non-motile spermatozoa. She had exhibited the Medical Report prepared by her as Exhibit-5.

In her cross-examination, she stated that hymeneal tear in female child can also occur due to activities like sports and physical tasks.



PW10 is the District Medical Superintendent-cum-Registrar of Birth & Deaths of Gyalshing District Hospital. He stated that on a requisition of the Investigating Officer of the case, he issued a letter certifying the authenticity of the Birth Certificate of PW1, showing her date of birth as 14.11.2002 and date of registration as 21.11.2002. He had also issued certificate of authenticity of Birth Certificate of the accused showing his date of birth as 24.08.1998 and date of registration as 08.09.1998. He had exhibited as Exhibit-19, the Medical Report in respect of the accused, which was prepared by Dr. Srijana Subba.

20. PW11 is the Principal of the School where PW1 was studying and she had stated that on a requisition given to her, she had, after verifying school records, intimated a Sub-Inspector of Police that the date of birth of PW1 was 14.11.2002.

21. PW12 is the Chief Judicial Magistrate, who was also In-Charge of the Court of Judicial Magistrate, West Sikkim, Gyalshing. She deposed that she had recorded the statement of 'X' under Section 164 Cr. P.C. and before such recording, she had satisfied herself that 'X' desired to give her statement voluntarily.

In her cross-examination, she stated that the victim had not made any allegation of sexual assault in Exhibit-1.

22. PW13, the father of 'X' and the informant stated that as 'X' did not return from her tuition they searched in the nearby localities and they suspected that the accused may have taken his daughter and accordingly, verbally reported the matter to Darap Police Out-post. On the same very day, at night, they came to learn that the accused had taken his daughter to his uncle's house at Gangtok. As Gangtok Sadar Police Station found his daughter along with the accused, they went there and brought them back to Gyalshing Police Station. He stated that his daughter was born in the year 2002.

In his cross-examination, he stated that he was aware of the fact that his daughter was having an affair with the accused and that his daughter had not stated anything adverse against the accused. He denied the suggestion that he



s informed by the father of the accused that his daughter and accused were in Gangtok.

23. PW14, the mother of 'X' stated that as 'X' did not return home after tuition, they looked for her in the nearby localities and they suspected that the accused had taken her daughter and accordingly, the matter was reported to Darap Police Out-post. On the same very night, they came to learn that the accused had taken her daughter to his uncle's house at Gangtok. Gangtok Sadar Police found her daughter and the accused and accordingly, they went to Sadar Police Station, Gangtok and brought her daughter to Gyalshing Police Station. She also stated that 'X' was born during the year 2002.

In her cross-examination, she stated that on being asked once prior to the incident, 'X' denied having any relationship with the accused. She also deposed that the accused was seen with another girl prior to the incident. She further stated that she does not have any complaint against the accused person.

24. PW15 was the Station House Officer of Gyalshing Police Station at the relevant point of time. He stated about the registration of the FIR lodged by the father of 'X', as Exhibit-17. He stated that PW13 had brought the victim and the accused to the Police Station.

25. PW16 is the Investigating Officer of the case. She deposed about the various steps taken by her during investigation. She stated that she had recorded the statement of witnesses under Section 161 Cr. P.C. She stated that 'X' proceeded to Gyalshing Bazaar in a tipper, which was driven by the accused and he took the victim to Gangtok in a tourist vehicle without informing anyone and stayed in the house of PW6. After strenuous search, the accused and the victim were traced early morning and they were produced at Gyalshing Police Station. It is further stated by her that during the course of investigation it was revealed that at around 12.00 hours, in the afternoon, the complainant (father of the child victim) had seen the accused driving the tipper bearing No. SK-02D/0238 and proceeding towards Darap Bazar and he



spected that the accused had come to meet his daughter. While the accused was working in Darap as a driver there was rumour that they had an affair. As such the complainant inquired about his daughter from her tuition teacher and at around 16.30 hours, he came to know that his daughter did not go for tuition. Accordingly, the entire family then started searching for 'X'. She also stated that the accused used to call 'X' to his rented room of PW4 and 'X', unaware of the intention of the accused, had visited his room, wherein the accused used to sexually assault the child victim. It is also stated that when 'X' came to learn that her parents were searching for her she along with the accused went to Sadar Police Station, from where they were brought back to Gyalshing. She stated that the statement of victim under Section 161 Cr. P.C. and medical report of the victim suggested that she was sexually assaulted multiple times in the past.

In her cross-examination, she stated that the victim in her statement under Section 161 Cr. P.C. had stated that when she and the accused had just reached Gangtok, they received a phone call at 10.30 pm informing that her parents were looking for her and then both of them were taken to Sadar Police Station, Gangtok by the uncle of the accused (PW6). She denied the suggestion that there was no sexual contact between 'X' and the accused and she also denied the suggestion that the accused did not sexually assault her in his rented room.

26. That PW1 was a minor at the relevant time, aged about 15 years, is not disputed by Mr. Jain. The accused was, at the relevant time, aged about 19 years. It appears that it was PW1, who had asked the accused to take her to Gangtok, though the accused wanted her to go back home on 30.12.2017. It is evident from the evidence of PW1 that she had a soft corner and feelings for the accused. Though PW16, Investigating Officer, during her deposition, at one stage, had stated that after strenuous search the victim and the accused were traced next morning, in subsequent stage, she stated that PW1 and accused person themselves had gone to the Sadar Police Station, Gangtok after PW1



ne to learn that her parents were searching for them. PW6 stated that father of the accused as well as father of PW1 had called him on that day and he had taken the accused and PW1 to the Sadar Police Station on the request made by father of PW1. Though PW13 and PW14 had stated that they had come to know that the accused had taken his daughter to the house of PW6 at Gangtok, they did not divulge the source from which they came to know about the same. Deposition of PW13 makes it clear that he was aware that the accused and his daughter were having an affair.

27. This episode of accused and PW1 coming to Gangtok is not very relevant for the purpose of this case.

28. The appellant was convicted under Section 5 (I) of the POCSO Act, i.e. on the ground he had committed penetrative sexual assault on the child more than once or repeatedly. Penetrative sexual assault is defined as follows:

"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."



It will also appropriate to note the definition of 'sexual assault' as per Section 7, which reads as follows:

"7. Sexual Assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

30. Though PW13 in his FIR had stated that the accused had sexually assaulted his daughter several times, in his evidence as PW13, he was conspicuously silent about such allegation and rather, in his cross-examination, had stated that his daughter had not stated anything adverse against the accused. Logical conclusion will be that PW1 had not stated anything about any sexual assault or penetrative sexual assault to him. PW14, mother of 'X', had also not stated that PW1 had told her that the accused had made any sexual assault, far less aggravated sexual assault at any point of time to her. PW14 stated that she does not have any complaint against the accused, while stating at the same time that the accused is not innocent. It will not be unreasonable to hold that a mother will definitely have complaint against a person if he had committed any sexual offence on her minor child. It is not clear what she meant when stated that the accused is not innocent.

31. In her evidence, PW16 did not state on the basis of whose statement she came to learn that the accused used to call PW1 to his rented room and sexually assaulted her. There is no evidence to that effect in the depositions of any of the witnesses examined on behalf of the prosecution. From her cross-examination, it would appear that PW1, in her Section 161 Cr. P.C. statement, had only stated that when she and accused had reached Gangtok there was a phone call at 10.30 pm stating that her parents were looking for her and then both were taken to Sadar Police Station by the uncle of the accused (PW6).



dence of PW16 does not in any manner lead to a possible conclusion that the accused is guilty of the offence alleged.

32. There is no ingredient of penetrative sexual assault in the evidence of PW1. Evidence of PW1 is that she had 'physical relationship' with the accused 5/6 times. What is meant by 'physical relationship' had not been explained. 'Physical relationship' may be in very many ways. By a process of surmises and conjectures, 'physical relationship' cannot be construed to mean penetrative sexual assault within the meaning of Section 3 of the POCSO Act. PW9 in her evidence had stated that PW1 had given a history of sexual assault with consent several times. As such, it may be contended that PW1 being a minor, 'physical relationship' comes within the ambit of sexual assault as defined under Section 7 of the POCSO Act.

33. In her statement recorded under Section 164 Cr. P.C. (Exhibit-1) on 29.01.2018, PW1 had stated as follows:

"On 30.12.2017 myself and my boyfriend, Dipesh decided to meet at Darap. After we met we came to Geyzing. It got late so we went towards Gangtok where we stayed at the house of his *Kaka*. My mother called me up and asked me where I was. After that Dipesh told me that my mother was very worried so we went to Sadar Thana and from there we were brought to Geyzing."

34. It is seen from the above that PW1 did not make any allegation of aggravated sexual assault or sexual assault or of any other sexual offence against 'X'. PW1 had stated that Exhibit-1 contained her true statement. Materials on record demonstrate that PW1 did not make allegation of sexual assault of any kind in her statement under Section 161 Cr. P.C also. In such circumstances, we find it difficult to accept the testimony of PW1, when she, for the first time, talked about a 'physical relationship' with the accused. In the aforesaid context, evidence of PW9 cannot form the basis of conviction for sexual assault also.



In view of the above discussion we are of the opinion that the prosecution has not been able to establish the guilt of the accused beyond reasonable doubt. Accordingly, the impugned judgment is set aside and the accused is acquitted and set at liberty.

36. Lower Court records be sent back.

Judge

Chief Justice

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