



# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 21<sup>st</sup> March, 2020

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**SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

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Crl.A. No.13 of 2019

**Appellant** : Binod Sanyasi

**versus**

**Respondent** : State of Sikkim

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

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**Appearance**

Mr. Bhusan Nepal, Advocate for the Appellant.

Ms. Mukun Dolma Tamang and Mr. Hissey Gyaltsen Bhutia,  
Assistant Public Prosecutors for the State-Respondent.

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## J U D G M E N T

Meenakshi Madan Rai, J.

**1.** The Appellant impugns the Judgment in Sessions Trial (POCSO) Case No.25 of 2018 (*State of Sikkim vs. Binod Sanyasi*), dated 30.05.2019, and the Order on Sentence of even date, wherein he was convicted of the offence under Section 354 of the Indian Penal Code, 1860 (hereinafter "IPC") and sentenced to undergo Simple Imprisonment for a term of one year and to pay a fine of Rs.2,000/- (Rupees two thousand) only, with a default clause of imprisonment.

**2.** The Prosecution case is that on 08.10.2018 at around 21:00 Hrs, a verbal Complaint was received from the victim at the Kaluk Police Station (reduced into writing by the



Police), to the effect that when she was alone at home that evening, after School, the Appellant came to her home, touched her body, her private parts and also attempted to sexually assault her. He was unable to accomplish his intentions as her brother returned home. She narrated the incident to her father upon which the First Information Report ("FIR") came to be lodged, seeking redressal. The case was duly registered under Section 376 IPC read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the "POCSO Act") and taken up for investigation.

**3.** Investigation revealed that the victim, a student of Class IV, in a Senior Secondary School, was living with her family. On the relevant day when she reached home, she was followed home by her younger brother shortly, who came along with another boy and the Appellant. The victim directed her younger brother to fix the water pipes and he left along with the other boy to attend to the chore. As she was left alone with the Appellant he attempted to sexually assault her inside her home. On completion of investigation, Charge-Sheet was submitted against the accused/Appellant under Section 354 IPC read with Section 8 of the POCSO Act. The learned trial Court framed charge against the Appellant under Section 9(m) of the POCSO Act and Section 354 IPC. On examination of 11 (eleven) Prosecution witnesses and closure of evidence thereof, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter the "Cr.P.C."), pursuant to which he sought to examine one Defence Witness. His witness was accordingly examined and the final arguments of the parties



were heard thereafter. The learned trial Court taking into consideration the entire evidence and documents on record, acquitted the Appellant of the offence under Section 9(m) of the POCSO Act, on the failure of the Prosecution to establish that the victim was below 12 years of age. The learned trial Court however convicted the Appellant under Section 354 IPC, observing that the Prosecution had proved its case for the said offence. The Sentence as extracted *supra* was meted out consequently.

**4.** Learned Counsel for the Appellant, before this Court, submits that the learned trial Court was in error in convicting the Appellant under Section 354 of the IPC, since the victim in her evidence has clearly stated that as she was afraid of her father she lied to him about the incident of sexual assault by the Appellant, when in fact no such assault had taken place. That, her cross-examination categorically reveals that the Appellant and another man had come to her house when she was washing utensils and she served them tea after which they both left the house. When her father returned home that evening and scolded her as to why she had spent time with the boys, she narrated a non-existent incident of sexual assault to him. However, she unequivocally admitted under cross-examination that the Appellant did not commit any kind of sexual assault on her. That, her evidence finds corroboration in that of PW2, her younger brother, who has stated that on the relevant day he had gone to the field to connect the water pipes and when he returned from the field he saw the Appellant along with one Manoj (DW1) coming out from their house as also his sister (victim). No



allegation of sexual assault was made by the victim to him. This finds substantiation in the evidence of DW1 as well who was with the Appellant at the victim's house that day. That, the victim herself having been declared hostile by the Prosecution, the other Prosecution witnesses have not been able to throw light on the alleged sexual assault. That, the evidence on record reveals that the victim's statement was recorded at the Police Station by a male Police personnel in contravention to the mandate of Section 24 of the POCSO Act. The conviction of the Appellant is based solely on the Section 164 Cr.P.C. statement of the victim which is not substantive evidence and the contents of Exhibit 3, the Section 154 Cr.P.C. statement of the victim, have not been proved by her. The evidence of the Doctor negatives the Prosecution case. It thus emanates that the Prosecution has failed to establish the offence against the Appellant under Section 354 IPC, hence the impugned Judgment and Order on Sentence be set aside.

**5.** Learned Assistant Public Prosecutor despite making efforts to support the Prosecution case conceded that the conviction of the Appellant was based on the Section 164 Cr.P.C. statement of the victim which is not substantive evidence.

**6.** I have heard the submissions put forth by Learned Counsel at length and given due and anxious consideration to the same. I have also carefully perused the records of the case including the evidence and the impugned Judgment and Order on Sentence.



7. The question that falls for consideration before this Court is whether the conviction handed out to the Appellant by the learned trial Court under Section 354 IPC can be sustained?

8. It is pertinent to mention that the acquittal of the Appellant under Section 9(m) of the POCSO Act has not been challenged by the Prosecution in any proceeding and has thereby attained finality.

9. While examining the evidence of the victim (PW1), it is revealed that on the relevant day when she came home from School, the Appellant along with another "Dada" (brother) came to her home. As she was washing utensils outside her home, the Appellant called her to the kitchen and asked for a cup of tea, which she offered, after which the said duo left the house. When her father came home he scolded her for talking to the Appellant and due to her fear of him, she told him that the Appellant had sexually assaulted her. Although she identified Exhibit 1 and Exhibit 2 as her Section 164 Cr.P.C. statements and Exhibit 3 as her statement recorded by the Police, the Prosecution declared her hostile on grounds that she was resiling from her statements under Sections 154 and 164 Cr.P.C. Under cross-examination by the Prosecution she deposed that she was not tutored by anyone in her house to give false evidence before the Court. Her cross-examination by the learned defence Counsel *inter alia* elicited the following information;

**".....It is true that on the relevant day, the accused did not do any kind of sexual assault on me.(sic) It is true that due to fear of my father, I gave a false statement to my father that the accused sexually assaulted me on the relevant day. It is true that in fact nothing had done (sic) to me by the accused**



***on the relevant day. ....It is true that the statement given by me to the police and the Judge Madam are false statements, which I had given due to fear of my father. ....It is not a fact that whatever I have statement in my examination in chief is false statement (sic). ..."***

**(Emphasis supplied)**

**10.** On careful consideration of the evidence of this witness, it is clear that she has denied the occurrence of the incident of sexual assault. The learned trial Court in its Judgment while considering the Section 164 Cr.P.C. statement of the victim has relied on the lone sentence of the victim in the Court which has emerged under cross-examination viz.

*".....It is not a fact that whatever I have statement in my examination in chief is false statement. (sic) ....."*

The learned trial Court was also impressed by the fact that the victim had consistently stated that she wanted to give her statement to the learned Magistrate so much so that she did not seek time to reflect and desired that the learned Magistrate record her statement the very same day viz. her Section 164 Cr.P.C. statement. The learned trial Court however discounted the evidence of the victim as deposed in the Courtroom wherein she categorically denied any sexual assault on her by the Appellant. Her father (PW3) has also stated that his victim daughter told him that she gave a false statement to the Police and to the Court as she was afraid of him. The evidence of the victim and her father are corroborative. Also it is worthwhile noticing that while categorically denying any sexual assault on her by the Appellant, the victim has detailed her reasons for levelling a false accusation against the Appellant, viz. that it was



on account of fear of her father when he scolded her and asked her why she was talking to the Appellant.

**11.** It is settled law that where the Prosecution version is not supported by its witnesses, the Court cannot rely on the Section 164 Cr.P.C. statement of the witness to convict the accused as such a statement is not substantive evidence. It may be reiterated that statement under Section 164 Cr.P.C. can only be used to corroborate or contradict statements made by the witness under Section 145 and Section 157 of the Evidence Act and can never be used as substantive evidence. In the light of this observation, it would be erroneous to rely upon the Section 164 Cr.P.C. statement of the victim and thereby convict the Appellant.

**12.** It may appositely be observed that Section 164 Cr.P.C. is resorted to during the course of investigation when an accused or any other person seeks to make a confession or statement, of his own free will and is generally recorded when there is apprehension that he may resile from his statement or his evidence is likely to be tampered with. The following observation pertaining to Section 164 Cr.P.C. was made by the Hon'ble Supreme Court in *R. Shaji vs. State of Kerala*<sup>1</sup> wherein it was held as hereunder;

**"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is**

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<sup>1</sup> (2013) 14 SCC 266



under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

**27.** So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. **A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.** (Vide *Jogendra Nahak v. State of Orissa* and *CCE v. Duncan Agro Industries Ltd.*)

**28.** Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. **As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.**

**29.** During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. (Vide *Mamand v. Emperor*, *Bhuboni Sahu v. R.*, *Ram Charan v. State of U.P.* and *Dhanabal v. State of T.N.*)”

(Emphasis supplied)

**13.** So far as the contents of Exhibit 3, her statement to the Police which was later reduced to writing and drawn up as the formal FIR, Exhibit 4, the contents therein are unproved. It was scribed by a Police personnel at the Kaluk Police Station who was not cited as a witness by the Prosecution and therefore not





examined. The Prosecution evidence nowhere reflects that the contents of Exhibit 3 were read over and explained to the victim after it was reduced into writing by the Police. This fact was not tested in the evidence-in-chief of the victim. All that she has stated in cross-examination conducted by the Prosecution is that;

*"It is true that my statement was recorded by the police at Kaluk PS which is marked Exhibit-3."*

PW11, the Investigating Officer of the case shed no light on this aspect as well. PW3, the victim's father has stated that Exhibit 3 is the statement of his daughter but no question was put to him as to its contents.

**14.** Merely because the victim affixed her signature on Exhibit 3, assumptions cannot be drawn of her knowledge of its contents. The document cannot prove itself, the contents thereof are required to be proved in terms of the provisions of the Indian Evidence Act, 1872 (hereinafter "Evidence Act") viz. Section 67 of the Act, unless the contents of the documents are said to be admissible by reasoning of a provision of a Statute, example, Section 90 of the Evidence Act. Identification of her signature on Exhibit 3 is not conclusive of knowledge of the contents, when the contents were not put to her to replenish her memory.

**15.** While addressing the question of the victim PW1 having turned hostile, the Hon'ble Supreme Court in **State of U.P. vs. Ramesh Prasad Misra**<sup>2</sup> has held that the evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused, but it can be subjected to close

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<sup>2</sup> (1996) 10 SCC 360



scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

**16.** In *K. Anbazhagan vs. Superintendent of Police and Others*<sup>3</sup> the Hon'ble Supreme Court held that if the Judge finds that in the process, the credit of the witness has not been completely shaken, he may, after reading and considering the evidence of the witness, as a whole, with due caution and care, accept, in the light of other evidence on the record, that part of his testimony which he finds to be creditworthy and act upon it.

**17.** The Hon'ble Supreme Court in *State through PS Lodhi Colony vs. Sanjeev Nanda*<sup>4</sup> *inter alia* held as follows;

"**101.** We cannot, however, close our eyes to the disturbing fact in the instant case where even the injured witness, who was present on the spot, turned hostile. This Court in *Manu Sharma v. State (NCT of Delhi)* and in *Zahira Habibullah Sheikh (5) v. State of Gujarat* had highlighted the glaring defects in the system like non-recording of the statements correctly by the police and the retraction of the statements by the prosecution witness due to intimidation, inducement and other methods of manipulation. Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation."

**18.** It thus concludes that Courts are therefore not to reject the evidence of a hostile witness in totality but to consider that part of the witness's testimony which is found creditworthy. It is also to be assessed whether the hostility was a consequence

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<sup>3</sup> (2004) 3 SCC 767

<sup>4</sup> (2012) 8 SCC 450



of intimidation or inducement. In the light of the settled position of law while examining the evidence of the victim and sifting the chaff from the grain, she has clearly stated under cross-examination by the learned Defence Counsel that the Appellant committed no sexual assault on her. Her father has supported her evidence by stating;

*"It is true that my victim daughter told me that she gave the false statement to the police and the Court due to my fear."*

Therefore, the question of the victim being intimidated or induced by the Appellant does not arise. Her father, who is her guardian and protector also stands by the statement made by her. In the light of the denial of the incident by both daughter and father and in the absence of any other evidence to substantiate the Prosecution case, the statements of the victim and her father before the learned trial Court, are to be considered as the truthful version.

**19.** Indeed, sexual offences against women and children are not to be taken lightly and have to be dealt with an iron hand and the accused brought to book but such steps can be taken by the Court only if the statement of the victim is cogent and coherent pointing to the unequivocal perpetration of the offence by the accused. On this count, we may usefully rely on the decision of the Hon'ble Supreme Court in ***Rai Sandeep alias Deepu vs. State (NCT of Delhi)***<sup>5</sup> wherein it was held as follows;

**"22.** In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face

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<sup>5</sup> (2012) 8 SCC 21



value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.

**20.** Reliance is also to be placed on ***Raju and Others vs. State of Madhya Pradesh***<sup>6</sup> wherein the Hon'ble Supreme Court held as under;

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<sup>6</sup> (2008) 15 SCC 133



**"11. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration."**

**(Emphasis supplied)**

**21.** Addressing the contention flagged by learned Counsel for the Appellant that the statement of the victim was recorded in contravention of the provisions of Section 24 of the POCSO Act, it may well be recapitulated from the evidence of PW3, the victim's father, that he took the victim to the Police Station where her statement came to be recorded. The Police did not summon her there. The evidence of the victim undoubtedly reveals that a male Police personnel recorded her statement at the Police Station but it may be clarified herein that the provisions of Section 24 of the POCSO Act provide recording of a statement by a woman Police Officer "as far as practicable." In view of these discussions, I am of the considered opinion that there was no contravention of the provisions of Section 24 of the POCSO Act.

**22.** From a perusal of the evidence furnished by the Prosecution witnesses under no circumstance can it be said to establish the Prosecution case, against the Appellant. The evidence of the victim, PW 1, can neither be said to be cogent nor coherent, the Medical Report, Exhibit 9, shows no injuries on



the person of the victim. In the gamut of the existing facts and circumstances, it would be a travesty of justice to convict the Appellant when the standard of proof as required in criminal cases being "beyond a reasonable doubt" has not been adhered to by the Prosecution.

**23.** Consequently, the conviction cannot sustain. The impugned Judgment and Order on Sentence of the learned trial Court is liable to be and is accordingly set aside.

**24.** Appeal allowed.

**25.** The Appellant is acquitted of the offence under Section 354 IPC.

**26.** The Appellant is on bail vide Order of this Court dated 30.07.2019 in I.A. No.01 of 2019. He is discharged from his bail bonds.

**27.** No order as to costs.

**28.** Copy of this Judgment be transmitted forthwith to the learned Trial Court, for information.

**( Meenakshi Madan Rai )**  
**Judge**  
21.03.2020