



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 28th of April, 2022

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

CRL. A. No.10 of 2021

Appellant : Leela Raj Biswakarma *alias*
Ghattey Kaila

versus

Respondent : State of Sikkim

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

Appearance

Mr. B.K. Gupta, Advocate (Legal Aid Counsel) for the Appellant.
Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan
Sunwar, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant impugns the Judgment and Order on Sentence, both dated 25.02.2021, passed by the Court of the Learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (*for short, the "POCSO Act"*), West Sikkim at Gyalshing, in S.T. (POCSO) Case No.01 of 2020, convicting the Appellant of the offence under Section 9(m) punishable under Section 10 of the POCSO Act and sentencing him to undergo Rigorous Imprisonment for a term of six years and to pay fine of Rs.5,000/- (Rupees five thousand) only, with default clause of Rigorous Imprisonment for one year.

2. The Prosecution case is that on 13.11.2019, the parents of the minor Victim (aged about six years) were at work, leaving her and her infant brother (aged about two years) alone at home. The same day, around 13:00 Hrs, the Appellant took the Victim and her brother to his house. At around 13:30 Hrs when



P.W.4, a co-villager, stopped by the Appellant's house to check on the Appellant's wife's health, she allegedly saw the Victim with the lower part of her body naked on the Appellant's bed, in his room. The Appellant covered himself with a quilt. Shocked at the sight, P.W.4 took the minor Victim and her infant brother to her own house where the Victim revealed to her that the Appellant had sexually assaulted her several times for over a month and given her money ranging from Rs.50/- (Rupees fifty) only, to Rs.200/- (Rupees two hundred) only, with threats not to divulge the incident to anyone. Thereafter, P.W.4 informed the Victim's parents upon which P.W.3 the Victim's mother, went to the Appellant's house and brought him over to their house (*house of P.W.3*). P.W.6 and P.W.13, both co-villagers, also arrived there on being informed of the incident. At 15:30 Hrs of the same day i.e. 13.11.2019, P.W.2 the Victim's father, lodged the FIR, Exhibit 1, before the Officer-in-Charge of the concerned Police Station, narrating the facts reflected therein. On completion of investigation, Charge-Sheet was submitted against the Appellant under Section 376 of the Indian Penal Code, 1860, read with Section 6 of the POCSO Act.

3. The Learned Trial Court framed Charge against the Appellant under Sections 5(m) and 5(l) of the POCSO Act. He pleaded "not guilty" to the Charges, hence, trial commenced where 15 (fifteen) Prosecution Witnesses were examined, upon closure of which, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, to enable him to explain the incriminating evidence against him. He claimed that the allegations were false. On hearing the arguments of Learned Counsel for the



parties and examining the evidence on record, the Learned Trial Court passed the impugned Judgment and Order on Sentence.

4.(i) It is contended by Learned Counsel for the Appellant that although Charge was framed under Sections 5(m) and 5(l) of the POCSO Act, both punishable under Section 6 of the Act, on consideration of the evidence on record, the Learned Trial Court reached a finding that there was no proof of the act of penetrative sexual assault on the Victim by the Appellant, to fulfill the ingredients of the offence charged with. That, the Learned Trial Court however found the testimony of the Victim reliable with regard to the offence under Section 9 of the POCSO Act, considering that the Victim had stated that the Appellant had cleaned himself after the act, leading to the conclusion that the Appellant had physical contact with the Victim when he touched her from behind, and he did so with sexual intent and hence the conviction of the Appellant under Section 9(m) of the POCSO Act punishable under Section 10 of the same Act. It is contended that, in fact, the medical evidence lends no succour whatsoever to the Prosecution case and the Appellant consequently deserves an acquittal in the absence of proof of any sexual assault.

(ii) In the alternative, Learned Counsel for the Appellant urged that the punishment prescribed under Section 10 of the POCSO Act is imprisonment of not less than five years but which may extend to seven years with fine. The Learned Trial Court has however sentenced the Appellant to six years imprisonment as detailed *supra*. It is urged by Learned Counsel for the Appellant that, in fact, the Appellant has no criminal antecedents and his family members, earlier comprising of his parents, wife and three



children who, except his wife, have passed away in the interregnum, is suffering the consequences of his incarceration as she is left to fend for herself sans an earning member. Learned Counsel hence prays that the Sentence be reduced to the minimum imprisonment prescribed under Section 10 of the POCSO Act i.e. of five years. That, the default clause of imprisonment also be reduced to one month from one year.

5. Learned Additional Public Prosecutor, while objecting to the prayer, submitted that the Victim is only aged about six years and has been traumatized both physically and mentally by the Appellant. He thus prays the Appeal be dismissed.

6. I have given due consideration to the submissions of Learned Counsel for the parties. The evidence and all documents relied on by the parties and the impugned Judgment and Order on Sentence have been meticulously perused.

7.(i) The Medical Report of the Victim, Exhibit 11, was prepared by P.W.9., the Doctor. The "local examination" of the Victim therein reads as follows;

*"Local Examination – No redness/No discharge/No bleeding
Labia majora & minora – N
Hymen – intact, Fourchette – N
Posterior commissure – N"*

(ii) The Medical Report (*supra*) does not lend corroboration to the allegation of penetrative sexual assault to establish the offence under Sections 5(m) and 5(l) of the POCSO Act in view of the fact that the offence was alleged to have been committed on a child of six years by an adult male of forty-five years, which would obviously have left definitive injuries on her genitals/private parts. The evidence of P.W.4 is that she saw the Victim P.W.1 naked, it is her categorical admission that she did not witness the Appellant



sexually abusing P.W.1. P.W.15, the Investigating Officer ("I.O."), admits that P.W.9 has given no opinion about penetrative sexual assault on the minor Victim. It is also an admitted position that the biological samples of the minor Victim being her vaginal swab and of the Appellant being his blood sample, penile swab and pubic hair sample, collected and handed over by the respective Medical Officers, were forwarded to the Regional Forensic Science Laboratory ("RFSL"), Saramsa. Admittedly, the Report was still awaited when the evidence of the I.O. was recorded. No plea was made by the Prosecution before the Learned Trial Court seeking to file the FSL Report even at a later stage. The Learned Trial Court, therefore, did not have the benefit of considering the RFSL Report and correctly arrived at the finding that there was no penetrative sexual assault committed on the Victim by the Appellant. However, considering the evidence of the Victim P.W.1 and P.W.4, the offence under Section 9(m) of the POCSO Act cannot be ruled out.

(iii) In light of the above evidence, facts and circumstances as narrated by the Prosecution and bearing in mind Section 29 of the POCSO Act, while at the same time, considering that the Appellant has no criminal antecedents and his family, now comprising only of his unemployed wife, his other family members having since passed away, has to bear the consequences of his incarceration as revealed *supra*, I am of the considered opinion that this is a fit case where the prayer of the Appellant seeking reduction of Sentence from six years to five years can be and is accordingly permitted.

8. Consequently, the Sentence imposed by the Learned Trial Court on the Appellant under Section 10 of the POCSO Act for



committing the offence under Section 9(m) of the Act, is accordingly reduced from six years to five years, which is the minimum prescribed period of imprisonment. The default clause of imprisonment of one year is reduced to one month, as prayed.

- 9.** Appeal allowed to the extent above.
- 10.** Crl. A. No.10 of 2021 stands disposed of accordingly.
- 11.** No order as to costs.
- 12.** Copy of this Judgment be forwarded to the Learned Trial Court forthwith, for information and compliance, along with its records.

(**Meenakshi Madan Rai**)
Judge
28.04.2022