



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

Dated : 12th April, 2023

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

Crl.A. No.12 of 2022

Appellant : Sak Tshering Lepcha

versus

Respondent : State of Sikkim

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

Appearance

Mr. Udai. P. Sharma, Advocate (Legal Aid Counsel).

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 assails the Judgment, dated 28-02-2022, in Sessions Trial (POCSO) Act, Case No.03 of 2021, of the Court of Learned Special Judge (POCSO) Act, at Mangan, North Sikkim, convicting him of the Offence under Section 375 of the Indian Penal Code, 1860, (hereinafter, the "IPC"), punishable under Section 376 of the IPC and the consequent Order on Sentence, dated 01-03-2022, by which he was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of ₹1,000/- (Rupees one thousand) only, with a default clause of imprisonment. He was acquitted of the offence under Sections 5(j)(ii), 5(n) and 7 of the Protection of Children from Sexual Offences Act, 2012 (for short the "POCSO Act").

2. In Appeal it was the submission of Learned Counsel for the Appellant that, although the victim alleges and has deposed



that the Appellant was molesting her sexually over a period of time, however, she did not inform either P.W.1, her aunt or P.W.3, her mother or for that matter her cousins, being the children of the Appellant with whom she was living, raising doubts about the involvement of the Appellant in the alleged offence. On walking this Court through the evidence of P.W.10, the victim, Learned Counsel urged that it is apparent that the victim was an intelligent individual and could well understand the questions put to her and gave rational answers. In such a circumstance, the delay of seventy-three days' in lodging the FIR is unexplained by the Prosecutrix and the Prosecution. That, P.W.1 has specifically stated that P.W.10 exhibited no behavioural changes during the time when she was allegedly being sexually assaulted, hence there were no signs of trauma to indicate sexual assault. P.W.3, the mother of the Prosecutrix who was separated from her husband, revealed that her child used to visit her occasionally at her house but she did not complain to P.W.3 of any sexual assault. P.W.4, the teacher in her school has also deposed that the victim did not inform her of her condition.

(i) That, the cross-examination of P.W.1 reveals that the victim in fact had a boyfriend, therefore his role in her alleged sexual assault cannot be ruled out. That, it is only in her evidence before the Court that she stated that she screamed when the incident occurred but she made no such revelation in her statements under Sections 161 and 164 of the Code of Criminal Procedure, 1973, (hereinafter, the "Cr.P.C."). That, P.W.2, who resides on the floor below, on rent, in the same house, never heard any screams from the residence of the Appellant. That, the victim's



evidence being embellished has to be approached with circumspection as she is apparently unreliable. That, although the DNA tests carried out by P.W.15 were inconclusive with regard to the paternity of the fetus, the Prosecution failed to establish even the pregnancy of the Prosecutrix in the absence of evidence of the Doctor, who allegedly conducted the abortion on the victim. Hence, the guilt of the Appellant not having been proved beyond reasonable doubt, the Appeal be allowed.

3. Learned Additional Public Prosecutor *per contra*, contended that the Prosecution has proved its case beyond all reasonable doubt. Refuting the argument pertaining to the alleged boyfriend of P.W.10, it was contended that this is a false narrative of the Appellant who was afforded an opportunity to explain such a circumstance in his examination under Section 313 Cr.P.C. but he failed to reveal the identity or the alleged involvement of the alleged boyfriend, who is a figment of his imagination. P.W.1 was told of the incident by P.W.10 and she has corroborated the victim's statement with regard to the incident. That, although there is no DNA report confirming the involvement of the Appellant or the paternity of the fetus, however, it is clear that the Appellant committed the offence based on the cogent evidence of the victim. The victim being a child and living in the house of her uncle, the perpetrator, fearing adverse penal consequences was unable to narrate the incident to anyone including her parents. For the same reason she was unable to approach the concerned authorities. That, in fact the age of the victim being fourteen years has been unequivocally proved by the evidence of P.W.1, P.W.4, P.W.12 and P.W.13 although the Learned Trial Court was not convinced of it



and thereby opted to ignore it and acquit the Appellant of the charges framed under POCSO Act. It was however conceded by Learned Additional Public Prosecutor that the State-Respondent has opted not to assail the finding of the Learned Trial Court pertaining to the age of the victim. That, in light of the grounds advanced the Appeal be disallowed.

4. We have given due consideration to the submissions put forth by Learned Counsel for the parties and perused all documents and evidence on record. This Court has to determine whether the conviction of the Appellant was correct or whether it warrants interference.

5. On 08-03-2021, at around 1900 hours, the victim, P.W.10, allegedly aged about fourteen years, lodged Exhibit 7 the First Information Report (for short, the "FIR"), before the concerned Police Station, accusing her paternal uncle, aged about thirty-six years, of sexually assaulting her for the past two years. That, on 26-12-2020, at around 1300-1400 hours, when she went to the room of her uncle to fetch a mirror, he raped her and there was no one at home to hear her screams. He also threatened her and told her not to narrate the incident to anyone. On 05-03-2021, while at school she fell ill with giddiness and vomiting. P.W.1, her aunt, the wife of the Appellant, conducted a pregnancy test on the victim, the result of which was positive. Following the circumstance on 08-03-2021, she was taken to Gangtok, for further medical tests. The same evening, she verbally lodged Exhibit 7, duly reduced to writing by P.W.8, the Woman Constable at the Police Station and also entered by the Police Station into the format of FIR, being Exhibit 23. On receipt of Exhibit 7,



investigation was conducted by P.W.17, the Investigating Officer (for short, the "I.O."). His investigation confirmed the facts alleged in Exhibit 7, accordingly Charge-Sheet was submitted against the Appellant under Sections 376/506 of the IPC read with Sections 6 and 10 of the POCSO Act. The Learned Trial Court framed Charges against the Appellant under Section 7 punishable under Section 8 of the POCSO Act, Sections 5(j)(ii) and 5(n) punishable under Section 6 of the POCSO Act and Section 375 punishable under Section 376 of the IPC. The Charges were read over to the Appellant who pleaded "not guilty", upon which the Prosecution chose to examine seventeen witnesses. Following the closure of Prosecution evidence, the Appellant was examined under Section 313 of the Cr.P.C. He claimed to have been falsely implicated in the matter. He had no witness to examine, hence the final arguments of the parties were heard. The Learned Trial Court on considering the evidence and documents on record convicted and sentenced the Appellant as reflected *supra*.

6. P.W.10 as the victim obviously is the only witness to the incident of sexual assault. She has deposed unwaveringly that she was living in the house of the Appellant, her paternal uncle and aunt P.W.1, since the time she was in Class VI (six). When she was in Class VII (seven), the Appellant started kissing her and fondling her private parts. On 26-12-2020, at around 01.00-02.00 p.m. when she went to the room of the accused to fetch a mirror, he forcibly committed penetrative sexual assault on her. At that time, his wife and daughter were not in the house. She screamed for help but he threatened to beat her. It was the specific contention of Learned Counsel for the Appellant that the evidence



of the victim pertaining to her screams is vacillating and consequently unreliable, however, on perusal of Exhibit 7, the oral information given by her, reduced to writing by P.W.8, it is revealed that she has categorically stated that she screamed resoundingly but as there was no one at home at the relevant time, it went in vain. In Exhibit 11, her Section 164 Cr.P.C. statement before the Learned Judicial Magistrate, she has again reiterated that when the Appellant forced himself on her, she screamed but he threatened her and told her not to scream. Therefore, the question of there being any contradiction or embellishment in her evidence before the Court, on this aspect, is nullified.

(i) Learned Counsel for the Appellant has also relied on the evidence of P.W.1 to indicate that perhaps a third person i.e., the victim's boyfriend was involved. We find that it is clearly the introduction of a "*Red Herring*" by P.W.1, in light of the fact that the Appellant is her husband. Investigation reveals no such boyfriend nor it is writ in the evidence of any other witness of the Prosecution, including P.W.10. In the impugned Judgment, it is seen that the Learned Defense Counsel had submitted before the Learned Trial Court that the Prosecutrix has a '*Facebook*' boyfriend. Both these allegations are unsubstantiated lacking ocular or circumstantial evidence. P.W.1 has subsequently admitted that she was unaware who such boyfriend was and that the victim "referred" to the name of her husband as the perpetrator of the offence. These statements establish the complicity of the Appellant. P.W.10 stated that on 05-03-2021 she had a bout of dizziness in the school assembly and was sent home by her class teacher. Although she shared the problem with P.W.1, she did not



pay any heed but proceeded to Gangtok, while at the same time handing over a pregnancy kit to one lady who conducted the pregnancy test on her, which came positive. This lady is P.W.2, a teacher at the Integrated Child Development Services (for short, the "ICDS"), Centre. According to P.W.2 after taking the test, she forwarded it by "*Whatsapp*", to the phone of P.W.3, who confirmed that the result was positive for pregnancy. Learned Counsel for the Appellant sought to convince this Court that P.W.2 did not hear any scream or cries from anyone inside the house of the accused, rendering the allegation by the victim against the Appellant as false. We deem it necessary to observe that P.W.2 would obviously not be in the house 24 x 7, waiting for screams to emanate from the house of the Appellant, such a situation cannot be envisioned. The evidence of P.W.12 reveals that on 08-03-2021, Prosecutrix was taken to the concerned Government Hospital at around 1930 hours. She did not find any abnormality in her medical examination of the victim. The last menstrual period of the Prosecutrix was recorded as 03-01-2021 and her urine test for pregnancy was found positive. Exhibit 17 is the Medical Report of the Prosecutrix prepared by P.W.12. The evidence of the doctor is conclusive of the fact that the victim was pregnant at the time of her examination at the Hospital. P.W.8, the Police Constable would buttress the Prosecution case with regard to the pregnancy of the victim as according to her, during investigation, the I.O. of the case seized the Sonology Report of the Prosecutrix done at Ruchi Diagnostic Clinic on 08-03-2021 and identified it as such.

(ii) In light of the foregoing discussions we conclude that the Appellant was the perpetrator of the offence which has been



established by unimpeachable evidence. Consequently, we uphold the impugned Judgment of the Trial Court convicting the Appellant under Section 375 punishable under Section 376 of the IPC.

- 7.** Appeal dismissed and disposed of accordingly.
- 8.** No order as to costs.
- 9.** Copy of this Judgment be forwarded to the Learned Trial Court along with its records.

(Bhaskar Raj Pradhan)
Judge
12-04-2023

(Meenakshi Madan Rai)
Judge
12-04-2023

Approved for reporting : **Yes**