THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 6th 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.14 of 2022

Appellant : Kishore Gurung

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Senior Advocate (Legal Aid Counsel) with Mr. Simeon Subba, Advocate for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor with Mr. Sujan Sunwar and Mr. Shakil Raj Karki, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. By its Judgment dated 31-05-2022, in Sessions Trial (POCSO) Case No.36 of 2018, the Learned Trial Court convicted the Appellant under Section 3(a)/4 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"). On the same date, he was sentenced to undergo simple imprisonment for a period of 10 years and to pay a fine of ₹ 10,000/- (Rupees ten thousand) only. The sentence of fine bore a default clause of imprisonment and set off the period of imprisonment undergone during trial. He was however acquitted of the offence under Section 5(j)(ii)/6 of the POCSO Act. Aggrieved, the Appellant now assails both the Judgment of Conviction and the Order on Sentence.

2. The victim, P.W.1, aged about 16 years, lodged Exhibit 1, the FIR before the concerned Police Station on 10-08-2018, at

1650 hours, informing that, on 01-01-2018 she and her friend had gone on a picnic to Gangtok. As it was late in the evening, her friend (hereinafter, "S") telephonically called her friend to drop them home, he arrived at 'Jalipool' where they had awaited him, accompanied by another boy. Both boys suggested that all four of them spend the night together. 'S' was agreeable to the proposition despite the insistence of the Prosecutrix to return home. 'S' and her boyfriend slept on one bed while the Prosecutrix slept in another bed. At night, one "Sudesh Rai" forcibly sexually assaulted her. After the incident, she did not meet him, however she stopped menstruating. On 10-08-2018, two of her teachers, P.W.4 and P.W.5, took her to the Hospital for a medical check-up where she was found to be pregnant. Thereafter, the Doctor forwarded her to the Police Station with two personnel from the "Child Care", hence she sought legal action against the said "Sudesh Rai".

(i) Zero FIR was registered on the same date under Section 376 of the Indian Penal Code, 1860 (hereinafter, "IPC"), read with Section 6 of the POCSO Act, against "Sudesh Rai" and forwarded to the jurisdictional Police Station where it was duly re-registered. The matter was endorsed to P.W.12 for investigation, upon completion of which Charge-Sheet was submitted against the Appellant "Kishore Gurung" under Section 376(i) of the IPC and Section 6 of the POCSO Act. The Learned Trial Court framed Charge against the Appellant under Section 5(j)(ii) of the POCSO Act, punishable under Section 6 of the same Act, to which the Appellant entered a plea of "not guilty". Trial commenced consequently whereby 12 (twelve) witnesses were examined by the Prosecution. Thereafter, the Appellant was examined under

Section 313 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."). On consideration of all materials on record and final arguments advanced by the Learned Counsel for the parties, the Appellant was convicted and sentenced as reflected hereinabove.

3. In the arguments advanced by Learned Senior Counsel for the Appellant it was contended that the FIR was lodged against one "Sudesh Rai", but the trial proceeded against "Kishore Gurung" with no reasons put forth by the Prosecution as to how both were identified by them to be one and the same person. That, the Learned Trial Court had concluded that the Appellant was the perpetrator of the offence sans Test Identification Parade (for short, "TI Parade") and chose to rely on the evidence of the victim who had deposed that the actual name of the Appellant was "Kishore Gurung" and not "Sudesh Rai" although she admitted to having learnt of it from the police sources. It was urged that it was at the behest of the Police that the victim identified the Appellant as the perpetrator and it was not her independent identification. That, the Trial Court erroneously observed that identification of the Appellant even after about one year and three months of the alleged incident could not be doubted as the victim and the Appellant spent one whole night in the room. That, in Exhibit 1, the Prosecutrix had informed that all of them slept in one room and she occupied one bed separately, contrarily in her deposition before the Court, she stated that the accused came and slept with her while his friend slept with 'S'. That, again contrary to the above statements, in her Section 164 Cr.P.C. statement, the victim had stated that 'S' and her boyfriend went to one room and she was given one extra room where she slept, thus conjuring up one room

suddenly. That, "Sudesh Rai" came to her room after parking the vehicle and forcibly removed her clothes and sexually assaulted her. This allegation also found no place either in the FIR or in her Section 164 Cr.P.C. statement. That, in light of the foregoing contradictions in her statements, the victim's evidence is unreliable.

(i) It was further argued that the Learned Trial Court without cogent proof reached a finding that the victim was a minor at the time of incident, based on the evidence of P.W.8, the victim's School Headmaster and P.W.11, the victim's grandmother, despite the evidence of P.W.8 who while furnishing the School Admission Register pertaining to the years 2001-2020, Exhibit 10, stated that he could not confirm whether "27-03-2002" was the actual date of birth of the minor victim. That, he had issued Exhibit 9, the Certificate of Date of Birth of the victim based on the entries in the Register and he was unaware of the author of the entries in Exhibit 10. That, P.W.11 was produced as a witness to fill up the lacuna in the Prosecution case with regard to the victim's date of birth, but she could furnish no documentary evidence of proof of date of birth of the victim.

(ii) That, the Learned Trial Court failed to consider that the victim under cross-examination admitted that she had physical relations with other persons after 01-01-2018, hence the Appellant cannot be saddled with the offence as the perpetrator, on nebulous identification.

(iii) That, however, the Learned Trial Court correctly disregarded the DNA Test results which sought to establish the paternity of the Appellant, as the Prosecution failed to put forth

plausible evidence concerning the collection of blood samples, Exhibits 12, 13 and 14 and its dispatch to the concerned Centre for the Expert's opinion.

(iv) That, the Prosecution case is totally dependent on the evidence of 'S', the victim's friend and "S's" boyfriend, both however remained untraceable during trial and the Prosecution reported that they had already left for Nepal and dropped them from the list of Prosecution witnesses. That, in such circumstances, the very existence and the statements of 'S' and her friend are suspect.

(v) In light of the arguments advanced, the impugned Judgment and Order on Sentence of the Learned Trial Court deserves to be set aside.

4. In the *contra* arguments advanced by Learned Additional Public Prosecutor, it was urged that mere absence of T.I. Parade would not prejudice the Prosecution case as the unequivocal identification of the Appellant by the victim as the perpetrator of the offence, suffices to establish the Prosecution case, as she had seen the Appellant at close quarters. The victim's age has been duly established by the School Headmaster, P.W.8 and the victim's grandmother, P.W.11 requiring no further proof. That, in her Section 164 Cr.P.C. statement, the victim has denied having any relations with other persons apart from the Appellant and after the night of 01-01-2018 she had not been sexually assaulted by any other person. Consequently, the Appeal be dismissed.

5. We have considered the entirety of the rival submissions put forth by Learned Counsel before us and meticulously perused all documents and evidence on record. This

Court has thus to determine; (i) Whether the Learned Trial Court was correct in concluding that the victim had identified the Appellant as the perpetrator of the offence, the actual name of the Appellant being "Kishore Gurung" and not "Sudesh Rai"; and (ii) Whether the finding of the Learned Trial Court that the victim is a minor passes the muster of legal proof?

6. We deem it essential to firstly deal with the question relating to the identification of the Appellant. The Learned Trial Court observed that, the minor victim had categorically deposed before the Court that it was only later that she came to know that the actual name of the accused was "Kishore Gurung" and not "Sudesh Rai". The Court recorded at Paragraph 28 as follows;

> **"**…….. (*the records would reveal that the tinted glass partition in the Court room was removed after her evidence was recorded for identification of the accused. She categorically identified him*). …….**"**

(i) It was further observed that merely because no TI Parade was conducted in the matter, her identification of the accused cannot be doubted as she had spent one whole night with the accused in a room, where he had committed penetrative sexual assault. We are afraid we have to differ with the findings of the Learned Trial Court for the reasons enunciated hereinafter;

(ii) Admittedly, Exhibit 1 was lodged by P.W.1 against one "Sudesh Rai" who according to her, had sexually assaulted her on the relevant night. She had not met him prior to that day nor did she encounter him anytime after the incident, as per her deposition. She admitted with clarity under cross-examination that she came to "know from Police sources" that the actual name of the accused was "Kishore Gurung" and not "Sudesh Rai". That, the accused had initially introduced himself to her as "Sudesh Rai".

That having been said, a careful perusal of the victim's evidence nowhere reflects that she had affirmatively identified the Appellant by his face, in the Court room, as the perpetrator of the offence, contrary to the observation of the Learned Trial Court. Thus, the Prosecution has failed to extract a statement of positive identification of the Appellant from P.W.1. The Court on closure of the evidence of P.W.1 has enigmatically recorded as follows;

> **"**……..
>
> *In terms of Section 33(2) of the POCSO Act, 2012, the accused, who was behind the tinted glass partition, was identified by the victim after completion of her examination on the removal of the partition.*
>
> ……..**"**

(iii) Section 33(2) of the POCSO Act reads as follows;

> **"33. Procedure and powers of the Special Court**.—…….
>
> (2) The Special Public Prosecutor, or as the case may be, the counsel appearing for the accused shall, while recording the examination-in-chief, cross-examination or re-examination of the child, communicate the questions to be put to the child to the Special Court which shall in turn put those questions to the child.
>
> ……..**"**

In the above circumstances, on reading the above provision of law it emerges that Section 33(2) of the POCSO Act has no relevance to the identification of an accused. It is unfathomable as to how the Prosecution is insistent upon their stand that the Appellant is "Sudesh Rai" and that both "Kishore Gurung" and "Sudesh Rai" are one and the same person.

(iv) In this context, it is necessary to notice that the Investigating Officer (I.O.) P.W.12, in her evidence has not elucidated as to how she concluded that the person who had committed the offence and was identified as "Sudesh Rai" by the victim was in fact "Kishore Gurung". Her statement is not

augmented by the production of any documents of either "Kishore Gurung" or "Sudesh Rai" and she has admitted as much. No TI Parade was conducted by the Prosecution to identify the Appellant. We cannot help but observe that the investigation on this aspect is totally lacking and lackadaisical. When the victim had identified the offender as "Sudesh Rai", even if the Prosecution and the I.O. concluded, for reasons only known to them, that, he was in fact "Kishore Gurung", evidence ought to have been placed on record to indicate that a thorough investigation had been carried out on this aspect and no anomalies persisted. This would have assured the Court of the veracity of the Appellant's identification. The victim appears to be toeing the line to support the Prosecution case, sans her own conviction of such identity. P.W.6 the Officer-in-Charge of the Jurisdictional Police Station has made a concerted effort to improve the Prosecution case, regarding the identification of the Appellant, by stating that P.W.1 had filed a written FIR before him, alleging sexual assault by one "Sudesh Rai alias Kishore Gurung". Exhibit 1 however belies such statement, P.W.1 clearly not having mentioned any "alias" in Exhibit 1. P.W.6 further claimed to have registered a case against "Sudesh Rai alias Kishore Gurung", this again is belied by Exhibit 2, which categorically reveals that the registration was against the alleged accused "Sudesh Rai", devoid of "any alias". P.W.12, the I.O. by her evidence sought to convince the Court that the accused had introduced himself to P.W.1 as "Sudesh Rai alias Kishore", which however finds no place in the evidence of P.W.1 herself, she having consistently identified one "Sudesh Rai" as the perpetrator. P.W.2 the Officer-in-Charge of the Police Station where the Zero FIR was registered admitted that

Exhibit 1 was lodged at her P.S. initially and the victim had not stated in the FIR that the accused had given a false name.

(v) The above circumstance of non-identification of the Appellant is further exacerbated by the fact that, the Prosecution failed to establish that the blood samples of the Appellant, the victim and the baby born to her were ever collected and forwarded for Expert opinion. No evidence emerged to fortify this stand of the Prosecution. The Trial Court has correctly ignored the DNA report where no proof of drawing of blood of all three was established, added to the fact that it was unproved that the alleged blood samples were stored as required, to prevent deterioration or contamination. In light of these gaping lacunae, as detailed above, found in the Prosecution case, it thus rings clear as a bell that the identification of the Appellant is nebulous, unconfirmed and inconclusive. The Prosecution has to attain the bar of proof beyond reasonable doubt and no Court can made deductions, sans cogent proof, especially with regard to an accused who stands to loose productive years of his life, by reason of erroneous identification and callous investigation. It would do well to recall that the Supreme Court in ***Sharad Birdhichand Sarda*** vs. ***State of Maharashtra***[1] cautioned as follows;

> **"179.** We can fully understand that though the case superficially viewed bears an ugly look so as to prima facie shock the conscience of any court yet suspicion, however great it may be, cannot take the place of legal proof. A moral conviction however strong or genuine cannot amount to a legal conviction supportable in law.
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> **180.** It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made.**"**

[1] (1984) 4 SCC 116

(vi) In ***Khekh Ram*** vs. ***State of Himachal Pradesh***[2] the Supreme Court observed that;

> **"33.** It is a common place proposition that in a criminal trial, suspicion however grave, cannot take the place of proof and the prosecution to succeed has to prove its case and establish the charge by adducing convincing evidence to ward off any reasonable doubt about the complicity of the accused. For this, the prosecution case has to be in the category of "must be true" and not "may be true". This Court while dwelling on this postulation, in *Rajiv Singh* v. *State of Bihar* [(2015) 16 SCC 369] dilated thereon as hereunder : (*Rajiv Singh case*, SCC pp. 392-93, paras 66-69)
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> > "*66*. It is well-entrenched principle of criminal jurisprudence that a charge can be said to be proved only when there is certain and explicit evidence to warrant legal conviction and that no person can be held guilty on pure moral conviction. Howsoever grave the alleged offence may be, otherwise stirring the conscience of any court, suspicion alone cannot take the place of legal proof. The well-established cannon of criminal justice is "fouler the crime higher the proof". In unmistakable terms, it is the mandate of law that the prosecution in order to succeed in a criminal trial, has to prove the charge(s) beyond all reasonable doubt.
> >
> > ……**"**

(vii) It is also an established proposition of criminal law that if two views are possible on the evidence adduced in the case, the one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted [*See* ***Kali Ram*** vs. ***State of Himachal Pradesh***[3] and ***Ajit Savant Majagvai*** vs. ***State of Karnataka***[4]].

(viii) Now, while addressing the issue pertaining to the age of the victim, the Learned Trial Court was of the opinion that the Prosecution was able to prove that the victim was a minor at the time of the incident, although her parents adduced no evidence and her birth certificate was not furnished in proof thereof. The

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[2] (2018) 1 SCC 202
[3] (1973) 2 SCC 808
[4] (1997) 7 SCC 110

Learned Trial Court was impressed with the evidence of P.W.8, the Headmaster of the victim's school, who categorically deposed that, as per the school records the date of birth of the victim was "27-03-2002" having produced the School Admission Register containing the entries. The Learned Trial Court was aware that P.W.8 had no personal knowledge of the entries in Exhibit 10 and he had no knowledge whether the Aadhaar Card on the basis of which the entries of the date of birth of the victim was made, was her own or that of her parents. There was no investigation in this context. Nevertheless the Court went on to observe that, in any event P.W.11 had deposed that the victim's date of birth was "27-03-2002". P.W.8 received a requisition Exhibit 8, dated 30-10-2018, from the I.O. P.W.12, requesting for issuance of Birth Certificate of the victim. P.W.8 verified the details, particularly the School Admission Register and issued the date of birth of the minor victim as "27-03-2002". However, it emerges that P.W.8 is oblivious of the identity of the person who had made the relevant entries in 2014, in Exhibit 10, as he had joined the school as its Headmaster in 2018. Evidently, the victim was admitted in the 6th standard of the school on 14-02-2014, without proof of where she had attended Kindergarten or production of supporting documents thereof for proof of age. P.W.8 was also unaware as to whether the victim's parents had filed her Birth Certificate during her admission to school. Thus, the birth certificate of the victim was not furnished nor were her parents produced as witnesses to substantiate the fact of her date of birth. Her parents had separated but it is not the Prosecution case that they were untraceable. The grandmother of the victim was examined as

P.W.11, obviously after P.W.8, in an attempt to improve the Prosecution case. She deposed that the date of birth of her granddaughter is "27-03-2002", sans clarity as to how she recalled her granddaughter's date of birth or whether she did so on account of her presence at the time of the birth of P.W.1, or during her school admission. Pausing here briefly, apposite reference may be made to the law laid down by the Supreme Court in ***Mahadeo s/o Kerba Maske*** vs. ***State of Maharashtra and Another***[5] holding that the age of the juvenile has to be gauged by the following methods;

> **"12.** .....
>
> "**12. (3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining—
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> (*a*)(*i*) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (*ii*) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (*iii*) the birth certificate given by a corporation or a municipal authority or a Panchayat;"
>
> Under Rule 12(3)(*b*), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(*a*)(*i*) to (*iii*), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"**
>
> **[emphasis supplied]**

The above prescribed method for gauging the age of a juvenile can be applied for the purposes of assessing the age of a victim as well, but was apparently not resorted to by the Prosecution in the absence of a birth certificate.

(ix) The I.O. ought to have considered as to whether the certificate Exhibit 9, issued by the Headmaster, P.W.8 would pass

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[5] (2013) 14 SCC 637

the muster of legal proof, failing which an Ossification Test or any other latest medical test for age determination could have been resorted to, to verify the age of the victim, which is sadly lacking. All that the Court can fall back on with regard to the age of the victim is, sans documentary evidence, the statements of P.W.11 and that of P.W.8, which does not fulfil the legal parameters prescribed for proof of a document.

(x) In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[6] the Hon'ble Supreme Court observed at Paragraph 18 *inter alia* that, even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration *by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved*. The standard of proof required herein is the same as in other civil and criminal cases. The persons on whose information entries were made in Exhibit 10 were not produced. There is, therefore, no unimpeachable evidence to establish the age of the victim in the absence of which she cannot be declared to be a minor.

(xi) While addressing the concerns raised by Learned Counsel for the Appellant pertaining to the unreliability to the victim's evidence, in view of the contradictions apparent in her statement before the Court and under Section 164 Cr.P.C., we notice that the victim has indeed made contradictory statements requiring the Court to be especially circumspect while appreciating her evidence. Under Section 164 Cr.P.C. statement she stated that her friend and her boyfriend went to one room, while she was

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[6] (2010) 9 SCC 209

given one extra room. In contradiction thereof, before the Court, it was her testimony that the residence of her friend's boyfriend was a single room with two beds. This is confirmed by her cross-examination where it is her admission that, on the relevant night four of them had stayed in one single room. In Exhibit 1, she had reported that 'S' and her boyfriend slept on one bed and she slept on another bed. She did not indicate that there was another room with a bed which she occupied. In her Section 164 Cr.P.C. statement she has stated that the said "Sudesh Rai" sexually assaulted her that night, but before the Court in exaggeration of her earlier statement, she deposed that, he repeatedly assaulted her sexually that night. Her evidence appears to have been embellished and the new facts that emerge in her evidence appear to have been made in order to fortify the Prosecution case. Such contradictory statements cannot be considered by the Court as gospel truth to nail the Appellant, when the Prosecution has failed to discharge its responsibility of proving the case beyond reasonable doubt. In passing it is noticed that 'S' has conveniently disappeared from the annals of the Prosecution case along with her boyfriend, which makes the genesis of the Prosecution case itself doubtful.

(xii) In ***Pramjit Singh*** vs. ***State of Uttarakhand***[7] the Supreme Court held as extracted hereinbelow;

> **"10.** A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is an event in real life and is the product of an interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would

[7] (2010) 10 SCC 439

> have to depend upon its own facts. The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. "The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence." In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinising the evidence more closely, lest the shocking nature of the crime induces an instinctive reaction against dispassionate judicial scrutiny of the facts and law. ……**"**

The Court thus has to be wary and declare a person guilty only on sound, cogent and clinching evidence, which assures the Court that the case has been proved beyond reasonable doubt.

7. In light of the facts and circumstances, we are of the considered opinion that the Prosecution has failed to attain the high bar set for to it to prove its case beyond reasonable doubt.

8. Consequently, Appeal is allowed.

9. The conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

10. The Appellant is acquitted of the offence under Section 3(a)/4 of the POCSO Act.

11. He be set at liberty forthwith if not required to be detained in any other case.

12. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

13. No order as to costs.

14. Copy of this Judgment be forwarded to the Learned Trial Court for information along with its records.

15. Copy of this Judgment also be forwarded to the Jail Authority at the Central Prison, Rongyek, for information and compliance.

(Bhaskar Raj Pradhan)
Judge
06-04-2023

(Meenakshi Madan Rai)
Judge
06-04-2023

Approved for reporting : **Yes**

ds/sdl