THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 19th June, 2024

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

Crl. A. No.10 of 2023

Appellant : Ganesh Tamang

versus

Respondent : State of Sikkim

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

Appearance

Mr. Dewen Sharma Luitel and Mr. Bhaichung Bhutia, Advocates for the Appellant.

Mr. Thinlay Dorjee Bhutia, Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Prosecution narrative commences with the lodging of the FIR, Exhibit No.1, on 28-02-2016, at around 1800 hours by PW-3 the victim's father, informing that on the same date his seventeen year old daughter, PW-1, had been requested by the Appellant to assist him in some chores. That, she went as requested and helped the Appellant to carry manure till 02.00 p.m. The Appellant thereafter took her to a nearby river, for the purpose of carrying stones, at which time he sexually assaulted her by touching her inappropriately. She escaped from the predator's clutches and called PW-3 on his cell phone at around 04.00 p.m. and informed him of the incident. PW-3 hurriedly reached the house of PW-8, where the victim had taken shelter and took her to the Police Station, where he lodged Exhibit No.1. The Police Station registered a case against the Appellant under Section 354 of the Indian Penal Code, 1860 (hereinafter, the "IPC"), read with

Section 12 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act") and on the same day endorsed it to PW-10, the Investigating Officer (IO) for investigation. Charge-Sheet consequently came to be submitted against the Appellant under Section 354 of the IPC read with Section 12 of the POCSO Act, before the Court of Learned Special Judge (POCSO Act, 2012), Gangtok, Sikkim.

(i) Charge was framed against the Appellant by the Learned Trial Court, for sexual assault under Section 7 of the POCSO Act punishable under Section 8 of the same Act, under Section 9(c) of the POCSO Act punishable under Section 10 of the said Act for aggravated sexual assault as the Appellant was a public servant at the relevant time and under Section 354 of the IPC, for using criminal force against the minor victim with intent to outrage her modesty. The Appellant pleaded "not guilty" to the charges and claimed trial. The Prosecution examined ten witnesses, including the IO of the case, on closure of which the incriminating circumstances against the Appellant were put to him in his examination under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C.") in which he claimed innocence.

(ii) After hearing the opposing arguments of the Counsel for the parties and appreciating the evidence furnished, the Learned Trial Court convicted the Appellant in Sessions Trial (POCSO) Case No.37 of 2019 (*State of Sikkim* vs. *Ganesh Tamang*), for the offence under Section 7 punishable under Section 8 of the POCSO Act and sentenced him to undergo simple imprisonment of three years, with fine of ₹ 5,000/-(Rupees five thousand) only and a default stipulation. While acquitting him of the offence under Section 9(c) punishable under Section 10 of the POCSO Act, it was

reasoned that there was no evidence to show that he had committed the offence in the "garb" of being a public servant and therefore could not be punished under Section 10 of the POCSO Act. No penalty was imposed under Section 354 of the IPC, on grounds that, he had been punished for the more severe offence (*supra*). Aggrieved, the Appellant is before this Court, assailing the Judgment of conviction and Order on Sentence.

2. Learned Counsel for the Appellant while advancing multipronged arguments contended that, in the first instance the birth certificate of the victim "Doc A" is in photocopy and consequently her age has not been proved as per the mandate of law. That, Exbt-4, a photocopy of the relevant portion of the live birth register, reveals the date of birth of the victim as 22-02-1999, however the informant's name has not been recorded in the document. That, the victim allegedly escaped from the Appellant and ran to the house of PW-8, but no injuries were detected on her person. That, the Learned Trial Court has correctly observed that there are flaws in the investigation as the *doko* (bamboo basket) in which the collected stones were to be carried was not seized by PW-10, nor photographs of the collected stones taken, which renders the Prosecution story improbable. That, the wife of the Appellant has also not been listed as a Prosecution witness, casting suspicion on the Prosecution case as she had been working alongside the victim for some time. That, in light of the evidence furnished, the Learned Trial Court ought to have acquitted the Appellant. That, accordingly the impugned Judgment and Order on Sentence be set aside.

3. *Per contra,* Learned Public Prosecutor contended that, the victim and her father have categorically deposed that the

victim's date of birth is 22-02-1999 and there was no reason to doubt the veracity of their statements. That, contrary to the submissions of Learned Counsel for the Appellant, one "*G. Pradhan*" was the informant in Exbt-4, although, admittedly he was not examined as a Prosecution witness. That, the evidence of PW-1 is consistent, cogent and duly supported by the evidence of PW-6, her co-villager, who deposed that the victim narrated the incident to her. That, the evidence of PWs 3 and 4 also corroborates the evidence of PW-1 regarding the incident which she had narrated to them. That, minor discrepancies with regard to who the victim called first on the phone does not affect the crux of the case pertaining to sexual assault and is irrelevant. Hence, no error arises in the Judgment of conviction of the Learned Trial Court.

4. Due consideration has been afforded to the submissions advanced by Learned Counsel which were heard *in extenso* and the evidence carefully perused.

5. Before proceeding further, it may be remarked that the assailed Judgment and Order on Sentence of the Learned Trial Court are upheld by this Court for reasons that follow.

(i) Notwithstanding the above circumstance, in my considered opinion, it is relevant to remark here that the Learned Trial Court marked the Birth Certificate as "Doc A" and in Paragraph 21 of the impugned Judgment observed as follows;

> **"21.** So far as the age of the victim is concerned, the birth certificate of the victim (marked Document 'A') would show that her date of birth has been recorded as 22.02.1999. The said birth certificate is an attested copy and the original is reported to be in the possession of the victim's father (PW-3). Thought the I.O has not produced the original birth certificate, it can be safely concluded that her date of birth is indeed 22.02.1999 due to

> the fact that the Registrar of Births and Deaths (PW-5) found the entries made in Document 'A' matched with the entries made in the original live birth register maintained in his office. He has prepared a report marked Exhibit-3 after verification. ……..**"**

The appreciation of the documentary evidence by the Learned Trial Court is erroneous for the reason that the document marked "Doc A" could not have been taken into consideration by the Learned Trial Court. On this facet, it would be beneficial to look at the provisions of the Indian Evidence Act, 1872 (hereinafter, the "Evidence Act"), which deals with documentary evidence. Section 61 of the Evidence Act provides as follows;

> **"61. Proof of contents of documents.—**The contents of documents may be proved either by primary or by secondary evidence.**"**

(ii) Section 62 of the Evidence Act prescribes what is primary evidence and lays down as follows;

> **"62. Primary Evidence.—**Primary evidence means the documents itself produced for the inspection of the Court.
>
> *Explanation* 1.—Where a document is executed in several parts, each part is primary evidence of the document;
>
> Where a document, is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.
>
> *Explanation* 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.
>
> *Illustration*
>
> A person is shown to have been in possession of a number of placards, all printed at one time from one original. Any one of the placards is primary evidence of the contents of any other, but no one of them is primary evidence of the contents of the original.**"**

This provision which deals with primary evidence is self explanatory.

(iii) Section 63 of the Evidence Act defines secondary evidence and reads as follows;

> **"63. Secondary evidence.—**Secondary evidence means and includes—
>
> (1) certified copies given under the provisions hereinafter contained;
>
> (2) copies made from the original by the mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
>
> (3) copies made from or compared with the original;
>
> (4) counterparts of documents as against the parties who did not execute them;
>
> (5) oral accounts of the contents of a document given by some person who has himself seen it.
>
> *Illustrations*
>
> (a) A photograph of an original is secondary evidence of its contents, though the two have not been compared, if it is proved that the thing photographed was the original.
>
> (b) A copy compared with a copy of a letter made by a copying machine is secondary evidence of the contents of the letter, if it is shown that the copy made by the copying machine was made from the original.
>
> (c) A copy transcribed from a copy, but afterwards compared with the original, is secondary evidence; but the copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original.
>
> (d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or a machine-copy of the original, is secondary evidence of the original.**"**

(iv) Section 64 of the Evidence Act provides for proof of documents by primary evidence and lays down that documents must be proved by primary evidence except in the cases as mentioned thereafter.

(v) Section 65 of the Evidence Act with which we are specifically concerned herein, deals with cases in which secondary evidence relating to documents may be given. This section provides as follows;

> **"65. Cases in which secondary evidence relating to document may be given**.—Secondary evidence may be given of the existence, condition, or contents of a document in the following cases:—
>
> (a) When the original is shown or appears to be in the possession or power—
>
> of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or
>
> of any person legally bound to produce it,
>
> and when, after the notice mentioned in section 66, such person does not produce it;
>
> (b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest;
>
> (c) **when the original has been destroyed or lost, or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;**
>
> (d) when the original is of such a nature as not to be easily movable;
>
> (e) when the original is a public document within the meaning of section 74;
>
> (f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;
>
> (g) when the originals consists of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.
>
> In cases (a), (c) and (d), any secondary evidence of the contents of the documents is admissible.
>
> In case (b), the written admission is admissible.
>
> In case (e) or (f), a certified copy of document, but no other kind of secondary evidence, is admissible.
>
> In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents.**"**
>
> **(emphasis supplied)**

(vi) Thus, it is only when primary evidence cannot be furnished for the reasons enumerated in the provision (*supra*) that secondary evidence can be allowed and permitted by the Courts to be taken on record and considered as an Exhibit. It needs no

reiteration that primary evidence is the best evidence to establish with certainty the fact in question. As elucidated in the provision extracted *supra*, secondary evidence is permissible in the absence of the original document and after the Court is convinced of the circumstances due to which the document cannot be produced. In other words, sufficient reasons are to be furnished for non-production of the original document. It is only then that secondary evidence can be admitted and proved. The rule of "best evidence" by furnishing of the original document is to be complied with except in the contingencies described *supra*. The statute also provides for proof of document produced as primary evidence which is to be in terms of Section 67 to Section 73 of the Evidence Act.

(vii) In the instant case "Doc A" is not even certified to be a true copy of the original. The document surely could not have been utilized for the purpose of comparing the entries therein with the entries made in the live birth register Exbt-4, maintained in the office of PW-5. Besides, no purpose is served by marking a document as "Doc A", when it is settled law that the contents of the document and the signatures thereof are to be proved by the party relying on it and then it is to be marked as an Exhibit. Then and only then can the contents of the document be considered in its entirety as evidence by the Court. The Prosecution failed in its duty to furnish the original document or to give lucid reasons for its non-production.

(viii) Nevertheless, the cross-examination of PW-3 the victim's father in this context, only extracted the following statements;

> **"**…… It is not a fact that *Document A* is not the copy of the *birth certificate* of my victim daughter. It is not a fact that the *date of birth* indicated in *Document A(its original)* is not her correct date of birth. It is not a fact that her *date of birth* is not 22.02.1999. It is not a fact that I had not obtained her *birth certificate* from the concerned office and its original is not in our house. ……..**"**

The cross-examination therefore merely reaffirms what he has stated in his evidence in chief, while relying on "Doc A". It did not decimate the veracity of "Doc A" or its contents nor were the provisions of law as per the Evidence Act, as discussed above, taken into consideration when the cross-examination was conducted. PW-5 corroborated the evidence of PW-3 where under cross-examination he testified that he was absolutely sure that "Doc A" is the copy of the original/first birth certificate. Thus, although "Doc A" could not have been admitted in evidence, however for the foregoing reasons and the same having remained undecimated in cross-examination, the finding of the Learned Trial Court with regard to the age of the victim based on the document requires no interference.

(ix) Now, the next question to be delved into is whether Exbt-4, the photocopy of the entries made in the original live birth register would establish the age of the survivor. In this context, it is seen as pointed out by the Learned Public Prosecutor that one "*G. Pradhan*" was the informant to the entries made in the Serial No.64 which pertains to details of the victim, her date of birth, parentage, etc. The document, Exbt-4 may be an official record in terms of Section 74 of the Evidence Act and admissible under Section 35 of the same Act, however the contents require to be corroborated by the person on whose information the entries were recorded. This aspect has been discussed in ***Madan Mohan Singh and***

Others vs. ***Rajni Kant and Another***[1], where the Supreme Court observed as hereunder;

> **"18.** Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326], *Ram Murti* v. *State of Haryana* [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681] , *Harpal Singh* v. *State of H.P.* [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat Singh* [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194] . In these cases, it has been held 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.
>
> **19.** Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].
>
> **20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information**. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
>
> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, **he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein**. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868].)**"** **(emphasis supplied)**

[1] (2010) 9 SCC 209

The test laid down by this ratio remained unfulfilled before the Learned Trial Court.

(x) That having been pointed out, the Learned Trial Court while discussing Exbt-4 has *inter alia* observed as follows;

> **"22.** Learned Counsel for the accused has voraciously argued that PW-5 cannot be permitted to produce live birth register (Exhibit-4) for the first time in Court. In this regard, it will be relevant to note that PW-5 had produced live birth register for inspection of the Court and to show genuineness of the birth certificate (Document 'A'). By production of the said register, the prosecution (or PW-5) has not introduced any new fact which would take the defense by surprise. It only relates to authenticity of the victim's birth certificate and the entries made therein. Hence, the facts and circumstances of this case cannot be compared to the case of *Bhagyashree Prashant Wasankar*.**"**

The evidence of PW-5 is again relevant. He is the witness who produced the original live birth register maintained in the relevant office. He identified Exbt-4 as the copy of the relevant page/portion of the live birth register containing the entries pertaining to the minor victim. His cross-examination was merely a reaffirmation that Exbt-4 was the relevant page of the live birth register containing the entries. No questions were put to him in cross-examination regarding the non-examination of the informant of the details at Serial No.64 of the said document. Consequently, the finding of the Learned Trial Court on this aspect is also upheld.

(xi) It is also found that the Learned Trial Court in Paragraph 20 of the impugned Judgment observed that there are flaws in the investigation of the case which is reproduced hereinbelow as follows;

> **"20.** I agree with Learned Counsel for the accused that there are flaws in the investigation of the case, such as the *doko* has not been seized by the I.O, photographs of the stones so collected near the stream has not been taken and the accused person's wife has not been listed as a witnesses (*sic.*). ……..**"**

(xii) In my considered opinion, how the seizure of the said articles would have made a difference to the Prosecution case of sexual harassment is beyond comprehension and hence this observation is disregarded.

6. With regard to the offence under Section 9(c) punishable under Section 10 of the POCSO Act, the Learned Trial Court in Paragraph 24 of the impugned Judgment observed as follows;

> **"24.** The prosecution has been able to bring home the charges against the accused beyond a reasonable doubt. The accused is convicted under Section 8 of the POCSO Act, 2012. However, there is no evidence to show that the accused had committed the offence in the garb of being a public servant. He did so as the victim's neighbour and co-villager and not in the capacity of a public servant. Hence, he cannot be punished under Section 10 of the POCSO Act, 2012. ……**"**

7. The observation of the Learned Trial Court (*supra*) is clearly a misreading and a misunderstanding of the provision. The act of sexual assault does not have to be committed by a person in the "garb". The only requirement to constitute an offence of aggravated sexual assault under Section 9(c), punishable under Section 10 of the POCSO Act, is that the perpetrator has to be a "public servant". He does not have to "act" in the "garb" of a public servant. Regardless of the above clarification, considering that the Prosecution has failed to furnish any evidence to establish that the Appellant was a government servant, his acquittal under Section 9(c) of the POCSO Act is upheld by this Court, but on the ground of absence of proof.

8. Now, while examining the pivotal issue pertaining to the offence of sexual assault committed on the victim, PW-1, she has without dithering, unwaveringly deposed that, on 28-02-2016 she had gone to work in the fields of the Appellant, his wife was

also there. After working in his fields for some time he told her that she was to work till 02.00 p.m. and asked her to accompany him to a nearby river. On reaching the said place, they collected stones and they had two bamboo baskets (*dokos*) with them. After they had collected the stones, the Appellant told her to carry one bamboo basket on her back to enable him to put the stones in it. When she did so and turned around, the Appellant suddenly grabbed her breasts and pulled her towards him in order to molest her. She somehow managed to free herself and started running away from him. He followed her up to some distance, while she then came up to the residence of PW-8, which is situated at some distance away from her house. There she met PW-6 the daughter of PW-8 and asked for her mobile and called her father PW-3 and told him about the incident. She also told PW-6 about the incident. After some time her father, her cousin and other relatives came to the house of PW-8 from where they went to the concerned Police Station and lodged Exhibit No.1. She was then forwarded for medical examination to the STNM Hospital, Gangtok. Although, in cross-examination an effort was made to demolish the act of sexual assault by suggesting to the witness that the Appellant had touched her accidentally, she denied it and reiterated that he had suddenly put his hands on her breasts. PW-3 corroborated the evidence of PW-1 with regard to her having informed him of the incident and how it unfolded at the place where it occurred. PW-6 the victim's friend also corroborated the evidence of PWs 1 and 3. There is no reason to doubt the evidence of PW-1. The consistency in her evidence qualifies it as sterling. Thus, it is established that the Appellant perpetrated the offence of sexual assault on the victim.

9. In the end result, the assailed Judgment of the Learned Trial Court and the Order on Sentence are upheld.

10. Appeal dismissed and disposed of accordingly.

11. No order as to costs.

12. Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

(Meenakshi Madan Rai)
Judge
19-06-2024

Approved for reporting : **Yes**

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