

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED: 16.09.2019

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

Crl. Appeal No. 10 of 2018

Appellant : Nima Tamang

versus

Respondent : State of Sikkim

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

Appearance:

Mr. Gulshan Lama, Advocate (Legal Aid Counsel) for the
Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for
the State.

J U D G M E N T

Meenakshi Madan Rai, J

1. Aggrieved with the Judgment dated 12.12.2017 of the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short the "POCSO Act"), in Sessions Trial (POCSO) Case No. 16 of 2016 (*State of Sikkim v. Nima Tamang*), the Appellant is before this Court challenging the conviction and the sentence. The Appellant was convicted under Section 5 (m) punishable under Section 6 of the POCSO

Act. He was sentenced to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of Rs.5,000/- (Rupees five thousand) only, with a default clause of imprisonment. The fine, if recovered, was to be made over to the victim, as compensation.

2. Mr. Gulshan Lama, learned Legal Aid Counsel for the Appellant, would firstly assail the First Information Report (for short the "FIR"), Exhibit 3, as according to him, it was lodged belatedly, the incident allegedly having occurred on 16.05.2016 while the FIR came to be lodged only on 20.05.2016. It was also contended that the age of the minor victim remained unproved despite seizure of the victim's Birth Certificate as her parents were not examined as witnesses neither were witnesses to the seizure of the Birth Certificate produced. The Investigating Officer (for short the "I.O.") is the only witness who stated that the Birth Certificate was handed over to her by the victim's mother which remained unestablished on account of non-examination of the victim's mother. Consequently, as the age of the victim has not been proved, the charge under Section 5(m) of the POCSO Act is not the relevant provision of law to have charged or convicted the Appellant. Towards this contention, reliance was placed on **Jarnail Singh v. State of Haryana**¹. Reliance was also placed on the decision of this Court in **Lall Bahadur Kami v. The State of**

¹ (2013) 7 SCC 263

Sikkim². Conceding that the victim may well be below 18 years of age, it was urged that however nothing emanates to establish the victim being below 12 years of age. According to him, there are inconsistencies in the evidence of the victim and the cousin of the victim, PW10 which strike at the root of the Prosecution case since according to the victim, she went to the house of her cousin, PW10 whereas PW10 states that she had called the victim to her residence. Moreover, there is also a variation in the evidence of the victim before the Court and in her Statement under Section 164 of the Code of Criminal Procedure, 1973 (for short the "Cr.P.C."). Considering the evidence on record and the anomalies in the Prosecution case, the impugned Judgment and Order on Sentence deserves to be set aside and the Appellant acquitted.

3. *Per contra*, Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for the State contended that he relies on the evidence of PW7, Dr. R.N. Deokota to establish the age of the victim. That, the witness has clearly identified Exhibit 9A as the Birth Certificate of the victim issued by him. Once the witness identifies the said document as having been issued by him, there is no reason to doubt the veracity of the witness's statement or the document. On this count, reliance was placed on the decision of this Court in **Sancha Hang Limboo v. State of Sikkim**³. The commission of the act is consistent as can be

² 2018 Cri.L.J. 439 (SC)

³ SLR (2018) SIKKIM 1

gauged from the evidence of the Prosecution witnesses. PW5, the Doctor who examined the victim has given proof of the fact of the occurrence of the incident. Hence, in this view of the matter, the findings of the learned trial Court ought not to be disturbed.

4. We have heard the rival contentions of learned Counsel for the parties at length and have carefully considered all evidence and documents on record. The impugned Judgment and the Order on Sentence have also been carefully perused as also the citations made at the Bar.

5. We may now take stock of the facts in the instant matter. On 20.05.2016, at around 00:05 Hrs, the victim, PW1 lodged a complaint, Exhibit 2, before the Ranipool Police Station complaining of having been sexually assaulted by her neighbour, the Appellant, on 16.05.2016. Based on the report, a Criminal Case being FIR No. 32/2016, under Sections 342/376 of the Indian Penal Code, 1860 (for short the "IPC"), read with Section 4 of the POCSO Act was registered against the Appellant and investigation taken up. The Appellant, aged 28 years, a resident of Sonada, Darjeeling, West Bengal, residing at East Sikkim at the relevant time, was apprehended and taken into custody. Investigation revealed that although the assault had occurred on 16.05.2016 but the matter came to be reported only on 20.05.2016, the victim being apprehensive of disclosing it to anyone. On 19.05.2016, the victim had gone to visit her cousin, PW10 who noticed that

she appeared a little distracted and on her persuasion, the victim disclosed the incident to her. Later, the victim's father came to pick her up from the residence of PW10 and learnt of the incident upon which Exhibit 3, the FIR, came to be lodged at the Police Station. The victim was taken for medical examination. It transpired that the Appellant, the neighbour of the child and also her father's friend took the victim swimming along with her brother, his daughter who was the victim's School friend and his son, on 16.05.2016 to Ray *Khola*. Once there, they all began swimming and after sometime the Appellant asked the victim to fetch clothes and medicines and bait for fishing. She went to do the errand and while returning, thorns got embedded in her foot. The Appellant told her that he would remove the thorns and took her to a jungle by the riverside where he committed penetrative sexual assault on the victim, apart from biting her cheeks and pinching her breasts. She was unable to scream as he covered her mouth. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376(i)(j) and 506 of the IPC read with Section 4 of the POCSO Act.

6. The learned trial Court, framed charge under Section 5(m) punishable under Section 6 of the POCSO Act and under Section 506 of the IPC, against the Appellant. The Appellant pled "not guilty" to the charges and claimed trial. The Prosecution examined fifteen witnesses to establish its case. On closure of evidence, the Appellant was examined

under Section 313 Cr.P.C. and his responses duly recorded. The learned trial Court considered the evidence furnished and pronounced the impugned Judgment and Order on Sentence.

7. The only question that falls for consideration before us is whether the conclusion of the learned trial Court in convicting the Appellant is correct.

8. Before the learned trial Court, the victim was examined under Section 33 of the POCSO Act and Section 118 of the Indian Evidence Act, 1872, to gauge her capability to testify. The Court, being satisfied of the witness's capability, proceeded to examine her. She categorically stated that her age was 10 years at the time of evidence, and that she was attending Class V in a Government School. The victim went on to identify the Appellant and narrated the incident of the Appellant having sexually assaulted her at Ray *Khola* on the pretext of removing a thorn from her foot. According to her, he forcibly inserted his genital into hers, pinched her nipples and cheeks and covered her mouth when she tried to scream. After about seven days, she went to the house of her cousin, PW10 where she disclosed the incident to her. Her cousin then called up the victim's mother over the phone and informed her of what the victim had narrated to her. She also told the victim to ask her father to meet her in connection with this matter. Later, the victim accompanied her father and her paternal uncle and aunt to Ranipool Police Station. She was thereafter referred to Manipal Hospital for medical

examination. Her cross-examination reaffirmed the fact of sexual assault and the specific act committed by the Appellant. PW2, the Station House Officer, Ranipool Police Station, identified Exhibit 2 as the Statement of the victim recorded under Section 154 Cr.P.C. and Exhibit 3 as the formal FIR drawn up by her, under her signature. Upon lodging of the complaint, the Case came to be registered against the Appellant under Sections 342 and 376 of the IPC read with Section 4 of the POCSO Act and endorsed to the I.O., PW15, for investigation.

9. PW3 and PW8 testified to the seizure of MOI, the black outfit said to be worn by the victim at the time of her sexual assault and MOII, the black swimming shorts with yellow stripes worn by the Appellant during the commission of the offence. PW6 is the aunt of the victim. According to her, one evening, the victim, accompanied by her father, came to her residence where the victim's father told her husband that the Appellant had tried to sexually assault the victim. On taking the victim aside and enquiring from her as to the veracity of the incident, the victim narrated the same to her. This witness stated that the victim told her that the Appellant had fondled her breasts, removed her panty and tried to insert his penis into her vagina. She examined the body of the victim and noticed bruises and struggle marks on her chest region. Thereafter she along with her husband, accompanied the victim, her father and another aunt of the victim to the

Ranipool Police Station. Her cross-examination would further confirm the fact of the incident.

10. PW10 corroborated the evidence of the victim of the fact that she had gone to the house of PW10 and in the course of their conversation, she told the victim that incidents of rape were increasing and warned her to be careful. Upon this, the victim narrated the incident to her stating that the Appellant, her father's friend, had committed rape on her at Ray *Khola* when the victim along with the daughter of the Appellant had been taken fishing, a few days ago. The victim, while revealing some pinch marks on her chest, stated that the Appellant had pinched her during the incident. Her father later came to pick her up at the house of PW10 and the victim narrated the said incident to him, in her presence. The victim's father, the victim and her younger brother went to the Police Station to report the matter. The evidence of the victim, PW1 and PW10 are thus corroborative of the presence of the victim at the house of PW10, the narration of the incident to PW10 by the victim, the consistency of the facts of the act and the victim's father coming to learn of the incident, followed by the matter being reported at Ranipool Police Station. PW14 was the victim's 8 year old brother. He attended a Government School and at the relevant time, was in Class II. The witness stated that he had gone swimming along with the victim, the Appellant and his son and daughter. On reaching Ray *Khola*, the Appellant asked the witness as well as his son and

daughter to remain at one spot while he took the victim away from them and returned after sometime. In cross-examination, it came to light that the place where the victim was taken, was not visible from the place where he along with the Appellant's children had remained. The evidence of this witness corroborates the fact of the victim being taken away by the Appellant from him and his friend.

11. While addressing the vehement arguments of the Counsel for the Appellant that the age of the victim has remained unestablished, we may carefully examine the evidence of the victim, PW1. According to her, on the first question put to her by the Court as to how old she was, she had unequivocally stated that she is "10 years old." PW5 was the Doctor who examined the victim on her being forwarded by the Ranipool Police Station. She advised X-ray of right wrist, right elbow and right hip of the victim for the purposes of bone age estimation. Upon receipt of the X-ray findings, she recorded her opinion on Exhibit 9, which is the Wound Certificate pertaining to the victim issued by the Central Referral Hospital, Tadong, Gangtok, East Sikkim, under her signature. It is recorded *inter alia* therein as follows;

"Investigations: 1) X-ray (rt) wrist PA + Lat.
2) X-ray (Rt) elbow AP + Lat.
3) X-ray Pelvis AP"

Her opinion on the reverse page *inter alia* records, as extracted hereinunder;

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"X-ray findings : As per report of the radiologist, CRH dated 20/05/16.

(1) X-ray (Rt) elbow AP + Lateral shows – (a) Lateral epicondyle of humerus epiphysis is seen (small) [appears at 10 – 12 yrs of age].

(b) Olecranon process of ulna epiphysis is seen (appears at 10 – 13 yrs)

(2) X-ray (Rt) wrist PA + Lateral shows – (a) Piriform is seen (about 11 yrs)

(3) X-ray Pelvis AP view shows – (a) Iliac crest epiphysis is not seen (appears at puberty) (b) Lesser Trochanter epiphysis is not seen (appears at 8-14 yrs)

- Bone age is estimated to be between 10 yrs to 12 yrs.

*.....
OPINION : As per the queries of the I/O of the case –*

(1) As per the physical examination, the evidence of sexual intercourse cannot be refuted.

(2) No evidence of any injury on the vital parts of her body is seen except injury no (1) and (2)c. as described above under physical examination.

(3) Evidence of penetrative sexual intercourse is present.

*(4) **Age of the patient as per bone age estimation is above 10 yrs and below 12 yrs.**"*

(emphasis supplied)

Her evidence substantiates the evidence of the victim as regards her age.

12. Apart from the evidence of this witness, it is relevant to examine the evidence of PW7, Dr. R.N. Deokota. According to him, in the year 2007, he was holding the post of Registrar, Births and Deaths, STNM Hospital, Gangtok in addition to being the Consultant, Gynaecology and Obstetrics Department, STNM Hospital, Gangtok. He identified Exhibit 9A as the Birth Certificate issued to the victim by him. That, the victim's date of birth has been recorded as 18.01.2007 in the said Birth Certificate, Exhibit 9A. She was issued the Birth

Certificate bearing Sl. No. B-I/115 bearing Registration No. 115/2007 which was registered on 19.01.2007 and issued on 12.03.2007. He identified Exhibit 9A(a) as his signature on the Birth Certificate. His examination-in-chief withstood the test of cross-examination. The evidence of this witness also establishes the age of the victim at the time of the incident as 9 years.

13. Now what remains to be examined is whether the incident occurred at all. The evidence of the witnesses i.e. the victim, PW1 and her younger brother, PW14, clearly indicate that the incident occurred on the relevant day. The evidence of her cousin, PW10 indicates that there were injuries on the body of the victim, to establish the fact of the incident. That apart, it is relevant to revert back to the evidence of PW5. According to her, upon examination of the victim, she *inter alia* found the following;

"Erythema (redness) over bilateral breast and it was non-tender. Small hymen tear at 7 o'clock position. No other external injury over other parts and genital area were seen. Labia majora covers minora and labia minora is opposed. No haematoma or bleeding present."

Thereafter, besides advising X-ray of the victim for bone age estimation, she also collected 5 ml blood as sample along with vaginal swab and nail clippings of the victim, for examination. No injuries were found on the vital parts of the body, however, there was evidence of penetrative sexual intercourse on the child as per her physical examination. This evidence remained

undecimated in cross-examination. In Exhibit 9, she has opined, as follows;

"OPINION : As per the queries of the I/O of the case –

(1) As per the physical examination, the evidence of sexual intercourse cannot be refuted.

(2) No evidence of any injury on the vital parts of her body is seen except injury no (1) and (2)c. as described above under physical examination.

(3) Evidence of penetrative sexual intercourse is present.

(4) Age of the patient as per bone age estimation is above 10 yrs and below 12 yrs."

Therefore, the evidence *supra* establishes the injuries on the victim and thereby the fact of the incident, in which the Appellant sexually assaulted the victim.

14. In view of the gamut of facts and evidence on record, we are of the considered opinion that there is no reason to differ with the findings of the learned trial Court in the impugned Judgment and the impugned Sentence.

15. In the end result, the Appeal deserves to be and is accordingly dismissed.

16. No order as to costs.

17. Copy of this judgment be sent to the learned trial Court along with its records, for information.

(Bhaskar Raj Pradhan)
Judge
16.09.2019

(Meenakshi Madan Rai)
Judge
16.09.2019

Approved for reporting: **Yes**
Internet: **Yes**

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