

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED: 23rd June, 2017

**Single Bench : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI,
JUDGE**

Crl. A. No. 17 of 2015

Appellant : Shri Indra Kumar Pradhan,
C/o Late Singha Raj Pradhan,
R/o Rhenock Bazaar,
East Sikkim.

Versus

Respondent : State of Sikkim

Appeal under Section 374 of the Code of Criminal Procedure, 1973.

Appearance:

Mr. N. Rai, (Senior Advocate) Legal Aid Counsel with Ms. Malati Sharma,
Advocate for the Appellant.

Mr. Karma Thinlay, Additional Public Prosecutor with Mrs. Pollin Rai,
Assistant Public Prosecutor, for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Being aggrieved with the Judgment of Conviction and Order on Sentence, both dated 31.08.2015, in S.T. (POCSO) Case No. 04 of 2015, State of Sikkim vs. Indra Kumar Pradhan, passed by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'), East Sikkim at Gangtok, this instant Appeal has been preferred.

2. By the impugned Judgment, the Appellant was convicted under Section 10 of the POCSO Act and thereafter by the impugned Order sentenced to undergo Simple Imprisonment for five years with a fine of Rs.5000/- (Rupees five thousand) only, and a default Clause of imprisonment, duly setting off the incarceration period already undergone.

3. In Appeal, it is contended by learned Senior Counsel for the Appellant, that, the FIR is an afterthought, as evident from its belated filing on 21.10.2014, whereas the incident allegedly occurred at 11 a.m. on 14.9.2014. That, the evidence furnished by the Prosecution witnesses have to be considered with caution, as the evidence of P.W.-1, P.W.-2, P.W.-3 and P.W.-8 are fraught with contradictions. As per P.W.-2, although the Appellant had sexually assaulted her twice, she did not recall the dates. P.W.-3 stated that the Victim P.W.-2, had told her that the Appellant had fondled her private part. To the contrary, P.W.-8 stated that P.W.-3 informed him that, the Appellant had made P.W.-2 fondle his genital. That, as per P.W.-1, P.W.-2 alleged that the Appellant had sexually assaulted her on two occasions, the previous occasion being two days prior to 21.10.2014, as mentioned in Exhibit-1, her Report. That, this is at variance with the information in Exhibit-2, which alleges that the Victim had been assaulted on 14.9.2014. Therefore, the question of the child being molested two days prior to 21.10.2014 is false, as no one has complained of or furnished

such evidence. The contradictions are, thus, fatal and indicate that the incident had not occurred and Exhibit-7 was lodged on the instigation of P.W.-4 and P.W.-5. That, no explanation was afforded for the belated FIR or why it was forwarded to the Magistrate on 22.10.2014, although lodged on 21.10.2014. To bolster his submissions with regard to the delayed lodging of the FIR, reliance was placed on ***Md. Ali alias Guddu v. State of U.P.***¹ and on ***Marudanal Augusti v. State of Kerala***². That, P.W.-4 and P.W.-5 were extraordinarily enthusiastic in assisting P.W.-8, which raises a doubt about their motives as P.W.-4 and P.W.-5 had acrimonious relations with the Appellant. P.W.-5 had scribed the FIR, while P.W.-4 accompanied P.W.-1 and the Victim for the medical examination, out of vengeance against the Appellant. This is revealed in the response of the Appellant, to Question 46 of the Section 313 Cr.P.C. Statement, where he stated that P.W.-4's tenant had beaten up his (Appellant's) physically challenged brother, against which the Appellant had lodged a Complaint at the Rhenock Police Station. While P.W.-5, who lives near his house, had constructed a toilet near his kitchen, giving rise to a quarrel, on which P.W.-5 had threatened reprisal. That, the occurrence of the incident is improbable as the Appellant's wife was admittedly

1. 2015 CRI L.J. 1967

2. AIR 1980 SC 638

washing utensils in front of the shop. That, there are anomalies regarding the amount of money P.W.-2 had carried to the shop, which according to her was Rs.100/- (Rupees one hundred) only, while as per P.W.-3, it was Rs.10/- (Rupees ten) only. Thus, the case of the Prosecution fails to inspire confidence and the Judgment and Order on Conviction of the learned Trial Court deserves be set aside.

4. Rebutting the aforesaid arguments, learned Additional Public Prosecutor contended that, the delay in lodging the FIR has been sufficiently explained by the evidence of P.W.-4, P.W.-5 and P.W.-8. That, the evidence of P.W.-1 lends credence on this count, as she has clarified that the Victim and her parents had approached P.W.-1, prior to the lodging of the FIR. Moreover, P.W.-8 being a mere hawker and unaware of the provisions of law was unable to take immediate steps, as explained by him. Admitting that there could be minor discrepancy in the evidence of P.W.-8, P.W.-2 and P.W.-3 concerning the incident, it was explained that this was due to the hearsay nature of evidence of P.W.-8, who had heard it from P.W.-3, who in turn was told of it by P.W.-2. Nevertheless, such minor discrepancies do not shake the Prosecution Case, the other evidence standing firm to establish the offence. Apart from which, P.W.-8 was examined one month after the incident for which concession must be afforded to his educational background. To buttress his submissions, reliance was

placed on ***State of H.P. v. Gian Chand***³, ***State of Uttar Pradesh v. Manoj Kumar Pandey***⁴ and ***State of Punjab v. Gurmit Singh and Others***⁵.

5. Learned Counsel for both parties placed their arguments in *extenso* and I have given due consideration to their submissions. I have also perused the appended documents on record, as also the impugned Judgment and Order on Sentence.

6. The question that falls for consideration is;
Whether the Appellant was erroneously convicted by the learned Trial Court?

7. In the first instance, we may advert to the facts of the Case for a clear picture. The Prosecution Case, as it unfolds is that on 21.10.2014, Exhibit-2, the FIR, was lodged by P.W.-8, the Victim's father, a resident of Rhenock Bazaar, East Sikkim, to the effect that on 14.9.2014 at around 1100 hours, when the Victim P.W.-2, had gone to the shop of the Appellant to purchase a pencil, he took her inside a room and sexually molested her. P.W.-8 having been informed belatedly of the incident by the Victim, reported the matter to the State Commission for Protection of Child Rights, Gangtok, from where he was directed to report the matter to the Police Station.

3. (2001) 6 SCC 71

4. (2009) 1 SCC 72

5. (1996) 2 SCC 384

8. On the basis of Exhibit-2, the Rhenock Police Station drew up the formal FIR Exhibit-7 and registered Rhenock P.S. Case, FIR No. 14(10)/2014 dated 21.10.2014 under Section 354(A) of the Indian Penal Code (for short "IPC"), read with Section 8 of the POCSO Act, against the Appellant and endorsed it for investigation. During the course of investigation, the Appellant was medically examined, as also the Victim P.W.-2. The Statement of the Victim under Section 164 Cr.P.C. was duly recorded. Investigation revealed that the Victim, aged about five years, a student, was living with her parents in rented accommodation in Rhenock Bazaar, East Sikkim. P.W.-8, the father of the Victim, was a hawker while the Appellant was running a shop in the same area. On 14.9.2014, when the Victim had gone to the Appellant's shop to buy a pencil, the Appellant taking advantage of the fact that no one else was in his shop, rubbed his finger on the vagina of P.W.-2 and later gave her some sweets. That, it was the second such incident committed by the Appellant on P.W.-2. The Victim narrated the second incident to P.W.-3, her mother, who in turn, narrated it to P.W.-8. P.W.-8 for his part took the matter to P.W.-4 and P.W.-5, whereupon, P.W.-4 took P.W.-8 and P.W.-2 to the State Commission for Protection of Child Rights, Gangtok, where the Protection Officer P.W.-1, counselled the child, who had narrated the incident to her. This was followed by the lodging of the FIR. On completion of investigation, Charge-Sheet was

submitted against the Appellant under Section 354(A) IPC read with Section 8 of the POCSO Act.

9. The learned Trial Court framed Charge against the Appellant under Section 9(m) punishable under Section 10 of the POCSO Act and on the Appellant entering a plea of "not guilty", commenced Trial. To establish its case beyond all reasonable doubt, the Prosecution examined eleven witnesses, on completion of which, the Appellant was examined under Section 313 Cr.P.C. Thereafter, final arguments were heard. On the basis of the evidence furnished before it, the learned Trial Court convicted and sentenced the Appellant, as per the impugned Judgment and Order on Sentence aforementioned.

10. While carefully analyzing the evidence on record, according to P.W.-1, the Child Protection Officer under the Social Justice, Empowerment of Women and Child Welfare Department, the Victim, P.W.-2, came with P.W.-8, her father, to their Office. P.W.-1 took P.W.-2 to a separate room, where on enquiry the child told her that the Appellant had rubbed his finger on her genital on two different occasions, when she had gone to his shop to purchase articles. She then accompanied the Victim P.W.-2, to the STNM Hospital where P.W.-2 was examined by P.W.-7, where during the course of her examination, the victim being traumatized cried throughout. The Victim's (P.W.-2) statement with regard to

sexual assault corroborated the deposition of P.W.-1, *inasmuch* as the Appellant had inserted his fingers into her genital and fondled it, then given her two sweets, which she refused to take. She complained of the incident to her parents. As per the Victim, the Appellant had on a previous occasion committed the same act on her but she had not reported it to P.W.-3 apprehending a beating. The evidence of the mother of the Victim, P.W.-3, establishes that P.W.-2 had indeed told her of the incident, that the Appellant had given her sweets and fondled her private part. That, he had committed such an act even in the past. The evidence of the said witnesses along with the evidence of P.W.-8 is consistent of the fact of sexual assault. Although, it had been raised in argument that the evidence of P.W.-8 was at variance with other witnesses as already stated, it is evident that P.W.-8 was told of the incident by P.W.-3, who herself had heard it from P.W.-2. There appears to have been some misunderstanding in the communication, nevertheless, it is a minor discrepancy, which does not demolish or whittle down the entire Prosecution Case of sexual assault, as the Victim's evidence about the incident is consistent and unwavering despite her tender years. That apart, the argument that the wife of the Appellant was closeby and therefore, the incident could not have occurred, cannot be countenanced, as P.W.-2 has clearly said that she and the Appellant were inside the shop. There is no evidence to establish that the inside of the shop was visible to the Appellant's wife. The denomination of the rupee notes, I find are

not even relevant to the issue at hand and deserve no consideration. The argument that the Victim failed to recollect the date is a little farfetched, as the Victim was only 5 years old and would obviously not have learnt about dates or months or years. She has remembered the act of sexual assault and recapitulated it to her mother, that suffices as evidence. It had been vehemently argued for the Appellant that P.W.-4 and P.W.-5 had in fact instigated the Victim's family to lodge a false FIR. However, on careful scrutiny of the evidence of P.W.-5, he has on a suggestion put to him, stated that he had no enmity with the Appellant or his family members. P.W.-4 also denied acrimony with the Appellant. Although, it is true that the evidence of P.W.-7, the Gynaecologist who examined the Victim, showed no signs of the reported sexual assault, however, it must be borne in mind that the incident took place on 14.9.2014, whereas Exhibit-2 was lodged on 21.10.2014 and the Victim examined only on 22.10.2014 at around 1:30 p.m. An argument was raised by learned Senior Counsel for the Appellant that P.W.-1 in her Report, Exhibit-1, had recorded that the second incident happened "two days ago" which would thereby mean 19.10.2014. This is obviously an error, but a holistic appreciation of the facts and evidence on record have to be taken. What is of prime consideration is the fact that the Victim, a mere child of 5 years has not dithered in her evidence while narrating the incident. There is no reason to doubt the veracity of her

evidence or for the child to conjure up such an incident when she was obviously mortified by the disgusting act.

11. While reverting to the argument of the Appellant that the FIR was a false one considering the delay in lodging it, in ***Md. Ali alias Guddu v. State of U.P.***¹, relied on by the Appellant, the Supreme Court had allowed the Appeal and set aside the Judgment of Conviction and Order on Sentence, as the FIR had been lodged belatedly. The circumstances therein are distinguishable from the facts at hand, as the victim therein was found to be missing from the midnight of 22.11.1996, the FIR came to be lodged only on 3.12.1996 and the victim was traced on 18.1.1997. In the instant case, the child was not missing. It is merely on account of the educational, social and economic status of the Victim's parents, leading to their ignorance that the FIR was lodged belated, they being unaware of the mode of accessing the Criminal Justice System. If we revisit the evidence of P.W.-8, he has in categorical terms stated that he went from one person to the other seeking advise on how to take steps till P.W.-4 and P.W.-5 assisted him. These two witnesses appear to have no axe to grind with the Appellant. Reliance was also placed on ***Marudanal Augusti v. State of Kerala***², wherein the Supreme Court found that, the most serious infirmity that appeared in the case was although the FIR was lodged on the midnight of 23/24.6.1971, but was despatched to the Sub-Magistrate and received by him on 5:30

a.m. on 25.6.1971, i.e. a delay of almost 29 hours and the Investigating Officer failed to give any explanation for such delay. In the said case, other anomalies were found in the prosecution case, such as those pertaining to the injuries on the victim and the date that the victim had gone to the doctor for medical examination, while here, the FIR, Exhibit-2, was lodged at 20:00 hours on 21.10.2014 and was marked as "Seen" by the Magistrate on 22.10.2014. Neither the time that the FIR was forwarded, nor the time of receipt has been recorded but the Chief Judicial Magistrate was examined as P.W.-9 and no question on this count was put forth under cross-examination, either to him or to the Investigating Officer. Considering that the Appellant had ample opportunity to rebut any evidence before the learned Trial Court to elicit the truth, but failed to do so, this argument cannot be raised in Appeal. Besides, it is a fact that Exhibit-2 was lodged at Rhenock Police Station which is at a distance of 3-4 hours drive from Gangtok. Therefore, the Judgment cited is of no assistance to the learned defence Counsel. The delay in lodging the FIR has been sufficiently explained and is accepted by this Court.

12. We may also usefully refer to the decision in **State of H.P. v. Gian Chand³**, cited by learned Additional Public Prosecutor, wherein it was held that the delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same, solely on the ground of delay in lodging the

first information report. That, delay has the effect of putting the Court on its guard, to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal but mere delay cannot be a ground for discarding the entire prosecution case. It is also held in ***State of Punjab v. Gurmit Singh and Others*⁵**, that if the evidence of the prosecutrix inspires confidence it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason, the court finds it difficult to place implicit reliance on her testimony, it must look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations.

13. As already discussed, delay in the lodging of the FIR has been satisfactorily explained and found acceptable by this Court. The evidence of the Victim being consistent thereby inspires confidence and needs no further corroboration. Nevertheless, by way of abundant caution, the evidence of the other Prosecution witnesses have also been considered.

14. At the same time, it would do well to consider the mandate set out by Section 29 of the POCSO Act, which requires the Court to presume that the offence was committed if the offences are under Sections 3, 5, 7 and 9 of the POCSO Act. The Section reads as;

"29. Presumption as to certain offences. – Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3,5,7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved."

Undoubtedly, this is a rebuttable presumption as evident from Section 30 of the POCSO Act, which provides as follows;

"30. Presumption of culpable mental state. – (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.

(2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

Explanation. – In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact."

However, no resort was taken to this Section, by the Appellant before the learned Trial Court.

15. In conclusion, I find no impairment in the Judgment and Order on Sentence of the learned Trial Court.

Indra Kumar Pradhan vs. State of Sikkim

16. Accordingly, Appeal fails and is dismissed. The Appellant shall surrender before the Court of the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 at Gangtok, East Sikkim, immediately, to undergo the Sentence as pronounced by the learned Court in the impugned Order of Sentence dated 31.08.2015.

17. No order as to costs.

18. Records of the learned Trial Court be remitted forthwith.

Sd/-
(**Meenakshi Madan Rai**)
Judge
23-06-2017

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

bp