

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 19th MAY, 2016

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

Crl.A. No.18 of 2015

Appellant : Shri Suren Kumar Subba,
S/o Dhan Bahadur Subba (Limboo),
R/o Lower Kamrang,
South Sikkim.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance

Mr. B. K. Gupta, Legal Aid Counsel for the Appellant.

Mr. Karma Thinlay Namgyal, 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. This Appeal seeks to assail the Judgment and Order on
Sentence, dated 25-11-2014, of the Court of Learned Special Judge

Shri Suren Kumar Subba vs. State of Sikkim

(POCSO Act, 2012), South Sikkim at Namchi, in Sessions Trial (POCSO) Case No.01 of 2014, convicting the Appellant under Sections 9(m)/10 of the Protection of Children from Sexual Offences Act, 2012 (for short “POCSO Act”) and Section 354-B of the Indian Penal Code, 1860 (for short “IPC”). The Appellant was sentenced to undergo simple imprisonment of seven years and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, with a default stipulation. For the offence under Section 354-B of the IPC, he was sentenced to undergo simple imprisonment for a period of four years and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, also with a default clause of imprisonment. The sentences of imprisonment were ordered to run concurrently.

2. Before this Court, the grounds urged in Appeal, *inter alia*, were that as per the Section 164, Code of Criminal Procedure, 1973 (for short “Cr.P.C.”), statement of the victim, it appeared that she had been raped, but in her deposition before the Court, the act amounted only to an attempt, the evidence being of a child witness and vacillating, therefore, deserve no consideration. The FIR, Exhibit 1, was lodged one month after the incident without assigning satisfactory reasons for the delay. That Sections 9(m)/10 of the POCSO Act and Section 354-B of the IPC cannot be attracted together and that, there is nothing in the Medical Report, Exhibit 5, of the victim to support the Prosecution case. Hence, in consideration of

Shri Suren Kumar Subba vs. State of Sikkim

the anomalies in the Prosecution case, the impugned Judgement and Order on Sentence dated 25-11-2014 be set aside.

3. *Per contra*, Mr. Karma Thinlay Namgyal, Learned Additional Public Prosecutor, contended that the delay in lodging of the FIR does not effect the outcome of the case, the victim being a mere child of 10 years at the time of the incident, she would have been apprehensive of informing her parents of it, who in turn would be reluctant to lodge the FIR, in view of the future repercussions for the child. To fortify this submission, he has placed reliance on the decision of the Hon'ble Apex Court in ***State of Himachal Pradesh vs. Suresh Kumar alias DC***¹ and ***Mohd. Imran Khan vs. State Government (NCT of Delhi)***². That there is no reason to disbelieve the statement of the victim only because she is a mere child, when her statement has been consistent in connection with the incident. On this point, the attention of this Court was drawn to the decisions in ***State of Himachal Pradesh vs. Prem Singh***³ and ***State of Uttar Pradesh vs. Krishna Master and Others***⁴. Thus, it is prayed that the Appeal deserves no indulgence and be dismissed.

4. The rival contentions of both Learned Counsel were heard at length. I have also carefully perused the impugned

1. (2009) 16 SCC 697

2. (2011) 10 SCC 192

3. (2009) 1 SCC 420

4. (2010) 12 SCC 324

Shri Suren Kumar Subba vs. State of Sikkim

Judgment and Order on Sentence, the evidence and all documents on record.

5. The question that falls for consideration before this Court is whether the Appellant has been wrongly convicted by the Learned Trial Court. In order to have a clear perspective into the matter, it would be necessary to briefly refer to the facts of the case.

6. On 04-10-2013, P.W.1, the victim's mother, lodged an FIR, Exhibit 1, before the Namchi Police Station, South Sikkim, informing therein that on September 5, 2013, the Appellant had taken her daughter, the victim P.W.4, to a place between the Kitchen and the Water Tank of one Kichu Dumra, Primary School and attempted to insert his genital into the genital of P.W.4. P.W.1 came to learn of the incident from P.W.2, her sister-in-law and on enquiry from the minor victim P.W.4, she confirmed the same. Namchi P.S. Case was registered on the same date against the Appellant, under Sections 376/511 of the IPC, read with Section 8 of the POCSO Act and endorsed to P.W.11 for investigation. On completion of investigation, Charge-sheet was filed against the Appellant under the aforementioned Sections of Law. The Learned Trial Court after taking cognizance of the offence and hearing Learned Counsel for the parties, framed charges against the Appellant under Section 9(m) of the POCSO Act, punishable under Section 10 of the said Act and under Section 354-B of the IPC. After examining twelve

Shri Suren Kumar Subba vs. State of Sikkim

witnesses furnished by the Prosecution, the Learned Trial Court on the basis of the evidence so produced, convicted the Appellant and sentenced him as aforesaid.

7. Dealing with the arguments of Learned Legal Counsel for the Appellant that as per the Section 164 Cr.P.C. statement of the victim, it appeared that she was raped, but from her deposition in the Court it amounted to an attempt upon her, in this context, on going through the provisions of the POCSO Act, it is clear that regardless of whether there is penetration or not, if the offence of sexual assault is committed on a child below 12 years of age, it tantamounts to commission of an offence of aggravated sexual assault. Although, the offence of sexual assault has been described in Section 7 of the POCSO Act and looking at the evidence furnished by the victim in the Court, against the Appellant, i.e., ***“He then took out his ‘Pisab garney’ (Penis) and rubbed it on my (Pisab Garney) (Vagina)”***, appears to be a case of sexual assault as provided under Section 7, nevertheless in view of the specific provision made under Section 9(m) for sexual offences against a child below 12 years of age, the provisions of Section 9(m) have necessarily to be invoked. As there is consistency in the statement of the victim regarding the fact that the Appellant took her to the place of occurrence and committed the offence, there is no reason to doubt the veracity of her evidence, added to which it has to be noticed that a statement

Shri Suren Kumar Subba vs. State of Sikkim

under Section 164 Cr.P.C. is not substantive evidence but merely corroborative. Also, there is no proof that the victim during cross-examination was confronted with her statement under Section 164 Cr.P.C.

8. In *Mohd. Imran Khan vs. State Government (NCT of Delhi)*⁸ the Hon'ble Apex Court while dealing with the veracity of a victim's evidence held that –

“22. *It is trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (b) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice.”*

9. On the anvil of the principle above, despite being a minor, it is evident that the victim has given clear, consistent and cogent statements with regard to the offence. It would also not be out of place to mention the fact that the Court, in order to gauge her capacity to understand the matter before recording her deposition, put questions to her and found that she gave rational answers.

Shri Suren Kumar Subba vs. State of Sikkim

Therefore, the argument of the Appellant is not tenable on this count.

10. That having been settled, the next argument canvassed for the Appellant was that, the FIR was lodged belatedly. It is true that the FIR was indeed lodged a month after the incident. In this regard, it would be pertinent to point out that firstly no cross-examination on this count was made to any of the Prosecution witnesses. That apart, in ***State of Himachal Pradesh vs. Prem Singh***³ relied on by the Prosecution, the Hon'ble Apex Court has clearly held that –

“6. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe throw out the prosecution case merely on the grounds that there is some delay in lodging the FIR.”

11. In the instant case, the child had withheld the facts of the incident from her parents. Her mother, P.W.1, as soon as she learnt of it from P.W.2, enquired of its veracity from the victim and lodged the FIR on confirmation of the facts. The delay was on account of the child not having narrated the incident to her parents, who once seized of the matter took immediate steps, for which no fault can be attributed. Hence, this argument too has no legs to stand.

Shri Suren Kumar Subba vs. State of Sikkim

12. The argument that both Sections 9(m)/10 of the POCSO Act and Section 354B of the IPC cannot be attracted is evidently incorrect. Section 9(m) of the POCSO Act reads as follows;

“9. Aggravated Sexual Assault.—

(m) whoever commits sexual assault on a child below twelve years; or

.....

is said to commit aggravated sexual assault.”

Thus, this Section is concerned with aggravated sexual assault whereas, Section 354-B of the IPC deals with assault or use of criminal force to woman with intent to disrobe. For easy reference, it would be worthwhile to reproduce Section 354-B of the IPC hereinbelow;

“354B. Assault or use of criminal force to woman with intent to disrobe.—Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.”

The two Sections deal with completely different offences and, therefore, the argument that both Sections cannot be invoked together is not at all tenable.

13. The next leg of the argument of the Appellant was that there is nothing in the Medical Report of the alleged victim and P.W.7 to support the case of the Prosecution. That P.W.1 has

Shri Suren Kumar Subba vs. State of Sikkim

admitted that during the alleged period of incident she did not see any injury on the body of the victim who used to sleep soundly at night. A perusal of the Medical Report, Exhibit 5 of the victim reveals that she was taken for medical examination on 04-10-2013. It is no one's case that there was penetration at all, hence in the first instance the question of rapture of the hymen would not arise in the first instance. Given the interval between the date of offence and date of medical examination, it would be incongruous to expect that the examination of P.W.4 by P.W. 7 would yield any result to indicate the offence. The child too has made no allegation of physical force, merely stating that the Appellant carried her and took her to the place of occurrence and committed the offence.

14. It was also pointed out by Learned Legal Aid Counsel for the Appellant that P.W.5 has said that he along with P.W.3 verified the incident from P.W.4, after "a few days", while P.W.4 submits that "later" she told P.W.3 and P.W.5 of the incident, thereby raising an anomaly in their evidence. This appears to be an argument which cannot be countenanced, since P.W.4 has said "later" she told P.Ws 3 and 5 of the incident without specifying the time, which could have been the time when P.W.5 enquired of it from her and not necessarily immediately after the incident. Needless to add that there has been no cross-examination on this specific point.

Shri Suren Kumar Subba vs. State of Sikkim

15. At this juncture, one may usefully refer to the provisions of Section 29 of the POCSO Act with regard to presumption of offences. This Section reads as follows;

“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.”

16. Thus, when the victim herself has deposed that the Appellant had committed the offence, the Special Court is left with no option but to presume that such an offence has occurred, of course, with the rider that should the Appellant be able to disprove his culpable mental state, as provided under Section 30 of the POCSO Act, then he stands a chance of acquittal.

17. Having said that, in the end result, after due consideration of the entire evidence on record which includes consideration of the evidence of P.W.5, the brother of the victim, who witnessed the incident and which has not been demolished in cross-examination, I am of the considered opinion that the prayer for setting aside the impugned Judgment and Order on Sentence of the Learned Trial Court is not warranted.

18. Consequently, the Appeal fails and is dismissed.

Shri Suren Kumar Subba vs. State of Sikkim

19. Copy of this Judgment be sent to the Court below for information.

20. Records of the Court below be returned forthwith.

(Meenakshi Madan Rai)
Judge
19-05-2016

Approved for reporting : **Yes**

Internet : **Yes**

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