

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 9th DECEMBER, 2019

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

Crl.A. No.19 of 2018

Appellant : Lok Prasad Limboo @ Lokay

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. B. Khatiwada, Senior Advocate with Ms. Gita Bista, Legal Aid Counsel and Ms. Anusha Basnet, Advocate for the Appellant.

Mr. S. K. Chettri, Assistant Public Prosecutor for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. In Sessions Trial (POCSO) Case No.13 of 2017 the Appellant faced trial under Section 7 and Section 9(I) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act) and Section 354 of the Indian Penal Code, 1860 (hereinafter, IPC). Vide the impugned Judgment dated 31-05-2018, the Appellant was convicted on two counts for the offence under Section 7 of the POCSO Act, Section 9(I) of the POCSO Act and on two counts for the offence under Section 354 of the IPC. Consequently, he was sentenced to suffer simple imprisonment of four years on each count of the offence under Section 7 of the POCSO Act with fine of Rs.30,000/-

(Rupees thirty thousand) only, each, with default clauses of imprisonment. For the offence under Section 9(l) of the POCSO Act, he was sentenced to undergo simple imprisonment for a period of five years and to pay a fine of Rs.40,000/- (Rupees forty thousand) only, also with a default clause of imprisonment. On each count of the offence under Section 354 of the IPC, simple imprisonment for a period of four years and fine of Rs. 40,000/- (Rupees forty thousand) only, each, default clauses of imprisonment were prescribed. The periods of imprisonment were ordered to run concurrently.

2. Dissatisfied with the impugned Judgment and Order on Sentence the Appellant is before this Court contending that in the first instance no evidence determines that the victim was a minor as her Birth Certificate was not seized. Secondly, the victim complained of sexual assault on two occasions and deposed that when the earlier incident occurred her brother had also accompanied her to the shop of the Appellant for some errand. P.W.5, her brother however did not shed any light on this aspect in his evidence. It was next contended that when the first alleged sexual assault took place the victim did not disclose it to any person neither did she reveal it in her statement under Section 164 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.) to the Learned Magistrate and came to light for the first time in her evidence before the Court, thereby reeking of falsity. That, the evidence of the victim indicates a motive to falsely implicate the Appellant as she had stated that her uncle P.W.3 and the Appellant did not share cordial relations. It was urged

that prior to the alleged incident the victim frequented the shop of the Appellant but no such incident had ever been complained of. That, in all likelihood she was tutored by her uncle and aunt to depose against the Appellant when she went to record her statement under Section 164 Cr.P.C. That, the victim's case is that she had gone to the shop of the Appellant at 7 p.m. when infact his shop closes down at 6 p.m., revealing the intent of P.W.3 and P.W.4 to falsely implicate the Appellant by sending her after his shop closed. The Appellant, for his part has clearly denied the allegations made against him in his responses under Section 313 Cr.P.C. The medical evidence does not support the Prosecution case, accordingly the case not having been proved beyond a reasonable doubt, the Appellant deserves an acquittal.

3. Learned Assistant Public Prosecutor refuting the contentions so advanced, argued that no doubt arises on the age of the victim, since Exhibit 9, the Admission Register of the School in which she was admitted, was produced in evidence before the Learned Trial Court and proved. That, the victim's name and date of birth is recorded therein and the Headmistress of the School, P.W.10, has vouched for the authenticity of the entries by her evidence and issuance of a Certificate Exhibit 10. The incident took place on 27-06-2017, hence the victim was a minor in terms of the POCSO Act her date of birth being 02-10-2000. The victim has categorically described the sexual assault perpetrated on her by the Appellant. That, in his response to Question no.4 of the Section 313 Cr.P.C. statement, the Appellant admitted that the victim had indeed come to his shop

to purchase biscuits. That, this statement itself confirms the victim's presence at the place of occurrence. Hence, in view of the evidence furnished by the Prosecution no requirement arises to interfere with the impugned Judgment and Order on Sentence.

4. The rival submissions of Learned Counsel have been heard at length and duly considered, all evidence and documents as also the impugned Judgment have been duly perused and carefully considered.

5. The questions that fall for consideration before this Court is (i) whether the alleged incident indeed took place and (ii) whether the impugned Judgment is sustainable in its entirety, the Appellant having been convicted on two counts of Section 7 of the POCSO Act and on two counts of Section 354 of the IPC, sans FIR in the first incidents alleged.

6. In this regard, we may first look into the facts of the case. On 27-06-2017, P.W.3, the maternal uncle of the victim lodged an FIR, Exhibit 4, before the Mangan Police Station, at around 2200 hours, informing therein that on the same date, at around 1900 hours, his niece the victim had gone to purchase biscuits from the shop of the Appellant. She returned home crying and reported that the Appellant had sexually assaulted her by fondling her breasts at his shop. P.W.3 and his wife along with their son went to confront the Appellant at his house, who attempted to compromise the matter by offering them "Khadas" (ceremonial silk scarf) and money. P.W.3 reported the matter to

the local Panchayat and on being so advised by him, to the Police. Based on the FIR, Mangan P.S. Case dated 27-06-2017, under Section 8 of the POCSO Act was registered against the Appellant. During investigation it transpired that the victim was living with her aunt and uncle, the Appellant was their neighbour. In sum and substance investigation revealed the sexual assault on the victim as complained in Exhibit 4. The victim in her Section 164 Cr.P.C. statement stated that the Appellant had previously also fondled her breasts near his residence when she was studying in Class VII but she did not reveal the incident to anyone for fear of being disbelieved considering her young age. Charge-Sheet was submitted under Sections 8 and 10 of the POCSO Act against the Appellant. The Learned Trial Court framed Charge as reflected in the impugned Judgment. On his plea of "not guilty" the trial commenced, where the prosecution examined sixteen witnesses. On consideration of the evidence, the impugned Judgment and Order on Sentence came to be pronounced.

7. While addressing the first question formulated, I have examined the contents of Exhibit 9 the School Admission Register. The contents therein have been vouched for by P.W.10 Headmistress of the School. She identified Exhibit 9(a) as the entry pertaining to the victim. Exhibit 10 as the Certificate issued by her certifying therein that the date of birth of the victim as per Exhibit 9 was "02-10-2000". P.W.10 deposed that the minor victim had been admitted in their School in the pre-Primary Section on 21-02-2005 and left School in 2016. Considering the

contents of the document no ambiguity whatsoever concerning the age of the victim exists. Consequently, it is found that the victim was a minor when the incident took place and a child as defined under Section 2(d) of the POCSO Act.

8. The victim before the Learned Trial Court had stated that when she was in the 7th standard her brother and herself had gone to the shop of the Appellant to reach some '*bajri*' and sand. When her brother went to drink water, the Appellant suddenly put his hands on her breasts. Her cross-examination elicited the fact that this incident went unreported by her, either to her family or any authority. Pausing here momentarily it may be remarked that an FIR was lodged in the matter consequently no investigation ensued. She then narrated the incident that took place on 27-06-2017. She categorically stated that the Appellant fondled her breasts and on her resistance he left her upon which she ran home and reported the incident. That, she and her family rejected the offer of compromise by the Appellant when she and P.W.3 and P.W.4 confronted him. The statements made by the victim withstood the test of cross-examination. The evidence of P.W.3 would substantiate the Prosecution case pertaining to the lodging of the FIR, he also corroborated the evidence of the victim which found further corroboration in the deposition of P.W.4. P.W.5 was the brother of the victim who was present when they confronted the Appellant. His evidence corroborated the evidence of P.Ws 2, 3 and 4. P.W.6 was witness to the seizure of two *Khadas* and 10 number of Rs.500/- (Rupees five hundred) notes, from the Appellant at the Mangan

Police Station. P.W.7 was a neighbour of the minor victim and went to the Appellant's house on hearing a commotion, he witnessed the Appellant offering *Khadas* to the minor victim and her family members on the relevant night in the Appellant's house. The Panchayat, P.W.13, vouched for the fact that P.Ws 2, 3 and 4 had come to his residence informing him about the said sexual assault upon which he instructed them to report the matter to the Police. Although P.W.8 the Gynaecologist, who medically examined the victim stated that on examining the breasts of the victim she found no injury either there or on the person of the victim. No contradiction emanates in her statement and the Prosecution case as the victim has made no allegation of use of violence by the Appellant or of penetrative sexual assault. Her evidence is that he had fondled her breasts for which obviously unless violence was used there would be no signs of the assault. However, the statement of the victim with regard to the sexual assault on her on 27-06-2017 is consistent, cogent and reliable. As pointed out by Learned Assistant Public Prosecutor it is clear from the response to the question put to him under Section 313 Cr.P.C. statement the Appellant has admitted that the victim had come to his shop to purchase biscuits. Sexual assault includes touching of the private parts and the breasts of a child with sexual intent and involves physical contact without penetration. On the touchstone of this definition, it is obvious that since the Appellant touched the breasts of the victim no other conclusion can be drawn from the act except that it was with sexual intent. It is found from the

evidence on record that the Prosecution has proved its case beyond a reasonable doubt based on the anvil of the statement of the victim and the supporting witnesses.

9. Dealing with the second question it may be recapitulated here that this Court in **Taraman Kami vs. State of Sikkim** and **State of Sikkim vs. Taraman Kami**¹ had considered a similar question. The question that fell for consideration therein *inter alia* was (i) whether the Appellant can be convicted and sentenced for an alleged offence against "Victim A", P.W.3, sans FIR, based on her statement under Section 161 of the Cr.P.C.? The provisions of Section 154 of the Cr.P.C. was discussed and reference made to the **State of Haryana and Others vs. Bhajan Lal and Others**², **Prakash Singh Badal and Others vs. State of Punjab and Others**³ and **Lalita Kumari vs. Government of Uttar Pradesh and Others**⁴. It would be apt to reiterate here that in **Lalita Kumari** (*supra*) the Supreme Court held that;

"93. The object sought to be achieved by registering the earliest information as FIR is *inter alia* twofold: one, that the criminal process is set into motion and is well documented from the very start; and second, that the earliest information received in relation to the commission of a cognizable offence is recorded so that there cannot be any embellishment, etc. later.

120.

120.1. The registration of FIR is mandatory under Section 154 of the Code, if the information discloses commission of a cognizable offence and no preliminary inquiry is permissible in such a situation.

120.2. If the information received does not disclose a cognizable offence but indicates the necessity for an inquiry, a preliminary inquiry may

¹ SLR (2017) Sikkim 781

² 1992 Supp (1) SCC 335

³ (2007) 1 SCC 1

⁴ (2014) 2 SCC 1

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be conducted only to ascertain whether cognizable offence is disclosed or not.

120.3. If the inquiry discloses the commission of a cognizable offence, the FIR must be registered. In cases where preliminary inquiry ends in closing the complaint, a copy of the entry of such closure must be supplied to the first informant forthwith and not later than one week. It must disclose reasons in brief for closing the complaint and not proceeding further.

120.4. The police officer cannot avoid his duty of registering offence if cognizable offence is disclosed. Action must be taken against erring officers who do not register the FIR if information received by him discloses a cognizable offence.

.....” [emphasise supplied]

Thereafter, in Paragraphs 13 and 14 of ***Taraman Kami*** (*supra*) it was observed that;

"13. On a reading of the above rationale, it is indeed explicit that when an offence is committed it is imperative that a complaint under Section 154 of the Cr.P.C. is lodged at the Police Station, and the Police shall take steps as enumerated hereinabove. Thus, in the instant case, if the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a Complaint under Section 154 of the Cr.P.C., register a fresh Complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short cut route, foregoing legal provisions and file a Charge-Sheet on the basis of a Section 161 Cr.P.C. statement of a witness. At best, Section 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in Section 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an FIR which connect him with the offence to enable him to protect his interest.

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14. In *Youth Bar Association of India vs. Union of India and Others*⁵ the Hon’ble Supreme Court while issuing directions to the States to upload each and every FIR registered in all the Police Stations within the territory of India in their official website, observed, *inter alia*, that;

“12.

(a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.

(b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report can submit an application through his representative/agent/ parokar for grant of a certified copy before the concerned police officer or to the Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy shall be supplied within twenty-four hours.

(c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.

.....

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

.....”

The above ratio emphasises the importance of an FIR in a criminal offence, in the absence of which an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case. Thus, in view of the gamut of discussions which have taken place hereinabove, it concludes that the answer to the first question is in the negative.”

⁵ MANU/SCOR/18594/2016

Although the accused herein is the same person alleged to have committed the offence on an earlier occasion, when an offence was revealed in her Section 161 Cr.P.C. statement the Investigating Officer was required to take steps as necessitated by law.

10. The Judgment *supra* of the Division Bench of this Court appears to have escaped the noticed of the Learned Trial Court.

11. Thus, sans FIR and investigation the Appellant cannot be convicted for the alleged previous offence.

12. Hence, the conviction of the Appellant on the first count for the offence under Section 7 of the POCSO Act and the first count under Section 354 of the IPC is set aside.

13. The conviction for the offence under Section 9(I) of the POCSO Act, i.e., for repeated sexual assault, is set aside and he is acquitted of the said offence.

14. The Appellant stands convicted on one count for the offence under Section 7 of the POCSO Act and one count for the offence under Section 354 of the IPC.

15. He is accordingly sentenced to undergo simple imprisonment of four years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only, under Section 7 punishable under Section 8 of the POCSO Act. In default thereof further simple imprisonment of three months. He shall undergo simple

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imprisonment for a period of four years and pay a fine of Rs.40,000/- (Rupees forty thousand) only, under Section 354 of the IPC. In default, further simple imprisonment of three months.

16. The Appeal is allowed to the extent above.

17. The order pertaining to compensation in terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016, warrants no interference.

18. No order as to costs.

19. Copy of this Judgment be forwarded to the Learned Trial Court for information.

(Justice Meenakshi Madan Rai)
Judge
09-12-2019

Approved for reporting : **Yes**

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