

HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

Dated: 18.05.2016

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

Crl. A. No. 24 of 2015

APPELLANT:

Rakesh Gurung @ Chandan @ Prakash
S/o Late Krishna Gurung alias Kishore
Gurung,
R/o Rongu, Jaldhaka,
West Bengal.
Presently Central Prison at 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 Mr. S.K. Chettri and Mrs. Pollin Rai,
Assistant Public Prosecutors for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal has been preferred by the Appellant assailing the
Judgment and Order on Sentence, both dated 30.08.2014, passed by

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the Learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (hereinafter “POCSO Act, 2012”), South Sikkim at Namchi, in Sessions Trial Case No. 2 of 2013, whereby the Appellant was convicted under Section 10 of the POCSO Act, 2012 and Section 354B of the Indian Penal Code, 1860 (hereinafter “IPC”). He was sentenced to undergo simple imprisonment of seven years and to pay a fine of Rs.50,000/- (Rupees fifty thousand) only, under Section 10 of the POCSO Act, 2012, with a default clause of imprisonment. For the offence under Section 354B 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 stipulation. The Sentences were ordered to run concurrently and the amount of fine, if paid, was to be made over to the minor Victim by way of compensation.

2. Before this Court, while advancing his arguments contrary to the prayer in the Appeal, Learned Legal Aid Counsel for the Appellant submitted that he does not seek to assail the conviction but prays that the Sentence of imprisonment under Section 10 of the POCSO Act, 2012 i.e. seven years be reduced to the minimum period prescribed for the offence i.e. five years, considering the fact that the Appellant is a young man and ought to be allowed to rehabilitate in society.

3. Learned Additional Public Prosecutor on his part submitted that the Sentence of imprisonment handed out by the Learned Trial Court under Section 10 of the POCSO Act, 2012 brooks no interference, bearing in mind the gravity of the offence which was committed by the Appellant (aged about 22 years), on a minor Victim (aged about 11 years), hence the Appeal be dismissed.

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4. I have heard the submissions put forth by Learned Counsel for the parties and given due consideration to the same. I have also perused the entire records of the Case, as well as the Judgment and impugned Sentence.

5. What arises for consideration before this Court is whether the Sentence meted out to the Appellant ought to be decreased keeping in mind the circumstances put forth by the Learned Counsel.

6. In this regard, it would be necessary to briefly advert to the facts of the Case. The F.I.R. dated 10.03.2013, was lodged by P.W.-3, the father of the minor Victim, P.W.-1, against the Appellant before the Temi Police Station, South Sikkim and registered as Temi Police Station Case F.I.R. No. 3(3)13, under Section 376 IPC, 1860. The genesis of the offence is that on 10.03.2013, at around 13:30 hours, the Appellant went to the house of the Complainant, located at Palak, Bermoik, South Sikkim, the Complainant not being in his house, he introduced himself to the wife of the Complainant and sought employment, who decided to employ him as a domestic servant. After half an hour, she sent him along with her minor daughter P.W.-1 and two other minor children P.W.-8 and P.W.-9, to fetch dry leaves from the nearby jungle. The Appellant asked the younger children to return home telling them that he would come later with the Victim. He then took the Victim towards the dense jungle where he disrobed her and sexually assaulted her. On the Victim crying out, the Appellant gagged her with dry leaves, after which he fled the area, leaving behind the unconscious Victim. The mother later looked for the child, taking with her the two younger children and found the Victim lying naked and unconscious in the jungle with dry leaves in her mouth. She narrated the incident to

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her husband, which resulted in the lodging of the F.I.R., medical examination of the Victim and subsequent arrest of the Accused.

7. The Learned Trial Court on hearing the rival contentions of the Counsel, framed charges under Section 10 of the POCSO Act, 2012 and Section 354B of the IPC. After examining the witnesses furnished by the Prosecution, pronounced the Judgment and impugned Sentence.

8. Section 10 of the POCSO Act, 2012 provides for punishment for aggravated sexual assault, the specific offence relevant to this Case, being defined in Section 9(i) and Section 9(m) of the Act. As the Judgment is not assailed, it follows that the findings therein are not under challenge. Paragraph 29 of the Judgment reads as follows;

“29. Resultantly, the Prosecution case succeeds. It has been clearly established through circumstantial evidence that the accused disrobed the minor victim and committed aggravated sexual assault on her. He is, accordingly, convicted of the offences under Section 10 of the POCSO Act, 2012 and Section 354B of the IPC, 1860.”

9. The penalty imposed is a consequence of the heinous and depraved act of a 22 year old adult male, on an unsuspecting innocent child of 11 years, who obviously fought to defend herself, in vain. Her evidence has been consistent and cogent with regard to the incident, having deposed in Court after being found competent to do so. I refrain from discussing the merits of the Case which led to the Conviction, as, on pain of repetition it may be stated that the Judgment is not being questioned.

10. Thus, I am of the considered opinion that the imprisonment handed out to the offender under Section 10 of the POCSO Act, 2012

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is commensurate to the offence committed by him and requires no interference.

11. Coming to Section 354B of the IPC, the argument canvassed by Learned Counsel for the Appellant was that, both Sections i.e. Section 9/10 of the POCSO Act, 2012 and Section 374B IPC, cannot be attracted at the same time.

12. Having considered this submission, while placing the two Sections in juxtaposition, Section 354B IPC reads as;

“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 liable to fine.”

While Section 9(m) of the POCSO Act, 2012 reads as follows;

“9. Aggravated Sexual Assault.-(a).....

(b).....

(c)....

(d)....

(e)....

(f)....

(g)....

(h)....

(i)....

(j)....

(k)...

(l)...

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

(n)..."

(o).....

(p)....

(q)....

(r)....

(s)....

(t)...

(u)..."

is said to commit aggravated sexual assault.”

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To clarify, it may be pointed out here that sexual assault for the purposes of the POCSO Act, 2012 has been defined under Section 7 of the Act.

13. Hence, it is clear that offences under the Section 9 of the POCSO Act, 2012 and Section 354B of the IPC are different. Accordingly, there appears to be no rationale in interfering with the Sentence meted out to the Appellant under Section 354B of the IPC, either. In any event, this Sentence is ordered to run concurrently with the Sentence imposed under Section 10 of the POCSO Act, 2012.

14. Before closing this matter, on the question of sentence for sexual offences against women and children, it may be pointed out that in *State of Madhya Pradesh vs. Bablu*¹, while discussing Section 354 of the IPC, the Hon'ble Apex Court held as follows;

“10. It is well-settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which is commensurate with the gravity and nature of the crime and manner in which the offence is committed. One should keep in mind the social interest and consciousness of the society while considering the determinative factor of sentence commensurate with the gravity and nature of crime. The punishment should not be so lenient that it shocks the conscience of the society. It is, therefore, the solemn duty of the court to strike a proper balance while awarding sentence as awarding a lesser sentence encourages any criminal and as a result of the same society suffers.”

15. Further, in *Dhananjay Chatterjee v. State of W.B.*² the Hon'ble Apex Court observed that;

“14. In recent years, the rising crime rate – particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get

1. (2014) 9 SCC 281

2. (1994) 2 SCC 220

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very harsh sentences while many received grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factor cannot be ignored and similarly mitigating circumstances have also to be taken into consideration."

16. Reverting back to the decision of *State of Madhya Pradesh vs. Bablu²*, it was emphasized by the Hon'ble Apex Court that;

"17. Indisputably, imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime where it relates to the offences against women involving moral turpitude or moral delinquency, which have great impact on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Liberal attitude by imposing meager sentences or taking sympathetic view merely on account of lapse of time in respect of such offences will be counterproductive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system."

17. In view of all of the above facts and circumstances and the observation made in the portions of the Judgments extracted hereinabove, the Sentences imposed by the Learned Trial Court, in my considered opinion, warrants no interference.

18. Consequently, the Appeal is dismissed.

19. No order as to costs.

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20. Records of the Learned Trial Court be remitted forthwith.

Sd/-
Judge
18.05.2016

Index : Yes / ~~No~~
Internet : Yes / ~~No~~

bp