

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

CrI. A. No. 24 of 2018

Kiran Karki @ Chettri Uncle,
Son of late Purna Bahadur Karki,
Resident of Birganj Zilla,
Village Thori,
Nepal.

*Presently at Central Prison,
Rongyek, East Sikkim.*

.....Appellant

versus

State of Sikkim

..... Respondent

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

Appearance:

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the
Appellant.

Mr. Thupden Youngda, Additional Public Prosecutor for the
Respondent.

Date of hearing : 13.11.2019 & 04.12.2019
Date of judgment : 17.12.2019

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The criminal investigation was set in motion when PW-1, ASHA member, lodged the First Information Report (for short 'the FIR') (Exhibit-1) at the Mangan Police Station on 20.09.2016 alleging that the victim (PW-3) who was a 16 year old

child, had been “*reportedly raped*” by one Deepak Subba @ Dupli Gogo (for short ‘Deepak Subba’) “*since 3 (three) to 4 months ago*” and she was found pregnant. In the said FIR (Exhibit-1), the victim was referred to as an abnormal child.

2. On 01.08.2017, a charge-sheet was filed against Deepak Subba and the appellant. It was alleged that investigation revealed that the appellant, in fact, was the first one to rape the victim.

3. On 21.02.2018, eleven charges were framed against the appellant under section 5(l), 5(k) of the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’) (for three occasions), sections 376(2)(n) and 376(2)(l) of the Indian Penal Code, 1860 (for short ‘the IPC’) (for three occasions), 376(2)(j) IPC (for three occasions), section 5(j)(ii) of the POCSO Act and section 354B IPC.

4. 17 witnesses including the Investigating Officer (PW-17) were examined by the prosecution. The appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (for short ‘Cr.P.C.’) on 06.06.2018. The appellant stated that he was falsely implicated in the case and he had never sexually assaulted the victim. The appellant blamed the victim’s mother (PW-4) for the false implication. The appellant stated that

the victim's mother (PW-4) disliked him as she reportedly lost Rs.4000/- (Rupees four thousand) in his house during one of her visits and blamed him for it.

5. The learned Special Judge convicted the appellant under sections 5(k)/6, 5(j)(ii)/6 of the POCSO Act, section 376(2)(l), section 376(2)(j) and section 354B of the IPC (all on single counts) and acquitted him of other charges vide impugned Judgment dated 23.06.2018. The learned Special Judge sentenced the appellant in the following manner:-

- (a) Rigorous imprisonment of 20 years and fine of Rs.50,000/- for the offence under section 376(2)(l) IPC and section 5(k)/6 of the POCSO Act. In default to pay fine to undergo simple imprisonment for 6 months.
- (b) Rigorous imprisonment of 20 years and fine of Rs.50,000/- for the offence under section 5(j)(ii)/6 of the POCSO Act. In default to pay fine to undergo simple imprisonment for 6 months.
- (c) Rigorous imprisonment of 20 years and fine of Rs.50,000/- for the offence under section 376(2)(j) IPC. In default to pay fine to undergo simple imprisonment for 6 months.
- (d) Simple imprisonment of 5 years and fine of Rs.40,000/- for the offence under section 354B IPC. In default to pay fine to undergo simple imprisonment for 3 months.

- (e) The period of imprisonment was directed to run concurrently.

6. The appellant is aggrieved by the conviction and the sentences.

7. Heard Mr. Jorgay Namka, learned counsel for the appellant. It is submitted that except the DNA profiling report (Exhibit-12) there is no clinching evidence against him. In so far as the DNA profiling report is concerned, he submits the evidence as to how the blood sample was collected by the Investigating Officer is wanting. It is argued that neither the FIR (Exhibit-1) nor the deposition of the victim blamed the appellant for the crime he has been convicted for and in fact there is no FIR against the appellant. The FIR (Exhibit-1), in fact, blamed one Deepak Subba. The victim had also blamed Deepak Subba in her statement recorded under section 164 Cr.P.C. (Exhibit-14) and no allegation was made against the appellant. He relied upon the judgment of the Hon'ble Supreme Court in **Labhuji Amratji Thakor and others vs. State of Gujarat and another**¹ and the judgment of this Court in **Taraman Kami vs. State of Sikkim**². He pointed out that the FIR (Exhibit-1) was registered against another accused and not the appellant. He also pointed out that the appellant was

¹ AIR 2019 SC 734

² SLR (2017) Sikkim 781

made an accused only subsequently after the DNA profiling. In the circumstances, Mr. Jorgay Namka contended that the case was squarely covered by the aforesaid two judgments. Mr. Jorgay Namka did not question the determination of the age of the victim and her minority.

8. Mr. Thupden Youngda, learned Additional Public Prosecutor, *per contra*, submitted that the order dated 29.07.2017 passed by the learned Judicial Magistrate reflects that an application – for permission to collect the blood sample of the appellant for the purposes of DNA profiling was allowed. A copy of the order was also handed over to this Court. Learned Additional Public Prosecutor submitted that DNA profiling is accurate and the result binding. He relied upon the judgment of the Hon'ble Supreme Court in ***Nandalal Wasudeo Badwaik vs. Lata Nandlal Badwaik and Another***³. The learned Additional Public Prosecutor clarified that the DNA profiling report (Exhibit-12) was placed before the learned Special Court by way of a supplementary charge-sheet. He submitted that the result of the DNA profiling clearly establishes the fact that the appellant was guilty of commission and therefore, liable for the offences.

9. The FIR (Exhibit-1) was lodged by PW-1, an ASHA member, when she heard that the victim was pregnant;

³ (2014) 2 SCC 576

reportedly Deepak Subba was responsible for it and subsequently, she delivered a baby. The mother of the victim (PW-4) who was the natural witness about the age of the victim and the Headmaster (PW-9) who produced the school admission register of the school she first attended, established and corroborated that the victim was a minor. There is overwhelming evidence that the victim was pregnant. Her mother (PW-4) confirmed not only her pregnancy but the birth of a child. She also deposed that the victim had blamed the appellant for her pregnancy initially. The ASHA member (PW-1) who lodged the complaint, the former Panchayat member (PW-2), the Panchayat (PW-5), the owner of the land cultivated by the appellant (PW-7), all talked about it. The victim's pregnancy is, however, confirmed by Dr. Dawa Dolma Bhutia, the Medical Officer (PW-16), at the District hospital who examined her on 20.09.2016 and Dr. Chungden Lepcha, Gynaecologist (PW-10), who examined her on 21.09.2016. Until the victim's pregnancy was visible, no one seems to have had an idea that anyone had sexual intercourse with her. The evidence led by the prosecution established that although there was an indication that the appellant may have been responsible, the evidence is sketchy and most of it hearsay.

10. The victim was examined by the learned Special Judge who found her capable of answering properly in Nepali language although with some difficulty. The victim was able to

speak slowly, her speech was occasionally unclear and required some time. She was found competent to communicate. The learned Special Judge found that she did not know the sanctity of oath and therefore, oath was not administered to her. Oath was, however, administered to the special educators present. The victim's evidence was recorded in question and answer form and is reproduced below:

“.....

Q. Do you know accused Kiran Karki *alias* Chetti uncle?(*in Nepali vernacular*).

Ans: Nods signaling 'yes' and says 'Chettri uncle'.

Q. Do you know Deepak Subba *alias* Dupli Gogo?(*in Nepali vernacular*)

Ans: Says, '*gothala*' meaning that Deepak Subba is also known as gothala.

Q. What did *Chettri uncle* and *gothala* do to you?(*in Nepali vernacular*).

Ans: Says, '*Chettri uncle ley sutayo*' meaning *Chettri uncle made me sleep*. Also says, '*ulle pet ma nani huda pani luga kholera photo khichyo*' meaning *even when I was pregnant he took my photos after opening my clothes*. Also says, '*gothala ra Chettri uncle aama ghansma jada ghar aunthyo anta chya khanthyo*' meaning *gothala and Chettri uncle used to come home when my mother used to be out for cutting grass/collecting fodder and have tea*. Also says, '*Chettri uncle ley mero pant kholthyo*' meaning *Chettri uncle used to open my pants*. Also says, '*gothala ley pani maatera kapal ra luga tanthyo*' '*gotma lagera mobile ma gaana sunaunthyo*' meaning *gothala also used to pull my hair and clothes after being drunk – He used to take me to the cowshed and make me listen songs on his mobile handset*. Also says, '*Chettri ko ma pura paisa cha ra malai luga haru pani kindinchu bhanthyo*' meaning *Chettri has lots of money and he used to tell me that he would buy clothes for me*. Finally says, '*aaru kei pani bhayana*' meaning *nothing else happened*.

XXX on behalf of the accused person

A Questionnaire has been given to this Court by the Ld. Defence Counsel. Questions are accordingly put to the minor victim through the Special Educators:-

Q. Did Chettri uncle used to open your clothes?(*in Nepali vernacular*).

Ans: Feels shy and says, '*testo na sodhu, malai saram lagcha*' meaning *don't ask me that as I feel shy*.

Q. You used to go to Chettri uncle's home, isn't it?(*i Nepali vernacular*).

Ans: '*Paila jhanthe*', '*aaile jhandena*' meaning *earlier I used to go, not now*.

Q. Chettri uncle and gothala used to go for collecting fodder along with your mother, isn't it?

Ans: Says, '*haina, aama matai jhanthyo*' meaning *No, only mother used to go*.

Q. Who all used to be in your house with your younger brother when you used to go out of the house?

Ans: Says, '*thumba*'.

Q. Did Chettri uncle take your photos?

Ans: Says, '*tha chaina*' meaning *I don't know*. Again says, '*testo na bhannu*' meaning *don't say so*.

.....”

11. The deposition of the victim suggests that the appellant used to visit her house when her mother was out. The victim stated that “*Chettri uncle ley sutayo*”. Colloquially, it would mean that the appellant had made the victim sleep with him. The victim also deposed that the appellant used to open her pant; took her picture after opening her clothes even when she was

pregnant and he promised to buy her clothes as he had lots of money. The statement of the victim has been adequately corroborated.

12. The deposition of Dr. O.T. Lepcha (PW-14) confirmed that the victim, her baby, Deepak Subba and the appellant's blood samples had been collected and sent for DNA profiling.

13. The Investigating Officer (PW-17) confirmed having sent the blood samples for DNA profiling. Dr. Subhankar Nath, Deputy Director [DNA Typing Division of State Forensic Science Laboratory (SFSL), Tripura] (PW-12) confirmed that it was the appellant who was the father of the child and not Deepak Subba.

14. At this juncture, we must first deal with the concern of the learned counsel for the appellant. According to him, the evidence led by the prosecution regarding the collection of appellant's blood sample is wanting.

15. Dr. O.T. Lepcha (PW-14) clearly narrates how the blood sample of the appellant was obtained, preserved and handed over to the Investigating Officer (PW-17). Dr. O.T. Lepcha (PW-14) obtained the blood sample of the appellant in filter paper (MO-IV). He had earlier obtained the blood sample from the victim and her baby (MO-I and MO-II). All blood samples were

obtained by the Pathologist of the hospital under his instructions and supervision. He exhibited the certified copies of the Biological Specimen Authentication Forms for DNA testing filled by him with respect to the appellant (Exhibit-19), victim (Exhibit-20) and the new born baby (Exhibit-21). He informed that the originals were in the case records of ST (POCSO) Case No. 11 of 2017, State vs. Deepak Subba @ Dupli Gogo. Dr. O.T. Lepcha (PW-14) deposed that after the blood samples were obtained, they were put in sealed envelopes. He identified the envelopes as well as the filter papers and the blood samples. During his cross-examination, he admitted that he had not himself drawn the blood of the appellant, minor victim and the new born baby. He also admitted that the blood sample of the appellant was taken on 29.07.2017 in the Pathological Department of the hospital in his presence. The witnesses to the blood sample collection vide Exhibit-19, Exhibit-20 and Exhibit 21 have not been produced by the prosecution. However, it is of not much significance because when the maker of the documents, Dr. O.T. Lepcha (PW-14), exhibited them it was done without objection. More importantly, during his cross-examination, the defence re-confirmed that in fact the blood sample of the appellant was collected on 29.7.2017 which is the date endorsed in Exhibit 19. The appellant confirmed this fact in his answer to question 26 during his examination under section 313 Cr.P.C. He stated that his blood sample was not taken by Dr. O.T. Lepcha (PW-14) but

by a ward boy. The defence also confirmed that thereafter, Dr. O.T. Lepcha (PW-14) forwarded the blood samples to the Senior Superintendent of Police, CID, on 18.08.2017. The Investigating Officer (PW-17) confirmed having sent the blood sample for forensic examination. Dr. Subhankar Nath (PW-12) confirmed having examined the blood samples and submitting his DNA profiling report (Exhibit-12) to the forwarding Authority, i.e., the Senior Superintendent of Police, vide the forwarding letter (Exhibit-13). Dr. Subhankar Nath (PW-12) is the expert who examined the sample of the victim, newly born male baby and Deepak Subba. On DNA analysis, it was found that the victim was the mother of the baby but Deepak Subba was not his biological father. He also examined the blood sample of the appellant sent for DNA profiling and concluded vide his DNA profiling report (Exhibit-12) that the appellant was the father of the male baby. The learned Judicial Magistrate on 29.07.2017 allowed the application filed by the Investigating Officer (PW-17) praying for permission to collect the blood sample of the appellant to send the same for DNA profiling. The order also records that the accused had given his consent and that the blood sample was required to be collected at the STNM Hospital. We are of the considered view that the prosecution has been able to establish that the blood samples of the victim, her baby, Deepak Subba and the appellant had been obtained, sent for DNA profiling and result obtained.

16. The next issue raised by the learned counsel for the appellant was about the non-mention of the name of the appellant in the FIR (Exhibit-1). The judgment of the Hon'ble Supreme Court in **Labhuji Amratji Thakor** (supra) was on the scope of section 319 Cr.P.C. and therefore, not dealing with the issue raised. In **Taraman Kami** (supra), the Division Bench of this Court had examined a case in which the allegation against the appellant therein was independent of the offence alleged in the FIR. The FIR was lodged by the victim's mother categorically stating that the victim had revealed that the appellant therein had sexually assaulted her. However, during the course of investigation, it came to light the elder daughter had also been subjected to sexual assault and therefore, her statement under section 161 Cr.P.C. was recorded and thereafter charge-sheet filed against the appellant for commission of both the offences committed by him to the victim and her elder sister at different points of time. The present case is quite different. The FIR (Exhibit-1) was lodged by an ASHA member (PW-1). It reported two aspects. Firstly, that the sixteen year old victim who seemed abnormal was "*reportedly raped*" by one Deepak Subba. Secondly, the victim was three to four months pregnant. It is well settled that the FIR is only the first information about a cognizable offence. Section 154 provides that every information relating to the commission of a "*cognizable offence*" must be recorded. When the FIR gives information of a "*cognizable*

offence” having been committed it is incumbent upon the investigating officer to investigate the crime and bring the culprit to book even if there is no information as to who the culprit is. The FIR (Exhibit-1) reported about the pregnancy of the victim who was a minor. It was, therefore, incumbent upon the Investigating Officer (PW-17) to investigate whether Deepak Subba had raped the victim. It was also important for the Investigating Officer (PW-17) to investigate about the pregnancy of the victim who was a minor. Failure to mention the name of the appellant in the FIR (Exhibit-1), therefore, was of not much significance, as admittedly, the fact that the appellant was the biological father of the baby came to light only after the DNA profiling. The DNA profiling was done during the period of investigation. The charge-sheet was filed against both Deepak Subba and the appellant. The learned Special Judge, however, while examining Sessions Trial (POCSO) Case No. 11 of 2017 registered against both Deepak Subba and the appellant vide order dated 21.02.2018 came to the conclusion that the alleged offences allegedly committed by them were committed separately/independently and did not form part of the same transaction. Therefore, in view of section 223 Cr.P.C., the learned Special Judge considered it appropriate to try them separately so that no prejudice is caused to them. Accordingly, the appellant was separately tried in the present case right from the inception till the judgment. This order dated 21.02.2018 was not assailed

by the appellant. In fact, the appellant fully participated in the trial. It is apparent that no prejudice was caused to him.

17. In *Nandlal Wasudeo Badwaik* (supra), the Hon'ble Supreme Court held:

“**13.** Before we proceed to consider the rival submissions we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillions of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pairs in 46 duplex threads of DNA. DNA consists of four nitrogenous bases –adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in *Kamti Devi* that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl child.”

18. It is, therefore, evident that the prosecution has been able to prove the fact that it was the appellant and the appellant alone who was responsible for making the victim pregnant and

the baby she delivered was his. For the offences the appellant has been convicted for, penetration to any extent is a necessity except for the offence under section 354B IPC. When there is an allegation of making the victim pregnant, insertion of the penis into the vagina would be integral cause, and pregnancy, the effect. The victim has clearly deposed that the appellant had made her sleep with him. The prosecution has proved that the victim was a child. The defence does not make an issue about the victim's minority. Minority having been established, victim's consent or lack of it is immaterial. We are of the considered view that the ingredients of the offence of rape have been made out by the prosecution.

19. Having held so, we venture to examine the conviction and sentences imposed on the appellant. Rape having been established, to prove the offence under section 376(2)(l) IPC, the prosecution is required to prove the victim's mental or physical disability. The prosecution examined Archana Chettri (PW-11). She is an Assistant Professor (Clinical Psychologist) in the Department of Psychiatry, Central Referral (Manipal) Hospital. The victim was referred to her by Dr. C. S. Sharma, Psychiatrist of the STNM Hospital for her psychological evaluation. She examined the victim on 21.06.2016. On psychological evaluation using Vineland Social Maturity Scale (for short 'VSMS method'), Archana Chettri (PW-11) came to an opinion that the victim's

mental age was five years old as compared to her chronological age. She further opined that the victim's Intelligence Quotient (IQ) was calculated at 31 suggestive of severe mental retardation. She also exhibited certified copy of her psychological evaluation report (Exhibit 9) and the certified copy of OPD Form (Exhibit 10) by which she forwarded the report to the concerned Authority. The deposition of Archana Chettri (PW-11) and her opinion makes it evident that the victim was suffering from mental disability.

20. Consequently, it is also apparent that the victim was incapable of giving consent. Thus, the offence under section 376(2)(j) IPC also stands established.

21. The evidence led by the prosecution also establishes that the appellant had committed penetrative sexual assault on the victim who was a female child having taken advantage of her mental disability and made her pregnant as a consequence of the penetrative sexual assault. The ingredients of section 5(j) and 5(k) of the POCSO Act also stands proved.

22. Section 42 of the POCSO Act and section 71 of the IPC have, however, not been considered by the learned Special Judge while imposing the sentences. Where an act or omission constitutes an offence punishable under the POCSO Act and also

under sections 376 IPC amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under either the POCSO Act or the IPC as provides for punishment which is greater in degree. The offences under sections 376(2)(j) and 376(2)(l) IPC is punishable with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. The offences under section 5 of the POCSO Act is punishable under section 6 thereof with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine. We are of the view that the punishment prescribed under section 376(2) IPC is greater in degree than the one provided under the POCSO Act. Consequently, although the appellant is found guilty and convicted for the offences under the POCSO Act, the sentences under sections 5(j) and (k) of the POCSO Act awarded to him is set aside.

23. The learned Special Judge had charged the appellant of using criminal force with the intention of disrobing the victim in order to rape her. In view of section 71 IPC, the sentence cannot stand. Consequently, we set aside the sentence under section 354B IPC as well.

24. The conviction of the appellant and the sentences awarded to him under sections 376(2)(l) and 376(2)(j) of the IPC are upheld. As directed by the learned Special Judge, the period of imprisonment shall run concurrently. The award of compensation to the victim as directed by the learned Special Judge is maintained.

25. Consequently, the appeal is partly allowed. The impugned order on sentence stands modified to the above extent.

26. Copy of this Judgment be transmitted to the Court of the learned Special Judge (POCSO) North Sikkim at Mangan.

27. The records of the learned Trial Court be returned forthwith.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

Approved for reporting : **Yes/No**
Internet : **Yes/No**

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