

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

Crl. A. No. 30 of 2018

Santa Bahadur Sarki @ Santay,
Son of late Bhakta Bahadur Sarki,
Resident of Ulabari, Nepal.
Presently at Central Prison,
Rongyek, Gangtok,
East Sikkim.

..... Appellant

versus

State of Sikkim,
Represented by and through
the Public Prosecutor,
Government of Sikkim,
Gangtok,
East Sikkim.

..... Respondent

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

Appearance:

Ms K.D. Bhutia, Advocate (Legal Aid Counsel) for the Appellant.
Mr. S.K. Chettri, Assistant Public Prosecutor for the Respondent.

Date of hearing : 24.10.2019
Date of judgment : 08.11.2019

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The appeal is against the judgment dated 30.07.2018 convicting the appellant under section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act') for

commission of aggravated penetrative sexual assault on two minor victims (PW-1 and PW-2) and under section 448 of the Indian Penal Code, 1860 (for short 'IPC') for house-trespass.

2. On the basis of the final report dated 03.11.2017 submitted by the prosecution the learned Special Judge on 02.02.2018 framed two charges both under Section 5(m) of the POCSO Act against the appellant for commission of aggravated penetrative sexual assault on PW-1, PW-2 and PW-3 on 02.08.2017 and also during the year 2017. Charge for house-trespass under Section 448 of the Indian Penal Code (for short 'IPC') and for entering Sikkim - a restricted area without valid permit under Section 14A of the Foreigners Act, 1946 were also framed against the appellant as he was a foreigner.

3. During the trial, fifteen witnesses including three minor victims (PW-1, PW-2 and PW-3) were examined. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') and on his declining to lead any defence evidence, the parties were heard and the impugned judgment rendered on 30.07.2018.

4. The learned Special Judge held that the evidence of PW-1 and PW-2 were corroborated by the evidence of Dr. Meenakshi Dahal (PW-11), the Medical Officer and the medical reports, i.e., Exhibit-3 and Exhibit-7 of PW-1 and PW-2. As the medical evidence

relating to PW-3 and deposition of her mother (PW-5) did not support the evidence of PW-3, the learned Special Judge held that her uncorroborated evidence cannot be taken to be proved.

5. The learned Special Judge convicted the appellant under Section 5(m) of the POCSO Act, 2012 and under Section 448 of the IPC in respect of the offence committed on PW-1 and PW-2. However, the learned Special Judge held that the prosecution failed to establish that the appellant had committed any offence against PW-3 under the POCSO Act or had violated Section 14A of the Foreigners Act, 1946.

6. On 07.08.2017, when PW-4 came to learn that her daughter (PW-1) and her friend, i.e., PW-2, had been sexually assaulted by the appellant, she lodged the First Information Report (for short 'FIR') (Exhibit-1) dated 08.08.2017 before the Jorethang Police Station, alleging that PW-1 and PW-2 had been violated by the appellant by putting his finger in their private parts.

7. PW-1, PW-2 and PW-3 were all medically examined on 08.08.2017 by PW-11. PW-11 found superficial healing abrasion below the urethral opening of PW-1 who was crying, uncooperative and complaining of burning sensation on urination. There was no active bleeding but there was tenderness on dressing the area. Clinical examination of PW-1 showed injury to the perineal region and therefore PW-11 opined that it may be due to fingering. The

examination of PW-2 reflected that there was mild erythema and swelling below the labia minora. There was no tear or active bleeding but localised pain on dressing the lesion. PW-2 was also crying, uncooperative and complained of burning sensation on urination. PW-11 opined that the mild erythema may be due to fingering.

8. The learned Judicial Magistrate (PW-13) recorded the statement of PW-1, PW-2 and PW-3 under Section 164 Cr.P.C. on 01.09.2017. PW-1 stated that the appellant had put his hands in her vagina and he did that four times. PW-2 also stated that the appellant had put his hands in her vagina.

9. Heard Ms K.D. Bhutia, learned Legal Aid Counsel for the appellant and Mr. S.K. Chettri, learned Assistant Public Prosecutor for the respondent. Learned Counsel for the appellant did not dispute determination of age of the victims nor the fact that both of them were below the age of 12 (twelve) years. She, however, submitted that the evidence produced by the prosecution does not establish the ingredients of the offence charged and even if one were to ignore the discrepancies in the evidence, the offence made out may fall under Section 7 and not under Section 5(m) of the POCSO Act, 2012. The discrepancies pointed out by the learned Counsel for the appellant shall be examined hereafter. The learned Assistant Public Prosecutor on the other hand submitted that the

prosecution has been able to lead cogent evidence to establish both the offences and as such the impugned judgment is unassailable.

10. As the State has not preferred any appeal against the impugned judgment absolving the appellant for commission of offence on PW-3 as well as the offence alleged under the Foreigners Act, 1964, we shall examine the impugned judgment only to the extent of the commission of offence under Section 5(m) of the POCSO on PW-1 and PW-2 and for commission of offence under Section 448 IPC.

11. The identification of the appellant is certain. PW-1 and PW-2 identified him as the perpetrator of the crime. PW-2, PW-3, PW-4 (mother of PW-1), PW-5 (mother of PW-3), PW-6 (elder minor sister of PW-3), PW-12 (father of PW-2) and PW-14 (minor elder sister of PW-2 and PW-1's cousin) also identified him as their co-villager.

12. PW-1 deposed that on the relevant day when her parents and younger brother were not at home, the appellant came to her house and touched her vagina.

13. PW-2 deposed that the appellant had come to PW-1's house and touched her vagina.

14. Both PW-1 and PW-2 also deposed that on the relevant day the parents of PW-1 were not at home and this fact was corroborated by PW-4. The cross-examination of both the victims did not yield any evidence in favour of the defence.

15. PW-4 proved that she had lodged the FIR (Exhibit-1) after her daughter, i.e., PW-1, disclosed about a week after the incident that the appellant had inserted his finger into her private part. PW-4 confirmed that on the relevant day she had gone to Church and her husband to work. She deposed that when she returned PW-1 was watching television and did not complain about the incident. However, a week thereafter, PW-1 complained to her about burning sensation while urinating. On examining PW-1, PW-4 noticed some redness in her private part. After that PW-1 disclosed to PW-4 that the appellant had inserted his finger in her private part. According to PW-4, she also enquired from PW-1's friends (PW-2 and PW-3) both of similar age as PW-1 who used to reside near her house. They also disclosed that they were sexually abused by the appellant on the same day with PW-1 by inserting his finger into their private parts.

16. The FIR was lodged by PW-4 on 08.08.2017. On the same day, PW-1 and PW-2 were medically examined. The medical reports (Exhibit-3 and Exhibit-7) proved by PW-11 confirms the evidence of PW-1 and PW-2 and the fact that in fact the appellant had inserted his finger in their vagina. The fact that the injury and

the erythema were visible even after a week of the incident reflects the extent to which the appellant had violated PW-1 and PW-2. The FIR lodged by PW-4 immediately after she was informed by PW-1 and PW-2 that the appellant had inserted his finger in their vagina corroborate this fact. Both PW-1 and PW-2 had clearly stated to the learned Magistrate that the appellant had put his hand "in" their vagina. Therefore, their statements recorded under section 164 Cr.P.C. also corroborate the fact that the appellant had in fact committed penetrative sexual assault on PW-1 and PW-2.

17. The learned counsel for the appellant submitted that there were discrepancies in the statements given to the learned Magistrate by PW-1 and PW-2 and in their depositions. PW-1 and PW-2 had deposed that the appellant had touched their vagina although in their statements to the learned Magistrate they had stated that the appellant had put his hand in their vagina. Therefore, it was argued that the evidence of the two minor victims made it apparent that the appellant was not guilty of having committed aggravated penetrative sexual assault. Both PW-1 and PW-2 were below 8 (eight) years when they deposed before the Court. Their evidence must thus be appreciated keeping in mind their tender age, the lapse of time between the date of the incident, i.e., a week before 08.08.2017 and the time of recording the depositions, i.e., 01.03.2018 and other evidences produced. It is quite obvious that due to their tender age PW-1 and PW-2 did not articulate their depositions keeping in mind the legal ramifications.

The discrepancy pointed out by the learned counsel for the appellant can be satisfactorily explained on the basis of the medical evidence produced by the prosecution. Their depositions read with the medical evidence clearly establish that both the victims were subjected to penetrative sexual assault as defined by section 3(b) of the POCSO Act. Insertion of the appellant's finger, to any extent into the vagina amounts to penetrative sexual assault. As admittedly, both PW-1 and PW-2 were below 12 (twelve) years of age, the commission of penetrative sexual assault on them amounts to aggravated penetrative sexual assault as per section 5(m) of the POCSO Act.

18. The learned Counsel for the appellant submitted that there was discrepancy in the version of PW-4 and PW-5 about the incident. PW-5 deposed that PW-3 told her that she had seen the appellant inserting his finger into the private parts of both PW-1 and PW-2 when she peeped into the hole and looked inside the room where he had taken them. According to PW-5, PW-3 also told her that the appellant had not done anything to her. PW-3 on the other hand had deposed that the appellant had touched her vagina when she had gone to his house. It is clear that PW-1 and PW-2 were deposing about another incident which transpired in PW-1's house and not in the appellant's. PW-3 did not depose about being an eye witness to the said incident where she allegedly saw the appellant inserting his finger into the vagina of PW-1 and PW-2 as deposed by PW-5. Although there is no explanation by the prosecution on this

aspect, we are of the view that this discrepancy does not destroy the substratum of the evidence of PW-1 and PW-2 which is amply corroborated by the medical evidence.

19. The learned Counsel for the appellant submitted that the deposition of PW-14 is doubtful as she had admitted she had not stated to the police about what she had witnessed. PW-14 deposed that when she had gone to the house of PW-1 she saw the appellant closing the door and witnessed the appellant fingering the private parts of PW-1 and PW-2 while PW-3 was also present. During cross-examination, she admitted that she had not stated to the police that she had seen the appellant fingering the private parts of PW-1 and PW-2. Besides PW-14, even PW-6 had deposed that he had seen the appellant touching the private parts of PW-1 and PW-2 while PW-3 was sitting on the bed. Their depositions does not conflict with the deposition of PW-1 and PW-2 on the crucial aspect of the appellant's heinous acts. Even if the evidence of PW-6 and PW-14 are ignored, the evidence of PW-1 and PW-2 confirmed by the medical evidence led by the prosecution clearly establishes the ingredients of the offence of aggravated penetrative sexual assault committed by the appellant on PW-1 and PW-2.

20. The punishment prescribed for aggravated sexual assault under section 6 of the POCSO Act is rigorous imprisonment for a term which shall not be less than 10 (ten) years but may extend to imprisonment for life and shall also be liable to fine. The

learned Special Judge has used her discretion to impose the minimum sentence of 10 years prescribed along with a fine of Rs.2000/- (Rupees two thousand).

21. Section 448 IPC prescribes punishment for house-trespass which is defined under section 442 IPC. Whoever commits criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building used as a place of worship, or as a place for the custody of property, is said to commit house-trespass. Criminal trespass is defined in section 441 IPC. Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit criminal trespass.

22. PW-1 deposed that the appellant had come to her house and committed the crime. PW-2 corroborated the evidence of PW-1. The appellant used to reside above the house of PW-4 and sometimes used to visit their house and watch television as per the deposition of PW-4. Therefore, although the initial entry into the house of PW-4 may have been lawful, his remaining there and thereafter committing aggravated penetrative sexual assault upon PW-1 and PW-2 brings the act clearly within the fold of section 448

IPC. The learned Special Judge has sentenced the appellant to undergo simple imprisonment for a term of six months for the said offence, although she could have sentenced to a maximum of one year and fined him Rs.1000/- (Rupees one thousand) for the offence committed.

23. We are of the considered view that the conviction and sentence of the appellant, both under section 5(m) of the POCSO Act and under section 448 IPC, need no interference. Resultantly, the appeal must fail and is accordingly, dismissed. The impugned Judgment and Order on Sentence are upheld.

24. The appellant is presently lodged at Central Prison, Rongyek, Gangtok, East Sikkim. He shall continue to be there and shall serve out the rest of the sentence as imposed by the learned Special Judge.

25. The crime was committed in the year 2017, on which date the Sikkim Compensation to Victims or his Dependents Amendment Schemes, 2016 had already been enforced. As per the said Scheme, the maximum limit of compensation which may be given to a victim of rape is Rs.3,00,000/- (Rupees three lakhs). Insertion of finger to any extent into the vagina of a victim and made punishable under section 6 of the POCSO Act as aggravated penetrative sexual assault also amounts to rape as defined in section 375(b) of the IPC. The learned Special Judge has directed

payment of compensation of Rs.1,00,000/- (Rupees one lakh) to each of the victim. We are of the considered view, keeping in mind the nature of offence and the tender age of the victims, that this is a fit case where the maximum compensation permissible should be given to rehabilitate them. Accordingly, we direct the Sikkim State Legal Services Authority (for short 'SSLSA') to pay compensation of Rs.3,00,000/- (Rupees three lakhs) to each of the victims, i.e., PW-1 and PW-2. The said amounts shall be kept in a fixed deposit in the account of PW-1 and PW-2 payable on their attaining majority. If PW-1 and PW-2 do not have any savings account, the SSLSA shall render assistance to the victims to do so.

26. Copy of this Judgment be transmitted to the Court of the learned Special Judge, POCSO Act, 2012, South Sikkim at Namchi.

27. Copy be made over to the learned Member Secretary, SSLSA, for information and compliance.

(Bhaskar Raj Pradhan)
Judge

(Arup Kumar Goswami)
Chief Justice

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

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