

THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appellate Jurisdiction)

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. Appeal No. 37 of 2018

Ashok Kumar Pariyar *alias*
Ashok Pariyar,
Resident of Temi Tarku,
Tanak Busty, South Sikkim.
Residing at:
Adarsh Gaon, East Sikkim,

At present:
State 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. Tashi Norbu Basi, Legal Aid Counsel for the
Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor
for the Respondent.

J U D G M E N T
(20.08.2019)

Bhaskar Raj Pradhan, J

1. The Appellant assails the judgment of conviction dated 27.09.2018 passed by the learned Special Judge, POCSO, East Sikkim at Gangtok, convicting him for penetrative sexual assault as defined in Section 3(a) of the Protection of

Children from Sexual Offences Act, 2012 (POCSO Act, 2012), wrongful confinement under Section 342 of the Indian Penal Code, 1860 (IPC) and for rape as defined in Section 376 (2) (i) of the IPC. The order on sentence dated 28.09.2018 is assailed as well.

2. The learned Special Judge relying upon the evidence of the victim (P.W.1), her father (P.W.3) and Dr. K. N. Sharma (P.W.14) the Senior Radiologist, STNM Hospital, Gangtok who had conducted and determined the bone age of the victim (exhibit-23) came to the conclusion that the victim was a child within the meaning of Section 2(d) of the POCSO Act, 2012.

3. The learned Special Judge held that the evidence of the victim, her brother (P.W.13) and her father (P.W.3) were duly corroborated by the medical evidence and therefore no further proof was required for arriving at the conclusion that the Appellant had wrongfully confined the victim and committed penetrative sexual assault on her.

4. The learned Legal Aid Counsel for the Appellant contested the determination of the age of the victim; the finding of conviction based on the evidence which according to him clearly proved that the act was consensual; the conviction of the Appellant under Section 376 (2) (i) of the IPC as the prosecution had failed to prove that the victim

was “*under sixteen years of age*” and the Appellant’s conviction for wrongful confinement.

5. The learned Additional Public Prosecutor for the Respondent *per contra* submitted that the victim’s statement was clear, unequivocal and reliable which was duly corroborated by her brother (P.W.13). He submitted that the evidence led by the prosecution had clearly brought home the guilt of the Appellant.

6. The POCSO Act, 2012 defines the word “*child*” to mean any person below the age of 18 years. This is required to be proved by the prosecution who alleges that the victim was a child against whom the alleged crime was committed. In re: ***Sunil v. State of Haryana***¹ the Supreme Court held that it would be quite unsafe to base conviction on an approximate date of birth of the prosecutrix.

7. Section 3 of the Indian Evidence Act, 1872 defines the word “*evidence*” in the following manner.

“Evidence means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.

(2) all documents including electronic records produced for the inspection of the Court, such documents are called documentary evidence.”

¹ (2010) 1 SCC 742

8. The oral evidence of the father (P.W.3) that the victim, his daughter, was 16 years old and studying in Class VIII at the time of the incident could not be demolished in his cross-examination. In fact besides a denial no attempt was made by the defence to even question the truthfulness of the oral evidence of the father (P.W.3). The victim also deposed that she was “16 plus years” at the time of her deposition and attending school in Class VIII. In her cross-examination she admitted she did not know her actual date of birth. She however, volunteered to state that her mother told her that she was 16 years old then. The victim was further cross-examined and she admitted that her mother had told her that she had attained 16 years of age based on her Aadhar Card. The victim denied the suggestion that she was an adult during the time of the incident.

9. In re: ***Vishnu Alias Undrya v. State of Maharashtra***² the Supreme Court while considering an appeal against the conviction under Section 376/366 IPC examined the question of date of birth of the victim and held that in the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case the untainted evidence of the father (P.W.3) clearly establishes that the victim was in fact 16 years at the time of the incident. This proves that the victim fell within the

² (2006) 1 SCC 283

definition of the word “*child*” as defined by Section 2(d) of the POCSO Act, 2012. What the victim heard from her mother about her age being 16 years was reiterated by her in her deposition. Although this is hearsay, the evidence of her father (P.W.3) confirms what the victim heard from her mother was true.

10. The learned Counsel for the Appellant submitted that the prosecution has not attempted to produce the birth certificate or the school records to establish her age through documentary evidence and therefore the prosecution had failed to follow the law declared by the Supreme Court in re: ***Mahadeo v. State of Maharashtra & Anr.***³ and ***Jarnail Singh v. State of Haryana***⁴.

11. The judgment of the Supreme Court in re: ***Mahadeo (supra)*** and ***Jarnail Singh (supra)*** are dated 23.07.2013 and 01.07.2013 respectively. The Supreme Court in both the said cases examined Juvenile Justice (Care & Protection of Children) Act, 2000 (Act 56 of 2000) and Juvenile Justice (Care & Protection of Children) Rules, 2007 (2007 Rules). Juvenile Justice (Care & Protection of Children) Act, 2015 came into force on 15.01.2016 repealing Act 56 of 2000. Juvenile Justice (Care & Protection of Children) Model Rules, 2016 came into force on 21.09.2016 repealing the 2007

³ (2013) 14 SCC 637

⁴ (2013) 7 SCC 263

Rules. The alleged act is of 11.01.2016 when Act 56 of 2000 and 2007 Rules were still applicable.

12. The prosecution has not followed the procedure laid down by the Supreme Court in re: ***Mahadeo (supra)*** and ***Jarnail Singh (supra)*** i.e. ascertaining the age of the child by adopting the method postulated in Rule 12(3) of the 2007 Rules. Had the learned Special Judge followed the procedure laid therein there would be certainty and definiteness in ascertainment of the age of the victim. The question is, if therefore, as submitted by the learned Counsel for the Appellant, the procedure laid down by the Supreme Court has not been followed what is the evidentiary value of the depositions of the father (P.W.3) and the victim regarding her minority?

13. A three Judge Bench of the Supreme Court in re: ***Abuzar Hossain v. State of West Bengal***⁵ examined Rule 12(3) of the 2007 Rules and held that non-production of the certificates or any one of them is not, however, fatal to the claim of juvenility, for sub-Rule (3) (b) to Rule 12 makes a provision for determination of the question on the basis of the medical examination of the accused in the absence of the certificates. It was further held that mere non-production may not, therefore, disentitle the accused of the benefit of the act nor can it tantamount to deliberate non-production,

⁵ (2012) 10 SCC 489

giving rise to an adverse inference unless the Court is in the peculiar facts and circumstances of a case of the opinion that the non-production is deliberate or intended to either mislead the Court or suppress the truth.

14. The Senior Radiologist (P.W.14) examined the victim and prepared the report of bone age estimation (exhibit-23) on 15.01.2011. He recorded the following findings and then his opinion:

- “(1) Distal Radius and ulna-not completely firmed.*
- (2) Epiphysis around elbow joint are fused.*
- (3) Epiphysis around knee joint are fused.*
- (4) Upper humerus epiphysis show incomplete fusion.*
- (5) Iliac crest-epiphysis append and not fused.*

Imp:-

The bone age range between 15 yrs to 16.5 years.”

15. Therefore, the prosecution has led three evidences to prove that the victim was a child. There is oral evidence of the father (P.W.3) and the victim that the victim was sixteen years old. Then there is the bone age estimation by the Senior Radiologist (P.W.14) opining that the bone age range of the victim was between 15 years to 16.5 years.

16. In re: ***Jaya Mala v. Government of Jammu & Kashmir***⁶ the Supreme Court held that the Court could take judicial notice that the margin of error in age ascertained by radiological

⁶ (1982) 2 SCC 538

examination is two years on either side. While considering the juvenility of a child under the Juvenile Justice (Care & Protection of Children) Act, 2000 the Supreme Court in re: **Mukarrab & Ors. v. State of Uttar Pradesh**⁷ held:-

“10. Age determination is essential to find out whether or not the person claiming to be a child is below the cut-off age prescribed for application of the Juvenile Justice Act. The issue of age determination is of utmost importance as very few children subjected to the provisions of the Juvenile Justice Act have a birth certificate. As juveniles in conflict with law usually do not have any documentary evidence, age determination, cannot be easily ascertained, specially in borderline cases. Medical examination leaves a margin of about two years on either side even if ossification test of multiple joints is conducted.

11. Time and again, the questions arise: How to determine age in the absence of birth certificate? Should documentary evidence be preferred over medical evidence? How to use the medical evidence? Is the standard of proof, a proof beyond reasonable doubt or can the age be determined by preponderance of evidence? Should the person whose age cannot be determined exactly, be given the benefit of doubt and be treated as a child? In the absence of a birth certificate issued soon after birth by the authority concerned, determination of age becomes a very difficult task providing a lot of discretion to the Judges to pick and choose evidence. In different cases, different evidence has been used to determine the age of the accused.”

17. The question of age determination of a victim in a criminal case is vital to the prosecution. A Division Bench of this Court in re: **State of Sikkim v. Girjaman Rai @ Kami &**

⁷ (2017) 2 SCC 210

Ors.⁸ held that date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with a proof of minority of the victim drags an accused to the rigours of the POCSO Act, which mandate a reverse burden of proof. Therefore, it is absolutely vital to prove the minority of the victim.

18. As seen earlier there is no documentary evidence of proof of age of the victim although there is evidence that the victim was attending Class VIII in a School. There is oral evidence of the father (P.W.3) and the victim that the victim is sixteen years old. There is also the bone age estimation report (exhibit-23) which estimates the bone age of the victim to be between 15 to 16.5 years of age. The learned Counsel for the Appellant submits that if the margin of error is two years on either side the age of the victim may cross the border line between a child and adult. Bone age estimation or ossification test is a medical evaluation on the basis of a scientific study of the bone age. It is estimation only. There is a margin of error. However, it cannot be said that in every case there has to be an error.

19. In re: **Sunil (supra)** cited by the Appellant it was held that in the absence of primary evidence, reports of the dental Surgeon and the Radiologist would have helped in arriving at the conclusion regarding the age of the prosecutrix. In re:

⁸ SLR (2019) Sikkim 266

Ram Suresh Singh v. Prabhat Singh⁹ the Supreme Court found that the medical evidence of the ossification test corroborated the entry in the school register of the juvenile. In re: **Suchita Srivastava v. Chandigarh Admn.**¹⁰ the Supreme Court held that the result of the ossification test conclusively proved that the victim was a minor. In re: **Om Prakash v. State of Rajasthan**¹¹ the Supreme Court held:

“35. While considering the relevance and value of the medical evidence, the doctor's estimation of age although is not a sturdy substance for proof as it is only an opinion, such opinion based on scientific medical tests like ossification and radiological examination will have to be treated as a strong evidence having corroborative value while determining the age of the alleged juvenile accused.”

20. There is no evidence to suggest that non-production of documentary proof of age was deliberate and intended to mislead the Court for suppress the truth. The Investigating Officer (P.W.15) clarified that he did not seize the birth certificate of the victim as it was not available. During his cross-examination no suggestion was made that documentary proof of age of victim was suppressed. In view of the aforesaid this Court is of the opinion that the oral testimony of the father (P.W.3) (who would have the best knowledge about the birth of the victim) and the victim corroborated by the bone age estimation report (exhibit-23)

⁹ (2009) 6 SCC 681

¹⁰ (2009) 9 SCC 1

¹¹ (2012) 5 SCC 201

established by Senior Radiologist (P.W.14) proved that the victim was a child. The learned Special Judge considering the matter before it believed and concluded that the victim was a child. This Court does not find any evidence contrary thereto to hold that the finding was incorrect.

21. Section 3(a) of the POCSO Act, 2012 states that a person is said to commit “*penetrative sexual assault*” if he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person.

22. The victim (P.W.1) and her brother (P.W.13) deposed that they had gone to their aunt’s residence at Ranka, East Sikkim during winter vacation where they stayed for fifteen days. The fact that they had gone to their aunt’s place is confirmed by their father (P.W.3). The victim’s brother (P.W.13) and their father (P.W.3) confirm that the brother (P.W.13) returned home alone. P.W.4 the owner of the vehicle which was seized by the Singtam Police in connection with this case as being used for the offence confirmed that the Appellant was the driver of the vehicle during the relevant time plying in an around Singtam area. The victim (P.W.1) and her brother (P.W.13) who boarded the said vehicle driven by the Appellant positively identified the Appellant. The then Chief Judicial Magistrate (P.W.12) conducted the test identification parade of the Appellant by the victim on

30.05.2019. He deposed that the victim positively identified the Appellant during the Test Identification Parade. P.W.15 the Sub-Inspector posted at the Singtam Police Station identified the Appellant as the person he had arrested from Singtam bazaar after he commenced investigation. P.W.7 a resident of Singtam identified the Appellant as the driver of the vehicle whose owner is his neighbour. He was the seizure witness to seizure memo (exhibit-7) through which the vehicle was seized. He proved the seizure of the vehicle.

23. The victim deposed that their aunt arranged a vehicle for their return journey from Gangtok to Singtam. After reaching Singtam they went to a “Mela” after which they boarded a vehicle for their journey up to (Axxx)*. However, the driver of the said vehicle dropped them at (KKxxx)* as he was going somewhere else. Thereafter, they started walking towards their residence taking a short cut from (KKxxx)*. At that time a vehicle came there and the Appellant stopped the vehicle and inquired as to where they were proceeding. They told him that they were proceeding to their residence at (Kxxx)*. The Appellant told them that he was also proceeding there and he would drop them. They boarded the vehicle and occupied the second seat. The Appellant drove the vehicle to a hotel on the way and purchased beer for them which they refused to consume. The Appellant consumed two bottles of beer. The Appellant then drove them towards some unknown

place. They requested the Appellant to drop them to their residence as promised. The Appellant drove the vehicle towards (Dxxx)* and dropped the victim's brother (P.W.13) but did not permit the victim to get down from the vehicle. He threatened her that he would hit her with the vehicle. Thereafter, the Appellant drove her towards an unknown place. The Appellant also asked the victim to marry him and accompany him to his residence. Thereafter, the victim states that *"the accused kissed me, opened my clothes below my waist and did chara to me. By chara I mean the accused put his pisab garney (penis) into my susu garney (vagina)."*

24. The victim was subjected to elaborate cross-examination. The cross-examination reveals that the Appellant did not deny the fact that the victim and her brother had boarded his vehicle on the relevant day. The victim admitted that the Appellant who had given them lift did not forcibly put them in the vehicle and that they had boarded it on their own accord. She admitted that she did not know the colour, type of vehicle or the registration number. She admitted that while travelling to the house an old man was also inside the said vehicle. She denied the suggestion that what she stated about the Appellant kissing her, opening her clothes below her waist and committing penetrative sexual assault was a false statement. She denied all suggestions that she was tutored. She admitted that she

did not raise any hue and cry at the hotel. She admitted that when three persons boarded the vehicle she got down but did not narrate about the incident to any of them nor did she request them to take the Appellant and the vehicle to the Police Station. She denied the suggestion that she started blackmailing the Appellant to marry her and because of that she had falsely implicated the Appellant. She also admitted that when she got off at "*Goshkhan Dara*" which is a crowded place she again did not raise hue and cry.

25. The cross-examination of the father (P.W.3) has brought out discrepancy between his statement to the police and his deposition. Various statements which were not stated by the father (P.W.3) to the police have been brought out in his deposition. Much of these statements in the deposition which are in variance with the statement to the police relates to what he was told about the incident by the victim and her brother (P.W.13) and the details thereof. It does not demolish the fact that the victim's brother (P.W.13) had returned home alone and the victim (P.W.1) was brought back by the father (P.W.3) and the brother (P.W.13) the next day from Singtam. It also does not demolish the fact that the father (P.W.3) and the brother (P.W.13) had gone to Singtam and found the victim, lodged the FIR before the Singtam Police Station pursuant to which the Appellant was arrested and identified by both the victim and her brother (P.W.13).

26. P.W.5-the SHO of Singtam Police Station confirmed that on 11.01.2016 the victim appeared at the Singtam Police Station with her parents with the complaint against the Appellant that he had committed sexual assault on her the previous evening. He had the victim's statement recorded under Section 154 Cr.P.C. and registered a case against the Appellant. P.W.5 also identified the Appellant in Court.

27. The victim was medically examined on 11.01.2016. The incident was of the day before. The allegation is of penetrative sexual assault committed after threatening the victim with dire consequence. The testimony of the victim doesn't reflect that it was a case of violent sexual aggression or strong resistance by the victim. The Medico-Legal Report (exhibit-8) by Dr. Jai Bahadur Gurung (P.W.8) a Gynaecologist who examined the victim did not see any bruises or acute injuries. There was an old tear of the hymen at 6 O'clock position and the vagina accommodated two fingers. He opined that examination of the old tear suggested she had intercourse. He also opined that recent intercourse could not be ruled out. He did not explain why recent intercourse could not be ruled out. The Appellant was medically examined by Dr. Pranoy Kishore Chettri (P.W.10) the Medical Officer on the same day. He opined that the Appellant was capable of performing intercourse. The

forensic investigation drew a blank. The medical evidence does not conclusively establish penetrative sexual assault. It does not rule it out either.

28. Thus, the only evidence left is the testimony of the victim. The evidence of the victim which is elaborate in its details inspires confidence. There was no reason for the victim to falsely implicate the Appellant and expose herself to social ridicule. The explanation of the Appellant to the circumstances against him is of complete denial. Curiously, during cross examination the suggestions put to the victim and her brother (P.W.13) does show that he did not dispute that he had in fact given them a lift and the victim had spent the night with him. The evidence of the victim and her brother (P.W.13) proves that they did not know the Appellant before the date of the incident. The victim's brother (P.W.13) corroborates her statement till the Appellant dropped him and proceeded with the victim on that fateful day. The father (P.W.3's) deposition corroborates the fact that the victim and her brother (P.W.13) had gone away to their aunt's house and while returning home it was only the brother (P.W.13) who reached. The identification of the Appellant is incontestable. The deposition of the victim is also adequately corroborated by other prosecution witnesses. The evidence of the victim clearly reflects that the Appellant penetrated his penis into the victim's vagina. The argument of the defence

that the act was consensual cannot detain this Court any further as the evidence of the victim makes it clear that the Appellant had threatened her. Consent implies voluntary participation. Submission of the body, if at all, under threat cannot be construed as a consented sexual act. Consent of a child in any case is no consent. The conviction of the Appellant under Section 3(a) punishable under Section 4 of the POCSO Act, 2012 by the learned Special Judge cannot be faulted.

29. The conviction of the Appellant under Section 376(2)(i) IPC for committing “*rape on a woman when she is under sixteen years of age*” however, cannot be sustained as the prosecution has failed to prove that the victim was under sixteen years of age. The father (P.W.3) had deposed that the victim was sixteen years old. The victim herself stated that when she deposed on 11.05.2017 she was “*now 16 plus years.*” Although these depositions clearly establishes that the victim was a child, to establish one of the ingredients of Section 376(2) (i) IPC it must necessarily be established that victim was under sixteen years of age which was not done.

30. The Appellant has also been convicted under Section 342 IPC. Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said “*wrongfully to confine*” that person. The victim has deposed that the Appellant

dropped her brother but did not allow her to get down from the vehicle and drove her to an unknown place. The victim's brother (P.W.13) also corroborated this testimony of the victim. Their depositions establishes that the victim was wrongfully restrained preventing her from proceeding beyond the vehicle driven by the Appellant which are the ingredients of the offence of wrongful confinement as defined in Section 340 IPC. The conviction of the Appellant under Section 342 IPC must therefore, also be upheld. The Appellant has been sentenced to rigorous imprisonment for a period of one year and a fine of Rs.1000/- for the said offence which is the maximum sentence prescribed. Considering the nature of the offence this Court is of the view that the sentence must be upheld.

31. The sentence under Section 4 of the POCSO Act, 2012 and the sentence under Section 342 IPC shall run concurrently.

32. The learned Special Judge had granted compensation of Rs.1,00,000/- (Rupees one lakh) to the victim which is maintained.

33. The appeal is partly allowed. The conviction and sentence under Section 376(2) (i) IPC are set aside. The conviction and sentence under Section 4 of the POCSO Act, 2012 and Section 342 IPC are upheld. The Appellant is in

jail. He shall continue there to serve the rest of the sentences.

34. Certified copies of the judgment shall be sent forthwith to the Court of the learned Special Judge, POCSO, 2012 East Sikkim at Gangtok and to the Sikkim State Legal Services Authority for compliance. A copy thereof shall also be furnished to the Appellant.

(**Bhaskar Raj Pradhan**)
Judge
20.08.2019

Approved for reporting: yes.
Internet: yes.

to/

ⁱ *name of the neighbourhood withheld to protect the identity of the child as required under Section 33 (7) of the POCSO Act, 2012.