

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 41 of 2018

Kendrap Lepcha,
Son of Karma Dorjee Lepcha,
Resident of Shagyong Busty,
Lower Dzongu,
North Sikkim.

*Presently lodged 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. Ajay Rathi, Advocate for the Appellant.

Mr. Hissey Gyaltsen and Ms Mukun Dolma Tamang, Assistant
Public Prosecutors for the Respondent.

Date of hearing : 17.03.2020

Date of judgment : 01.06.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The appellant, a teacher in a Primary School, was tried, convicted and sentenced to imprisonment for the offences of rape, aggravated penetrative sexual assault, aggravated sexual assault and for assault on the minor victim (PW-5), a schoolgirl, with intent to outrage her modesty. Both the judgment of

conviction and the order on sentence dated 31.05.2018, have been challenged in the present appeal.

2. The First Information Report (for short 'the FIR') (Exhibit-1) was lodged on 11.12.2016, by a member of the village Panchayat (PW-6), PW-1 [mother of the minor victim (PW-5)], PW-7, PW-9, PW-10 and PW-14 (collectively referred to as first informants) mothers to the five schoolgirls aged between 7 to 11 years. The FIR (Exhibit-1) alleged that PW-14, mother of "O" (one of the five schoolgirls) was bathing her when she noticed redness on her breasts a few days ago. She therefore asked "O" about it, but she refused to open up. After a while, "O" narrated the incident and informed PW-14 that she and her other schoolgirls were being sexually assaulted by their teacher, the present appellant. The first informants alleged that the schoolgirls informed the first informants that the appellant used to touch their breasts in the classroom and outdoors. According to the first informants, the schoolgirls further alleged that the appellant used to put his finger in their private parts and lick it in front of them, make sexual gestures to them and threaten them that if they told their parents or anyone about it, he would cause serious trouble to them.

3. On the basis of the information, FIR No. 25(12)16 dated 11.12.2016 was registered and the case endorsed to Police Inspector Karma Euden Kaleon (PW-17) for investigation.

4. During the investigation, the minor victim (PW-5) was examined by Dr. Rozeela Bhutia (PW-13) on 11.12.2016 and a medical report (Exhibit-13) prepared. The appellant was also examined on 11.12.2016 by Dr. Dawa Dolma Bhutia (PW-16) and his medical report (Exhibit-16) was also prepared. The minor victim's (PW-5) statement (Exhibit-6) under Section 164 of the Code of Criminal Procedure, 1973 (for short 'the Cr.P.C.') was recorded on 26.12.2016 by the learned Judicial Magistrate (PW-12).

5. A consolidated charge-sheet was filed on 28.04.2017 against the appellant for the alleged offence allegedly committed against five schoolgirls of the same school in which he was a teacher. At the stage of framing of charges, the trial of the alleged offences against each of the five minor schoolgirls was split and each tried separately.

6. On 10.10.2017, the learned Special Judge (POCSO), North Sikkim at Mangan (hereinafter, 'the learned Special Judge') in *Sessions Trial (POCSO) Case No. 12 of 2017 - State of Sikkim vs. Kendrap Lepcha*, framed ten charges against the appellant for the commission of the alleged offences against the minor victim (PW-5). The appellant pleaded not guilty and claimed trial. Eighteen witnesses including the Investigating Officer (PW-17) were examined.

7. On 25.05.2018, the appellant was examined under section 313 of the Cr.P.C. The appellant claimed that he had been falsely implicated because he was a strict teacher and the parents of the schoolgirls used to dislike him. When the appellant declined to bring any witness in his defence, the matter was heard by the learned Special Judge and on 31.05.2018 passed the judgment of conviction and the order on sentence.

8. Mr. Ajay Rathi, learned counsel for the appellant submitted that the deposition of the minor victim (PW-5) is inconsistent. To demonstrate that he took us through the cross-examination of the minor victim (PW-5). It was submitted that the medical evidence was inconsistent with the evidence of the minor victim (PW-5). It was argued that the prosecution had not examined the other schoolgirls. He relied upon the judgment of the Hon'ble Supreme Court in **Yerumaua Latchaiah vs. State of Andhra Pradesh**¹ and prayed for an acquittal.

9. Mr. Hissay Gyaltzen, learned Assistant Public Prosecutor, relied upon the testimony of the minor victim (PW-5) as well and submitted that, save minor contradictions, her evidence is cogent and therefore, reliable. He submitted that all other relevant circumstances have been proved by the prosecution. The judgment of conviction and order on sentence are both sound.

¹ (2006) 9 SCC 713

10. Dr. Rozeela Bhutia (PW-13), the Medical Officer who examined the minor victim (PW-5) on 11.12.2016, the same day when the FIR (Exhibit-1) was lodged, did not find any external injury on her. However, on vaginal examination she found milky white discharge which had dried up. She also found that the hymen was not intact, and it admitted a tip of one finger. She noticed tenderness there and concluded that there was clinical evidence of sexual assault. In cross-examination, she admitted that the milky white discharge is a normal biological occurrence and the hymenal tear could have been caused by strenuous physical activity. She admitted that even without penetration the vagina can be one finger loose. She further admitted that her finding about clinical evidence of sexual assault was based on the history as reported by the Investigating Officer (PW-17) and the medical examination of the minor victim (PW-5). Dr. Dawa Dolma Bhutia (PW-16) who examined the appellant also on 11.12.2016, could not find any injury on his person.

11. PW-1 deposed that she came to know from some co-villagers, whose children used to study in the same school as the minor victim (PW-5), that they were sexually assaulted by the appellant. When she questioned the minor victim (PW-5), she confirmed that the appellant was putting his hands over her chest and vagina. In cross-examination, she admitted that apart from the appellant there were two more teachers in the school; which is a co-ed school; school is located in the village and is

surrounded by many houses; people of the locality often walk through the school compound; the appellant was a strict teacher; he used to conduct Hindi and Maths tests each month; her daughter was not so good in studies; when the appellant was the teacher in the school, her daughter attended school regularly; she personally did not know if any sexual assault was committed on her daughter or other schoolgirls; there was a meeting regarding the matter in the village between the parents, including her, and the villagers; prior to the said meeting her daughter never complained of having been sexually abused by the appellant or about any pain in her private parts; she did not see any blood stains in the undergarment of her daughter during and around the concerned period; the meeting was called by the mother of one of the victims which was not held in the school but in the village; prior to the said meeting they had never heard that the appellant had committed any sexual assault on any of the schoolgirls; the FIR (Exhibit-1) was signed by her on the insistence of the mother of one of the victims; the FIR (Exhibit-1) was not scribed by her and she did not know the contents thereof, which were also not read over and explained to her.

12. The other first informants (PW-6, PW-7, PW-9 and PW-10) deposed that they had heard the schoolgirls had been sexually abused by the appellant, the subsequent meeting and then the lodging of the FIR (Exhibit-1). All the first informants identified the appellant in Court.

13. The deposition of the first informants reveal that each of the five schoolgirls had informed their respective mothers, i.e., the first informants (PW-1, PW-7, PW-9, PW-10 and PW-14), that they had been sexually abused by the appellant. What they heard from the schoolgirls as deposed by them may stand. However, the truth and veracity of what the schoolgirls informed the first informants (PW-1, PW-7, PW-9, PW-10 and PW-14) could have been verified only if the schoolgirls had been examined. However, none of the schoolgirls were examined except the minor victim (PW-5). The truth and veracity of the allegations made by the six first informants in the FIR (Exhibit-1) dated 11.12.2016, therefore, hinges on the evidence of the minor victim (PW-5) alone.

14. At the time of deposition, the minor victim (PW-5) was ten years old. She identified the appellant in Court. She deposed that he used to be their teacher. She also named him as Kendrap Sir who used to teach them English, Environmental Science and Mathematics. She disclosed that earlier when she was in the third standard the appellant used to put his hands on her chest on the pretext of adjusting her shirt collar. According to her, he did so on about two occasions. She further deposed that the appellant used to put his fingers in her vagina on the pretext of adjusting her shirt and skirt. She said that he used to do the above acts both in the classroom and while taking tuitions in his house. She verified that she had given her statement (Exhibit-6)

before the learned Magistrate. During her cross-examination, she admitted that she had stated to the learned Magistrate that the appellant did not open his clothes. She also admitted that she had informed the learned Magistrate that she did not know the appellant's name. She admitted that she had also not stated before the learned Magistrate as to how many times the appellant had done the alleged acts to her as well as the fact that the appellant used to violate her during tuitions at his house. She admitted that the alleged incidents occurred in the classroom of the school where other schoolgirls were also there. She then clarified that the other schoolgirls used to go out of the classroom at that time. She admitted that the appellant was a strict teacher.

15. The cross-examination of the minor victim (PW-5) does show the improvements made in the version of the minor victim (PW-5) from the statements made by her to the learned Magistrate under section 164 Cr.P.C. She had not stated that the appellant used to put his hands in her vagina on the pretext of adjusting her shirt and skirt to the learned Magistrate although she deposed it. In fact, in her statement (Exhibit-6), she had specifically stated that the appellant neither opened his clothes or her clothes. In her statement (Exhibit-6), she had disclosed that the appellant used to touch her chest and put his hands on her vagina.

16. The medical evidence is not clinching. None of the observations made by Dr. Rozeela Bhutia (PW-13) on its own would lead to an irresistible conclusion that the appellant had committed penetrative sexual assault or rape on the minor victim (PW-5). The minor victim (PW-5) admitted during her cross-examination that she had stated that the appellant neither opened his clothes nor her clothes. In the circumstances, it is not possible to link the hymen of the victim not being intact to the acts of the appellant alone. Therefore, it would be extremely difficult to sustain the conviction of the appellant for commission of penetrative sexual assault or rape.

17. However, the minor victim (PW-5) has been consistent about the appellant having touched her chest and her vagina. This fact has been corroborated by her statement (Exhibit-6) as well as by the deposition of PW-1. At the time of the incident, the minor victim was barely eight years of age and therefore, may have been susceptible to all kinds of pressures and confusions. However, it is certain that the appellant had in fact sexually assaulted the minor victim (PW-5).

18. It is certain that the appellant did in fact commit sexual assault on the minor victim (PW-5). The evidence adduced by the prosecution also proved that the appellant committed sexual assault.

19. The fact that the appellant was a teacher of the minor victim (PW-5) has been sufficiently proved by the prosecution witnesses including the minor victim (PW-5), her mother (PW-1), PW-3 (the Deputy Secretary) and PW-4 (the Joint Secretary) both in the Human Resource Development Department of the Government of Sikkim, who proved his appointment orders – Exhibit 8 and Exhibit 9.

20. Although not challenged, the age of the minor victim (PW-5) has also been conclusively proved by the evidence of her parents i.e. mother (PW-1) and father (PW-18), the birth certificate (Exhibit-20), the deposition of the Principal In-charge of the school (PW-15) who proved the entry in the school admission register (Exhibit-14) which shows her date of birth as 24.06.2008 as also reflected in her birth certificate (Exhibit-20). Thus, at the time of the offence the minor victim (PW-5) was below the age of twelve years.

21. Consequently, the conviction of the appellant for the offence under sections 9(f), 9(l) and 9(m) of the POCSO Act are sustained. The convictions of the appellant under section 5(f), 5(l) and 5(m) of the POCSO Act are set aside. The conviction of the appellant under section 354 IPC is also set aside in view of section 71 IPC.

22. Although, the learned Special Judge had noticed the provision of section 42 of the Protection of Children from Sexual

Offences Act, 2012 (for short ‘the POCSO Act”), he has sentenced the appellant under section 376(2) of the Indian Penal Code, 1860 (for short “the IPC”) and section 5 of the POCSO Act. This would be incorrect and illegal. Section 42 of the POCSO Act provides that the offender found guilty of such offence shall be liable to punishment either under the POCSO Act or under the IPC as provided for punishment which is greater in degree. The learned Special Judge was required to examine which of the two offences provided for punishment was greater in degree and accordingly sentence the appellant. However, as we are inclined to interfere with the judgment of conviction against the appellant for commission of penetrative sexual assault and rape, we do not need to state anything further.

23. The learned Special Judge has sentenced the appellant under section 376(2)(f), 376(2)(n) and 376(2)(i) IPC and section 5(f), 5(l) and 5(m) of the POCSO Act, which are set aside. The sentence under section 354 IPC is also set aside. The sentences under section 9(f), 9(l) and 9(m) of the POCSO Act are sustained.

24. As directed by the learned Special Judge, the period of imprisonment for the sentences confirmed shall run concurrently.

25. Consequently, the compensation awarded by the learned Special Judge is modified and it is directed that the

minor victim (PW-5) shall be awarded a sum of Rs.50,000/- (fifty thousand).

26. The appeal is partly allowed.

27. The impugned order on sentence dated 31.05.2018 stands modified to the above extent.

28. Copy of the judgment be transmitted to the Court of the learned Special Judge (POCSO) North Sikkim at Mangan and another to the learned Member Secretary, Sikkim State Legal Services Authority, Gangtok, for compliance.

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

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

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

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