

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 12th NOVEMBER, 2019

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

Crl.A. No.05 of 2018

Appellant : Tshering Tempa Sherpa

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. B. Khatiwada, Senior Advocate with Ms. Gita Bista,
Legal Aid Counsel for the Appellant.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Prosecution case against the Accused Tshering Tempa Sherpa (Appellant herein) commenced on a First Information Report (FIR), Exhibit 5, lodged against him, by P.W.12, the victim's mother. A Charge-Sheet came to be submitted against him under Section 376 of the Indian Penal Code, 1860 (hereinafter, IPC) read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act, 2012). The Learned Trial Court framed Charges against the Appellant under Sections 5(l) and 5(k) punishable under Section 6 of the POCSO Act, 2012 and Sections

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376(2)(n), 376(2)(i) and 376(2)(l) of the IPC. On the Appellant pleading "not guilty", the Prosecution examined fifteen witnesses and on consideration thereof the Learned Trial Court convicted the Appellant of the offences under Section 376(2)(l) and 376(2)(n) punishable under Section 376(2) of the IPC, but acquitted him of the offences under Section 5(l), 5(k) of the POCSO Act, 2012 and 376(2)(i) of the IPC.

2. Dissatisfied with the finding, the Appellant is before this Court. He assails the impugned Judgment on the grounds that although the victim alleged that he had sexually assaulted her on several occasions she did not complain of it to either her parents or anyone else. That, according to her, she continuously had sex with the Appellant for three months prior to the lodging of Exhibit 5 but this evidence is uncorroborated. The victim (P.W.9) also complained that the Appellant used to frequent her home and sexually assault her when she was alone and she had narrated the incident to P.W.5, who however failed to endorse this evidence of P.W.9. Contrarily P.W.1 has deposed that the Appellant told him that the victim had lured him to have sexual intercourse with her. Besides, the aforesaid points the minority of the victim stood unestablished and the Learned Trial Court in the absence of any evidence opined that the victim was not a minor. Hence, the Appellant be acquitted of the Charges.

3. Refuting the contention raised by the Appellant, Learned Additional Public Prosecutor argued that although the Prosecution had furnished Birth Certificate of the victim before

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the Learned Trial Court in the absence of supporting documents it was not considered. That, infact the said document Exhibit 1 was never contested by the Appellant which therefore was an acceptance of the fact that the victim was a minor, her date of birth having been recorded as "03-06-2000" and the offence having occurred on 30-03-2016, thereby making her short of sixteen years of age. Relying only on the statement of the victim, it was contended that she has specifically stated that the Appellant had requested her to have sex with him holding out the promise that her deformities would be cured if she consented and acted on the consent. Thereafter, he frequently visited her house and sexually assaulted her repeatedly for two months. That, P.W.12 the victim's mother has corroborated the evidence of the P.W.9 as she has stated that on the relevant day her child, the victim come crying and running to her shop and told P.W.12 that the Appellant had entered their house, forcibly laid her on the bed, taken off her lower garment and rubbed his penis on her vagina. When she shouted for help the Appellant let go. Hence, the conviction handed out by the Learned Trial Court and the consequent penalty ought to be upheld as no error emanates therein.

4. The rival submissions of Learned Counsel have been heard at length and duly considered, all evidence and documents as also the impugned Judgment have been perused and considered.

5. The facts as can be gauged from the documents on record are that, on 31-03-2016, at around 1730 hours, P.W.12

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the victim's mother lodged an FIR, Exhibit 5, informing therein that the Appellant had sexually assaulted her daughter the victim P.W.9 at her house on 30-03-2016, at around 1530 hours. Based on the FIR, the case was registered at the Ravangla P.S., South Sikkim and investigation taken up which revealed that the Appellant 68, years of age at the relevant time, was a widower employed as a cowherd by P.W.1 and residing with him. P.W.12 sold farm produce by the road side while P.W.9 being physically challenged assisted her with household chores. On 30-03-2016 P.W.9 went to the shop of her mother and complained to her that the Appellant had sexually assaulted her. Pursuant thereto, P.W.12 went to the house of P.W.1 the employer of the Appellant and informed him of the sexual acts perpetrated by the Appellant on her child. Consequent thereto, Exhibit 5 came to be lodged. The victim had also informed her aunt P.W.5 of the incident who advised her to inform P.W.12. Charge-Sheet thus came to be submitted against the Appellant under the aforestated provisions of law.

6. While discussing the age of the victim the Learned Trial Court in the impugned Judgment has *inter alia* held that “..... Therefore, although the birth certificate marked Exhibit-1 is not disputed by the defense, in the absence of register maintained by Registrar, Births & Deaths and such other evidence on record to establish the authenticity of Exhibit-1, same cannot be safely considered in evidence to establish the age of the victim girl. Thus, it can be concluded that the prosecution has miserably failed to prove the age of the victim

girl.” It is evident from the extract *supra* that although Exhibit 1 the Birth Certificate was not contested by the Appellant the Learned Trial Court chose to ignore it in the absence of supporting documents. However, the Prosecution failed to raise any question on this finding of the Learned Trial Court, consequently Exhibit 1 cannot be taken into consideration by this Court at the appellate stage. It thus follows that the age of the victim has not been established.

7. We may now relevantly examine the evidence of P.W.6 the Gynaecologist who examined the victim on 31-03-2016. No external injuries were noticed on the person of the victim neither were injuries found on her private part. He recorded that her hymen was lax and proceeded to elucidate that if the hymen is lax it is an indication of repeated sexual intercourse or that the person is habituated to sexual intercourse. The Urine Pregnancy Test was negative. P.W.7 the Medical Officer at the District Hospital, Namchi who also examined the victim on 31-03-2016 noticed some scratches on her left hand, apart from which no other injuries were seen on the victim. While considering the evidence of P.W.6 it is clear that the witness has not explained as to whether the laxity of the hymen was a result of the occurrence of the alleged incidents or whether the hymen was lax prior to the incidents or for that matter whether medical science can at all point to the age of the laxity enabling the Court to draw a correct conclusion. In the absence of any categorical and cogent statement of P.W.6 in this context and in the absence of any fresh injuries on the genital or

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person of the victim the Medical Report is of no assistance to the Prosecution case neither can we foist the offence on the Appellant.

8. That having been said, the Appellant was convicted that under Section 376(2)(n) and 376(2)(l) of the IPC the offence of rape is described in Section 375 of the IPC which *inter alia* requires penetration of the perpetrator's penis to any extent, into the vagina, mouth, urethra or anus of the victim or he makes her to do so with him or any other person or that he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person. Rape would also occur if the accused manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person or the accused applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person. These acts must necessarily be against the will of the victim, sans her consent and if her consent is obtained by putting her in fear of death or hurt or any of the seven descriptions enumerated in Section 375 of the IPC.

9. In view of the provision as discussed hereinabove, the evidence of the victim is to be analysed, she has stated as follows;

"..... The accused requested me to have sex with him and if I have sex with him my fingers of the hand would get straight and cured. After some days the accused again

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came our house and at that time my sisters had gone to school and my mother had gone to collect "ninguro" in the forest. Finding me alone the accused made me lie down on the bed and had sex with me. I screamed for help but nobody was in and around.

The accused, thereafter, used to frequently visit when there was no one in the house and used to sexually assault me. The accused sexually assaulted me repeatedly for about a period of two months."

Assuming that her consent was given, it was not by putting her in fear of death or hurt. What emerges from the evidence of the victim is that the Appellant "had sex" with her. It is however unclear what the victim's understanding was of the words "had sex with me". The victim has failed to describe what the word 'sex' meant, neither has she described the actual act perpetrated on her by the Appellant. It is also stated that the Appellant used to "sexually assault" her, the term so utilised is also nebulous. The words "sexual assault" finds no definition in the IPC, thus for guidance we may look into the definition of the said words as found in the POCSO Act, 2012 under Section 7, which is as follows;

"7. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

Considering that she has only claimed that there was "sexual assault" the Court cannot arrive at a hasty conclusion that when she used the words "sexually assault" or "had sex with me" it would necessarily mean or imply penetrative sexual assault. It was imperative for the Prosecution to have extracted from the victim during her deposition the actual act that was

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committed on her considering that the Prosecution is under the mandate of proving its case beyond all reasonable doubt and cannot leave its case to ambiguities thereby leading to erroneous conclusions. It was thus incumbent not only upon the Prosecution but also the Learned Trial Court by exercising its powers under Section 165 of the Indian Evidence Act, 1872 to reach the crux of the matter when the victim was being examined. These observations are being verbalised in view of the fact that not only has the victim failed to specify the offence but P.W.12 the victim's mother has in her evidence stated as follows;

“..... In the afternoon, at about 3-3.30 p.m, while I was in my shop my victim daughter came running to the shop crying and told me that the accused entered into the house, forcibly laid her on the bed, took off her **lower garments and rubbed his penis on her vagina.**”

Thus, this act of the Appellant does not satisfy the ingredients of Section 375 of the IPC which requires that there has to be penetration of the Appellant's genital to any extent into the vagina, mouth, urethra or anus of a woman. The other ingredients of Sections 375, viz., Section 375(b), (c) and (d) are also not fulfilled. Assuming that the act was against her consent it is clear that the offence is not one under Section 375 punishable under Section 376 of the IPC but would be covered by provisions of Section 354A(1)(i) of the IPC, which is punishable with rigorous imprisonment for a term which may extend to three years or with fine or with both.

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10. In view of the entire evidence before us, we are of the considered opinion that the Learned Trial Court erred in arriving at the finding that the Appellant committed the offence under Section 376(2)(n), 376(2)(i) and 376(2)(l) of the IPC. We are of the considered opinion that the offence is one under Section 354A(1)(i) of the IPC.

11. The Appellant is accordingly convicted under Section 354A(1)(i) of the IPC and sentenced to undergo rigorous imprisonment for a period of two years and fine of Rs.1,000/- (Rupees one thousand) only, duly setting off the period of imprisonment already undergone by him both as undertrial prisoner and convict.

12. Since the punishment prescribed under Section 354A(1)(i) of the IPC is lesser than Sections 376(2)(l) and 376(2)(n) punishable under Section 376(2) of the IPC, there is no requirement for a fresh hearing on sentence.

13. In view of the finding that the offence perpetrated on the victim was under Section 354A(1)(i) of the IPC, the victim is granted compensation of Rs.50,000/- (Rupees fifty thousand) only, in terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016, which is to be made over to the victim by the Sikkim State Legal Services Authority (for short "SSLSA").

14. The Appeal is allowed to the extent above.

15. No order as to costs.

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16. Copy of this Judgment be forwarded to the Learned Trial Court along with records of the case.

17. A copy also be sent to the Member Secretary, SSLSA forthwith for information and compliance.

(Bhaskar Raj Pradhan)
Judge
12-11-2019

(Meenakshi Madan Rai)
Judge
12-11-2019

Approved for reporting : **Yes**

Internet : **Yes**

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