THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 7th APRIL, 2017

D.B. : HON'BLE MR. JUSTICE SATISH K. AGNIHOTRI, CHIEF JUSTICE
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.19 of 2016

Appellant : Shri Santosh Gurung,
Son of Late Ran Bahadur Gurung,
Resident of Battisey Dara,
North Regu,
Rongli, East Sikkim.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance

Mr. S. P. Bhutia, Advocate for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Ms. Pollin Rai, Assistant Public Prosecutor for the State.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant was tried under Section 376(2)(i) of the Indian Penal Code, 1860 (for short "IPC"), Section 3(a) punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), Section 5(m) and Section 5(n) of the POCSO Act as well as Section 302 and Section 201 of the IPC, by the Court of the Learned Special Judge (Protection of Children

from Sexual Offences Act, 2012), East Sikkim at Gangtok, in S.T. (POCSO) Case No. 20 of 2014, and convicted as follows;

(i)	U/s.376(2)(i) of the IPC	-	Imprisonment for life and fine of Rs.1,000/- (Rupees one thousand) only, with a default stipulation.
(ii)	U/s.302 of the IPC	-	Imprisonment for life and a fine of Rs.1,000/- (Rupees one thousand) only, with a default stipulation.
(iii)	U/s.201 of the IPC	-	Simple imprisonment for a period of seven years and a fine of Rs.1,000/- (Rupees one thousand) only, with a default stipulation.

All the above sentences were ordered to run concurrently and the amount of fine, if recovered, was to be made over to the victim (*sic*). Although convicted under Sections 4 and 6 of the POCSO Act, also in view of the provisions of Section 42 of the POCSO Act, no sentence of imprisonment was handed out to the Appellant under these Sections.

2. The grounds raised in the Appeal are that the Prosecution has tried to establish its case by way of circumstantial evidence, but has failed to provide the necessary links to connect the offence to the Appellant. The evidence of the witnesses furnished by the Prosecution being replete with contradictions and inconsistencies are unreliable and cannot be the basis for convicting the Appellant. The Learned Trial Court has reached a finding of guilt mainly relying on the result of the investigation and statement of the Appellant under Section 24 and Section 27 of the Indian Evidence Act, 1872 (hereinafter the "Evidence Act"), which in the first instance, is not conformity with the Law, the extra-judicial confession of the Appellant allegedly having been made by him in the presence of P.W.1, a Police Official, after he was arrested. That

the Appellant had allegedly narrated to P.W.4 that he had committed a misdeed which he regretted, but in fact, no disclosure of any actual act committed was made by the Appellant to P.W.4, whose evidence comprises of improbable facts. Relying on the Judgment in ***State of Goa*** vs. ***Sanjay Thakran & Another***[1] it was urged that in cases of circumstantial evidence the circumstances from which inference of guilt is sought to be drawn, must be firmly and cogently connected and unerringly point towards the guilt of the accused, which the Prosecution has failed to do in the instant case. That P.W.4 failed to identify M.O.VI, while the statements of P.W.5 and P.W.14 do not corroborate with regard to the statement of the Appellant under Section 27 of the Evidence Act. That the place of recovery of the alleged articles is easily accessible as villagers are often there to repair water sources and recovery therefrom cannot be said to be fool proof. Learned Counsel sought to debunk the "last seen together theory" being unsubstantiated by the evidence of P.W.2, who was allegedly the last person to have seen the victim and Appellant together. Moreover, the time gap when the victim and the Appellant were last seen together has to be considered, which was about six months prior to the arrest of the Appellant and not immediately after the disappearance of the victim. Merely because the Appellant left Sikkim at that juncture would not make him guilty of the offence as he was a wanderer often employed for odd jobs in various places. The Prosecution has thus failed to prove its case beyond a reasonable doubt as mandated by Law, in consequence of which the Appellant is entitled to an acquittal.

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1. (2007) 3 SCC 755

3. Resisting the arguments of the Appellant, Learned Additional Public Prosecutor drew the attention of this Court to the evidence of P.W.4 and P.W.13, which were urged to be considered together and reveal that the Appellant was indeed guilty of the offence, the Appellant having come to the house of P.W.4 in a drunken condition with injuries on his neck and bits of wild shrub stuck on his clothes. He admitted to P.W.4 of having committed a serious act which no one else should repeat and that he would leave for Bhutan. That, the testimony of P.W.4 has been corroborated by P.W.13 in whose presence the Appellant admitted the commission of the act of rape and murder. The last seen together theory is confirmed by the evidence of P.W.2, the mother of the Appellant and grandmother of the victim. The articles of clothing were recovered in terms of the disclosure statement of the Appellant and the guilt of the Appellant can also be gauged from the fact that he absconded from the area subsequent to the crime, apart from which he failed to explain his absence despite the opportunity extended to him under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C."). That, the Judgment and Order of conviction of the Learned Trial Court, therefore, requires no interference.

4. We have heard Learned Counsel for the parties at length, perused the entire records of the Learned Trial Court and given our due and anxious consideration. What requires consideration is whether the Learned Trial Court fell in error in convicting the Appellant based on circumstantial evidence?

5. The facts of the case leading to the macabre incident may briefly be traversed.

On 12-11-2013, P.W.2 informed the Rongli Police Station, East Sikkim, that her son (the Appellant) and grand-daughter (the victim), were missing from 9 a.m. of 06-11-2013 and had remained untraced despite all efforts. She submitted photographs of both the missing persons. FIR, Exhibit 3, was accordingly registered and investigation was taken up. After about six months of the incident, on 12-05-2014, the Appellant was located at Matigara, Siliguri and was apprehended and brought to the Rongli Police Station. Thereafter, Rongli Police Station Case was registered against the Appellant on 13-05-2014 under Sections 376/302 of the IPC read with Section 6 of the POCSO Act and he was arrested. Investigation revealed that the Appellant had spent the night in the house of P.W.2 and the next morning she asked him to purchase some vegetables. Despite P.W.2 declining his request to let the victim accompany him to the Shop, the Appellant took her and *enroute* raped and murdered her and concealed her body. Thereafter, he left for Bhutan and was later traced in Siliguri.

6. On completion of investigation, Charge-Sheet was submitted against the Appellant and Charge was framed against him under Section 376(2)(i), 302 and 201 of the IPC read with Section 3(a), 4, 5(m), 5(n) and 6 of the POCSO Act. On a plea of "not guilty", sixteen witnesses were examined by the Prosecution to prove its case beyond a reasonable doubt, on consideration of which the impugned Judgment and Order of Sentence were passed.

7. The guilt of the Appellant hinges on circumstantial evidence, the principles of which have been elucidated in the decision of ***Sanjay Thakran***[1] (*supra*), which are as follows;

> **"13.** The prosecution case is based on the circumstantial evidence and it is a well-settled proposition of law that when the case rests upon circumstantial evidence, such evidence must satisfy the following tests:
>
> (*1*) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
>
> (*2*) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (*3*) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
>
> (*4*) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.
>
> (See *State of U.P.* v. *Satish* [(2005) 3 SCC 114], *Padala Veera Reddy* v. *State of A.P*. [1989 Supp (2) SCC 706], *Sharad Birdhichand Sarda* v. *State of Maharashtra* [(1984) 4 SCC 116], *Gambhir* v. *State of Maharashtra,* SCC p.355, para 9 [(1982) 2 SCC 351] and *Hanumant Govind Nargundkar* v. *State of M.P.* [AIR 1952 SC 343])."

8. It is now to be seen whether the Prosecution case will withstand the test of the above enunciated principles. The evidence of P.W.2 is of utmost importance, she being the witness who had seen the Appellant and the victim together that fateful morning. The Appellant being her third son often came to the village looking for odd jobs and lodged at places where he was thus engaged. On the evening, prior to the day of incident, the Appellant had come to her residence and the next morning expressed his desire to go to the Shop to make purchases and to take the victim along with him. She declined his proposal of taking the victim along and the last she

saw of them was when the Appellant was near the woodshed and the victim near the door of her house. Half an hour later she looked for the victim, but could neither find her nor the Appellant. She checked with her immediate neighbours, in vain. The victim not having returned that night she searched for her the next morning in the village and the Shop where the Appellant had wanted to take her, to no avail. On enquiry from one Prakash Gurung she learnt that the Appellant had visited his house the previous evening and spent the night there. With the help of the villagers she embarked on a search for the victim and scoured the entire jungle at "Battisey Dara". Having failed in her efforts to thus trace the child she lodged Exhibit 3, the FIR. Although a concerted effort was made during the cross-examination of P.W.2 to disprove her evidence that the Appellant and the victim were last seen together by her, her statements stood the test of cross-examination. On a question put to the witness by the Court as to the presence of any other person in the house, her categorical reply was that apart from herself, the victim and the Appellant, there was no one else as the two persons earlier mentioned by her had left by then.

9. The evidence of P.W.2 is corroborated by P.W.1, Hari Prasad Gurung, Head Constable, to the extent that the victim had gone missing from the house of P.W.2 and so had the Appellant. This is also supported by the evidence of P.W.6, who deposed that the child used to accompany her to the ICDS Centre where she was working. Two days after "bhai tika", when she called the child to accompany her, P.W.2 told her that the victim had gone to the shop with the Appellant. On her return P.W.6 found that the victim had

still not come home, P.W.2 then went to the shop to look for the child who, however, was not found.

10. Evidently on the same day around 1 p.m. the Appellant had gone to the house of P.W.4 where, as per P.W.4, the Appellant was drunk, had minor cuts, scratch/bruise mark on his neck as well as some spiked burrs (locally called "kuro") stuck to his clothing. After confiding in P.W.4 of having committed a serious act, he told him that he would leave for Bhutan and left the house of the P.W.4.

11. Laying the foundation of his argument on the decision of ***Sanjay Thakran***[1] (*supra*) it was consistently argued by Learned Counsel for the Appellant that the last seen together theory would normally be taken into consideration for proving the accused guilty of the offence charged with, when, it is established by the Prosecution that the gap between the point of time when the accused and deceased were found together, alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could be completely ruled out. The Appellant herein was traced only after six months of the offence and there is no proof whatsoever to associate him with the crime. We, however, find on an analysis of the evidence on record that there can be no two ways about the fact that the victim was last seen with the Appellant, the evidence of P.W.2 has been consistent and categorical on this aspect and remained undemolished to boot. The argument of the Learned Counsel that the crime cannot be foisted on the Appellant in the absence of any link cannot be countenanced in the face of evidence that has emerged.

12. It would now be worthwhile to examine the statement made by the Appellant under Section 27 of the Evidence Act. Before we consider this, it would be appropriate to draw attention to the legal principles.

13. Section 27 of the Evidence Act permits the proof of all kinds of information whether contained in a confession or not and goes beyond the provisions of Sections 25 and 26 of the Evidence Act. The conditions necessary for application of Section 27 are that;

> **"**(1) The fact of which evidence is sought to be given must be *relevant* to the issue. (S 27 has nothing to do with question of relevancy. The relevancy of the fact disovered must be established according to the rules relating to relevancy of other evidence connecting it with the crime in order to make the fact discovered admissible).
>
> (*2*) (*a*) The fact must have been discovered—(*b*) discovered in *consequence of some information* received from the accused (and not by the accused's own act).
>
> (*3*) The person giving the information must be *accused* of any offence.
>
> (*4*) He must be in the *custody* of a police officer [see *ante* & *post*].
>
> (*5*) The discovery of a fact in consequence of information received from an accused in custody *must be deposed to*.
>
> (*6*) And thereupon that portion only of the information which *relates distinctly* (*or strictly*) to the fact discovered can be proved. The rest is inadmissible.**"**
>
> **[See Sarkar Law of Evidence 16th Edition Reprint 2009 page 612]**

14. For the applicability of Section 27 of the Evidence Act two conditions are prerequisite, i.e., (i) the information must be such as has caused discovery of the fact (ii) the information must 'relate distinctly' to the fact discovered. The word 'fact' as used in this Section relates to physical or material fact which can be perceived by the senses. The discovery of such facts alone can

eliminate the fear of the confession being improperly induced. This has been succinctly explained in the decision of ***Pulukuri Kottaya and Others*** vs. ***Emperor***[2].

15. On the touchstone of the principles so put forth, we now proceed to examine the statement of the Appellant, being Exhibit 4. According to him, he took his niece with him to the Shop but *enroute* he throttled her from behind, knocked her to the ground and raped her. She was bleeding from her nose, mouth and genital and had stopped breathing. He covered her with his black jacket and returned home, brought a printed shawl that belonged to his sister, laid the victim on it and covered her with his jacket. He then carried the body to a jungle below the house where he left it and his necklace. He added that he could show the place. P.W.5 and P.W.14 were witnesses to the statement made by him when he was at the Rongli Police Station. Infact both the witnesses, according to them, had gone to the Police Station out of curiosity having read of the arrest of the Appellant in connection with the case in a local newspaper. Both witnesses vouched for the truth of the statement made by the Appellant and that in pursuance thereof they had accompanied the Police to the place revealed by the Appellant. On arrival there, the Appellant led the Police to the place of offence and to the place of concealment of her body. Thereupon recovery was made of M.O. I to M.O. VII from where the Police also obtained M.O. VIII (soil sample). Although it was suggested during the arguments by Learned Counsel for the Appellant that the spot was easily accessible to the public and hence the Appellant could not be held

2. AIR 1947 PC 67

guilty on this count, but on going through the evidence of P.W.5 and P.W.14 this argument is belied, as both have categorically deposed that the place shown by the Appellant was not near the village road but was a little secluded. Both have vouched for the truth of recovery of M.O.I to M.O.VII from the place shown at the behest of the Appellant. P.W.2 for her part was also later asked to identify M.O.I to M.O.IV. She identified the articles as clothing which had belonged to her granddaughter. This fact is corroborated by the evidence of P.W.10, the Chief Judicial Magistrate, who conducted the Test Identification Parade of the articles recovered by the Police where P.W.2 was to identify the articles and did so correctly. A perusal of Exhibit 3, the FIR, would also reveal that P.W.2 had infact given a description of the clothes worn by the victim at the relevant time being a pair of Jeans (M.O. IV) and a Red high neck (M.O.I). She had also described the clothes worn by the Appellant being black trousers and a black jacket (M.O.V).

16. A statement under Section 27 of the Evidence Act as already discussed is admissible with regard to only those statements which relate to discovery of fact, consequently how he throttled the child, raped her during the course of which she died would not be encompassed within the ambit of Section 27 of the Evidence Act. We are to be concerned only with the "fact so discovered", at the behest of the Appellant, which were M.O.I to M.O. VII and there is credible evidence to indicate recovery of these articles based on the statement of the Appellant.

17. Relying on the decision of ***Sahadevan and Another*** vs. ***State of Tamil Nadu***[3] it was canvassed by Learned Counsel for the Appellant that where there are contradictions and discrepancies in the evidence of the witnesses, the advantage of such must be afforded to the accused. The facts therein we find are distinguishable to the fact at hand inasmuch as there the Prosecution failed to establish a connection between the articles recovered and the alleged crime. The accusation was that kerosene had been poured on the deceased by the perpetrators but no trace or odor of kerosene was found either on the deceased or his belongings. In the case at hand, the witnesses and the Police have been led to the *locus criminis* by the Appellant and at his behest the articles aforesaid were recovered despite a lapse of six months from the accident, thereby leaving no doubt whatsoever of the complicity of the Appellant in the commission of the offence.

18. The next aspect which raises its head for consideration would be the providential absence of the Appellant after the offence. It is indeed more than a coincidence that the Appellant decided to proceed to Bhutan seeking employment opportunities immediately after the offence, having confided to P.W.4 that he had committed an act for which he was apparently remorseful. The Appellant of course had the benefit of committing the offence and thereafter the opportunity of absconding the next day (as emerges from the evidence on record), since P.W.2 failed to inform the Police straightaway but had resorted to her private investigation. On this

3. (2012) 6 SCC 403

point, it may be remarked that the social standing of P.W.2, her exposure to the outside world and awareness thereof have to be considered, added to the fact that she would have no reason to falsely implicate her son. Consideration is also to be taken of the fact that she was living alone with the victim while the Appellant used to occasionally visit and stay with them and, therefore, she had no one to turn to for immediate guidance. She has, however, clearly stated in Exhibit 3 that the child and the Appellant were missing from the morning of 06-11-2013 and there appears to be no afterthought or foul play in this regard. Infact no such argument was also advanced by Learned Counsel for the Appellant on this count. This Court is conscious and aware of the fact that absconding by itself does not prove the guilt of a person, who may do so due to fear of false implication or arrest (***Sk. Yusuf*** vs. ***State of West Bengal***[4]). However, in the instant case the material on record is sufficiently incriminating to lead to a conclusion of guilt of the Appellant, apart from which it is obvious that the M.O.I to M.O.VII were recovered from the spot indicated by the Appellant six months after commission of the offence.

19. So far as the argument of Learned Additional Public Prosecutor that the Appellant failed to clarify his position when questioned under Section 313 of the Cr.P.C., it may be stated that merely refusal to answer any question put to him by the Court in relation to any evidence against him would not justify a finding of guilt and, therefore, this argument of the Learned Additional Public Prosecutor is not found tenable.

4. (2011) 11 SCC 754

20. Now what remains for consideration is the alleged extra-judicial confession of the Appellant. According to P.W.1 the appellant confessed of his offence at the Rongli Police Station after his arrest, to the contrary P.W.4 says that it was in the vehicle after the Appellant was apprehended and he along with P.W.1 and the Appellant were travelling from Siliguri to Rongli. P.W.13 a totally independent witness states that the confession was made by the appellant to him when he was being subjected to medical examination, however, the Investigating Officer (for short "I.O.") appears to have taken him to P.W.13 and the testimony of P.W.13 does not clarify whether the I.O. remained with them when the Appellant was giving his history. As the circumstances of the Appellant's confessional statement is inchoate, in view of the discussions hereinabove, we are of the opinion that it deserves no consideration and is accordingly discarded.

21. Thus, in the light of the factors discussed hereinabove, due weight has to be attached to the evidence furnished and discussed, which when taken cumulatively completes the chain of circumstances to fasten the offence on the Appellant who callously snuffed out the life of an innocent as a consequence of his debauchery.

22. In the end result, we have reached a finding that the Judgment and Order of the Learned Trial Court brooks no interference and it is ordered accordingly.

23. Appeal dismissed.

24. No order as to costs.

25. Copy of this Judgment be sent to the Learned Trial Court along with Records of the Court forthwith.

Sd/-
(Meenakshi Madan Rai)
Judge
07-04-2017

Sd/-
(Satish K. Agnihotri)
Chief Justice
07-04-2017

Approved for reporting : **Yes**

Internet : **Yes**

ds/jks