THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 18th APRIL, 2017

S.B. : HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.27 of 2015 (Jail Appeal)

Appellant : Shri Arjun Subba alias Saila,
Son of Ram Singh Subba,
Resident of Dhulabari,
Nepal.
[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. S. Hamal, Legal Aid Counsel for the Appellant.

Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Dissatisfied by the Judgment and the Order on Sentence, both dated 30-07-2014, passed by the Learned Special Judge (Protection of Children from Sexual Offences Act, 2012), South Sikkim, at Namchi, in Sessions Trial (POCSO) Case No. 10 of 2013, the Appellant is before this Court. The Appellant having been found guilty of the offence under Section 8 of the Protection of

Children from Sexual Offences Act, 2012 (for short "POCSO Act") and Section 354B of the Indian Penal Code, 1860 (for short "IPC"), was sentenced as follows;

> *(i) For the offence under Section 8 of the Protection of Children from Sexual Offences Act, 2012 the convict is sentenced to undergo Simple Imprisonment for a period of Four and a half years and to pay a fine of Rs.50,000/- (Rupees Fifty thousand) only. In default to pay the said amount of fine he shall undergo further Simple Imprisonment for a period of six months; and*
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> *(ii) For the offence under Section 354-B of the IPC, 1860 he is sentenced to undergo Simple Imprisonment for a period of Four and a half years and to pay a fine of Rs.50,000/- (Rupees Fifty thousand) only. In default to pay the said amount of fine he shall undergo further Simple Imprisonment for a period of six months.*

The sentences of imprisonment were ordered to run concurrently, duly setting off the period already undergone by the Appellant. The amount of fine, if realised, was to be paid to the minor victim (hereinafter "P.W.9"). The Appellant was also charged under Section 354 of the IPC and Section 8 of the POCSO Act for the offence allegedly committed on 14-07-2013, however, no conviction was arrived at on this count in the absence of evidence of P.W.9.

2. In order to reach a finding of the Appellant's guilt or otherwise, it would be essential to briefly walk through the facts of the case and thereafter, analyse the evidence on record.

3. The Prosecution version that unravelled during trial is that, on 14-07-2013, P.W.1 Leela Maya Subba, mother of P.W.9, lodged Exhibit 1, the FIR, before the Namchi Police Station, South

Sikkim, reporting therein that her second husband had attempted to rape P.W.9 (the Complainant's daughter from her first husband), when she was asleep. Based on the FIR, the Namchi P.S. registered a case on the same day under Sections 376/511 of the IPC and commenced investigation. The facts revealed during such investigation was that, P.W.9 was living with her maternal grandparents after the separation of her parents as her mother having remarried was living with her second husband, the Appellant, at Lower Maneydara, South Sikkim. During the relevant time, P.W.9 went to her mother's house for the Summer Vacation and thereafter decided to live with her mother and step-father. On 12-07-2013 at about 9 a.m., when P.W.9 was asleep, she heard someone shouting and woke up to find her trousers pulled down to her knees, while her step-father was wrapping a towel around his waist. This was witnessed by P.W.2, Bal Krishna Chhetri, who was the person calling out to the Appellant which had woken P.W.9. Being uneasy with the situation, she went to her aunt's house, but *en route* met P.W.5 Prem Kit Lepcha and P.W.3 Sanchaman Rai and narrated the incident to them, apart from narrating it to one Sunil Chettri, who, as records reveal was not included as a Prosecution witness. She was advised by P.W.5 not to inform her mother of the incident as a fight could ensue between the mother of P.W.9 and the Appellant. On 14-07-2013 at about 0600 hours, again, when she was asleep, the Appellant allegedly came to her bed and tried to rape her, but fortunately she managed to defend herself and informed her mother of the incident upon which Exhibit 1 came to be lodged. The I.O. forwarded P.W.9 and the Appellant for medical examination. On

completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376/511 of the IPC.

4. The Learned Trial Court framed Charge against the Appellant under Section 8 of the POCSO Act for the incidents of 12-07-2013 and 14-07-2013 and under Section 354B of the IPC for the incident of 12-07-2013 and under Section 354 IPC simpliciter, for the offence of 14-07-2013. On the plea of "not guilty" by the Appellant, the trial commenced at which stage the Prosecution examined thirteen witnesses to bring the Appellant to book by seeking to prove its case beyond a reasonable doubt. The Learned Trial Court on consideration of the entire evidence on record convicted and sentenced the Appellant as aforesaid, hence this Appeal.

5. In Appeal, it is contended by Learned Legal Aid Counsel for the Appellant that the Judgment of conviction and Order on Sentence is manifestly improper, incorrect and unsustainable in Law as the Learned Trial Court has failed to appreciate that the Prosecution has not led any reliable evidence against the Appellant to prove that on the morning of 12-07-2013 the Appellant had any sexual intent against P.W.9, who was asleep and hence, on this count, he deserves an acquittal. Besides, the Prosecution has not led any reliable evidence against the Appellant to prove that he had used criminal force against P.W.9 with the intention of disrobing her and, therefore, no offence under Section 354B of the IPC has been made out. It was also canvassed that the evidence of P.W.1, mother of P.W.9, is not only contradictory, but also creates

reasonable doubt of the commission of the offence by the Appellant. That, P.W.2 who allegedly saw P.W.9 and the Appellant naked has under cross-examination indicated that there was a possibility that the Appellant was changing his clothes and that he could not say it was the Appellant who had disrobed P.W.9. It was further contended that the Learned Trial Court failed to appreciate the evidence of P.Ws 3, 5, 6, 9, 13 in their correct perspective or appreciate that the Appellant in his statement under Section 313 of the Code of Criminal Procedure, 1973, has not only denied the allegations made against him, but has also stated that he was falsely implicated in the case. That, in the event of two views being possible, viz; one in favour of the Appellant and the other against him, the view favouring the Appellant must be considered by the Court. Hence, the prayer for setting aside the impugned Judgment of conviction and Order on Sentence.

6. The argument in opposition raised by Learned Assistant Public Prosecutor was that a mere reading of the FIR would clearly indicate that there was sexual assault on P.W.9. The evidence of P.W.2 is duly corroborated by the evidence of P.Ws 3 and 5 as P.W.2 informed P.Ws 3 and 5 of the incident, hence the evidence of these witnesses read together would clearly indicate the presence of the Appellant at the place of occurrence at the relevant time. The Appellant has failed to clarify as to why he was in the room at that time and has merely denied that the offence was committed. It is conceded that although the offences against P.W.9 are allegedly to have been committed on 12-07-2013 and 14-07-2013, however, the Prosecution does not seek to press the incident of 14-07-2013.

That, in view of the evidence on record and the fact that Section 7 of the POCSO Act clearly states that it is not merely the touching of the various body parts of P.W.9 as detailed in the Section, but includes "*any other act with sexual intent which involves physical contact without penetration*" the Appellant is liable for committing sexual assault. That, the evidence on record suffices to convict the Appellant and, therefore, there is no infirmity in the impugned Judgment and Order on Sentence of the Learned Trial Court, hence the Appeal be dismissed.

7. The rival contentions put forth were duly considered by me as were the documents, the evidence and the impugned Judgment.

8. Section 8 of the POCSO Act is the penal provision for sexual assault, while Section 7 of the POCSO Act defines the offence, which reads as follows;

> **"7. Sexual assault.—**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.**"**

9. Based on the above definition, it would now be essential to meticulously traverse the evidence on record to gauge as to whether an offence has been made out, in terms of the afore-extracted provision.

(i) P.W.1 is the mother of P.W.9 who lodged Exhibit 1, the FIR. Evidently, she heard from her father, P.W.10, that there were rumours of some unhealthy relations between the Appellant and P.W.9. She verified it with

her daughter who confirmed to her that the Appellant had tried to sexually assault her on several occasions. This witness has also confirmed that P.W.9 is aged about fourteen years old and produced Exhibit 3, the Birth Certificate of P.W.9, wherein her date of birth is reflected as "20-02-2001" making her about 12 years and five months at the time of the incident. She identified Exhibit 5 as the concerned medical document on which her initials were obtained consenting to the medical examination of P.W.9. These facts have not been demolished under cross-examination. Although an effort was made to allege that the FIR was lodged only after consulting with the villagers, insinuating that it was embellished, in the absence of any evidence to establish such a fact there is no reason to doubt the veracity of Exhibit 1.

(ii) P.W.2 for his part, had gone to the house of P.W.1 on the morning of 12-07-2013 to borrow a belt from the Appellant, on no one answering the door, he opened the door and found the Appellant standing naked next to a bed on which P.W.9 was lying naked. The Appellant on seeing P.W.2, grabbed a towel and wrapped it around himself, meanwhile P.W.2 embarrassed by what he had witnessed, left the place. His evidence stood the test of cross-examination, although he opined that the Appellant could have been changing his dress, but opinion cannot substitute evidence and the cross-

examination must succeed in demolishing the Prosecution case.

(iii) P.W.3 was informed of the incident by P.W.2 who later verified it from P.W.9, who confirmed that the Appellant had sexually assaulted her.

(iv) P.W.4 was told by P.W.9 in the presence of P.W.5 that on one occasion when she woke up she found that her step-father, the Appellant, was standing next to her wrapped in a towel and her clothes had been partially removed.

(v) P.W.5 was also told by P.W.9 the same facts that was narrated to P.W.4.

(vi) The Doctor, who examined P.W.9 was P.W.6, has found no injury on the person or genitals of P.W.9. His opinion after examining P.W.9 on 14-07-2013 at around 10.45 p.m. was as follows;

> **"**…… She had been brought with an alleged history of having been manhandling and sexually assaulted by her step-father. On her examination, I did not find any fresh injury on her person. Her hymen was also intact. I obtained her vulva-vaginal swab/wash and sent it for analysis to the pathology lab. Later, the concerned report was obtained. There was no motile or non-motile spermatozoa detected in the swab/wash. There was no clinical evidence of forceful vulval, vaginal or anal penetration. Exhibit-5 already marked in the medical report prepared by me. Exhibits 5(b) and 5(c) are my signatures along with my seal. ……..**"**

However, at this juncture, it may be reiterated that the Prosecution case is not of penetrative sexual assault, therefore the evidence of the Doctor revealing

no injuries on the genitals of the victim or absence of proof of penetrative sexual assault does not affect the Prosecution case.

(vii) The minor victim, as already stated, was examined as P.W.9. According to her, she often used to visit her mother's house, but in the absence of her mother, P.W.1, the Appellant used to touch her on various body parts including her genitals on several occasions. According to her, on 12-07-2013, sometime during the morning, when she was asleep she woke up on hearing one of her uncles, i.e., P.W.2, calling out to the Appellant. On waking up she saw that her trousers had been pulled down to her knees, while the Appellant was standing next to her, which was witnessed by P.W.2. She further stated that the Appellant was wrapping a towel around himself and was wearing nothing else. She has corroborated the evidence of P.W.5 who had stated that P.W.9 had narrated the incident to her and to P.W.3.

10. Having thus walked through the evidence of the Prosecution witnesses, the question that arises before this Court for consideration is whether the above situation would tantamount to an offence under Section 7 of the POCSO Act and Section 354B of the IPC or did the Learned Trial Court commit an error in convicting the Appellant?

11. Although the medical evidence on record indicates that there were no injuries on the genitals or other parts of the body of P.W.9, I have to agree with the submissions of Learned Assistant Public Prosecutor that sexual assault does not only comprise of touching the body parts of P.W.9 with sexual intent, but includes "any other act" done with sexual intent which involves physical contact without penetration, as contained Section 7 of the POCSO Act. The Appellant has failed to explain why he was naked in front of the child, who, for her part has stated that she was asleep and woke up to the cries of P.W.2 calling out to the Appellant and found that her trousers had been pulled down. Even though the Appellant insists that he was falsely implicated in the case he has failed to put forth a motive for the alleged stance of the witnesses. Emphasis was placed by the Appellant's Counsel on the evidence of P.W.9 where under cross-examination she stated that she was unable to say who had undressed her, urging therefore that, no allegation can be foisted on the Appellant for the state of undress of P.W.9. Having taken note of the aforesaid submission, it would not be unreasonable to question as to why an adult male would venture into a room where a child is sleeping and himself be in a state of nudity. Assuming that he did not undress the child then why was no effort made by him to protect the child's modesty by at least covering her. The evidence of P.W.2 is clear and cogent with regard to the state of undress of the Appellant and P.W.9. What justification can be given for the lack of clothes on his person, was he there to change into some other clothes? Then why would he choose only that particular room? There is evidently no justification

for the naked condition of the Appellant, save for the purpose of violating P.W.9. Assuming he did not touch her on either her vagina, anus or breast, his presence in the room in a state of nakedness is obviously an act done with sexual intent, apart from which the fact that the trousers of P.W.9, who was asleep, had been pulled down to expose her, cannot be lost sight of. In such a circumstance, it is clear that the Appellant has done "*any other act with sexual intent which involves physical contact without penetration*" and is resultantly an offence under Section 7 of the POCSO Act. In this context, we may also briefly refer to the provisions of Section 29 of the POCSO Act, which lays down as hereinbelow;

> **"29. Presumption as to certain offences**.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.**"**

Thus, the presumption is that he committed the offence as charged unless proved contrarily.

12. At the same time, we may look into the provisions of Section 30 of the POCSO Act which affords the Appellant the opportunity of disproving that he had such mental state with respect to the act charged as an offence in the Prosecution. The Appellant has failed to take advantage of this provision of Law and no evidence whatsoever has been led in his defence.

13. Now, to deal with Section 354B of the IPC, the Charge under the Section has been framed against the Appellant for the offence committed on 12-07-2013. The Section reads as follows;

> **"354B. Assault or use of criminal force to woman with intent to disrobe.—**Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.**"**

Thus, for a person to be accused of the offence he must have either "assaulted" or used "criminal force" against any woman with the intention of disrobing her or compelling her to be naked.

14. Section 350 of the IPC defines criminal force and provides that whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other. Illustration (f) to Section 350 of the IPC reads as follows;

> **"**(f) *A* intentionally pulls up a woman's veil. Here *A* intentionally uses force to her, and if he does so without her consent intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.**"**

This illustration is apt for the purposes of this case and indicates clearly that here too the Appellant has used criminal force against P.W.9 by pulling down her trousers. So far as assault is concerned, Section 351 of the IPC defines assault as any gesture made by a person or preparation, intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that, he who makes that gesture or preparation is about to use criminal force to that person. Thus, the offence under Section 354B of the IPC requires proof of either an assault or

criminal force. In view of the fact that assault by the Appellant has been proved, criminal force necessarily does not have to be established. The next ingredient for the offence is whether the Appellant abetted such act with the intention of disrobing P.W.9. Intention, is an aim or a volition that a person seeks to carry out. Here it is apparent from the state of undress of P.W.9 and the Appellant that not only did he have the intent of disrobing her, but had partially disrobed her. Hence, the evidence on record of P.W.2 and P.W.9 are consistent and cogent thereby establishing the offence under Section 354B of the IPC against the Appellant.

15. In view of the evidence on record and the foregoing discussions, I find that the impugned Judgment of the Learned Trial Court requires no interference.

16. Appeal accordingly dismissed.

17. No order as to costs.

18. Copy of this Judgment be remitted to the Learned Trial Court forthwith along with Records of the Court.

Sd/-
(Meenakshi Madan Rai)
Judge
18-04-2017

Approved for reporting : **Yes**

Internet : **Yes**

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