THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 10th MAY, 2019

DIVISION BENCH : THE HON'BLE MR. JUSTICE VIJAI KUMAR BIST, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.03 of 2018

Appellant : Ashim Stanislaus Rai

versus

Respondent : The State of Sikkim

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

Appearance

Mr. K. T. Tamang, Advocate (Legal Aid) for the Appellant.

Mr. Thinlay Dorjee, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The present Appeal is preferred against the impugned Judgment and Order on Sentence, dated 22-09-2017, of the Learned Special Judge (POCSO), North Sikkim, at Mangan, in Sessions Trial (POCSO) Case No.01 of 2017. The Appellant, vide the Judgment was convicted under Section 354B, Section 376(2)(i), Section 376(2)(f) of the Indian Penal Code, 1860 (hereinafter, IPC) and Section 5(m)/6 and 5(f)/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, (POCSO Act, 2012).

2. The impugned sentence is as follows;

(i) For the offence under Section 376(2)(f) of the IPC and Section 5(f) of the POCSO Act, 2012, the convict was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only;

(ii) For the offence under Section 5(m) of the POCSO Act, 2012, the convict was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only;

(iii) For the offence under Section 376(2)(i) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only; and

(iv) For the offence under Section 354B of the IPC, he was sentenced to undergo simple imprisonment for a period of three years and to pay a fine of Rs.25,000/- (Rupees twenty five thousand) only.

The sentences were ordered to run concurrently and all the sentences of fine bore a default clause of imprisonment. The fine, if recovered, was to be paid as compensation to the victim, in addition to a sum of Rs.1,00,000/- (Rupees one lakh) only, to be paid to her out of the Victims Compensation Fund [*sic*, The Sikkim Compensation to Victims Dependents (Amendment) Schemes, 2013].

3. The facts are briefly being adverted to for clarity in the matter. On 04-06-2016, a written First Information Report (FIR), Exhibit 3, came to be lodged at the Mangan Police Station, North Sikkim, by P.W.2, the father of the minor victim,

P.W.1, stating that, the Appellant a teacher in the victim's school had sexually assaulted the minor, aged about 9 years, on 03-06-2016, at around 11.30 a.m. or 12.30 p.m. Acting upon the Complaint, the Mangan Police Station on the same date registered Mangan P.S. Case under Sections 376/511 of the IPC read with Sections 4 and 8 of the POCSO Act, 2012, against the Appellant and endorsed it for investigation. Investigation revealed that the victim had been admitted to the residential school in the year 2012 and was in Class II at the relevant time. On 30-05-2016, around 2050 hours, when the victim along with other hostel students was studying in the hall, the Appellant called her and another student of Class II to the adjacent Boys' dormitory. After admonishing the boy for having teased the victim the Appellant dismissed him to the study hall, but held the victim back in the dimly lit room. He locked the door to the room and told her to lie down in the bunk bed in the room and thereupon sexually assaulted her by way of fondling and licking her vagina, kissing her mouth and cheeks. When he attempted to commit penetrative sexual assault by inserting his genital into hers, the victim resisted by biting one of his hands. He threatened to beat her should she reveal the incident to anyone indicating that he would use his belt for the purpose. In the meanwhile, another student knocked on the door of the room which afforded an opportunity to the victim to escape. She did not report the incident to anyone immediately, i.e., on 30-05-2016, but on 31-05-2016 she informed her teacher, P.W.3 who

in turn narrated it to P.W.6, P.W.7, P.W.8, P.W.10, the other teachers of the school. The Principal of the school, P.W.5, was out of station on 31-05-2016 and on her arrival the same evening, she was apprised of the matter by P.W.6 upon which she confirmed of it from the victim. As the Appellant was out of station on 01-06-2016, on his return that evening, P.W.5, the Principal, confronted him about the incident to which he admitted in the presence of Members of the School Children Committee, constituted by P.W.5. The Appellant executed a document admitting his guilt and signed on it which was duly countersigned by the five teachers, pursuant to which, he resigned from service. On completion of investigation, Charge-Sheet came to be filed against the Appellant under Section 4, 8 and 10 of the POCSO Act, 2012.

4. The Learned Special Judge (POCSO) Act, 2012, after considering the materials on record, framed Charge against the Appellant under Sections 5 (m), 5 (f), 9(m), 9(f) of the POCSO Act, 2012 and Sections 376(2)(i), 376(2)(f), 354 and 354B of the IPC. On a plea of "not guilty" by the Appellant, sixteen witnesses were examined by the Prosecution, including the I.O. of the case. The Appellant thereafter was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, Cr.P.C.) to enable him to explain the incriminating circumstances appearing against him and his responses recorded. On closure thereof, the final arguments of the parties were heard. The Learned Trial Court on consideration of the

entire evidence on record pronounced the impugned Judgment of conviction, but found no materials to convict the Appellant under Section 9(m), 9(f) of the POCSO Act, 2012 and Section 354 of the IPC. Following the impugned Judgment of Conviction, the impugned Order on sentence was pronounced as stated *supra*. Discontented thereof, the instant Appeal has arisen.

5. Learned Counsel for the Appellant would contend before this Court that the Section 164 Cr.P.C. statement of the victim came to be recorded on 09-06-2016 with no time for reflection afforded to the victim prior to such recording thereby causing prejudice to the Appellant. The evidence of P.W.9, another student of the school as well as of P.W.11 do not support the Prosecution case. According to P.W.9, he saw the minor victim with the Appellant but she appeared to be neither nervous nor uneasy. P.W.11 deposed that the Appellant had called the minor victim and P.W.12 to the Boys' dormitory and after sometime the minor victim, P.W.12 and the Appellant exited the room together and they all seemed normal, thereby falsifying the Prosecution story. As per P.W.11 the door to the Boys' room was open when the victim, P.W.12 and the Appellant were inside. This is in contradiction to the evidence of the victim who has stated that when she went inside the room where the Appellant had called her, he had caught hold of her, taken off her clothes and committed sexual assault. That, the evidence of the victim appears improbable as P.W.9 has

specifically stated that when he had gone to hand over the Appellant's mobile phone the victim was in the room talking to the Appellant. That, when he knocked on the door to the said room the door was wide open. Also it is his specific evidence that he did not see anything unusual when he entered the room. Drawing strength from the ratio in ***State of Himachal Pradesh*** vs. ***Sanjay Kumar alias Sunny***[1], it was urged that the evidence of the victim cannot be treated as gospel truth and ought to be evaluated with circumspection. That, infact the Learned Trial Court ought to have garnered corroborative evidence of the adult witnesses to test the veracity of the victim's evidence. That, although the victim's evidence insinuates penetrative assault yet the medical evidence shows nothing to support the said allegation, thereby raising a serious doubt on the Prosecution story. That, the offence has been wrongly foisted on the Appellant as he was a strict teacher. In support of his contentions, Learned Counsel placed reliance on ***Abbas Ahmad Choudhary*** vs. ***State of Assam***[2], ***Panchhi and Others*** vs. ***State of U.P.***[3] and ***State of U.P.*** vs. ***Ashok Dixit and Another***[4]. Hence, in the light of the anomalies in the witnesses' evidence, the Appeal be allowed and the impugned Judgment and Sentence be set aside.

6. Countering the arguments of Learned Counsel for the Appellant, Learned Additional Public Prosecutor submitted that the victim has specifically detailed the nature of the sexual

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[1] (2017) 2 SCC 51
[2] (2010) 12 SCC 115
[3] (1998) 7 SCC 177
[4] (2000) 3 SCC 70

assault committed on her by the Appellant, this finds due corroboration in her Section 164 Cr.P.C. statement. The Medical Report, Exhibit 26, of the Appellant reveals that there was a bite mark with reddish discolouration on the right side of the thumb of the Appellant, which is corroborative of the victim's Section 164 Cr.P.C. statement, where, she has stated that she had resisted the assault of the Appellant by biting one of his hands. That, the evidence of the victim before the Court as well as in her Section 164 Cr.P.C. statement is consistent, besides which, the POCSO Act 2012 provides that if the Appellant is prosecuted for committing or attempting to commit any offence under Section 3, 5, 7 and 9 of the POCSO Act, 2012, the Special Court shall presume that such person had committed the act unless the contrary is proved. The evidence of P.W.2 is duly corroborated by the teachers in her school being P.Ws 3, 6, 7 and 8 as they had been informed of the incident by the minor victim and no inconsistencies arise in their evidence. In the given circumstances, no reason emanates to set aside the impugned Judgment and Sentence of the Learned Trial Court.

7. We have heard the rival assertions of the Learned Counsel at length. Careful perusal of the documents and impugned Judgment and Order on Sentence have also been made.

8. Was the conclusion of the Learned Trial Court in convicting the Appellant correct? This falls for consideration of

this Court. We may carefully walk through and scrutinise the evidence of the Prosecution witnesses in order to gauge this. P.W.1, the victim, is categorical in her statement that the Appellant had sexually assaulted her by narrating graphic details of the incident in her evidence. That, the Appellant had after committing the act told her not to tell anyone of the incident and threatened her of physical assault. The chain of events as narrated by the victim is reiterated and substantiated by P.Ws 3, 5, 6, 7, 8, 10 in their evidence. According to P.W.3, on 31-05-2016, at around 06.30 a.m., the victim told her that she wanted to say something to her and proceeded to divulge that the Appellant had sexually assaulted her and described the various acts of sexual assault perpetrated on her by the Appellant. P.W.3 informed P.W.10 about it while P.W.7 and P.W.8 were privy to their conversation, thereafter P.W.3 informed P.W.6. The evidence of P.W.3 is duly corroborated by the evidence of P.Ws 6, 7, 8 and 10. P.W.5, the Principal, for her part stated that she was informed of the incident by P.W.6 on 31-05-2016, when she returned from Kalimpong, where she had gone for some work the same morning. P.W.5 then reported the incident to the parents of the victim on 03-06-2016, who reached the school on 04-06-2016 as duly affirmed by P.W.2, the father of the victim. It further transpires that on 04-06-2016 the FIR Exhibit 3, came to be lodged before the Mangan P.S by P.W.2. There is no contest about the age of the victim in the instant matter and indubitably she was about eight years old when the

incident occurred. P.W.13, the Doctor who medically examined the Appellant and the victim found no injury on the person of the victim, which is not an erroneous finding as there is no allegation by the victim of use of violence by the Appellant. Her statement *inter alia* was to the effect that when she entered the room, he caught hold of her, took off the clothes below her waist and thereafter started licking her genitals. There is no question of insertion of finger or any other object in her genital. While examining the Appellant, P.W.13 found a bite mark and reddish discolouration on his right thumb. This could not be demolished under cross-examination. The injury on the hand of the victim is consistent with the statement of the victim under Section 164 of the Cr.P.C. that she had bitten his hand in order to escape from the situation when the Appellant attempted to insert his genital into hers. Although another plea was raised by the Appellant that a false allegation had been foisted on him as he was a strict teacher, in our considered opinion, this would scarcely be a motive for a child to spin a yarn against him for a depraved and horrific act. It is only an attempt on the part of the Appellant to introduce a red herring.

9. While addressing the question of delayed lodging of the FIR, the delay has been sufficiently explained by P.W.5. According to her, it was the first time such an incident had occurred in the school leading to shock and confusion about steps to be initiated. It was only after much deliberations amongst themselves, i.e., the teachers, that the parents of the

minor victim were informed on 03-06-2016, added to which the difficulty in contacting the parents of the victim due to their mobile phones being switched off exacerbated the delay. The Supreme Court in ***State of Punjab*** vs. ***Gurmit Singh and Others***[5] has observed that —

> **"8.** …… The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. ……..**"**

The above observation covers the reality of situations in such offences. In the instant matter, the delay from the date of incident to the date of lodging of the FIR has been explicitly clarified in the evidence of P.W.5.

10. Dealing with the question of corroborative evidence, having placed reliance on ***Panchhi*** (*supra*) and ***Ashok Dixit*** (*supra*) Learned Counsel for the Appellant would emphasise that the evidence of the victim ought to be evaluated carefully as she could be prone to tutoring. This Court is conscious and aware that the evidence of a child witness is to be considered after taking all due precautions which are necessary to find out the truth and to ensure that her deposition is trustworthy. In the matter at hand, the evidence on record indicates that the victim did not divulge the unfortunate incident to any of her friends and slept over it that night. The next morning, on 31-05-2016,

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[5] (1996) 2 SCC 384

at around 06.30 a.m., at the first opportunity she got she informed P.W.3 of the incident. The action of the victim is understandable as in the first instance an incident which she could not fathom in its correct perspective had taken place, her body had been violated and instinctively sensing that it was a wrong act, which obviously rankled and traumatized her, she dealt with it by keeping it under wraps the night of the incident. The next morning, she confided the incident to the teacher who also had her living quarters in the school. On careful analysis of the victim's entire evidence the consistency therein is undeniable and is found to be cogent, honest and truthful, consequently her testimony requires no further corroboration. While dealing with a somewhat similar issue the Supreme Court in ***Sanjay Kumar*** (*supra*) held as follows;

> **"31.** After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of

> rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See *Bhupinder Sharma* v. *State of H.P.* [(2003) 8 SCC 551 : 2004 SCC (Cri) 31]). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove.**"**
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> **[emphasise supplied]**

11. Thus, it is only when the Court is ambivalent about the veracity of the victim's evidence that resort can be taken to corroborative evidence. This Court harbours no such doubts. As already pointed out the question of the child having been tutored is completely out of the question as firstly she is living in a hostel, it is not the Prosecution case that she divulged the incident to her friends who could have influenced her and neither was she under the influence of any other adult to create a story to foist the offence on the Appellant nor was there any underhanded motive to do so.

12. While considering the provisions of Section 164 of the Cr.P.C. the provision deals with recording of confessions and statements. Section 164(2) requires that the Magistrate shall, before recording any "confession", explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and the Magistrate shall not record any such confession unless, upon questioning the person making it, he has the reason to believe that it is being made voluntarily. The provision lucidly lays down that

when confessions are being recorded the Magistrate is to exercise caution to ensure that the confession is voluntary. Although as evident from a reading of Section 164(2) the statute does not specify that time for reflection is to be given to the person making such confession but nevertheless by way of abundant precaution a minimum of 24 hours is granted to the accused for this purpose to ensure the voluntariness of his statement. Besides, before recording the confession of an accused he is to be informed that the Officer recording his statement is a Magistrate and that the statement given by him can be used as evidence against him. His voluntariness is of paramount importance as also his awareness that he is no longer in the custody of the police, neither is he bound by any statement, unless he does so of his own freewill. It is also settled law that the statement recorded under Section 164 of the Cr.P.C. can never be used as substantive evidence of truth of the facts but may only be used for contradiction or corroboration of the witness who made it.

13. In the same thread, we may now look at Section 164(5) of the Cr.P.C. which requires that any statement, other than a confession, made under Sub-Section (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted for circumstances of the case and the Magistrate shall have power to administer oath to the person whose statement is so recorded. Hence not extending time for reflection to the victim

who was a witness, before recording her statement, lends no prejudice to either the victim, the Prosecution or the Appellant. Moreover, the cross-examination of the witness reveals that she was never confronted with her Section 164 Cr.P.C. statement to contradict what she had stated therein before the Learned Trial Court.

14. Having carefully and cautiously evaluated the entire evidence on record, examined the veracity of the evidence of the victim and the corroborative evidence as emerges of the other Prosecution witnesses, there is no reason to interfere with the findings of the Learned Trial Court and the impugned Judgment and the Sentence of imprisonment imposed vide the Order on Sentence as also the fine payable and the default stipulation. However, with regard to the compensation of Rs.1,00,000/- (Rupees one lakh) only, ordered to be paid to the victim, it is relevant to notice that the FIR was lodged on 04-06-2016, the trial concluded with the impugned Judgment and Order on Sentence, both dated 29-09-2017. Prior to pronouncement of the impugned Judgment an amendment came to be made to The Sikkim Compensation to Victims Dependents (Amendment) Schemes, 2013, as The Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016. This was notified on 18-11-2016, by the Home Department, Government of Sikkim. It was published in the Sikkim Government Gazette, No.451, dated 25-11-2016. The Notification provided that the said Scheme would come into

force at once, thereby meaning that on 18-11-2016 the Scheme was enforced. Vide the said Scheme a sum of Rs.3,00,000/- (Rupees three lakhs) only, is to be granted as compensation to victims of rape. Since the impugned Judgment is later in time than the amended Scheme *supra*, it would be in the fairness of things to enhance the compensation to the victim to Rs.3,00,000/- (Rupees three lakhs) only, as against Rs.1,00,000/- (Rupees one lakh) only, granted by the Learned Special Court. The compensation is modified to the extent *supra*.

15. Appeal disposed of accordingly.

16. No order as to costs.

17. Copy of this Judgment be sent to the Learned Trial Court.

18. Records of the Learned Trial Court be remitted forthwith.

(Meenakshi Madan Rai)
Judge
10-05-2019

(Vijai Kumar Bist)
Chief Justice
10-05-2019

Approved for reporting : **Yes**

Internet : **Yes**

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