

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 31st AUGUST, 2019

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

Crl.A. No.04 of 2019

Appellant : Deepan Darjee alias Sungurey Bada

versus

Respondent : State of Sikkim

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

Appearance

Mr. B. K. Gupta, Advocate for the Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor and Ms.
Pollin Rai, Assistant Public Prosecutor for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant was convicted under Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, POCSO Act, 2012), and under Section 506 of the Indian Penal Code, 1860 (hereinafter, IPC), vide the impugned Judgment dated 20-12-2018, in Sessions Trial (POCSO) Case No.31 of 2017. The Order on Sentence, dated 21-12-2018 incarcerated the Appellant to rigorous imprisonment for a period of 10 years and fined him Rs.5,000/- (Rupees five thousand) only, under Section 5(m)

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punishable under Section 6 of the POCSO Act, 2012, with a default clause of imprisonment. Under Section 506 of the IPC, the Appellant was to undergo imprisonment (sans description) for one year and fined Rs.1,000/- (Rupees one thousand) only, also with a default clause of imprisonment. The sentences of imprisonment were ordered to run concurrently.

2. Assailing both, the Appellant contends that the Prosecution case is unsustainable as there was no corroboration in the evidence of the victim P.W.1, her mother P.W.8 and grandmother P.W.11 with that of P.W.3, the Doctor, who examined the victim but did not detect any abrasion or injuries in the victim's vagina. P.W.6 the Junior Scientific Officer of the Biological Division, RFSL, Saramsa, East Sikkim, has also failed to corroborate the Prosecution case. That, the statement of P.W.8 the victim's mother and P.W.11 her grandmother are exacerbated versions of the victim's statement who has nowhere stated that she was unable to walk or bled while passing urine or that the Appellant threatened to kill P.W.8 and P.W.11. The discrepancies in the statements of the witnesses lead to doubts in the Prosecution case the benefit of which ought to be extended to the Appellant. Hence, the impugned Judgment and Order on Sentence be set aside.

3. Resisting these contentions, Learned Additional Public Prosecutor while drawing the attention of this Court to the evidence of not only P.W.1 the victim but also P.W.3 the Gynaecologist who examined the victim, urges that the Doctor

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has specifically stated that he prescribed medication to the victim since she complained of pain in her genital region, thereby establishing some injuries therein and substantiating the Prosecution case. The evidence of P.W.8 the victim's mother reveals with clarity that on the relevant day her daughter complained of pain in her abdomen and passed some blood in her urine. She also complained of pain while passing urine and was unable to walk, apart from P.W.8 detecting redness and bruising of the genital of the victim duly corroborated by P.W.11. The evidence of P.W.1 and P.W.8 finds support in the evidence of P.W.11 who stated that on their questioning P.W.1 narrated the incident of sexual assault by the Appellant on her. That, due to fear on account of the threat of physical harm held out by the Appellant to P.W.1 she had not revealed the incident to anyone earlier. Both P.W.8 and P.W.11 took the victim to the Doctor who advised them to approach the Police. As the Prosecution case has been established the Appeal be dismissed. Learned Additional Public Prosecutor in support of his case relied on ***Mohd. Imran Khan vs. State Government (NCT of Delhi)***¹.

4. The rival contentions of the Learned Counsel have been heard. Evidence, documents on record and the impugned Judgment and Order on Sentence perused.

5. The facts, according to the Prosecution, are that on 16-06-2017, P.W.8 lodged an FIR Exhibit 14, before the

¹ (2011) 10 SCC 192

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Singtam Police Station to the effect that her minor daughter P.W.1, aged about 5 years, was sexually assaulted by the Appellant. She learnt of the incident when she took the victim to urinate and the victim cried out due to pain in her private area. On enquiry, the victim reported to the complainant that the Appellant had inserted his finger into her vagina. Singtam P.S. Case FIR No.43/2017 dated 16-06-2017 under Section 376 IPC read with Section 6/10 of the POCSO Act, 2012, was registered against the Appellant. On the edifice of Exhibit 14, investigation commenced, on completion of which Charge-Sheet came to be filed against the Appellant under the above Sections of law.

6. Was the conviction marred by any error and consequently the sentence? This is the question for determination by this Court.

7. P.W.1, the victim, deposed on 23-11-2017 before the Learned Trial Court. When questions were put to her under Section 33 of the POCSO Act, 2012 and Section 118 of the Indian Evidence Act, 1872, she stated that she was four years old. According to her, on the relevant day, when she was alone in her house the Appellant came there, carried her down the stairs, removed her trousers and inserted his finger nails into her vagina upon which she cried in pain. Thereafter, the Appellant left her threatening to throw her out of the window should she narrate the incident to anyone. She dressed herself

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and climbed up the stairs. That, thereafter she had pain while passing urine upon which she revealed the incident to her mother. P.W.8, the victim's mother deposed that at the time of the incident the victim was aged six years. Her evidence while fortifying the evidence of P.W.1 regarding the incident has gone a step further. She stated that on her arrival home on the relevant day her daughter walked up awkwardly to her, then kneeled on the bed, complained of pain in her abdomen and wanted to go to the toilet. When P.W.8 took her there P.W.1 complained of pain in her private part. When the victim passed urine P.W.8 saw some blood therein. On the victim's inability to walk she carried her to the room and she along with P.W.11, her mother-in-law, checked the victim's private part, which they found was reddish and bruised. On enquiry from her daughter, she told them that the Appellant had given her some chocolate, carried her downstairs, kept her on his lap, removed her clothes, touched her private parts and inserted his fingers thereto. When she complained of pain, he threatened to throw her out of the window and also to kill P.W.8 and P.W.11. Thereafter, Exhibit 14 came to be lodged at the Police Station. However, she could not identify the scribe of the document. The victim was then forwarded to the District Hospital for medical examination and she accompanied her daughter. While being cross-examined she admitted to not stating in Exhibit 14 that her victim daughter complained of stomachache and that there was bleeding from and bruise marks on her private part.

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P.W.11 in sum and substance supported the evidence of P.W.8. However, according to her, they took the victim to the Doctor first who then advised them to approach the Police. It is relevant to notice that P.W.8 has contrarily stated that they first lodged Exhibit 14, upon which the victim was forwarded to the District Hospital, Singtam for medical check-up.

8. P.W.3 the Gynaecologist posted at District Hospital Singtam examined the victim on 16-06-2017, the day of the incident, at around 11.21 p.m. The victim had given a history of being sexually assaulted by the Appellant. She had not taken a bath after the incident and was infact produced at the Hospital at 10.40 p.m. His medical examination was revelatory of the following;

“

Chest, CVS, CNS-no abnormality defined.

On local examination, mons pubis-normal, labia majora and minora-normal, hymen intact, no abrasion or haemotoma. My provisional report was to the effect that there was no signs of force but sexual assault could not be ruled out.

I obtained the vaginal swab of the victim and handed it over to the Police along with the pajama (grey coloured with white dots and butterflies) of the victim.

I advised counselling and care by CWC Counsellor.

I also prescribed medication since the victim complained of pain in her genital region.

Exhibit 4 is the Medical Examination Report prepared by me under my signature Exbt. 4(a).

The consent for medical examination of the victim was given by her mother who had also affixed her signature in the column 'consent for examination' in Exbt.4.

I did not receive the report of the vaginal swab form the Pathology Lab till preparation of Exbt.4 and collection of the same by the Police.

.....”

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The vaginal swab M.O.I and coloured Pyjama M.O.II of the victim were forwarded to P.W.6, the Forensic Expert who examined the articles but found no foreign materials therein or for that matter in M.O.IV the penile swab of the Appellant.

9. From a careful consideration and analysis of the evidence on record, the evidence of P.W.8 undoubtedly amplifies the evidence of P.W.1. According to P.W.8 not only did the victim complain of pain but she also walked awkwardly, over and above the evidence of P.W.1, who has nowhere deposed about her inability to walk. P.W.8 added that P.W.1 bled while urinating, this fact found no place in the evidence of P.W.1. She has also stated that the Appellant, according to P.W.1, had given her some chocolates and thereafter committed the act, besides threatening to throw her out of the window and threatening to and kill P.W.8 and P.W.11. The act of giving chocolates and threatening to kill both P.W.8 and P.W.11 are absent in the evidence of P.W.1. According to P.W.1 the threat held out to her was confined to throwing her out of the window and no one else. P.W.11 was present when P.W.1 narrated the incident to P.W.8. The evidence of P.W.11 supports the evidence of P.W.1 to the extent that the Appellant took her to a place below the staircase and inserted his finger into her private part and threatened to throw her out of the window if she narrated the incident to anyone else. However, her evidence, like that of P.W.1, does not indicate that P.W.1 stated that the Appellant threatened to kill P.W.8 and P.W.11. She would

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however support the evidence of P.W.8 with regard to the bruise and redness in the genital of P.W.1. Strangely, in contradiction to the evidence of P.W.8 and P.W.11, P.W.3 the Gynaecologist despite having examined P.W.1 at around 11.21 p.m. following the incident which had occurred at 5.50 p.m., neither found any bleeding nor bruises or redness in the genital of the victim. His evidence is clear that there was no haematoma or abrasion on the mons pubis, labia majora and minora. Her hymen was also intact besides which she had not taken a bath after the incident. In such circumstances, it is unfathomable as to why the Doctor would opine that there was no sign of force but sexual assault could not be ruled out. Surely force would have been required to aid the act of the Appellant on a mere child. Had finger nails been inserted tell tale injuries would have emerged in the allegedly violated aspect of the victim's body. This is not the finding of P.W.3, who has mentioned that there were no injuries in the victim's private part.

10. There is also a discrepancy pertaining to the age of the victim since before the Court she has stated that she was four years at the time of deposition, while her mother P.W.8 stated that she is six years old. The date of birth of the victim as per Exhibit 10 is "20-09-2012", thereby making P.W.1 about four years and nine months at the time of incident and approximately five years and two months at the time of deposition before the Learned Trial Court. P.W.8 appears to be unmindful of the age of her child. In such circumstances, it

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would be relevant to mull over what weight is to be attached to the entire evidence of P.W.8, although we add that this point would in no way vitiate the Prosecution case.

11. The Appellant for his part was medically examined by P.W.2 Dr. Nima Dolma Sherpa, Medical Officer at the District Hospital Singtam, on the date of the alleged incident, i.e., 16-06-2017. According to the Doctor the individual denied the allegation of sexual assault levelled against him. She found no smell of alcohol in his breath and on examination of his genital she found no redness. No blood stains were present on his garments. The penile swab and nail clippings of both hands of the Appellant were taken and his undergarment handed over to the Police. The evidence of P.W.6 would indicate that the nail clippings of both hands of the Appellant were not forwarded to the Laboratory for examination and instead one glass vial containing the nail wash and hand wash of the victim, M.O.V were forwarded. No evidence worthy of consideration was found in the articles.

12. In view of the evidence on record, the amplifications therein of the injuries and considering that the Doctor found no injuries on the genital of the victim, we are of the considered opinion that the offence of penetrative sexual assault on the victim has not been established whatsoever by the Prosecution. The evidence of P.W.8 and P.W.11 are not consistent with that of P.W.1 and have to be taken with a pinch of salt, their effort

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evidently being to enhance the gravity of their case. The Appellant in his Section 313 Cr.P.C. statement denied the allegations against him, however despite asserting that the allegations were due to enmity, he failed to bolster the statement with evidence, nor could he take advantage of the provisions of Section 30 of the POCSO Act, 2012.

13. This Court is conscious and aware that a victim of sexual assault is not an accomplice to a crime and stands at a higher pedestal than an injured witness as she suffers from emotional injury. This has been stated in **Mohd. Imran Khan** (*supra*) relied on by the Prosecution, however the Court is also to be alive to the circumstances of the Prosecution case and whether the evidence establishes the case sought to be put forth.

14. Thus, to conclude, we are of the considered opinion that the Prosecution has failed to make out a case of penetrative sexual assault, to that extent we differ with the finding of the Learned Trial Court. The conviction of the Appellant for penetrative sexual assault was based *inter alia* on Exhibit 1 the Section 164 Cr.P.C. statement of the victim and her oral evidence tendered during trial. However, when examining the evidence of the Prosecution witnesses we find that no reference has been made to the Section 164 Cr.P.C. statement of the victim save to the extent that Exhibit 1 shown to P.W.1 in the Court was the same document which she signed

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in the presence of a Magistrate. It is trite to mention here that a statement recorded under Section 164 Cr.P.C. is not substantive evidence and can be used either for contradiction or corroboration. No exercise to contradict or corroborate the statement made in Exhibit 1 was made by the Prosecution when examining the witness and is therefore out of the purview of consideration of this Court.

15. However, bearing in mind the evidence of the victim, an offence under Section 7 of the POCSO Act, 2012, i.e., sexual assault, is made out against the Appellant. In view of the threat meted out by him to the victim, which went unscathed in cross-examination, the offence under Section 506 of the IPC sustains.

16. Consequently, the conviction of the Appellant under Section 5(m) punishable under Section 6 of the POCSO Act, 2012, is set aside as also the imprisonment and fine imposed.

17. The Appellant shall instead undergo simple imprisonment of 3 years under Section 7, punishable under Section 8 of the POCSO Act, 2012, and pay a fine of Rs.1,000/- (Rupees one thousand) only. In default thereof, he shall undergo simple imprisonment of one month.

18. The sentence handed out under Section 506 of the IPC warrants no interference.

The sentences of imprisonment shall run concurrently.

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19. The Learned Trial Court had ordered that the fine, if recovered, shall be made over to the victim as compensation. We find no reason to interfere with this order of the Learned Trial Court save to the effect that the amount of fine to be made over shall be Rs.1,000/- (Rupees one thousand) only.

20. The Learned Trial Court also granted compensation of a sum of Rs.1,00,000/- (Rupees one lakh) only, to the victim under the Sikkim Compensation to Victims or his Dependents Scheme, 2011. On this count, it is apposite to mention that the offence was committed on 16-06-2017, by which time the Sikkim Compensation to Victims or his Dependents (Amendment) Schemes, 2016 was already notified vide Notification No.66/ Home/2016, dated 18-11-2016, Government of Sikkim. Thus, the order of the Learned Trial Court pertaining to compensation is set aside.

21. In terms of the amended Scheme 2016 *supra* and on account of the finding of sexual assault of the victim, a sum of Rs.50,000/- (Rupees fifty thousand) only, is awarded to the victim as compensation. The Sikkim State Legal Services Authority (SSLSA) shall take necessary steps as required in this context. The entire compensation amount shall be deposited in a Nationalised Bank, in a Fixed Deposit, in the name of P.W.1. The certificate of TDR shall be produced before the SSLSA by the victim's guardian for perusal and verification. P.W.1 shall be

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eligible to withdraw the amount when she attains the age of majority.

22. Appeal disposed of accordingly.

23. No order as to costs.

24. Copy of this Judgment be sent to the Learned Trial Court along with records of the Learned Trial Court.

25. Copy of this Judgment also be forwarded to the Member Secretary, SSLSA, for information and compliance.

Sd/-
(**Bhaskar Raj Pradhan**)
Judge
31-08-2019

Sd/-
(**Meenakshi Madan Rai**)
Judge
31-08-2019

Approved for reporting : **Yes**

Internet : **Yes**