

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 31st August, 2018

SINGLE BENCH : THE HON'BLE ACTING CHIEF JUSTICE MRS. JUSTICE MEENAKSHI MADAN RAI

Crl.A. No.09 of 2017

Appellant : State of Sikkim

versus

Respondent : Ram Nath Choudhary,
S/o Shri Anantlal Choudhary,
R/o Patna,
Bihar
(Presently at State Central Jail,
Rongyek, East Sikkim).

Appeal under Section 377 of the
Code of Criminal Procedure, 1973

Appearance

Mr. Karma Thinlay, Additional Public Prosecutor with Mr. S. K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State-Appellant.

Mr. B. K. Gupta, Advocate (Legal Aid Counsel) for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, ACJ

1. Assailing the minimum sentence of rigorous imprisonment for ten years under Section 376(2)(f)(i)(n) of the Indian Penal Code, 1980 (for short "the IPC") with fine of Rs.2,000/- (Rupees two thousand) only, five years under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act") with fine of Rs.2,000/- (Rupees two thousand) only, and three years under Section 354A of the IPC imposed by the

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Learned Trial Court on the Respondent/Convict, the State-Appellant is before this Court seeking imposition of the maximum sentence against the Respondent under the provisions of law under which he was convicted.

2. By the Judgment dated 09-06-2016, in S.T. (POCSO) Case No.21 of 2015, in the Court of the Special Judge, Protection of Children from Sexual Offences Act, 2012, East District, at Gangtok, the Respondent was convicted of the offence under Section 6 and Section 10 of the POCSO Act and under Section 376(2)(f)(i)(n) and Section 354A of the IPC. Since the offence punishable under Section 376(2)(f)(i)(n) of the IPC and Section 6 of the POCSO Act are the same, the Learned Trial Court imposed the punishment under Section 376(2)(f)(i)(n) of the IPC which is greater in degree, keeping in mind the provisions of alternative punishment provided under Section 42 of the POCSO Act. The impugned sentence was as follows;

- (i) For the offence under Section 376(2)(f)(i)(n) of the IPC, the convict was sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.2,000/- (Rupees two thousand) only.
- (ii) For the offence under Section 10 of the POCSO Act, the convict was sentenced to undergo rigorous imprisonment for five years and pay a fine of Rs.2,000/- (Rupees two thousand) only.

All the sentences of fine bore a default clause of imprisonment.

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- (iii) For the offence under Section 354A of the IPC, the convict was sentenced to undergo rigorous imprisonment for three years.

The period of imprisonment already undergone by the convict during investigation and trial was ordered to be set off against the sentences imposed which were ordered to run consecutively.

3. The submission of Learned Additional Public Prosecutor is that the offence pertains to penetrative sexual assault by the Respondent on his own child aged about 14 years and therefore in view of the gravity of the offence, he ought to be sentenced to life imprisonment.

4. On the other hand, Learned Counsel for the Respondent would contend that since Learned Trial Court has ordered that the sentence is imposed on the convict are to run consecutively, the total imprisonment is of 13 years and is thus commensurate with the offence.

5. Having heard Learned Counsel for the parties, it is apposite to refer to the Judgment of this Court in Crl.A. No.20 of 2016 dated 02-04-2018 : *Ram Nath Choudhary vs. State of Sikkim*, the Appellant therein is the Respondent in the instant Appeal. Having been convicted by the aforesaid Judgment of the Learned Trial Court, he assailed the Judgment and Order on Sentence in the aforementioned Appeal. This Court while upholding the Judgment and Order on Sentence of the Learned Trial Court modified the sentence to the extent that the various sentences of imprisonment

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imposed on the Appellant shall run concurrently and not consecutively relying on the ratio of the Hon'ble Supreme Court in **O. M. Cherian alias Thankachan vs. State of Kerala and Others**¹ wherein it was held as follows;

"17. This Court in *Mohd. Akhtar Hussain v. Collector of Customs* [(1988) 4 SCC 183 : 1988 SCC (Cri) 921], recognised the basic rule of conviction arising out of a single transaction justifying the concurrent running of the sentences. The following passage in this regard is relevant to be noted: (SCC p. 187, para 10)

"10. The basic rule of thumb over the years has been the so-called single transaction rule for concurrent sentences. If a given transaction constitutes two offences under two enactments generally, it is wrong to have consecutive sentences. It is proper and legitimate to have concurrent sentences. But this rule has no application if the transaction relating to offences is not the same or the facts constituting the two offences are quite different."

....."

6. The facts shorn of details are that, on 14-07-2015, P.W.14, the Child Protection Officer in the Social Justice, Empowerment and Welfare Department, Government of Sikkim, lodged an FIR Exhibit 23, informing therein that P.W.1, the Victim, aged about 14 years, studying in Class V in a Junior High School, as per information from the School Authorities was being sexually abused by her father, the Respondent. During counselling, the Victim P.W.1 confided to P.W.14, that, her father had been sexually assaulting her since she was in Class III. That, he would beat up her younger brother, P.W.2, and send him out during the evenings after which he would sexually assault her. Both of them lived with their father whom they are afraid of, their mother having abandoned

¹ (2015) 2 SCC 501

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them when they were very young. The FIR also reported that the Victim had confided to P.W.15, her neighbour, about the incident and seemed to be mentally disturbed. Acting on such information, the Police registered a Case under Section 376 IPC read with Section 4 of the POCSO Act against the Respondent, viz., Sadar P.S. Case No.193/2015, dated 14-07-2015, and endorsed it to the Investigating Officer (for short "I.O."). Investigation would reveal that the Respondent was aged about 45 years, his wife had abandoned him and he was living with his minor children, the Victim and a son, aged about 11 years, in a single rented room. The Respondent remained inebriated most of the time and would sexually abuse the Victim by committing various sexual acts on her person notwithstanding the presence of her brother who on protesting was subjected to physical assaults by the Respondent. The Victim despite warnings from the Respondent of dire consequences if she disclosed the offence to anyone else, did so to P.W.15, her neighbour, who in turn brought it to the notice of P.W.5, the Victim's relative. P.W.5 took the Victim away for some time to her own house, which was short-lived on the Respondent's refusal to permit her to continue her stay. The neighbours thereafter became aware of the sexual assaults by the Respondent on the Victim. On 14-07-2015, P.W.3, the Teacher of the School which the Victim, P.W.1, was attending, on learning of the alleged sexual assault on the Victim, shared the information with P.W.4 and P.W.6. Thereafter, they summoned the Victim and enquired into the matter which she confirmed. P.W.6 then contacted the Legal Officer of the Social Justice, Empowerment and Welfare Department, who directed

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P.W.14 to enquire and take necessary action, pursuant to which the above facts came to light. The Victim was subjected to medical examination as also the Respondent. The Medicolegal Report of the minor Victim suggested that she had been subjected to sexual intercourse while the medical report of the Respondent indicated that he was not incapable of the sexual act. In the absence of a Birth Certificate of the Victim, an Ossification Test was conducted on her and her bone age estimated to be between 14 to 15 years. On completion of the investigation, Charge-Sheet was submitted against the Respondent under Section 376(1) IPC read with Sections 4 and 8 of the POCSO Act.

7. On hearing the rival contentions of the parties, the Learned Trial Court framed Charge against the Respondent under Sections 5(1), 5(n), 9(1) and 9(n) of the POCSO Act and under Sections 376(2)(f)(i)(n) and 354A of the IPC. The Charges having been read to the Respondent, on his plea of "not guilty", the trial commenced. The Prosecution examined eighteen witnesses and on conclusion of the evidence, an opportunity was afforded to the Respondent in terms of Section 313 of the Code of Criminal Procedure, 1973, to explain the circumstances appearing in the evidence against him. Final arguments were heard and the Respondent was convicted and sentenced as detailed hereinabove.

8. It is evident that the victim was 14 years old and dependant on her father who instead of offering her protection and being an anchor to all her emotional needs perpetrated continuous sexual assault on her in the presence of her 11 year old brother.

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One cannot be even begun to imagine the trauma that the child suffered and the indelible adverse imprint and scar that the incestuous act has left in her psyche.

9. In view of the facts and circumstances that have emanated in the discussions in the Judgment of this Court *supra* which for brevity is not being detailed herein, I am of the considered opinion that enhancement of sentence would indeed be the proper course to meet the ends of justice.

10. Consequently, the Respondent is hereby sentenced as follows;

- (i) For the offence under Section 376(2)(f)(i)(n) of the IPC, the convict is to undergo rigorous imprisonment for life and to pay a fine of Rs.2,000/- (Rupees two thousand) only, in default of payment of fine, he shall undergo further simple imprisonment of six months.
- (ii) For the offence under Section 10 of the POCSO Act, the convict is to undergo rigorous imprisonment for seven years and pay a fine of Rs.2,000/- (Rupees two thousand) only, in default of payment of fine, he shall undergo further simple imprisonment of six months.
- (iii) For the offence under Section 354A of the IPC, the convict is sentenced to undergo rigorous imprisonment for three years.

As ordered by this Court in Crl.A. No.20 of 2016 (*supra*), the sentences of imprisonment imposed hereinabove shall run concurrently.

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- 11.** The sentences of imprisonment imposed by the Learned Trial Court stand modified to the above extent.
- 12.** Appeal allowed to the above stated extent and disposed of.
- 13.** No order as to costs.
- 14.** Records be remitted forthwith.

Sd/-
(Meenakshi Madan Rai)
Acting Chief Justice
31-08-2018

Approved for reporting : **Yes**

Internet : **Yes**