

# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 08.05.2019

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

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Crl. Appeal No. 12 of 2017

**Appellant** : Shiva Kala Subba  
[Presently lodged in  
Central Prisons, Rongyek]

**versus**

**Respondent** : State of Sikkim

## **Application under Section 374 (2) of the Code of Criminal Procedure, 1973**

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### **Appearance**

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for the Respondent.

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## **J U D G M E N T**

Meenakshi Madan Rai, J

**1.** The Court of the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (hereinafter the 'POCSO Act'), West Sikkim at Gyalshing, by the impugned Judgment dated 24.02.2017, convicted the Appellant of the offences under Section 5(m), Section 5(n) of the POCSO Act and Section 323 of the Indian Penal Code, 1860 (hereinafter the 'IPC'). Consequent thereto the Appellant was sentenced as follows;

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“.....

6. Therefore, I am of opinion that the ends of justice would be well served in this case if the convict is sentenced to undergo 15 years of rigorous imprisonment and to pay a fine of Rs.10,000/- under Section 6 of POCSO Act, 2012. In the event of default on payment of fine, convict shall undergo SI for a term of 1 year.

For the offence committed under Section 323 IPC, 1860, the convict is sentenced to undergo SI for a term of 1 year.

Both the sentences shall run concurrently. ...”

**2.** Assailing the finding of the learned trial Court, learned Counsel for the Appellant while inviting the attention of this Court to the First Information Report, Exhibit 1, dated 31.07.2015, contended that the document contains no imputation of sexual assault by the Appellant against the victim. This aspect has been ignored by the Prosecution in totality. In fact it brings to light the facet that her step father had previously sexually assaulted her. That, the First Information Report (Document 'X'), said to be lodged by the Protection Officer of the Child Welfare Commission would reiterate the allegation against the victim's step father, to the effect that he sexually assaulted her a few months back at Tadong, Gangtok. This statement also finds credence in the Statement of the victim under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C.") which contains no allegation of sexual assault by the Appellant. The medical examination of the victim confirmed the fact of sexual assault, however the Investigating Officer (hereinafter 'I.O.') of the case while conducting the investigation, relied only

upon Exhibit 1, received on 31.07.2015 said to be made by the victim's School Teacher to the detriment of the Appellant. That, the Appellant was arrested during the course of investigation while the victim's step father despite being the perpetrator of an attempt to sexually assault her was left scot free. That, the injuries which are revealed in the Medical Report of the victim Exhibit 3'A' are indicative of old healed scar marks in the genital area, thereby corroborating the victim's allegation that her step father had sexually assaulted her. That, Exhibit 4'A' Medical Report prepared by the Gynaecologist after conducting medical examination on the victim also reveals that the victim had a history of sexual abuse by her step father a few months back. That, despite such specific allegation, no steps were taken against the said step father and the emphasis of the investigation has been only on the Appellant. That, P.W.4 a Teacher in the victim's School had stated that the victim had told her and some other Teachers that her step father had attempted to sexually assault her, while the Appellant tortured her daily. That P.W.5, the Doctor (Medical Officer) who examined the victim had stated that, the victim was produced at the Primary Health Centre with an alleged history of having been "physically and mentally assaulted" by the Appellant, devoid of any allegation of sexual assault. Hence, sexual assault or culpable mental state for such assault by the Appellant is ruled out. That, the I.O. in his evidence lends support to the

statement contained in Exhibit 1 that the victim's step father had attempted to sexually assault her. It was also alleged that the learned trial Court has failed to exercise care and caution while considering the inconsistent statements of the witnesses and the Statement of the victim. That, it is now settled law that as a rule of practical wisdom the evidence of child witnesses must be considered along with adequate corroboration but variations occur in the statement of the victim under Section 164 Cr.P.C. Statement and in her evidence before the learned trial Court. That, the said circumstances as also the arguments *supra* require that the benefit of doubt be extended to the Appellant. The evidence of the witnesses being beset with anomalies, the impugned Judgment and Order on Sentence of the learned trial Court ought to be set aside.

**3.** Resisting the assertions of learned Counsel for the Appellant, the learned Additional Public Prosecutor would contend that in the first instance. Document X sought to be relied on by the Appellant was in fact not an Exhibit before the learned trial Court and deserves no consideration by this Court. That, it is the victim's case that the Appellant used to hit her on her hands, legs, back and her head sometimes with heavy objects and also bite her on her legs and hands apart from inserting soap in her genital. That, the Section 164 Cr.P.C. Statement of the victim duly corroborates the statement given by her before the learned trial Court. To

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clear the air on the sexual assault allegedly committed by the victim's step father, learned Public Prosecutor submitted that the step father had indeed been arrested on suspicion of the offence but was discharged by the Police due to lack of materials. That, from the Section 164 Cr.P.C. Statement of the victim, it appears that she had implicated her step father out of fear of the Appellant, moreover the victim has stated therein that the Appellant threatened to kill her if she refused to extend sexual favours to her step father. That, the evidence of P.W.5 who examined the victim reveals that the injuries found on the person of the victim was detected to have been inflicted within a span of less than twenty four hours to seventy two hours, the victim has admittedly been living with the Appellant from the month of November 2014, in such a circumstance the question of doubting the victim's step father in the offence are far-fetched and a mere allegation made by the Appellant to shift the blame on her step father. That, the evidence of P.W.6, the Gynaecologist who examined the victim clearly indicates that when he examined the victim, she told him that her aunt had pushed soap in her private area and on his examining the child he found injuries as described in Exhibit 4'A,' his Medical Report. P.W.6 also found evidence of recent sexual abuse as well as physical abuse pointing to the guilt of the Appellant. Accordingly, no reason emerges to interfere in the impugned Judgment and Order on Sentence.

**4.** We have carefully heard the rival contentions placed by Learned Counsel *in extenso* and given it due consideration. We have also meticulously perused all evidence and documents on record as also the impugned Judgment.

**5.** For clarity it would be beneficial to briefly traverse the facts of the case. The Ravangla Police Station, South Sikkim on 31.07.2015, at 20:00 Hrs, received a written complaint, Exhibit 1, from a Teacher in the School of the victim informing therein that the victim, aged about six years, was physically and sexually assaulted by her aunt, the Appellant. The Teacher learnt of this after noticing some visible marks and bites on the body of the victim child and as her behavior also appeared to have undergone a change. On enquiry by the Teacher as to the reason for the marks, the victim informed her that her guardian, the Appellant, tortured her physically everyday. The child also informed her that her step father had attempted to sexually assault her on a previous occasion. Consequently Ravangla Police Station Case was registered against the Appellant and the step father of the victim, and investigation commenced. The Appellant was arrested on the same day while the victim was forwarded for medical examination. Investigation revealed that the minor victim had earlier been living with her other siblings, mother and step father at Tadong Bazaar, Gangtok. In the month of November, 2015 she was taken by her maternal uncle to

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South Sikkim for education. However, during her stay there, she was subjected to physical torture by the Appellant, her aunt, wife of her maternal uncle, while her step father had sexually assaulted her at Tadong. After her medical examination, she was handed over to the Child Welfare Commission where she reiterated that her step father had sexually assaulted her a few months back at Tadong. A second FIR against the said step father came to be lodged at the Sadar Police Station in ignorance of the case already registered at Ravangla Police Station. Charge Sheet was submitted against the Appellant on completion of investigation under Section 6 of the POCSO Act read with Section 325 of the IPC and Section 23 of the Juvenile Justice (Care and Protection of Children) Act, 2000, however no case could be made out against the step father of the victim. The learned trial Court, on consideration of materials placed before it proceeded to frame charge against the Appellant under Section 5(m) and Section 5(n) of the POCSO Act punishable under Section 6 of the POCSO Act and under Section 323 of the IPC, 1860. The Appellant entered a plea of "not guilty" to the charges, pursuant to which the Prosecution examined nine witnesses to establish its case against the Appellant. On due consideration of the evidence on record, the trial culminated in the impugned Judgment of conviction and sentence *supra*.

**6.** Whether the Prosecution was able to establish a case under Section 5(m) and Section 5(n) of the POCSO Act and whether the offence committed by the Appellant contain the ingredients of Section 325 IPC in view of the evidence on record or would the offence be only under Section 323 IPC? These are the questions this Court needs to consider.

**7.** While addressing the first question framed hereinabove, we may turn to the definition of sexual assault as laid down in Section 7 of the POCSO Act, 2012 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."  
**(Emphasis supplied)**

**8.** A careful perusal of the above definition elucidates that an offence of sexual assault is committed when the parts of the body enumerated in the definition are touched by an accused with "sexual intent." In other words, the Act becomes culpable when it is established that there was a sexual intent or *mens rea* for the accused to commit a sexual offence. In this context, we may carefully examine the evidence of the Prosecution witnesses.

**9.** On noticing an apparent transformation in the behavior of the victim, injuries and bite marks on her body, P.W.4 a Teacher of the victim's School along with other

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Teachers enquired as to the cause of the injuries. They were duly informed by the victim that the Appellant had been subjecting her to physical torture daily. The victim also disclosed that her step father had "*attempted*" to sexually assault her on a previous occasion. On such discovery, P.W.4 informed P.W.1, the Panchayat of the area on 30.07.2015. The following day, P.W.1 went to check on the minor victim at her School where she found the Sub Divisional Magistrate, Yangang and some lady Police personnel already present. The injuries described by P.W.4 were also verified and found on the person of the victim, by P.W.1, who further detected injuries on the victim's private part. The victim informed them that the Appellant had inflicted those injuries. Exhibit 1 thus came to be filed on 31.07.2015. The fact of physical assault by the Appellant was substantiated by the evidence of P.W.2 who used to be the Appellant's neighbor living adjacent to their room, she testified that she often heard the minor victim crying. She had witnessed the Appellant on one occasion lifting the minor victim and flinging her towards the side of the terrace, upon which the victim sustained head injuries. As per this witness, on enquiry by the Sub Divisional Magistrate, Yangang and Police personnel she told them that the victim was subjected to cruelty by the Appellant. The victim, P.W.3 has categorically deposed that she used to live with her aunt who always used to hit her on her hands, legs, back and head. According to her, on some occasions she used to hit her

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with a spoon and also with the wire/charger of rice cooker, besides which she used to hang her on the wall upside down, put soap in her genital and insert her fingers therein. The Appellant also used to bite her legs and hands. After the Teachers noticed the injuries on her body she had told them what the Appellant had subjected her to. Her evidence is silent on the alleged attempt at sexual assault on her by her step father. The evidence of P.W.1, P.W.2 and P.W.4 correlate with each other and are consistent of the fact of physical assault by the Appellant on the victim. The evidence of the said witnesses withstood the rigours of cross-examination. It is thus evident that the Appellant tormented the victim with physical assault in various forms on different parts of her body.

**10.** In this thread, we may relevantly consider the evidence of P.W.5, the Doctor who examined the victim which is as follows;

"... In connection with this case, on 31.07.2015, at around 1:05 p.m, the minor victim was produced before me at the PHC with an alleged history of having been physically and mentally assaulted by her aunt Shiva Kala Subba at the latter's residence. On her examination, I found the following injuries on her person:-

1. There was sparse hair and two areas of graze(sustained in less than 24 to 48 hours) on the left parietal region;
2. There were areas of bruise and graze on the superior region of the right ear pinna with tenderness(sustained in less than 72 hours);
3. There were multiple areas of bruises and graze(sustained in less than 72 hours) on the left ear pinna with tenderness;

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4. There were multiple areas of graze(sustained within 72 hours) on the right cheek and the right angle of mouth;

5. There were multiple areas of graze(sustained within 48 hours) on the left cheek;

6. There were multiple areas of bruise on the right upper limb, especially on the posterior aspect of her forearm(sustained within 48 hours);

7. There were multiple areas of bruise on the left upper limb(arm and forearm)(sustained within 72 hours).

8. There was external trauma on the nail of the left ring finger, lateral aspect (sustained within 48 hours). There was area of graze on the dorsal aspect of the left index finger;

9. There was area of ulceration on the dorsal aspect of the right hand (sustained within 72 hours) with multiple areas of healed scar marks and bruises on both lower limbs;

10. The sole of the right foot showed an area of laceration with bite marks(sustained within 72 hours/3 cm x 5 mm x 2 mm);

11. There was area of bruise (10 x 13 cms) and contusion(less than 72 hours) on the right flank region and multiple healed scar marks over the back.

On examination of her genital region, I found that she was bleeding from her vaginal region and there were multiple areas of healed scar marks around the vaginal region. On passing of the probe, hymen was found to be destroyed and there was active bleeding with surrounding areas of erythema and swelling. Exhibit-3 is the medical report of the minor victim prepared by me and bearing my signature as Exhibit-3(a). ..."

**11.** P.W.6, the Medical Specialist (Gynaecology and Obstetrics), STNM Hospital, in his evidence would *inter alia* state as follows;

"... In connection with this case, the minor victim was produced before me on 01.08.2015 evening for her medical examination. The alleged history was that she had been subjected to repeated sexual abuse by her aunt (*mai ju*). In fact, she was in psychological trauma and told me that she was tortured in the form of biting, hitting with hammer by her aunt. Her aunt had also pushed

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soap in her private part. Further, *as per her*, she had also been sexually abused by her stepfather. On her examination, I found injury/abrasion over her perineum which was red in colour. Tear was present in posterior fourchette. The vaginal area was tender and was bleeding on touch. The other injuries on her were already reflected by the concerned Medical Officer who had examined her before she was produced before me. As she was having severe pain I could not examine her hymen. I found evidence of recent sexual abuse as well as physical abuse. ...”

In his cross-examination, it emerged as follows;

“... It is not a fact that she did not reveal to me about the sexual assault on her by her aunt. ...”

According to this Doctor (P.W.6), he found evidence of recent sexual abuse as well as physical abuse. On a perusal of Exhibit 4'A', the Medical Report prepared by P.W.6 when the victim was produced before him, he has recorded as follows;

“... A girl child brought from ... for examination with alleged history of repeated abuse by her aunty (maiju). As per child→She was repeatedly abused by her aunty (maiju). She was given torture in the form (*sic*) of biting, hitting with hammer. **She was also abused by pushing soap in private part.** She also give (*sic*) history of sexual abuse by her step father ... few month (*sic*) back at Tadong. ...”  
(Emphasis supplied)

**12.** The evidence of P.W.5 and P.W.6 clearly establish that there were injuries on the genitals of the victim. According to P.W.6, the vaginal area was tender and was bleeding on touch. As she was having severe pain he could not examine her hymen but he found evidence of recent sexual abuse as well as physical abuse. A careful analysis of

the evidence of both Doctors reveal that P.W.5 has not opined as to how the injuries could have been caused on the various parts of the victim's body including her genital region. According to her, the victim was brought with a history of having been "physically and mentally" assaulted by her aunt. There is no allegation of sexual assault recorded by her on Exhibit 3'A,' her Report. This witness examined the child on 31.07.2015 at around 1.05 p.m. and enumerated the injuries found on the victim. P.W.6 examined the victim on 01.08.2015, no time has been recorded on Exhibit 4'A,' the Medical Report prepared by him. As per P.W.6 the history of the child is that she was repeatedly abused by her "*maiju*" and tortured by hitting with hammer, biting and pushing soap in her private part. The history on Exhibit 4'A' does not mention "sexual abuse." However, before the learned trial Court P.W.6 would go on to state as follows;

"... The alleged history was that she had been subjected to repeated sexual abuse by her aunt (*maiju*). ..."

Herein is a discrepancy in the evidence of P.W.6. When the victim was brought to him in the first instance his report is silent on sexual assault but his statement before the Court appear exacerbated on this issue as he adds that the child had an alleged history of sexual abuse, thereby diminishing the veracity of this witness.

**13.** There is no reason given by P.W.6 as to why he concluded that because the victim was bleeding from the

hymen that it was due to sexual assault and no other cause, as the victim evidently said nothing about sexual assault nor does investigation establish sexual intent. This statement of P.W.6 is being mulled over in view of the fact that a sexual offence necessarily requires "intent" but the Prosecution has failed by any evidence whatsoever to establish that the Appellant had sexual intent when she inserted soap into the genital of the victim. **Black's Law Dictionary, Tenth Edition, at page 930**, defines "intent" as under;

"1. The state of mind accompanying an act, esp. a forbidden act. While motive is the inducement to do some act, intent is the mental resolution or determination to do it. When the intent to do an act that violates the law exists, motive becomes immaterial. Cf. MOTIVE; SCIENTER.

"The persistence of the word 'intent' in complex social problems where conscious intent is either irrelevant or indeterminable probably retards legal progress. The cloudy ethical atmosphere that hovers about this term tends to make [analysis] difficult." Edward Stevens Robinson, *Law and the Lawyers* 230 (1935).

"The phrase 'with intent to,' or its equivalents, may mean any one of at least four different things: - (1) That the intent referred to must be the sole or exclusive intent; (2) that it is sufficient if it is one of several concurrent intents; (3) that it must be the chief or dominant intent, any others being subordinate or incidental; (4) that it must be a determining intent, that is to say, an intent in the absence of which the act would not have been done, the remaining purposes being insufficient motives by themselves. It is a question of construction which of those meanings is the true one in the particular case." John Salmond, *Jurisprudence* 383-84 (Glanville L. Williams ed., 10th ed. 1947)."

**14.** Bearing the above definition in mind, it is apposite to note that nothing emanates in the evidence of the

victim or the other witnesses to establish the state of mind of the Appellant when the acts of physical violence were perpetrated by her on the victim and whether the acts were inflicted with sexual intent.

**15.** As per P.W.6 there was a tear in her fourchette which according to **Modi's Medical Jurisprudence and Toxicology, 24th Edition, in Chapter 31–Sexual Offences, at Page 668,** is indicative of use of violence. Nevertheless, despite such an injury was P.W.6 competent to proclaim that the injuries were due to sexual assault? On these lines, it would lend succour to refer to page **752 of Modi's Medical Jurisprudence and Toxicology, 25th Edition, Chapter 32–Sexual Offences** which states as follows;

“Rape is a crime and not a medical diagnosis to be made by the medical officer treating the victim. Therefore, the issue of whether rape has occurred or not is a legal conclusion, not a medical one. It is a charge made by the investigating officer on a complaint by the victim. The only statement that can be made by the medical officer is whether there is evidence of recent sexual activity and about injuries noticed in and around the private parts or bite marks noticed in any part of the body. His or her duty extends principally to provide adequate healthcare and comfort to the victim and secondarily to assist the prosecution with appropriate medical evidence.”

**16.** On the anvil of the commentary *supra* it appears to us that although severe injuries obtained in the genitals of the victim evidently as soap was inserted by the Appellant therein as also her finger but would this necessarily

tantamount to sexual assault. In our considered opinion, this would have to be answered in the negative as the prosecution has nowhere addressed this facet of the offence as discussed *supra*. It is indeed trite to reiterate that the Prosecution is required to prove its case beyond a reasonable doubt and cannot leave room for assumptions or doubts. If these exist then the benefit is to be extended to the accused. The Prosecution by way of cogent and unwavering evidence is required to establish that the Appellant had a culpable mind and *mens rea* when she committed the Act. The consistent stand of the Prosecution is that the victim was subjected to physical torture, in the light of this evidence insertion of the Appellant's finger and soap into the genital of the victim appears to be a method of meting out the pinnacle of physical torture on the victim. It is axiomatic that in the absence of proof of any sexual intent, assumptions cannot be drawn by this Court in this context.

**17.** So far as commission of sexual assault by the step father of the victim is concerned, the injuries on the genital of the victim are stated to have been inflicted within 48 to 72 hours of the medical examination of the victim by P.W.5. No evidence is furnished to prove that the victim had any interaction with her step father during the said period of time. Neither is there evidence to establish an attempt at sexual assault by him on any prior date/day. The arguments of learned Counsel for the Appellant are not tenable in this

context as it is evidently an effort to foist the entire case on a person against whom investigation resulted in naught.

**18.** Now, while answering the second question, Section 320 of the IPC enumerates the kinds of hurt which are designated as grievous hurt. The penalty for causing grievous hurt is at Section 325 of the IPC which provides as follows;

**“325. Punishment for voluntarily causing grievous hurt.** – Whoever, except in the case provided for by Sec. 335, voluntarily causes grievous hurt, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.”

**19.** The injuries listed in the Medical Reports of the victim Exhibit 3'A' and Exhibit 4'A' do not fall within the parameters as described in Section 320 of the IPC. Even if this Court were to take advantage of the latitude in "*Eighthly*" of Section 320 IPC which provides that any hurt which endangers life is also grievous hurt but we hasten to clarify that it is qualified with the words "*which causes the sufferer to be during the space of twenty days in severe bodily pain or unable to follow his ordinary pursuits.*" No medical evidence is forthcoming on this point. Hence, as the injuries on the victim cannot be defined as grievous, we find that the injuries noted by P.W.5 and P.W.6 can only be categorized as "simple injuries" as defined under Section 323 of the IPC, despite the

physical injuries which are sufficient to make a normal person cringe.

**20.** The learned trial Court had framed charge under Section 5(m) and Section 5(n) of the POCSO Act which reads as follows;

**“5. Aggravated penetrative sexual assault.-.....**

.....  
 (m) whoever commits penetrative sexual assault on a child below twelve years; or

(n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care of having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; .....

**21.** Since the prosecution has failed to establish sexual intent in the acts of the Appellant against the victim, the conviction and sentence handed out to the Appellant under Section 5(m) and Section 5(n) of the POCSO Act are set aside.

**22.** However, no error emanates in the conviction of the Appellant under Section 323 of the IPC, which is accordingly upheld.

**23.** The enormity of the inhuman and barbaric acts perpetrated by the Appellant on the unsuspecting and innocent victim, who was brought to reside with the Appellant on the promise of educating her, appalls us. A psychiatric

evaluation of the Appellant becomes imperative. Let steps be taken by the Jail authorities.

**24.** Appeal allowed to the extent above.

**25.** The impugned Judgment and Order on Sentence stand modified as discussed *supra*.

**26.** Copy of this Judgment be sent to the learned trial Court, for information.

**27.** Lower Court records be remitted forthwith.

**( Bhaskar Raj Pradhan )**

**Judge**  
08.05.2019

**( Meenakshi Madan Rai )**

**Judge**  
08.05.2019

Approved for reporting : **Yes**  
Internet : **Yes**

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