

Crl. A. No.12 of 2018  
(Padam Kumar Chettri v. State of Sikkim)

**IN THE HIGH COURT OF SIKKIM : GANGTOK**  
(Criminal Appellate Jurisdiction)

**Dated: 11<sup>th</sup> September, 2019**

-----  
**D.B.: HON'BLE MR. JUSTICE VIJAI KUMAR BIST, C.J.**  
**HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, J.**  
-----

**Crl. A. No. 12 of 2018**

Padam Kumar Chettri,  
Aged about 30 years,  
Son of Chandra Bahadur Chettri,  
Resident of Forest Colony,  
Singtam, East Sikkim,  
A/P State Central Prison, Rongyek, East Sikkim

... Appellant

Versus

State of Sikkim.

... Respondent

-----  
Appearance:

Mr. Gulshan Lama, Legal Aid Counsel.

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

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

**Chief Justice**

This Appeal is preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short "Cr. P.C.") is against the Judgment dated 04.08.2016 and Sentence dated 11.08.2016

passed by the Court of the Learned Special Judge, POCSO, East Sikkim at Gangtok in S.T. (POCSO) Case No.01 of 2016 (*State of Sikkim vs. Padam Kumar Chettri*), whereby the said Court convicted the accused Padam Kumar Chettri (hereinafter the appellant) under Section 6 of the Protection of Children from Sexual Offences Act, 2012 ( for short "POCSO Act, 2012") and Section 376 (2) of Indian Penal Code, 1860 (for short "IPC"). The appellant has been sentenced to rigorous imprisonment for a period of 10 (ten) years and has been imposed a fine of Rs.5,000/- (Rupees Five Thousand) under Section 6 of POCSO Act, 2012. In default of the payment of fine, he is directed to undergo further simple imprisonment for six months under Section 6 of the POCSO Act, 2012. It is also directed that the period of imprisonment already undergone by the appellant be set off against his sentence.

**2.** On 16.10.2015 mother of the victim (PW 2) lodged First Information Report at Singtam Police Station stating therein that after coming from the School her youngest daughter told her that eldest daughter had rashes around her vagina. She immediately called her and removed her underwear, where she found that her daughter had rashes all over her vagina. When she enquired about the matter her daughter told her that Padam Dada (appellant) had sexually assaulted her. That day her son and daughter (victim) had gone to stay with the appellant for a

night as his wife had gone to her parent's house. The victim also informed her that appellant told them to sleep with him in the same bed. Later at night when they were asleep, he removed his pant and tried to insert his penis inside her daughter's vagina and it was very painful. PW 2 stated that her kids used to go to her nephew's house to watch TV and due to this reason she had sent her kids to his home as his wife had gone to her parents' house. Next day the victim girl was fine and went to the school but on the third day, she had fever. Complainant gave her medicine and sent her to school. She came to know later i.e. on the day of FIR about this fact. She requested for taking strict legal action against the appellant.

**3.** The matter was handed over to SI Tshering Doma Bhutia (P.W.14), the Investigating Officer. He got the medical examination of the victim conducted by Dr. Jai Bahadur Gurung (PW 6) same day i.e. on 16.10.2015. Medical report submitted by him is as follows:

*"1. Back/front no bruise abrasion and bite mark.  
2. Abdoment back/front no bruise abrasion and bite mark.  
3. leg back/front no bruise abrasion and bite mark.  
Peremium normal no bruise, bite mark.  
Laceration per major no bruise bite mark.  
Laeceration minor intact no bruise.  
Labia minoria Hymen area b=abrasion (-Ve) no bleeding  
Hymen tear (+Ve) at 12' clock (+) no bleeding no hemativria.*

*Vaginal wash sample for presence or absence for spermatozoa  
Report No motile as such-motile spermatozoa seen  
CR. No-(8124) dated 17/11/15 with spermatozoa seen*

*Name of injury -simple, Grievous.  
The kind of weapon used or poison suspected."*

**4.** He seized the clothes etc. from the mother of the victim same day and prepared the memo. Same were sent for the forensic examination. As per report of medical forensic examination experts from the RFSL Laboratory, Sikkim, human semen were detected in blue coloured underwear of the victim. The statement of the Victim under Section 164 of the Cr.P.C was also recorded by the learned Chief Judicial Magistrate.

**5.** The Investigating Officer, after conducting the investigation submitted charge sheet against the appellant under Section 376 (2) (i) IPC and Section 4 of POCSO Act, 2012. Chief Judicial Magistrate committed the case to the Court of Special Judge, POCSO Act, 2012 for trial. The charges were framed under Section 5 (m) and (n) of the POCSO Act, 2012 punishable under Section 6 of the POCSO Act, 2012 and under Section 376 (2) (f) and (i) IPC, 1860, punishable under Section 376 (2) of the IPC, 1860 to which the appellant Padam Kumar Chettri pleaded not guilty and claimed trial.

**6.** PW 1 is the victim. She stated on oath that appellant is her cousin brother being the nephew of her father. He resides near her home and she call him "Padam Daju". She stated that incident occurred in October previous year. On the relevant evening when they were having their dinner, the appellant arrived at their residence from his duty. He asked her elder brother and her to accompany him to his residence. They used

to visit the residence of the appellant frequently, as such, they accompanied the appellant to his residence that evening. The wife of the appellant had gone to her grandparental house at Bermoik. They were not aware about the fact that the wife of the appellant is not there. As they entered the residence of the appellant, the appellant bolted his house from inside. Thereafter, they were asked to stay back at his residence. The appellant prepared their bed in the puja room of his house where she and her brother were asked to sleep. While, she was made to sleep on the wall side of the bed and her brother was made to sleep on the other side of the bed while the appellant slept in the middle between her and her brother. Later, the appellant made her sleep on the side of the bed where her brother was made to sleep and shifted her brother to the wall side of the bed. As soon as her brother fell asleep, the appellant removed his pant and also the underwear she was wearing. The appellant took out his private part and tried to insert the same into her private part. The appellant also inserted finger into her private part. She screamed out of pain. The appellant closed her mouth with a handkerchief. At that time her elder brother also woke up. Her brother asked her to sleep towards the wall side of the bed but the appellant did not allow her to do so. So, she continued sleeping on the side of the bed next the appellant. Next morning she and her brother returned back to their house. She developed fever and there was also pain in her private part and as a result

she found difficulty in passing urine. She however, could not tell her parents about the incident as the appellant had threatened her not to disclose the same to her parents. Few days later she narrated the incident to her younger sister, who in turn, informed her mother about the same. Her mother also informed her father about the incident. Thereafter, her parents enquired from her about the incident and she narrated the entire incident to her parents. Her parents thereafter took her to Singtam Police Station. From Singtam Police Station she was forwarded to District Hospital, Singtam where from she was referred to STNM Hospital, Gangtok for medical examination. She was examined by the doctor at District Hospital Singtam and at Gangtok Hospital. She had also made statement before a Judge at Gangtok in connection with this case. The Police during the course of investigation of the case had seized her wearing apparels which she was wearing on the night of the incident.

**7.** P.W 2 victim's mother stated on oath that she does not remember the exact date. One day when she was at home along with her friend Rita Sharma, her younger daughter told her that there was blood stains and some pus on the underwear of her elder daughter (victim). She called her elder daughter and checked her private part where she found some dirt and blood stains. There were blood stains on her undergarment also. She enquired from the victim about the same. Her daughter told her

that 10 (ten) days ago the appellant committed sexual assault on her. She told her that the appellant had inserted his finger on her private part when he was unable to insert his penis.

**8.** PW 4 Amrita Chettri is witness of seizure memo. She proved the seized items.

**9.** PW 6 Dr. Jai Bahadur Gurung stated on oath that on 16.10.2015, at around 15.50 hrs, he had examined the victim girl and on local examination he found, perineum-normal, no bruise, bite mark or laceration. Labia Majora and labia minora-normal. Hymen tear present over 12 o'clock position. No bleeding or haematoma was present. Based on his findings, he prepared the Medical Report in respect of the victim girl, Exbt. 7. In his cross-examination he deposed that the tear on the hymen found during local examination of the victim girl was about five days old. He stated that hymen could also be ruptured because of other activities such as cycling, swimming athletics etc. But at the same time this witness also stated that it is not true that under normal circumstances, hymen of an eight year old girl could be ruptured because of other circumstances than sexual assault.

**10.** PW 11 victim's elder brother stated the same things which were stated by the victim. He stated that on that day the appellant asked him to sleep on a bed in the prayer room. Accordingly, he with his victim sister slept on the said bed while

the appellant sat drinking alcohol in the adjacent room. He woke up at night when his victim sister screamed. When he enquired from her victim sister as to what had happened, the appellant intervened and said that he had pinched her and that is why she was screaming. At that time, he noticed that the appellant had shifted his victim sister towards the middle of the bed and the appellant slept on the wall side of the bed. He noticed that the appellant was naked and the clothes of his victim sister had also been removed. When he told his victim sister that they should go back home, the appellant again intervened and said that he and his victim sister should sleep at his residence and go back home only in the morning. He and his victim sister returned back to their residence, the following morning at around 7 am.

**11.** PW 13 Dr. Tshering Laden Bhutia has deposed on oath that on 02.12.2015 he received a requisition from the Investigating Officer for authentication of the Birth Certificate issued in favour of the victim. Upon such verification, he found that the Birth Certificate Exbt.16 issued in favour of victim of the case a genuine Birth Certificate whose particulars were found recorded in the Births and Deaths Register and the counterfoil of which was also found in the register of counterfoils of Birth Certificate issued to different individuals. As per records, the date of birth of the victim girl was 05.08.2006 and the Birth

Certificate issued to her was under Registration No.583/06 dated 04.09.2006.

**12.** The above witnesses are the witnesses whose depositions are very crucial for deciding the case.

**13.** Heard learned counsel for the parties. Perused the lower Court records.

**14.** Learned Counsel for the appellant submitted that there is nothing on record on which basis it could be proved that appellant sexually assaulted the victim. He submitted that age of the victim has not been proved and as such, appellant could not be convicted under the provisions of POCSO Act. He submitted that there is contradiction in the statement of the witnesses, as mother of the victim in her statement stated that her elder daughter informed her that 10 (ten) days ago the appellant sexually assaulted her whereas in the statement of Doctor (PW 6) he stated that tear on the hymen found during local examination of the victim girl was about 5 (five) days old. Learned Counsel for the appellant submitted that victim girl visited the place of appellant 10 (ten) days ago whereas injury in her private part was 5 (five) days old. Thus, the victim girl was sexually assaulted by someone else and not by the appellant and the appellant deserves to be acquitted by giving him benefit of doubts. He further submitted that Police seized the items but did

not take signature of any witness. Thus, seizure of these items cannot be said to be proved.

**15.** On the other hand, learned Government Pleader submitted that evidence of the prosecutrix has been consistent throughout. On the question of genuineness of birth certificate he referred the statement of PW 13 Doctor Tsering Laden Bhutia in which he has stated that he verified the contents of the birth certificate issued to the victim girl from the Birth & Death Register maintained by his Hospital. He submitted that hospital also maintained the register containing the counterfoil of the birth certificates issued to the individuals. The witness also stated that as per record, the date of birth of the victim girl was 05.08.2006. He submitted that her mother also stated before the Court that she was 9 years old. Learned Government pleader also referred the statement of the appellant under Section 313 of CrPC in which he admitted that he slept in the middle between the victim and her brother.

**16.** We have considered the submission of learned Counsel for the parties. First, we deal with the argument of the Counsel for the appellant. The age of the victim girl is proved by Dr. Tsering Laden Bhutia (PW 13). Doctor, who examined the victim, in her medical report has written the age of the victim as 9 years. No doctor will write age of a patient as 9 years in case she is major. Therefore, the argument of learned Counsel for the

appellant that victim was not minor cannot be accepted. His another argument that in the statement of the doctor, injury on private part was found five (5) days earlier and in the statement of the victim, she visited the appellant's place ten (10) days ago, therefore, she was sexually assaulted by someone else can also not been accepted in view of categorical statement of the victim and her brother. She clearly stated that the appellant removed his pant and also her underwear which she was wearing. Thereafter, he took out his private part and tried to insert the same into her private part. The appellant also inserted his finger into her private part on which she screamed due to pain. The appellant closed her mouth with handkerchief. At that time her elder brother also woke up and asked her to sleep at the wall side of the bed but the appellant did not allow her to do so. Her statement finds support from her brother's statement in which he has stated that he woke up at night that day when his sister screamed. He enquired from his sister as to what had happened but the appellant intervened and said that he had pinched her and that is why she was screaming. This witness further stated that at that time he noticed that appellant had shifted his victim sister towards the middle of the bed and himself slept on the wall side of the bed. He also noticed that the appellant was naked and the cloth of his sister had also been removed. The victim and her brother are child witnesses. There is nothing on which basis their testimony can be doubted. Statement of these

two witnesses fully supports the case of the prosecution. Statement of PW 2, mother of the victim is also relevant as according to her when she was told about the incident, she called the victim and removed her underwear. She found that victim had rashes all over her vagina. On asking, the victim told her that the appellant had sexually assaulted her. Apart from the statement of these witnesses, the case of the prosecution also finds support from medical evidence in which hymen tear of the victim was found. The same was proved by PW 6 Dr. Jai Bahadur Gurung. He stated that hymen tear present over 12'o clock position. This witness also stated that it is not true that under normal circumstances, hymen of an eight years old girl could be ruptured because of the other circumstances than sexual assaults. We also find that in forensic lab report semen were detected on the underwear of the victim. In our view, the above evidence is sufficient to prove the case of the prosecution. The Judgment of the Trial Judge is affirmed. The appeal filed by the appellant is dismissed.

**17.** Let the lower Court records be remitted back.

**Judge**  
11-09-2019

**Chief Justice**  
11-09-2019