THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 2nd August, 2018

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

Crl.A. 16 of 2017

Appellant : Tanam Limboo,
Aged about 23 years,
S/o Mon Bahadur Limboo,
R/o Timbrong Busty,
West Sikkim
(Presently at State Central Jail, Rongyek, East Sikkim).

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. B. Khatiwada, Senior Advocate with Mrs. Gita Bista, Advocate for the Appellant.

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

J U D G M E N T

Meenakshi Madan Rai, ACJ

1. Seeking a reversal of the Judgment of Conviction dated 05-04-2017 in Sessions Trial (POCSO) Case No.07 of 2016 in the Court of the Special Judge (POCSO), West Sikkim, at Gyalshing, and the consequent sentence dated 11-04-2017, by which the Appellant was sentenced to undergo simple imprisonment for a period of nine

years and to pay a fine of Rs.20,000/- (Rupees twenty thousand) only, under Section 4 of the the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), with a default clause of imprisonment, the Appellant is before this Court. The period of detention already undergone by the Appellant during investigation and trial were duly set off against the incarceration imposed.

2. Assailing the Judgment and the Order on Sentence, it is submitted that according to the victim, the Appellant used a condom while committing the act, if this be true, then the Appellant would have taken sometime to wear it during which time the victim could have escaped. However, no evidence accrues from the Prosecution to suggest that the victim made any effort to decamp from the place of occurrence. It was also urged that there is no medical evidence to support the allegation that the victim sustained injury by the alleged use of force by the Appellant. The victim herself has stated that on the relevant day she was cutting grass when her grandfather sent her to cut grass in an adjoining area, hence although a material witness the grandfather of the victim has been excluded from the list of Prosecution Witnesses. That, there are contradictions in the statement of the victim under Section 161 and Section 164 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C"). Besides, the victim claims that she asked for the mobile phone of one of the ladies and called up her "*Tumma*" (Aunt) P.W.4, informing her that the Appellant had raped her which evidence P.W.4 failed to corroborate. P.W.3 and P.W.5 would testify that when they saw the alleged victim she was normal and properly dressed. It is also the

victim's statement that she cried for help during the sexual assault. Although the alleged place of occurrence is located only 70 meters from her house and 30 meters from the road strangely no one heard her cries. That there are anomalies in the evidence of P.W.6, P.W.13 and P.W.4 as according to P.W.6 he lodged the First Information Report (FIR) based on information allegedly received by him from P.W.13 his son, who in turn alleges that such information was given to him by his mother, P.W.4 telephonically. P.W.4 does not corroborate this statement and has specifically admitted under cross-examination that the alleged victim did not convey anything to her about the incident, hence the Prosecution has failed to prove the circumstances under which P.W.6 received information about the alleged incident. P.W.13 mentions the father of the victim who however was not made a Prosecution Witness and no explanation is forthcoming for the reason as to why the FIR was lodged by the uncle of the victim and not her father. That, P.W.9 the Doctor who examined the victim has not given any conclusive opinion pertaining to the alleged rape of the victim, while P.W.10 who examined the Appellant found no injuries on the private part of the Appellant or on any other part of the Appellant's body. The Appellant for his part when examined under Section 313 of the Cr.P.C. has claimed his innocence, to establish which he even produced his wife, Mrs. Neelam Sherpa as D.W.1, according to whom, the Appellant was working with her in the fields for the entire day on 10-04-2016 when all of a sudden the Police came to their house and took the Appellant with them. The finding of guilt of the Appellant as per the impugned Judgment is based on the testimony of the victim supported by the

medical evidence, but there is no iota of evidence in the testimony of the Doctor who examined the victim to lead to such a conclusion, hence this is a fit case where the Appellant is to be acquitted.

3. Learned Additional Public Prosecutor while strongly refuting the arguments of Learned Counsel for the Appellant invited the attention of this Court to the conduct of the Prosecutrix and contended that had the victim consented to the offence neither would she have cried for help nor would she have rushed to the house of P.W.3 and informed her aunt P.W.4 from the mobile phone of P.W.2. It is also evident that her uncle P.W.5 came and took her home along with him. The evidence of P.W.2 and P.W.3 support the evidence of the victim P.W.1 with regard to her reporting the matter to her aunt. P.W.4 the victim's aunt has also stated that she received a mobile call from the victim requesting her to come immediately on which she sent her uncle P.W.5 to fetch her. P.W.5 has corroborated the fact that P.W.4, the wife of P.W.6, had told him to go to the house of one Sancha Raj Limboo to pick up the victim. Exhibit 5 is the Birth Certificate of the minor victim revealing her date of birth as "05-05-2000" the incident having taken place on 10-04-2016 would make the victim a month less than 16 years of age and, therefore, a minor in terms of the POCSO Act. That as the Birth Certificate remained unchallenged before the Learned Trial Court it cannot be questioned at the appellate stage to disprove the age of the victim. P.W.9 the Doctor who examined the victim has mentioned in Exhibit 8 that local examination indicated injury on the genital of the victim which was suggestive of blunt injury. The

Appellant evidently had made a disclosure statement under Section 27 of the Indian Evidence Act, 1872 (for short "Evidence Act"), Exhibit 12 on the basis of which the condom, M.O.I used by him was seized by the Police after it was pointed out by the Appellant in the presence of two witnesses P.W.14 and P.W.15. Hence, the Appeal deserves a dismissal.

4. The rival contentions of Learned Counsel were heard at length. The evidence and documents on record have also been examined carefully. The question that falls for determination is whether the Appellant is guilty of the offence as charged.

5. The facts of the case are briefly being traversed herein. On 10-04-2016, at 2220 hours, an FIR Exhibit 3 was lodged by P.W.6 to the effect that the victim aged about 15 years, living in his house since 2009 and a student of Class IX had been raped by the Appellant the same day at around 1500 hours, while she was in the complainant's cardamom field collecting fodder for cattle. Pursuant thereto, Gyalshing P.S. Case No.19/2016, dated 10-04-2016 was registered under Sections 376/341 of the Indian Penal Code, 1860 (for short "IPC") read with Section 4 of the POCSO Act, 2012 against the Appellant, Tanam Subba and taken up for investigation. The necessary formalities pertaining to investigation, viz.; recording the statement of witnesses including Section 164 of the Cr.P.C. statement of the victim, forwarding the victim and the Appellant for medical examination, visiting the place of occurrence and thereafter arresting the Appellant were completed. Exhibits of the case including the victim's Birth Certificate, Exhibit 5 were seized. The

victim was forwarded to "Manjusha Home", South Sikkim in consultation with the concerned Officers of the Social Welfare Department, Government of Sikkim duly obtaining the consent of her guardians. Investigation carried out revealed that the victim a school student was living with her uncle P.W.6 since 2009, her mother having remarried, while her father had left her with P.W.6 and migrated to Namchi. On the relevant day when the victim was collecting fodder about 100 meters away from her home at about 1500 hours the Appellant came to the spot. On enquiry by her as to why he was there he answered that he was going to cut grass, but suddenly closed her mouth, pushed her to the ground, wore a condom that was in his pocket, raped her and left the place thereafter. The traumatised victim for her part went in search of one her school teachers who was unavailable but instead found P.W.2 and P.W.3 working in the fields and narrated the incident to them. She borrowed the cell phone of P.W.2 and informed P.W.4 her aunt. After sometime P.W.5 arrived at the place and took her home to P.W.6. The Medical Report of the victim would indicate that she had a bright red bruise over the labia minora, tenderness, discharge and hymen deficit at 9 o'clock and 3 o'clock positions, but laboratory reports indicated absence of spermatozoa. That the RFSL Report would indicate that human semen was detected in a used condom, which tested positive for the presence of blood group 'O', the blood group of the Appellant. On conclusion of investigation finding a *prima facie* offence, Charge-sheet was submitted against the Appellant under Sections 376/341 of the IPC read with Section 4 of the POCSO Act.

6. The Learned Trial Court considering the materials on record framed Charge against the Appellant under Section 3(a) of the POCSO Act punishable under Section 4. On his plea of "not guilty", trial commenced wherein the Prosecution examined sixteen witnesses including the I.O. of the case. On closure of the Prosecution evidence the Appellant was afforded an opportunity to explain the incriminating circumstances appearing in the evidence against him by examination under Section 313 of the Cr.P.C. He claimed that the allegations against him were false, he sought to and was permitted to examine his wife Neelam Sherpa as D.W.1. On closure of the defence evidence the final arguments of the parties were heard, pursuant to which on appreciation of the evidence on record, the impugned Judgment and Order on Sentence came to be pronounced.

7. While adverting to the submissions of Learned Counsel for the parties, so far as the age of the victim is concerned, this aspect has not been raised by Learned Counsel for the Appellant. As a concomitant it can be assumed that the Appellant had no quarrel with the age of the victim as furnished by the Prosecution, in the form of Exhibit 5 and hence requires no further discussion. The offence allegedly was committed close to the road, but incongruity has been expressed by Counsel for the Appellant that her cries seeking help were not heard by anyone. In the first instance, it must be borne in mind that the incident occurred inside a cardamom field. Secondly, the place of occurrence being a village, evidently few people would be using the road and in all probability no one was

in the vicinity when the offence was being committed. The argument that the victim had sufficient time to escape as the Appellant had to wear the condom also finds no force as necessary consideration has to be extended to the fact that she is a mere child of 15 years, brought up in a village and would obviously not have the same reactions as a child brought up in an urban area. Her limited exposure to the outside world as well as her level of education are to be considered with sensitivity. The Prosecution would argue that the condom, M.O.I, was seized on the disclosure made by the Appellant before the Police and two independent witnesses under the provisions of Section 27 of the Evidence Act. In this context, the Prosecution has furnished the two witnesses in an effort to establish this aspect of their case. However, on careful consideration of the evidence of P.W.15 and P.W.14 inconsistencies emanate therefrom. The Learned Trial Court has discarded the evidence of these two witnesses on grounds that on scrutinising Exhibit 12 the statement appears to have been given by the Appellant in the presence of P.W.14 and P.W.15 on 11-04-2016 at 10:00 hours. However, both these witnesses have testified that they had gone to the Police Station on 10-04-2016 and not on 11-04-2016. A careful perusal of Exhibit 12 would indicate that the date and time of arrest of the Appellant is mentioned herein as "10-04-2016" and "22:45 hours" respectively while the disclosure statement is purported to be recorded on 11-04-2016. As pointed out by the Learned Trial Court both witnesses are categorical in their depositions that they had gone to the Police Station on 10-04-2016, hence the veracity of Exhibit 12 becomes suspect. Apart from which

there are inconsistencies in the statement of P.W.15 who states that he is unaware of the contents and purpose of preparation of Exhibit 12 and Exhibit 14 which is evidently a continuation of Exhibit 12. In such circumstances, the Learned Trial Court was correct in not relying on the said Exhibits and is also being discarded by this Court.

8. That, having been said no presumption of innocence of the Appellant arise merely because the child did not look dishevelled when she went to the residence of her teacher. P.W.2 has categorically testified that she noticed that the victim was crying and it is her indubitable testimony that the victim told her that she was raped by the Appellant. P.W.3 on this count has also corroborated the evidence of P.W.2. It is apparent that the victim narrated the fact that she was raped by the Appellant to the first persons, viz.; P.W.2 and P.W.3 when she met them although she did not encounter her teacher. The victim has also stated that she called up P.W.4 from the mobile phone of one of the ladies which fact has been corroborated both by P.W.2 and P.W.3. Although P.W.4 failed to shed light on the fact that the victim had informed her of the incident, but she has not denied the fact that the victim called her from the phone and asked her to come immediately to fetch her. The urgency indicates the occurrence of an untoward incident. Both P.W.1 and P.W.4 have said that her uncle, "*Tumba*" came to pick up her from the house of P.W.3. P.W.5 has substantiated the evidence of P.W.1 and P.W.4 that he picked up the victim up from the house of the husband of P.W.3.

9. The evidence of P.W.9, the Gynaecologist at the District Hospital, Gyalshing, West Sikkim, who examined the victim lends credence to the fact of sexual assault as narrated by P.W.1. According to P.W.9, the victim gave a history of being sexually assaulted by the Appellant at around 2 p.m. of the same day, while she was cutting grass in the nearby cardamom field and that the Appellant had used a condom. The medical examination of the victim took place on the date of offence, i.e., 10-04-2016, at around 11.45 p.m. The Gynaecologist found the following;

> **"**O/E - Pt. Conscious, co-operative
> Vitals - Stable Gait (N), Passed urine
> Chest & CVS – NAD
> P.A. – Soft, NAD
> Multiple abrasions over the back.
>
> Local examination –
> Hymen deficit at '9' o clock & '3' o' clock position.
> Bruise (P) – bright red over the (L) labia minora.
> Tenderness (P)
> Discharge (P)
>
> * 3 vaginal swabs taken & handed over to Police
> * Undergarment handed over to Police
>
> Opinion withheld till reports are available
>
> FINAL OPINION – The above history & clinical findings are suggestive of blunt injury. However, lab. Reports shows absence of spermatozoa.**"**

10. Exhibit 8 was identified as the report prepared by P.W.9. The fact that there was multiple abrasions or excoriation on the victim's back was evidently the result of applied friction, a probable consequence of the sexual assault. That apart, it is clear that her hymen was deficit at the 9 o'clock and 3 o'clock position. The injury to the labia minora being bright red was evidently fresh with

tenderness and discharge present. The Doctor opined that the injury was suggestive of a blunt injury. The evidence of P.W.1 and P.W.2 considered cumulatively leads to no other conclusion but that of penetrative sexual assault by the Appellant on P.W.1.

11. P.W.6 received information of the sexual assault on the victim from P.W.13, his son, who in turn stated that he received a phone call from his mother informing him that the Appellant has sexually assaulted the victim. It is categorical that P.W.6 on receiving the information returned to his home along with the victim's uncle. The guardian of P.W.1 as also the village Panchayat and ladies were present at the home of P.W.6. Thereafter Exhibit 3 came to be lodged by him. Addressing the argument of Learned Counsel for the Appellant that the FIR ought to have been lodged by the father of the victim and not P.W.6, it would be relevant to touch upon Section 154 of the Cr.P.C. which deals with information in cognizable cases. The information relating to the commission of a cognizable offence is given to the Officer-in-Charge of a Police Station under this Section. The Section does not envisage that a particular person is to lodge the FIR. All that the Section requires is that information relating to commission of a cognizable offence must be reported to the concerned Officer-in-Charge of a Police Station, the primary object of such a step being to set the criminal law in motion. Since P.W.6 was seized of the matter he lodged Exhibit 3 before the Police Station, nothing debars him from doing so. The evidence of P.W.11, the Junior Scientific Officer to the effect that human semen could be detected in M.O.I which gave a positive test

for the presence of blood group 'O' which was the blood group of the Appellant becomes irrelevant in view of the evidence of P.W.14 and 15 being disregarded.

12. From a careful appreciation of the evidence on record, it emanates that the victim reported the incident to P.W.2, P.W.3 and P.W.4 as soon as she was able to flee after the harrowing incident was committed on her. It has been contended that the victim's grandfather was not listed as a Prosecution Witness, I find no merit in this submission as all that he would prove is that he was cutting grass in the adjoining area. He was not a witness to the incident and is therefore of no relevance to the Prosecution case. Attention may be drawn to the fact that nothing furnished in the evidence of the Prosecution Witnesses points to any inimical relations either between the victim and the Appellant or their respective families prior to the incident which could have been a motive for the victim, if at all, to falsely implicate the Appellant in the case. Merely because the Appellant's body was devoid of injuries does not negate the fact of the penetrative sexual assault in the face of the evidence of P.W.1 duly substantiated by Exhibit 8.

13. The question of contradictions in the statement of the victim under Sections 161 and 164 of the Cr.P.C. was also raised by Learned Counsel for the Appellant. It needs no reiteration that the statements made under the above Sections are not substantive evidence. The statement under Section 161 of the Cr.P.C. can be utilised for the limited purpose of contradicting a witness in the manner prescribed in the proviso to Section 162(1) of the Cr.P.C.

Similarly a statement recorded under Section 164 of the Cr.P.C. can be used for the purposes of either contradiction or corroboration. The Appellant is afforded sufficient opportunity during cross-examination at the stage of trial to take advantage of the legal provisions and on failure to do so cannot raise this point at the appellate stage.

14. Minor contradictions with regard to the evidence of P.W.1 and P.W.4 bear no relevance to the Prosecution case. In ***A. Shankar*** vs. ***State of Karnataka***[1] the Hon'ble Supreme Court would hold as follows;

> **"22.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety.**"**

The fact that the incident occurred withstood the cross-examination and although P.W.4 may have been remiss in her deposition pertaining to the incident, sufficient corroborative evidence prevails to establish the Prosecution case.

15. It is also apposite in this context to consider the provisions of Section 29 of the POCSO Act. Section 29 of the POCSO Act specifically provides that where a person is prosecuted

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[1] (2011) 6 SCC 279

for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of the Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved. The commentary which appears thereafter based on notes on clauses of the Bill provides inter alia that where the victim is a child below the age of 16 years, the Special Court shall presume that the accused has committed the offence unless the contrary is proved. Hence, the statute provides that the statement of the victim has to be given the sanctity it deserves when an accused is prosecuted for any of the offences detailed thereunder. This brings us to Section 30 of the POCSO Act which reads as follows;

> **"30. Presumption of culpable mental state**.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
>
> *Explanation*.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.**"**

The Appellant has failed to avail of the opportunity extended to him under Section 30 of the POCSO Act for rebutting the presumption set out in Section 29 of the POCSO Act to disprove the fact of culpable mental state.

16. Consequently, the evidence on record being cogent and consistent is undisputedly indicative of the fact that the Appellant

had committed the offence of penetrative sexual assault on the victim. The impugned Judgment and Order on Sentence of the Learned Trial Court suffers from no infirmity to warrant interference therein.

17. Appeal fails and is accordingly dismissed.

18. No order as to costs.

19. Copy of this Judgment along with Records be sent forthwith to the Learned Trial Court.

Sd/-
(Meenakshi Madan Rai)
Acting Chief Justice
02-08-2018

Approved for reporting : **Yes**

Internet : **Yes**

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