

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

 SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Criminal Appeal No. 32 of 2018

Krishna Bahadur Chettri,
 S/o Late Nar Bahadur Chettri,
 Permanent Resident of Ralap,
 East Sikkim.

.... Appellant

versus

State of Sikkim

.... Respondent

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

Appearance:

Ms. Navtara Sarda, Legal Aid Counsel for the Appellant.

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

J U D G M E N T
(01.04.2019)

Bhaskar Raj Pradhan, J

1. This is my time to sing, dance and play. This is my
 time to be happy. This is my time. Give it back to me.

2. The conviction of the Appellant by the learned Special
 Judge for commission of aggravated sexual assault under
 Section 9(l), 9(m) and 9(n) punishable under Section 10 of
 the Protection of Children from Sexual Offences Act, 2012

(POCSO Act, 2012) narrate an unfortunate, distressing and alarming tale of a broken home in rural Sikkim.

3. The minor victim (P.W.1) is a hapless child of 7 years. The Appellant is her uncle, a 49 year old male who held the position of trust. The mother of the victim had left the father (P.W.2) and their three minor children several years ago. Unable to look after the three minor children on his own he brought the Appellant, his brother-in-law, to their house to look after them. The Appellant stayed with them for a few months. He used to do all the household work including cooking and bathing the children. During this period the elder minor daughter (P.W.3) was sexually assaulted by two juvenile relatives. A case was instituted under the POCSO Act, 2012 in the year 2016 against them. During the proceedings the Learned Judge told the father (P.W.2) that the elder minor daughter (P.W.3) had disclosed about the sexual assault on the minor victim by the Appellant. Pursuant thereto a written complaint (exhibit-5) dated 08.10.2016 was lodged by the father at the Temi Police Station. The formal First Information Report (FIR) (exhibit-6) was lodged on the same day. The investigation resulted in the charge-sheet against the Appellant for commission of sexual assaults on the minor victim.

4. Three charges were framed under Section 9(l), 9(m) and 9(n) of the POCSO Act, 2012, Section 354 of the Indian Penal

Code, 1860 (IPC, 1860) and Section 354B of the IPC, 1860 by the learned Special Judge on 11.04.2017. 11 prosecution witnesses were examined. The Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C., 1973) on 14.06.2018. He desired to lead defence witnesses. Two defence witnesses were also examined by the learned Special Judge.

5. Ms. Navtara Sarada the learned Legal Aid Counsel for the Appellant submits that the impugned judgement and order on sentence ought to be set aside on the grounds hereinafter considered. Mr. Thinlay Dorjee Bhutia, learned Additional Public Prosecutor for the State-Respondent on the other hand submits that the prosecution has been able to prove all the ingredients of the alleged aggravated sexual offences with the evidence of the minor victim and her two siblings. It is submitted that the identification of the Appellant as well the minority of minor victim has also been adequately proved by the prosecution witnesses.

6. The minority and the age of the 7 year old victim are not in question. It is not contested at this stage. The father has deposed that the date of birth of the minor victim was 16.08.2009 and identified the copy of the birth certificate which had been seized. The Registrar, Birth & Deaths STNM Hospital, Gangtok (P.W.10) deposed that he had verified the copy of said birth certificate from the Birth & Death register

maintained in STNM Hospital and found the contents to be correct. He thereafter endorsed on the body of the application dated 03.11.2016 made by the Investigating Officer to the Chief Registrar, Birth & Death, STNM Hospital (exhibit-18) that the copy was genuine.

7. The identification of the Appellant and his presence in the rented house of the family of the minor victim has been cogently established by the prosecution. The 7 year old minor victim has vividly described the sexual assault committed by the Appellant, her uncle. She identified him both during the Test Identification Parade as well as in Court. She did not remember the date, month and the year of the incident but she was certain that it transpired when she was residing at her residence and studying in UKG. She testified that one night the Appellant removed his pants and did "*chaara*" to her. The word "*chaara*" is a commonly used Nepali word. Translated it quite clearly describes the act of sexual assault. In fact the minor victim also deposed that the Appellant had put his penis in her vagina. Therefore no advantage can be taken by the defence, as was sought to, on the confusion created in the mind of the minor victim's minor elder sister (P.W.3) about the meaning of the word "*chaara*". Although she was subjected to cross-examination the 7 year old minor victim's version could not be

demolished. In fact she deposed that the Appellant did “*chaara*” to her several times.

8. Her minor elder sister (P.W.3), a 10 year old child, was also examined. She had seen the Appellant sexually assaulting her sister when she peeped through a window. She testified that after the sexual assaults the Appellant used to take her sister to the market. The defence could not demolish the evidence of this child witness too.

9. The third sibling, a 13 year old boy (P.W.7) deposed that when he was returning after fishing from the river he had noticed the Appellant giving sweets to the minor victim. He also testified that on the following day he had seen the Appellant sexually assaulting the minor victim inside their house. His cross-examination yielded no evidence in favour of the defence.

10. The father (P.W.2) is not an eye witness to the sexual assault. He lodged the FIR pursuant to the information received about the sexual assault by the Appellant on the minor victim.

11. In cross-examination the father (P.W.2) deposed that due to the statement made by the minor victim against him he was presently lodged in prison. The father (P.W.2) also deposed that the minor victim had falsely implicated him as well as the Appellant after she was tutored by the villagers,

persons from the Non Governmental Organization (NGO) and the police. The defence did not even suggest about the alleged false implication while cross examining the Investigating Officer. Therefore, not much credence could be given to this statement of the father in favour of the accused. More so when he himself has been implicated. The minor victim has clearly denied that she was tutored by the police to implicate the father (P.W.2) and the Appellant. She has also denied being tutored by others. The suggestion of the defence to the social worker working in the NGO (P.W.8) was that the minor victim was tutored by the police. It was not that he or anyone from the NGO had tutored her. This suggestion too was denied by the minor victim.

12. The ingredients of Section 9(l) of the POCSO Act, 2012 has been proved beyond all reasonable doubt by the evidence of the minor victim and her two minor siblings. Their evidence convincingly proves sexual assault on the minor victim more than once.

13. The act of sexual assault committed on the minor victim is proved by the minor victim and her siblings. The date of birth of the minor victim has been testified by the father (P.W.2). He was clear that the date of birth of the minor victim was 16.08.2009. This establishes that the sexual assault was perpetrated upon the minor victim who was below the age of 12 years. The date of birth of a child

would be known to the father (P.W.2). The date of birth given by the father (P.W.2) is the same date of birth as seen in the copy of the Birth Certificate which was verified by the Registrar of Birth and Death (P.W.10) from the Register maintained. This clear evidence of the father (P.W.2) of the minor victim would be material evidence to ascertain her age as being below 12 years at the time of the alleged sexual assault. There is no certainty about the date of the sexual assaults. However, the evidence of the father (P.W.2) read with the evidence of the minor victim and her two siblings as well as the evidence of P.W.4 in whose house the Appellant was residing in the year 2016 makes it certain that the incident of sexual assaults were committed by the Appellant in the year 2016. Thus, it could be concluded definitely that the minor victim was below the age of 12 years at the time of the commission of sexual assaults by the Appellant. These facts satisfy the ingredient of Section 9(m) the POCSO Act, 2012.

14. The ingredients of the offence under Section 9(n) of the POCSO Act, 2012 are satisfied by the evidence of the victim, her two minor siblings as well as their father (P.W.2). All the said minor witnesses have clearly identified the Appellant as their uncle and the perpetrator of the sexual assault. Their father (P.W.2) has without hesitation deposed that the Appellant is his brother-in-law. P.W.4, an independent

witness, in whose house the Appellant was residing during the year 2016 also confirms that the Appellant was the minor victim's uncle. He testified that the Appellant used to reside with the father (P.W.2) and his family. The father (P.W.2) has also very clearly deposed that after his wife had eloped he had brought the Appellant to his rented house to look after the minor children and the Appellant had stayed with them for a period of three-four months. The father's (P.W.2) evidence is corroborated by the evidence of the minor victim who deposed that during the relevant time she was residing with her father, her two siblings and the Appellant. Both the siblings of the minor victim have also confirmed that at the relevant time the Appellant was in fact staying with them. The feeble plea of alibi sought to be introduced, as an afterthought, through the evidence of two defence witnesses has been correctly rejected by the learned Special Judge. In cross-examination, at the instance of the defence, the father (P.W.2) has clearly testified that it was only after the Appellant left their house that he had constructed his own house. This evidence further clarifies the doubt sought to be introduced with the depositions of the defence witnesses. The deposition of minor victim and her two minor siblings proves that the sexual assaults were committed by the Appellant when he was residing with them in their rented house.

15. The principal submission of Ms. Navtara Sarada was that there was contradiction between the statement of the minor victim and the medical evidence. She submitted that the medical evidence does not support the version of sexual assaults on the minor victim. On 09.10.2016 the minor victim was brought to the STNM Hospital for medical examination with a history of sexual assault during the early part of 2016. On local examination her hymen was intact and no fresh injuries were seen. Genital wash was not taken as the incident had occurred 10 months ago. The Gynaecologist (P.W.5) finally opined that clinical and local examination did not suggest forceful penetration in the past or in the recent period. The learned Counsel for the Appellant thus relies upon this deposition of the Gynaecologist (P.W.5) as well as his medical report (exhibit-9) to plead that the medical evidence did not support the ocular evidence of the minor victim. The facts, as is evident, reflect that the minor victim was medically examined after a fairly long gap of several months after the sexual assault. The ocular evidence does not reflect aggressive sexual assault. In such circumstances the Gynaecologist's (P.W.5) finding that no fresh injuries were seen cannot be termed as a contradiction which would shake the very foundation of the prosecution case to permit the Court to discard the ocular evidence of the minor victim and her two siblings who

had eye witnessed the sexual assault. These evidences are the best evidences that could be adduced. The Gynaecologist (P.W.5) had also opined that clinical and local examination did not suggest forceful penetration in the past or in the recent period and that minor victim's hymen was intact. Injury to the hymen is directly proportional to the violence perpetuated. Merely because the hymen was intact does not necessarily mean that sexual assault did not taken place. This is not a case where the Appellant was charged for penetrative sexual assault. Even in cases of penetrative sexual assault in small children, it is opined and also found in many instances that the hymen may not be ruptured. The Gynaecologist's (P.W.5) finding is an opinion of a medical expert and had it been obtained immediately after the sexual assault it would have compelling weight. However, the evidence which reflects that the medical examination of the victim of sexual assaults was conducted after several months impels this Court not to be moved by the opinion to such an extent so as to discard the ocular evidence of the minor victim and the eye witness account of her two minor siblings. This Court is thus of the firm view that primacy has to be given to the ocular evidences.

16. The second submission of the learned Counsel for the Appellant does not find mention in the grounds of appeal. Nevertheless this Court shall examine it as it raises an

important aspect of sensitivity towards the girl child who is a victim of sexual crime. She submits that as required by Section 27(2) of the POCSO Act, 2012 in case the victim is a girl child, the medical examination shall be conducted by a woman Doctor and since, in the present case, the Gynaecologist (P.W.5) who examined the minor victim, a girl child, was a male Doctor the conviction of the Appellant must be set aside. It is correct that the mandate of Section 27(2) of the POCSO Act, 2012 requires that in case the victim is a girl child, the medical examination shall be conducted by a woman Doctor. This is vital in the best interest of the girl child. Section 27(2) of the POCSO Act, 2012 is designed to protect the girl child from secondary victimization, embarrassment and to protect her privacy. The State must ensure that a woman doctor is readily available in all State medical facilities to examine such victims. However, this Court is certain that the Appellant, who is an accused alleged to have committed the sexual assault on the girl child, cannot be allowed to take advantage of this failure to seek an acquittal on this ground.

17. The final assault on the impugned judgment of the learned Special Judge by the learned Counsel for the Appellant was on the delay in lodging the FIR. The learned Special Judge has examined this aspect in fairly great detail. The father (P.W.2) has provided cogent reasons explaining

the delay. He came to learn about the sexual assault on the minor victim when he was summoned as a witness in the case under the POCSO Act, 2012 instituted against two juvenile relatives for sexually assaulting his eldest minor daughter (P.W.3). It was then that he was informed by the Learned Judge about his minor elder daughter (P.W.3) having disclosed about the Appellant sexually assaulting the minor victim. It was only after this incident that he lodged the FIR on 08.10.2016. Considering that the family life of the minor victim had been in disarray after her mother had left them it is perfectly understandable that she had not disclosed about the sexual assault to her father. Moreover, the father himself was accused of commission of sexual assault upon the minor victim in another proceeding. The minor victim would have no one to disclose about her being subjected to aggravated sexual assault by her own uncle. In such circumstances the delay in lodging the FIR cannot be a ground to throw out the prosecution which is otherwise based on direct evidence of the injured minor victim (which stands on a stronger pedestal) and the eye witness account of her two minor siblings.

18. The learned Special Judge has examined the evidence of the prosecution witnesses and held that there was no reason to disbelieve their testimony in the absence of any positive material in favour of the defence. The learned

Special Judge found the evidence of the minor victim duly corroborated by the evidence of her minor siblings who had deposed that they had seen the Appellant committing sexual assault on the minor victim. The learned Special Judge has also examined the provisions of the POCSO Act, 2012. She has correctly come to the conclusion that the Appellant was guilty of having committed the offence of aggravated sexual offence under Section 9(l), 9(m) and 9(n) of the POCSO Act, 2012 in view of the evidence produced by the prosecution and convicted him for the said offences.

19. The learned Special Judge has sentenced the Appellant to undergo simple imprisonment for a period of 5 years and to pay a fine of Rs.1,000/- for each of the offences under Section 9(l), 9(m) and 9(n) of the POCSO Act, 2012. The learned Special Judge has directed that in default of the payment of the fine for each of the offences the Appellant shall undergo further imprisonment for one month each under the said provisions. Section 10 of the POCSO Act, 2012 provides that whoever commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine. The learned Special Judge has imposed the minimum sentence of five year as prescribed for each of the

offences. This Court finds no reason to disturb the sentences imposed which has been directed to run concurrently.

20. The learned Special Judge has directed that the amount of fine, if recovered, shall be made over to the victim as compensation. The learned Special Judge has also directed the payment of Rs.1,00,000/- as compensation to the minor victim under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. The award of fine and compensation as directed shall remain undisturbed. The learned Special Judge has directed that the fine, if recovered, and the compensation amount granted be paid to the minor victim without setting out the modality. The evidence on record reflects that the mother of the minor victim had left them some years ago. The father (P.W.2) is himself accused of sexual assault on the minor victim and is said to have been convicted for the same. The minor victim is said to be residing in a home run by an NGO. Her siblings are lodged in yet another home. In the circumstances, the amount of fine if recovered and the compensation directed to be paid to the minor victim, if not already paid, shall be put in a fixed deposit in the name of the minor victim payable to her on attaining majority.

21. However, several disturbing questions remain unanswered. Home is usually the safest place for a child. However, when the home becomes the place where one's own

relatives become predators and indulge in sexual abuse upon minor children have no other place to go and feel safe. It is quite obvious that the minor victim and her two minor siblings are all lodged in different homes run by NGO's. No relatives seem to have come forward to take care of them. The father (P.W.2) stands convicted. The mother is nowhere around the children when they need her the most. How long do these children remain in such homes? Are these homes best equipped to take care of the "*best interest*" of these children? Do these children have any choice of a better alternative? What is the role and responsibility of the State towards these children - all victims of crime who have been subjected to such cruelty? Is grant of monetary compensation enough in such circumstances? Is enough being done? How do we better this unhappy situation?

22. This is my time to be happy weeps the child. Give my happiness back to me.

23. It is these thoughts which disturb the judicial mind and persuades this Court to direct the learned Registrar General of this Court to place this judgment as well as the records of this case before the Hon'ble Chief Justice to consider taking up these issues on the judicial side.

24. The appeal is dismissed. The impugned judgement and the order on sentence are upheld. The disbursement of the

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fine if realised and the compensation awarded shall be done in the manner as directed above.

25. Certified copies of this Judgement shall be sent to the Special Judge, the Sikkim State Legal Services Authority and the learned Registrar General of this Court for necessary action.

(Bhaskar Raj Pradhan)
Judge
01.04.2019

to/

Approved for reporting: yes.
Internet: yes.