

Crl. Appeal No.34 of 2016
Michael Kami v. State of Sikkim

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

S.B.: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. Appeal No. 34 of 2016

Michael Kami,
S/o Durjay Dhan Kami,
R/o Tinik, Chisopani,
South Sikkim.

**At present: Rongyek Jail,
Gangtok, East Sikkim.**

... Appellant/Accused

versus

State of Sikkim

... Respondent

**Appeal under Section 374 (2) Cr.P.C. 1973 against the
Judgment and Order on Sentence dated 30.09.2016.**

Appearance:

Mr. N. B. Khatiwada, (Senior Advocate), Legal Aid
Counsel with Ms. Gita Bista, Advocate for the
Appellant/Accused.

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

J U D G M E N T

(24.09.2018)

Bhaskar Raj Pradhan, J

1. The learned Special Judge (POCSO Act, 2012) South Sikkim at Namchi vide impugned judgment dated 30.09.2016 has found the Appellant guilty and convicted him of the offences under Sections 9 (m)/10 and 7/8 of the Protection of

Children from Sexual Offences Act, 2012 (POCSO Act, 2012); Section 354 of the Indian Penal Code, 1860 (IPC) on two counts and Section 354B/511 of the IPC. Resultantly, the Appellant has been sentenced vide impugned order on sentence dated 30.09.2016 to undergo:-

- (i) *simple imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence under Section 9(m)/10 of the POCSO Act, 2012 and in default to pay the said fine to undergo simple imprisonment for a period of six months;*
- (ii) *simple imprisonment of a period of five years and to pay a fine of Rs.10,000/- (Rupees ten thousand) for the offence under Section 354 of the IPC (first count) having default to pay the said fine to undergo simple imprisonment for a further period of six months;*
- (iii) *Simple imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence under Sections 7/8 of the POCSO Act, 2012 and in default to pay the fine to undergo simple imprisonment for a further period of six months;*
- (iv) *Simple imprisonment for a period of five years and to pay a fine of Rs.10,000/- for the offence under Section 354 IPC (second count) and in default to pay the fine to undergo simple imprisonment for a further period of six months; and*
- (v) *Simple imprisonment for a period of 3 ½ years and to pay a fine of Rs.10,000/- for the offence under Section 354B/511 IPC and in default to pay the fine to undergo simple imprisonment for a further period of six months. The aforesaid period of*

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imprisonment was directed to run concurrently and the period of imprisonment already undergone by the Appellant was to be set off against the above mentioned period.

2. Mr. N. B. Khatiwada, learned Senior Advocate and Legal Aid Counsel for the State Respondent would raise a solitary ground of appeal. He would submit that the learned Special Judge had erred in law in not believing the solitary defence witness who had categorically stated:

“..... On the night of 27.08.2015 the accused and I were sleeping in the same room i.e., one of the rooms under occupation of the victims’ family. We shared one bed. The accused was drunk that night and so far as I can say he did not leave the bed that night. On the following morning I left while the accused stayed back. I did not hear any noise that night. I was not told about any untoward incident by the minor victims or their parents on the following morning. I was not examined by the police in connection with this case. I know nothing about the present case against the accused.”

3. The said defence witness in cross-examination had stated:

“..... It is true that I did not wake up that night and as such I cannot say as to what all occurred that night.”

4. The learned Special Judge has disbelieved the defence version on the ground that the plea of the defence witness being present on the relevant night at the place of occurrence was taken for the first time during the Appellant’s statement recorded under Section 313 Cr.P.C. and that in cross examination the said defence witness had categorically

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admitted that he did not wake up that night and as such he could not say as to what all occurred that night. The reasoning of the learned Special Judge cannot be faulted.

5. The victims of the crime allegedly committed by the Appellant have both deposed before the Court. Their evidences have not been demolished. It inspires confidence.

6. Minor victim 1, 13 years of age has categorically stated:

“..... When I woke up I found that the accused was on our bed and his hand was on my chest, under my clothes. In the meantime, our parents also woke up. The accused ran away from the house after that. My younger sister told me that the accused had put his tongue inside her mouth and also tried to open her half pant.”.....

7. Minor victim 2, 11 years of age has categorically stated:

“... I suddenly woke up and saw that the accused was on top of me and had put his tongue inside my mouth. His hand was on my chest and he was trying to open my half pant. I screamed on which my parents and sister woke up.”

8. Both the minor victims have identified the Appellant as the aggressor and named him.

9. The ingredients of aggravated sexual assault in terms of Section 9(m) of the POCSO Act, 2012 are:

(i) Commission of sexual assault,

(ii) That sexual assault must be on a child below 12 years.

10. The ingredient of “*sexual assault*” as defined in Section 7 of the POCSO Act, 2012 are:

- (i) Sexual intent,
- (ii) Touch of the vagina, penis, anus or breast of the child by the accused or making the child touch the vagina, penis, anus or breast of the accused or any other person or doing any other act with sexual intent which involves physical contact without penetration.

11. The evidence of the minor victim 1 who was 13 years of age makes it clear that the Appellant had committed “*sexual assault*” on her as defined under Section 7 and punishable under Section 8 of the POCSO Act, 2012.

12. The evidence of the minor victim 2 who was 11 years of age makes it clear that the Appellant had committed “*sexual assault*” on her as defined under Section 7 and punishable under Section 9 of the POCSO Act, 2012 as “*aggravated sexual assault*” since sexual assault was committed on a child below 12 years of age.

13. Mr. N. B. Khatiwada, would also submit that in view of Section 42 of the POCSO Act, 2012 the sentence under Section 354B IPC is liable to be set aside. He would also submit that the conviction and sentence of the Appellant

under Section 511 IPC for attempting to commit the offence of Section 354B IPC was also bad in law.

14. Section 42 of the POCSO Act, 2012 provides where an act or omission constitute an offence punishable under POCSO Act, 2012 and also under Section 354B, IPC, amongst others, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment under POCSO Act, 2012 or under the IPC as provides for punishment which is greater in decree. The impugned sentence dated 30.09.2016 sentencing the Appellant under Section 354B IPC is thus liable to be set aside in view of the clear provision of Section 42 of the POCSO Act, 2012.

15. The learned Special Judge has also convicted and sentenced the Appellant under Section 354 IPC. In re: **Damber Singh Chettri v. State of Sikkim**¹ this Court has examined an identical situation in which the learned Special Judge had convicted and sentenced the Appellant both under Section 8 of the POCSO Act, as well as Section 354 IPC and held as under:

“However, the provision of Section 71 IPC must be taken into consideration which provides where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished the offender shall not be punished with the more

¹ 2018 SCC OnLine Sikk 132

severe punishment than the Court which tries it could award for any one of such offences. A perusal of the evidence proved by the prosecution makes it amply clear that for the same set of facts the Appellant has been sentenced under Section 8 of the POCSO Act as well as Section 354 IPC which is not permissible.”

16. The learned Special Judge has punished the Appellant for the offence under Section 354 IPC for the same act falling under the definitions of the provisions of Section 7 and 9(m) the POCSO Act, 2012 which was not permissible in view of Section 71 IPC.

17. Section 511 IPC provides:

“511. Punishment for attempting to commit offences punishable with imprisonment for life or other imprisonment.—Whoever attempts to commit an offence punishable by this Code with 1[imprisonment for life] or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with 2[imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence], or with such fine as is provided for the offence, or with both.”

18. In re: **Koppula Venkat Rao v. State of A.P.**² the Supreme Court would hold:

“8. *The plea relating to applicability of Section 376 read with Section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly, preparation to*

² (2004) 3 SCC 602

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commit it, and thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails, the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.”

19. The offence under Section 354B IPC is punishable with imprisonment for a term which shall not be less than 10 years but which may extend to 7 years, and shall also be liable to fine. “*Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections.*” The learned Special Judge had found the Appellant guilty of the offence under Section 354B/511 IPC. Since the learned Special Judge had held the Appellant guilty under Section 354B IPC the question of punishing the Appellant for an attempt to commit the said offence as well did not arise. Thus, the conviction and sentence of the Appellant under Section 354B/511 IPC is also not sustainable and liable to be set aside.

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20. In view of the aforesaid the appeal is partly allowed. The punishment imposed on the Appellant under Section 354B IPC 354 IPC, 354B/511 IPC are set aside. The conviction and sentence of the Appellant under Section 9(m) of the POCSO Act, 2012 and Section 8 of the POCSO Act, 2012 is confirmed.

21. The learned Special Judge even while holding the Appellant guilty for sexual assault and aggravated sexual assault upon the victims has failed to consider that the victims were liable to be compensated under the Sikkim Compensation to Victims or his Dependents Schemes, 2011. Accordingly, the Sikkim State Legal Services Authority is directed to pay an amount of Rs.50,000/- (Rupees fifty thousand) only each to the victims as compensation. The said amount of Rs.50,000/- (Rupees fifty thousand) only shall be kept in fixed deposit in the name of each of the victims payable to them on their attaining majority.

(Bhaskar Raj Pradhan)
Judge
24.09.2018