

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

DATED: 9th August, 2018

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

Crl. A. No. 38 of 2017

Appellant : Ram Krishna Jana,
Son of Jadu Pati Jana,
Resident of;
Ganga Sara, South Parganas,
West Bengal.
[At present State Central Prison, Rongyek, East Sikkim.]

versus

Respondent : State of Sikkim

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

Appearance:

Ms Navtara Sarda, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Thinlay Dorjee, Additional Public Prosecutor 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, J.

1. The Appellant is before this Court assailing the Judgment dated 30.10.2018, of the Court of learned Special Judge, Protection of Children from Sexual Offences (POCSO) Act, 2012, East Sikkim at Gangtok, in S.T. (POCSO) Case No. 19 of 2016. The Appellant having been convicted under

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Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act') was sentenced to undergo rigorous imprisonment for a period of 10(ten) years and to pay a fine of Rs.5000/- (Rupees five thousand) only, with a default clause of imprisonment vide the impugned Order on Sentence dated 31.10.2017.

2. The grounds raised before this Court are that the learned Trial Court failed to appreciate that "Sanu" uncle whose phone the Victim was playing with was in the same room where the offence was committed, despite which the Prosecution failed to cite him as a witness. Apparently, "Sanu" uncle did not wake up during the commission of the alleged incident or hear the cry of the prosecutrix, thereby lending suspicion to the veracity of the offence. Challenging the age of the Victim, it was contended that the birth certificate of the Victim was not furnished to establish that she was a child as defined under Section 2 of the POCSO Act. The Prosecution also failed to seize the School Admission register or other relevant records for this purpose. That apart, no certificate was produced from any corporation or municipal authority or for that matter no ossification test was conducted on the child. That, the medical report of the Victim reveals absence of spermatozoa in the vaginal wash sample finding corroboration in the evidence of PW-16, the Junior Scientific Officer of the Regional Forensic Science Laboratory, Saramsa, East Sikkim.

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In such circumstances, it is clear that the Prosecution has failed to prove its case beyond a reasonable doubt and hence, the Appellant ought to be acquitted of all charges.

3. The contra arguments raised by learned Counsel for the State-Respondent was that the evidence of the minor Victim suffices to establish the Prosecution case as is settled law. That, in the first instance, the Appellant has been identified as the assailant by the Victim who she referred to as 'lambu bhaiya'. The Victim unequivocally stated that the Appellant had on the relevant day inserted his finger into her vagina in the room of one "Sanu" uncle following which she screamed and cried. PW-2, the Victim's father, has stated that he and PW-3, the Victim's mother, were informed by PW-4 his brother-in-law that the Victim was bleeding from her private part. Later, the Victim confided to her mother about the incident which was duly corroborated by the evidence of PW-3, thereby clearly establishing that the Appellant had committed the sexual assault which led to the injury on the Victim. Laying emphasis on the evidence of PW-10, the Gynaecologist and Obstetrician who examined the Victim, it was contended that the injury on the Victim and the clinical findings of PW-10, reveal that the Victim was sexually assaulted by the Appellant. That, the evidence of PW-1 finds corroboration also in the evidence of PW-13, whom the Victim had confided to about the incident. PW-14, the Victim's elder brother also a minor,

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deposed that the Victim had told him that "lambu bhaiya" had inserted his finger into her vagina. The evidence of PW-16 confirmed that on examination of the Exhibits forwarded to him, *inter alia*, being MO-IV and MO-I, the half pants of the Appellant and the underwear of the Victim, respectively, human blood of the blood group 'AB' was detected, which was found to be the blood group of the Victim. Hence, the Prosecution has by cogent evidence established that the Appellant was the perpetrator of the offence, therefore, no error obtains in the impugned Judgment and Order on Sentence.

4. The rival submissions made at the Bar were heard at length and anxiously considered. The evidence and documents on record have been meticulously examined by us. What this Court is required to consider is whether the Conviction and Sentence handed out by the learned Trial Court is in accordance with law. In order to gauge this, we may briefly, for clarity, allude to the facts of the case.

5. PW-2, the Victim's father, on 17.07.2016 at 2200 hours lodged a written Complaint, being Exhibit-3, before the Pakyong Police Station, informing therein that during the day when he and his wife, PW-3, were not at home, the Appellant sexually assaulted the Victim aged about 5 years by inserting his finger into her vagina. Pursuant to Exhibit-3, Pakyong

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Police Station Case No. 15 of 2016 dated 17.07.2016 came to be registered against the Appellant, Ram Krishna Jana, under Section 376 of the Indian Penal Code, 1860 read with Section 4 of the POCSO Act. Investigation was taken up on the matter being endorsed to the Investigating Officer.

6. Investigation so conducted revealed that the Appellant aged about 23 years, a permanent resident of 24 Parganas, West Bengal, was working under the Simplex Infrastructures at Bhasmay, East Sikkim, and residing in a rented room in the house of PW-2, the Victim's father. On the relevant day, PW-2 and his wife PW-3, parents of the Victim, left their children at home, viz; the Victim and her two elder brothers and went to Rangpo. PW-4, the maternal uncle of the Victim, aged about 17 years who resided with the Victim's family also left the house to attend to his own chores. At around 1210 hours, two more children, PW-13 and PW-19, joined the children at their house. Left on their own, the children watched television and after a while PW-19 returned to her own home upon which PW-1 followed her with the intention of buying sweets. However, on reaching the first floor of her house she continued to play there alone. Finding the Victim alone, the Appellant who was also in the same floor of the building took her inside his room and sexually assaulted her by putting his finger into her vagina, thereby causing blunt trauma to the vulva and bleeding therefrom. The child went to

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urinate and on seeing blood coming out of her vagina informed her elder brother PW-12, that "lambu bhaiya" had inserted his finger into her vagina. PW-4, who in the meanwhile had returned home, telephonically informed PW-2 about the injury and bleeding. On reaching home and on enquiry by PW-3, the Victim told her mother that "lambu bhaiya" had inserted his finger into her vagina, hence charge-sheet was filed against the Appellant under Section 376 of the Indian Penal Code, 1860, read with Section 4 of the POCSO Act.

7. On consideration of the materials furnished before it, the learned Trial Court proceeded to frame charge against the Appellant under Section 5(m) of the POCSO Act, viz; commission of penetrative sexual assault on a child below twelve years of age, to which the Appellant pleaded "not guilty". The Prosecution in an effort to establish its case beyond a reasonable doubt examined twenty witnesses, following which the Appellant was afforded an opportunity to explain the incriminating circumstances appearing in the evidence against him, by examination under Section 313 of the Code of Criminal Procedure, 1973, to which he claimed innocence. The learned Trial Court pronounced the impugned Judgment and Order on Sentence on consideration and appreciation of the evidence on record, hence this Appeal.

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8. Turning our attention first to the question of the age of the Victim, admittedly the birth certificate or any other document pertaining to the age of the prosecutrix finds no place in the records of the case and admittedly, it was never seized by the police. However, it is the specific evidence of PW-2 and PW-3, the parents of the Victim that PW-1, their daughter, was aged five years old and was studying in a private school in UKG in Rangpo. On this, we may appropriately refer to ***Vishnu vs. State of Maharashtra***¹, wherein the Hon'ble Supreme Court held as follows;

"24. In the case of determination of date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother – PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW-1 and PW-13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated."

[emphasis supplied]

It is, thus, settled law that parents would give the best evidence of their child's age.

¹ 2006 Cri. L.J. 303

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9. Besides, on a meticulous examination of the evidence on record, it is seen that during cross-examination no questions were put to the parents to test the veracity of their evidence pertaining to the age of PW-1. The Appellant cannot now question their evidence before this Court. On this count, reliance can be placed in the decision in ***Sham Lal alias Kuldip vs. Sanjeev Kumar and Others***² below;

"**21.** One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:

"On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."

The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.

22. It has been held in *Dasondha Singh v. Zalam Singh* [(1997) 1 PLR 735 (P&H)] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit."
[emphasis supplied]

10. It is not the Appellant's case that the Victim was an adolescent thereby warranting a suspicion about her actual age. She is undoubtedly a child, aged about 5 years, a student of Upper Kindergarten and clearly falls within the ambit of

² (2009) 12 SCC 454

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Section 2 of the POCSO Act. The above discussions soundly quell any doubts regarding the age of the Victim.

11. So far as the identification of the Appellant as the assailant is concerned, the Victim has without vacillation identified him not only during the test identification parade held on 31.08.2016, vide Exhibit-16, but also proceeded to identify him in the Court Room and referred to him as "lambu bhaiya". PW-2 has testified that the Victim pointed out to the person as the assailant when he had called some people from the locality to ascertain the identity of the Appellant. The evidence of PW-3, PW-4, PW-12 and PW-14, also lend support to the fact that the Victim unerringly identified the Appellant as the person who had perpetrated the offence on her.

12. Turning to address the question raised by the Appellant that "Sanu" uncle was in the room when the act was committed, it would be essential to once again delve into the evidence of PW-1, the only person who can shed light on what happened at the relevant time. The witness has stated that on the relevant day the Accused came to the place where she was playing and took her to the room of one "Sanu" uncle and inserted his finger into her vagina. It is also her specific statement that she screamed and cried after which the Accused left the place. She went to the toilet to check her vagina and found that she was bleeding therefrom. She thus

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informed PW-4, her uncle (mama), and PW-12, her brother (bubu), about the incident. On being questioned by the Court, she would confirm that at the relevant point of time, the said "Sanu" uncle and "dariwala" uncle who used to reside there were not present in the room. The evidence of the Victim being cogent and consistent sets to rest the speculation that "Sanu" uncle was in the room. The only minor anomaly that arises in the Prosecution case is that PW-3 has stated that PW-1 informed her that one "Sanu" uncle was sleeping in his room when the Accused came and committed the offence. However, this statement does not vanquish the Prosecution case as the fact of assault has remained undisturbed. In any event, the incident occurred in July 2016 while the evidence was recorded in December, the same year. In this context, the Hon'ble Supreme Court held in **A. Shankar vs. State of Karnataka**³, 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."

[emphasis supplied]

³ (2011) 6 SCC 279

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13. The fact of the sexual assault by the Appellant has been asserted by the Victim. PW-3, the Victim's mother, came to learn of the incident from the Victim when she took her for a bath and noticed that a cloth had been placed on her private part which had blood. On enquiry from the Victim girl, the Victim was initially reticent about disclosing the cause of the bleeding but after sometime when she bled again and on being firmly questioned by PW-3, she narrated the incident to PW-3. There are no contradictions or exaggerations in the evidence of PW-1 with regard to the incident and the evidence of PW-1 and PW-3 are corroborative.

14. PW-12 and PW-14, the brothers of the Victim, while supporting the Prosecution case deposed that on the relevant day they remained at home watching television, while PW-1 left the house to play with PW-13 in the locality. After sometime, she returned crying saying that she was bleeding from her vagina. Both witnessed their Victim sister's bleeding upon which both of them along with PW-4 applied talcum powder to the bleeding portion which however did not stop. Consequently, PW-4 telephonically informed PW-2 of the said bleeding. According to PW-14, when their parents returned from Rangpo Bazaar, the Victim told them about the bleeding from her vagina, the cause being "lambu bhaiya" having inserted his finger therein. According to PW-19, the Victim's neighbour who is also a friend, on the relevant day after

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playing for sometime the Victim girl left for the nearby shop and returned after some time. She heard the screaming of the Victim girl from above her house and went to the house of the Victim to check the cause where she saw PW-1 bleeding from her vagina. As per PW-4, the Victim's Uncle, he returned home at around 1:30 p.m. to 2:00 p.m. and the Victim went to him crying and told him that she had been assaulted. She was bleeding from her private part after which he wiped the blood, changed her clothes and informed PW-2 of the injury and bleeding. The witness would further testify that the Victim informed PW-12, her elder brother, of the reason of the bleeding. PW-13, aged about 9 years, had on the relevant day gone to the Victim's house to watch television. The Victim who was not there then, returned after sometime crying. On enquiry as to why she was crying, PW-1 told her that she was bleeding from her private part and that 'lambu bhaiya" had inserted his finger therein. This evidence remained unruffled under cross-examination.

15. It would also be in the appropriateness of things to look into the evidence of PW-10, Gynaecologist and Obstetrician, who examined the Victim on 18.07.2016 the incident having occurred on 17.07.2016. The Victim had given the doctor the history of the Accused having inserted his finger into her vagina when she was alone at home. On examination, he found her underwear was soiled with blood

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which he handed over to the police. No injuries were detected by him on the body surface of the Victim. He would further note as follows;

"Fresh abrasions were noted on the inner aspect of the vulva on both sides. On the right side, the abrasion extended from 7 o'clock position to 11 o'clock position and on the left side, it extended from 1 o'clock to 4 o'clock position. Fresh bleeding was noted from the abrasions. Her hymen was intact, there were no injuries over thigh, groin and anal region.

.....
 clinical findings suggestive of blunt trauma to the vulva resulting in bleeding from the area."

He would also depose that blunt trauma to the vulva can be caused due to external manipulation but considering the age of the Victim, the injury on her vulva could not be self inflicted. On the basis of his medical examination, Exhibit-5, his report was prepared. Although, efforts were made under cross-examination to render the evidence unreliable and to disprove that the abrasions in the inner aspect of the vulva were fresh, his evidence withstood the said cross-examination.

16. PW-9, the Medico Legal Consultant at STNM Hospital, Gangtok, who examined the Appellant on 18.07.2016 at about 2:30 a.m., would identify MO-IV as the same half pant - dark green in colour with star patterns which belonged to the Appellant and which the doctor handed over to the police along with his penile swab, thereby establishing that MO-IV belonged to the Appellant.

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17. PW-16, the Junior Scientific Officer, examined the material objects forwarded to him from the office of the Sub Divisional Police Officer, Pakyong. On examining MO-VII, which was the blood sample of the Victim, he found her blood group to be 'AB'. MO-VIII, the blood sample of the Accused, was found to be of the blood group 'B'. On examining MO-I, the underwear of the Victim and MO-IV, the underwear of the Accused, he found that both garments tested positive for the blood group 'AB'. The evidence of this witness establishes that the Appellant had indeed violated the Victim by inserting his finger into her vagina. The argument of learned Counsel for the Appellant that no spermatozoa were found in the vaginal wash of the Victim is devoid of merit, as it is no one's case that the injury was caused due to penile penetration.

18. In the teeth of the evidence of the Prosecution witnesses discussed hereinabove and the consistency that emanates therefrom, no error obtains in the findings and conclusion of the learned Trial Court vide the impugned Judgment. Hence, the Judgment and Order on Sentence is upheld.

19. Appeal fails and is accordingly dismissed.

20. No order as to costs.

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21. Copy of this Judgment be transmitted to the learned Trial Court for information.

22. Records be remitted forthwith.

Sd/-
(Bhaskar Raj Pradhan)
Judge
09.08.2018

Sd/-
(Meenakshi Madan Rai)
Acting Chief Justice
09.08.2018

Index : Yes / ~~No~~
Internet : Yes / ~~No~~

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