

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 5th June, 2024

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

Crl.A. No.25 of 2023

Appellant : Phurba Lepcha

versus

Respondent : State of Sikkim

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

Appearance

Mr. Dewen Sharma Luitel, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Prosecution case that has led to the instant appeal is that, on 25-06-2021, Exhibit P-6/PW-6, the FIR was lodged by the Station House Officer of the concerned Police Station before the Learned Chief Judicial Magistrate, informing that when investigation was underway in another POCSO case (PS Case No.12 of 2021 dated 17-06-2021) where the Appellant had sexually assaulted a minor victim (PW-1 herein), the latter revealed that the Appellant had also inserted his genital into the mouth and anus of his younger sister. On such revelation, the minor victim PW-1 and his mother PW-4 were examined. It transpired that, the Appellant had come to their residence in an inebriated condition at about 9 p.m. on a particular day, three weeks prior to the lodging of the FIR (Exhibit P6/PW-6). PW-4 was cooking dinner with her husband PW-5, when the Appellant offered to help put their daughter, aged about three and half years, to sleep. PW-1 the brother, followed the Appellant and his sister to the room and witnessed the

Appellant committing the aforesaid act. That, the minor victim reportedly cried out in pain upon which the couple rushed to their room where PW-1 narrated the incident to them. Although PW-4 attempted to strike the Appellant, PW-5 restrained her. An FIR dated 25-06-2021 under Section 377 of the Indian Penal Code, 1860 (hereinafter, "IPC") read with Sections 4/6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act") was registered against the Appellant and endorsed to PW-7 for investigation, on completion of which Charge-Sheet was filed against the Appellant under the aforementioned Sections.

2. The Learned Special Judge (POCSO Act, 2012), East Sikkim, at Gangtok, framed Charge against the Appellant under Section 5(m)/6 of the POCSO Act, Section 5(l)/6 of the POCSO Act, Section 376AB of the IPC, Section 376(2)(n) of the IPC and Section 377 of the IPC. On closure of the evidence of the seven Prosecution witnesses, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C."), and the opposing arguments of the Learned Counsel for the parties heard. Analysing the evidence on record, the impugned Judgment was pronounced convicting the Appellant under Section 5(m) punishable under Section 6 of the POCSO Act. He was sentenced to undergo rigorous imprisonment for twenty years and to pay a fine of ₹ 5,000/- (Rupees five thousand), only, with a default stipulation of incarceration. He was acquitted of the charges under Sections 376AB, 376(2)(n) and 377 of the IPC.

3. Assailing the Judgment and Order on Sentence, it was submitted by Learned Counsel for the Appellant that the case came to light only on account of the statement of PW-1 made in relation to a criminal case in which he was the victim and the perpetrator

was the same Appellant. Although it is the Prosecution case that the infant, who was the victim, cried out when the Appellant inserted his genital into her mouth and anus and the parents PWs 4 and 5 came running to the scene of the incident, no FIR was lodged by them at the relevant time. That, PW-1 in his evidence has merely stated that the Appellant had inserted his fingers into the anus of the infant, however PW-4 has said that PW-1 told her that the Appellant had removed their daughter's frock, rubbed his hands all over her body and that the victim was bleeding from her vagina. When PW-4 went into the room she found her child in a state of panic while the Appellant had already left the room. That, the evidence of PW-4 and PW-1 do not corroborate. On the other hand, PW-5 stated that the Appellant had touched and played with their daughter's genital. Consequently, in the absence of consistency in the Prosecution case, the Appellant deserves an acquittal.

4. Resisting the arguments advanced, Learned Additional Public Prosecutor submitted that there was no reason for PW-1 to have conjured up a false case against the Appellant and the evidence of PWs 1, 4 and 5 being consistent, the impugned Judgment deserves to be upheld.

5. We have given due consideration to the submissions put forth by Learned Counsel for the parties. The evidence on record has been carefully examined by us.

6. The question that falls for determination is, Whether the Appellant is guilty of the offences he is charged with?

7. The Learned Trial Court discussed the evidence of PWs 1, 2 and 5 and observed that the accused had inserted his finger inside the victim's anus as witnessed by PW-1. That, although PW-

1 in his Section 164 Cr.P.C statement had stated that the Appellant had inserted his penis inside the victim's mouth and anus, however before the Court he stated that he had put his finger inside the anus which was not decimated in the cross-examination. The minority of the age of the victim was not doubted considering that the birth of the victim girl was registered on 04-05-2019, vide registration No.581, in the Live Birth Register of the Births & Deaths Cell, as deposed by PW-3. Her date of birth was 21-04-2019. We are not in disagreement with the finding of the Learned Trial Court regarding the age of the victim.

8. The victim in the instant case was thus alleged to be a three and a half year old girl child. She was not examined as a Prosecution witness as the Learned Trial Court vide its Order dated 07-12-2021, opined that, though the witness was present she was seen to be of tender age and as such unable to give any statement before the Court. Her brother PW-1 was examined in her stead as requested by their mother.

9. PW-1 is a nine year old boy, he was the victim in Sessions Trial (POCSO) Case No.27 of 2019 (arising out of PS Case No.12 of 2021 dated 17-06-2021), in the POCSO Court, Gangtok. The incident relating to the instant FIR allegedly took place in the year 2021, when the alleged victim, sister of PW-1 was about three and half years old. No complaint was filed before any authority by PW-4 and PW-5, the parents of the child nor was the incident disclosed to anyone by them or PW-1. It was only on 22-06-2021 during the recording of the statement of PW-1 under Section 164 Cr.P.C. before the concerned Learned Judicial Magistrate, East Sikkim, at Gangtok, in connection with PS Case No.12 of 2021 (*supra*), that PW-1 made the statement about the alleged sexual

assault on his baby sister. The evidence of PW-1 and PW-5 (victim's father) do not corroborate with that of PW-4 (victim's mother). According to PW-1, the Appellant had put his fingers in the anus of his younger sister, PW-5 stated that PW-1 told him that the Appellant had touched and played with his daughter's genital and the evidence of PW-4 exacerbated the entire incident by stating that as per PW-1 the Appellant had removed her daughter's frock and touched her all over her body and that she was bleeding from her vagina. She also found that her minor daughter was unable to speak and was in a state of panic.

10. That evidence of PWs 1, 4 and 5 does not inspire the confidence of this Court. The witnesses have given different versions of the alleged sexual assault on the minor child and, in our considered opinion, a child of three and half years would barely be able to understand the import of a person touching her private part, how she would be in a state of panic having comprehended that it was a sexual assault, is indeed astonishing and unbelievable.

11. As noted by Learned Trial Court, the medical evidence obviously would be of no consequence, considering that, the offence took place three weeks prior to the lodging of the FIR. The allegation of the offence appears to be an afterthought, in light of the vacillating evidence as already discussed, which cannot be relied upon to reach a conclusion of conviction. The evidence of PWs 1, 4 and 5 does not inspire the confidence of this Court to conclude that the Prosecution has proved its case beyond all reasonable doubt.

12. In light of the facts and circumstances, we are of the considered opinion that the Prosecution has failed to attain the bar

set for to it to prove its case beyond reasonable doubt. We are conscious and aware of the provisions of Section 29 of the POCSO Act, 2012, however, we cannot loose sight of the fact that the evidence does not establish even the probability of the offence having been committed. In any event, it is not the statement of the alleged victim that she was subjected to sexual assault.

13. Consequently, Appeal is allowed.

14. The conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

15. The Appellant is acquitted of the offence under Sections 5(m)/6 of the POCSO Act.

16. He be set at liberty forthwith if not required to be detained in any other case.

17. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

18. No order as to costs.

19. Copy of this Judgment be forwarded to the Learned Trial Court for information along with its records.

20. Copy of this Judgment also be forwarded to the Jail Authority at the Central Prison, Rongyek, by e-mail for information and necessary steps along with a soft copy to the Jail Superintendent for making it over to the Appellants /Convicts.

(Bhaskar Raj Pradhan)
Judge
05-06-2024

(Meenakshi Madan Rai)
Judge
05-06-2024

Approved for reporting : **Yes**