



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 12th 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.03 of 2023

Appellant : Ram Bahadur Subba @ Tawkey

versus

Respondent : State of Sikkim

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

Appearance

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

Mr. S. K. Chettri, Additional Public Prosecutor for the State-
Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The victim, a ten year old child was allegedly subjected to penetrative sexual assault four times by the Appellant, a fifty-three year old man, in March, 2020. Her mother at the relevant time was ailing and hospitalised and her father was tending to her. On 08-05-2020, PW-2 the father of the victim on coming to learn of the sexual assault from PW-6 the child's grandmother, lodged Exhibit 2 the FIR, stating the afore-mentioned facts and seeking early legal relief.

2. The investigation of the case was taken up by PW-16 the Investigating Officer, who submitted Charge-Sheet against the Appellant under Sections 376/354 of the Indian Penal Code, 1860 (hereinafter, "IPC"), read with Sections 6/8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act"). The Learned Trial Court framed Charge against the Appellant under Section 5(I) of the POCSO Act for committing



aggravated penetrative sexual assault repeatedly on the minor victim, under Section 5(m) of the POCSO Act, for committing aggravated penetrative sexual assault on a child below 12 years of age and under Section 5(n) for committing aggravated penetrative sexual assault on the child being a relative of the Appellant through blood or adoption or marriage. The penalty for all the offences *supra* are prescribed under Section 6 of the POCSO Act. Charge was also framed against the Appellant under Sections 376(2)(n), 376(3) and 354 of the IPC.

(i) The Appellant pleaded "not guilty" to all of the charges framed against him and on his claim for trial, the Prosecution examined sixteen witnesses to establish its case. The Learned Trial Court on examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C."), hearing the opposing arguments of the Learned Counsel for the parties and analysing the evidence on record, convicted the Appellant vide the impugned Judgment, dated 20-12-2022, under Section 5(l) and Section 5(m) punishable under Section 6 of the POCSO Act and under Sections 376(2)(n) and Section 376(3) of the IPC.

He was acquitted of the offence under Section 5(n)/6 of the POCSO Act and under Section 354 IPC.

(ii) By the Order on Sentence dated 21-12-2022, the Appellant was sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of ₹ 3,000/- (Rupees three thousand) only, for the offence under Section 5(l)/6 and 5(m)/6 of the POCSO Act and Section 376(3) of the IPC, each, with default stipulation. For the offence under Section 376(2)(n) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of



ten years and to pay a fine of ₹ 3,000/- (Rupees three thousand) only, and default clause of imprisonment. All the sentences were ordered to run concurrently setting off the period of incarceration undergone during investigation and trial.

3. Learned Counsel for the Appellant before this Court contended that, the FIR was lodged after a delay of ten days from the date of the alleged incident with the delay remaining unexplained. The person who scribed the FIR Exhibit 2, one Nanda Lal Limboo was not examined as a Prosecution witness, therefore, the FIR remained unproved. The signature of the Complainant on Exhibit 2 was not proved and the procedure prescribed under Section 154 of the Cr.P.C. for filing an FIR was not followed. The age of the victim has not been established as Exhibit 7 the Birth Certificate was not proved. Consequently, the case of the Prosecution fails and the Appellant ought to be acquitted.

4. Learned Additional Public Prosecutor *per contra* submitted that in **Ash Bahadur Subba vs. State of Sikkim**¹ this Court has held that the FIR is not substantive evidence and that even if the FIR is not proved, it would not be a ground for acquittal as the case would depend upon the weight of the Prosecution evidence. The delay in lodging the FIR was due to the fact that the wife of PW-2, the mother of the victim passed away on 18-04-2020 and he was pre-occupied with her death rites and rituals up to 10-05-2020. That, the Prosecution by cogent and consistent evidence has established the fact of penetrative sexual assault perpetrated by the Appellant on the victim, hence the impugned Judgment and

¹ 2022 SCC OnLine Sikk 42



Order on Sentence passed by the Learned Trial Court ought 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. Was the Appellant guilty of the offences charged with, this question requires determination by this Court.

7. PW-1 at the time of her deposition before the Learned Trial Court, on 02-03-2021, was aged about 11 years. At the time of the offence, she was allegedly 10 years of age. The Learned Trial Court put questions to the victim in terms of Section 118 of the Indian Evidence Act, 1872 and found her competent to testify. The victim categorically testified that the Appellant had taken her to a room where they harvest Mushrooms, opened his pants and made her open her's as well, after which, he committed penetrative sexual assault on her. According to her, the Appellant repeated the acts of penetrative sexual assault upon her on more than one occasion. Later, she narrated the incident to PW-5, who in turn informed the child's grandmother PW-6, who informed the victim's father PW-2. The victim identified Exhibit 1 as her statement under Section 164 Cr.P.C. This statement made by the victim was not demolished under cross-examination. She had stated therein as follows;

".....
Ram Bahadur Subba is a relative of mine and he lives a little further away from our home. My Mother expired at Gangtok this year. He raped me four times. First it happened at the Mushroom growing hut. Second time in the kitchen of my house. Third time below the kitchen. Fourth time in my Mother's room. Each time he put his "short garne into my short garne" (he put his penis into my vagina). I then told Pratima and Pranita Didi. They told my Maily Phupu, Sumitra Limbu. She then told my Kakas, Ram



Kaka and Laxuman Kaka. Phupu also told maternal Boju. My Papa also came to know from Boju.
.....”

The Learned Judicial Magistrate has recorded that “*The statement is read over to the witness in Nepali which she admits to be correct.*” Indeed, the statement made under Section 164 Cr.P.C. is not substantive evidence and is to be used for the purposes of corroboration and a contradiction. On examining her deposition made before the Learned Trial Court, it is clear that her statement under Section 164 Cr.P.C. is corroborative of the fact that the Appellant committed penetrative sexual assault on her in the Mushroom cultivating hut. That, the penetrative sexual assault was perpetrated upon her by the Appellant on more than one occasion.

(i) The evidence of PW-5 corroborates the evidence of PW-1 to the extent that PW-1 told her of the penetrative sexual assault perpetrated on her by the Appellant. According to PW-5, her sister PW-3 was also present when PW-1 disclosed such details, thereupon they informed their paternal aunt about the incident.

(ii) PW-3 has corroborated the evidence of PW-1 and PW-5 and stated that she saw the victim talking to PW-5 and after some time PW-5 told her that the Appellant had committed penetrative sexual assault on PW-1. The victim also revealed that the Appellant had committed penetrative sexual assault on her three-four times and described the various places where the assault took place.

(iii) PW-6 the grandmother of the victim was declared hostile by the Prosecution, nonetheless on her cross-examination by the Prosecution, she corroborated the evidence of PW-3 and PW-5 and deposed that the victim had told her about the penetrative sexual assault she was subjected to by the Appellant.



(iv) PW-10, a thirteen year old child, stated that after the death rites of her grandfather when PW-1 was playing with PW-10 she told her that the Appellant had raped her.

(v) PW-4 stated that he went to attend the death rites of the wife of PW-2, he witnessed the minor victim behaving abnormally and requested her guardian to bring her to the District Hospital for medical check up. Her uncle "R" (PW-7) took the victim to the Hospital after 10-15 days, where on medical examination of PW-1, the concerned Doctor told PW-7 that the victim was subjected to sexual assault.

(vi) PW-13 is a designated Adolescent Counsellor, posted at the concerned District Hospital. The minor victim was her patient and she was referred to PW-13 by the Psychiatrist at the District Hospital. On 18-05-2020, she had counselled the minor victim. She was found to be suffering from anxiety and palpitations. The victim gradually revealed to PW-13 that one old man, who was distantly related to her and helped her father in his chores used to sexually assault her and he had done so several times.

(vii) PW-15 the Doctor, examined the minor victim on 27-05-2020 after she received a requisition for the examination of the victim. Her examination is as follows;

".....

4. On her examination, she was conscious, cooperative, oriented. There is no pallor iterus (her haemoglobin was normal), no jaundice, afebrile. Pulse rate – 86 per minute. SPO2 – 96%. Pupils – bilaterally reacting to light. Systemic examination: CVS, CNS, RS, PA – no abnormality detected. Per vaginal examination: no signs of bleeding or laceration. Labia majora and minora normal. Vaginal walls are loose.

5. Impression: **There are signs of past sexual intercourse.** There are no



injuries on external examination. I advised her for Hepatitis A, Hepatitis B, C, HIV and Syphilis test.
.....” [emphasis supplied]

The Doctor medically examined the Appellant, a fifty-three year old man and on his systemic examination detected no abnormalities. She opined that he was capable of performing sexual intercourse.

(viii) PW-2 the Complainant, came to learn of the incident from PW-6 his mother, who told him that she had been informed by her cousin of the penetrative sexual assault perpetrated upon PW-1 by the Appellant. He identified Exhibit 2 as the FIR lodged by him which was scribed by his friend.

8. Having meticulously examined the evidence on record, we find that it is an open and shut case of penetrative sexual assault perpetrated on the hapless child by the depraved Appellant. Although she failed to specify the number of times that she was raped by the Appellant in her deposition in the Court, however, it is clear that the sexual assault was perpetrated on her repeatedly, as appears from Exhibit 1 and from the statement made by her to PWs 3 and 5. It is also evident from the deposition of the Counsellor that the child was traumatised to such an extent that she had signs of mental health issues after the sexual assault.

9. The Learned Trial Court on carefully examining the entire evidence on record observed that the Appellant took advantage of the situation in which the Complainant, i.e., the father was tending to his ailing wife and sexually assaulted the victim who was merely 10 years old. It was also observed that considering her age it could be presumed that the victim could not comprehend the events till the time she started feeling uncomfortable and then narrated the incident. It was also



observed that the Prosecution witnesses had proved beyond reasonable doubt that the Appellant was the perpetrator who committed penetrative sexual assault upon the victim. That, the Appellant was given a chance to rebut the allegations and to place his evidence before the Learned Trial Court under Section 313 Cr.P.C., but no justification was given by the Appellant.

10. While considering the arguments advanced regarding the delay in the lodging of the FIR (*supra*) the Supreme Court in ***State of Himachal Pradesh vs. Prem Singh***², has held that;

"6. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR."

The delay in the instant matter has been sufficiently explained, as emanates from the arguments of Learned Additional Public Prosecutor.

11. The argument that the FIR was not proved is untenable as PW-2 identified the FIR and was aware of its contents as appears from his deposition. Even assuming that the FIR was unproved it does not qualify as substantive evidence. In ***Krishna Mochi and Others vs. State of Bihar***³ the Supreme Court held as follows;

"35. It has been further submitted that the informant, Satendra Kumar Sharma has not been examined as such, the first information report cannot be used as a substantive piece of evidence inasmuch as on this ground as well the appellants are entitled to an order of acquittal. The submission is totally misconceived. **Even if the first information report is**

² (2009) 1 SCC 420

³ (2002) 6 SCC 81



not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the prosecution. Therefore, non-examination of the informant cannot in any manner affect the prosecution case." [emphasis supplied]

12. The evidence furnished by the Prosecution witnesses has led to the unerring conclusion of the commission of the offence, which has undoubtedly scarred the child for life, compounded with mental trauma.

13. In view of the cogent and consistent evidence of the victim corroborated by other Prosecution witnesses as discussed and the medical evidence, we are of the considered opinion that the Prosecution has established its case beyond all reasonable doubt and there is no reason for us to differ from the findings of the Learned Trial Court.

14. Consequently, the impugned Judgment is upheld as also the Order on Sentence.

15. Appeal dismissed and disposed of accordingly.

16. No order as to costs.

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

18. 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 Appellant /Convict.

(Bhaskar Raj Pradhan)
Judge
12-06-2024

(Meenakshi Madan Rai)
Judge
12-06-2024

Approved for reporting : **Yes**