IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Crl. A. No. 11 of 2019

Bir Bahadur Limboo
Khecheopalri,
West Sikkim,
at present State Central Prison,
Rongyek, East Sikkim

... Appellant

Versus

State of Sikkim.

... Respondent

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For the appellant : Mr. Gulshan Lama, Advocate (Legal Aid Counsel)

For the respondent: Mr. S.K. Chettri, Addl. Public Prosecutor, Sikkim

Date of hearing : 23.10.2020

Date of judgment : 03.11.2020

JUDGMENT

(*Arup Kumar Goswami, CJ*)

Heard Mr. Gulshan Lama, learned Legal Aid Counsel appearing for the appellant and Mr. S.K. Chettri, learned Additional Public Prosecutor, Sikkim appearing for the respondent.

2. This appeal is directed against the judgment dated 27.03.2019 passed by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012, (POCSO Act), East District, in Sessions Trial (POCSO) Case No. 7 of 2017 convicting the appellant under Section 3 (a)/4 of POCSO Act, 2012 and Section 376 (l) IPC and the order of sentence dated 28.03.2019 whereby the appellant was sentenced to suffer SI for a period of 7 years and fine of Rs.10,000/- under Section 3 (a) punishable under Section 4 of the POCSO Act, in default of payment of fine,

to undergo SI for two months and to suffer RI for a period of 7 years and fine of Rs.10,000/- under Section 376 (l) IPC, in default of payment of fine, to undergo SI for two months.

3. It is to be noted at the very outset that for an offence under Section 376(1) IPC, except for an offence under Section 376(2) IPC, minimum punishment prescribed is rigorous punishment which shall not be less than ten years. However, the learned trial court inexplicably sentenced the appellant with RI for seven years while convicting him under Section 376(1) IPC. It is impermissible in law to award sentence which is less than the statutorily prescribed punishment.

4. The sentences were directed to run concurrently and the period of imprisonment already undergone during the investigation and trial was set-off. By the aforesaid judgment, the victim was also granted compensation of Rs.1.00 lakh under the Sikkim Compensation to the Victims or its Dependants Scheme, 2011.

5. The father of the victim girl, who will be referred to as 'X' whenever required, lodged a first information report(F.I.R) on 26.02.2017 before the Officer-in-Charge, Singtam Police Station stating that his daughter, 'X', who is aged about 16 years, was sexually assaulted by the accused/appellant in Rangrang jungle at around 11.00 a.m. on that date and the said incident was witnessed by three boys, namely, Bharat Adhikari, Jainarayan Adhikari and Diwas Bhattarai of the same village. Based on the aforesaid F.I.R (Exhibit-6), Singtam Police Station Case No. 10 of 2017 was registered under Section 376 IPC read with Section 4 of the POCSO Act against the accused/appellant and the case was entrusted to one Vijay Basnett for investigation. After investigation was over, finding that a prima facie case has been established under Section 376 IPC read with Section 4 of the POCSO Act, 2012, charge-sheet was filed on 24.05.2017.

6. Learned Special Judge, POCSO Act, 2012, after hearing the parties and on consideration of materials on record framed charges under Section 4 of the POCSO

Act, 2012 and Section 376 (1) of IPC. Charges being read over, the accused pleaded not guilty and claimed to be tried.

7. During trial, the prosecution had examined 15 witnesses while the defence adduced no evidence. In his statement under Section 313 Cr. P.C., the accused had not set up any specific plea.

8. Mr. Gulshan Lama, learned Legal Aid Counsel has submitted that the prosecution has failed to establish that the alleged victim was a minor girl. He contends that the Birth Certificate (Exhibit-2) was not proved in accordance with law. In this connection he relies on a Division Bench Judgment of this Court dated 25.10.2017 in ***Crl. A. No. 08 of 2017*** (***Lal Bahadur Kami vs. State of Sikkim***). He submits that even the father and mother of the victim girl, in their cross-examination, had admitted that they did not know the date, month and year of birth of their daughter. He submits that the three persons whose names were mentioned in the FIR were examined as PW-3, PW-4 and PW-11, respectively, and if their evidence is considered in its entirety, the same would, at the most, point towards a consensual act. The seized underwear and the penile swab of the accused were subjected to forensic examination in the Regional Forensic Science Laboratory (RFSL) and PW-5, an Analyst in RFSL, in her evidence has stated that no blood, semen or any other fluid were detected and the same belies the prosecution case totally in as much as the victim girl was having menstrual cycle and if there was any penetration, there surely would have been some tell-tale sign of blood. Accordingly, he submits that the accused/appellant is entitled to acquittal. He also relies on a decision of the Hon'ble Supreme Court in the case of ***Sadashiv Ramrao Hadbe vs. State of Maharashtra and another***, reported in ***(2006) 10 SCC 92***.

9. Mr. S.K. Chettri, learned Additional Public Prosecutor, while supporting the judgment, contends that there is no reason to disbelieve the evidence of PW-1, the victim girl. He relies on a Division Bench Judgment dated 11.09.2019 of this Court

passed in Crl. A. No. 12 of 2018 (***Padam Kumar Chettri vs. State of Sikkim***) to contend that the Birth Certificate, Exhibit-2 was duly proved.

10. The evidence of PW-1 clearly demonstrates that the accused had forcefully committed penetrative sexual assault on her and as such no interference is called for with the impugned judgment and the appeal is liable to be dismissed, Mr. Chettri submits.

11. I have considered the submissions of the learned counsel for the parties and have perused the materials on record.

12. PW-1 deposed that she had seen the accused occasionally prior to the incident which happened while she was studying in class VII. Day of incident being a holiday she was going to the house of one of her friends by taking a village footpath which was passing through a jungle and the accused, by suddenly appearing, forcibly took her towards Rangrang Khola, removed her skirt and underwear, removed his own pant and thereafter, forcefully laying her on the ground had committed penetrative sexual assault. She further stated that she cried for help and on hearing her cries, the persons named in the FIR (who were examined as PW-3, PW-4 and PW-11), whom she called 'dada' (elder brother), reached there and on seeing them the accused left her. The accused was assaulted by PW-3, PW-4 and PW-11 and they had taken them to her house. On reaching home, she narrated the incident to her parents, who took her to Singtam Police Station from where she was referred to the District Hospital, Singtam for medical examination. She also stated about recording of her statement under Section 164 Cr. P.C. (Exhibit-1).

13. PW-2 and PW-8 are the witnesses of Seizure Memo (Exhibit-3), by which the Birth Certificate (Exhibit-2) of PW-1 was seized.

14. PW-3 stated that while he, Bimal, Bharat (PW-11) and Jainarayan (PW-4) were chit-chatting, PW-4 left for his house and after sometime PW-11 received a

call from PW-4 telling him that he had seen the accused in a compromising position with PW-1 behind the local school and as they had heard earlier that the accused had misbehaved with the victim girl they decided to follow the accused and the victim girl. Accordingly, he and PW-11 came down, met PW-4 and they looked around for the accused and the girl and finally found them in a compromising position near a big boulder on the riverside. Both of them were nude and the accused was committing penetrative sexual assault on PW-1. On being asked to wear their clothes they put on their clothes and immediately after wearing her clothes the victim girl had run away from the spot. The accused was caught by him and he had asked PW-4 to run after the girl and to catch her. Thereafter, both of them were taken to the house of victim and he had made a call to the In-charge, Makha Police Outpost regarding the incident. While they reached the house of the victim, the victim's father was only present and subsequently, the mother had also arrived. After some time, the In-charge, Makha Police Outpost along with police personnel came there and after making some preliminary enquiries the police took the victim, accused and the victim's father with them.

15. PW-4 deposed that he, after having chatted with PW-3 and PW-11, had left for his house and while proceeding towards his house, he saw the accused holding the victim girl close to him near the school. He called PW-11 and asked them to come down to school. Accordingly, they arrived near the school but the accused and the victim were not to be found there and as such they started looking for the accused and victim and finally found them in a compromising position at Rangrang Khola near a big boulder on the river side. Both of them were nude and the accused was committing penetrative sexual assault on the victim. They asked them to put on their clothes and as the victim had run away immediately after putting her clothes, he ran and caught hold of her. In the meanwhile PW-3 caught hold of the accused. He deposed that they took the victim and accused to the house of the victim. He also narrated the events in the house of the victim as stated by PW-3.

16. PW-5 is the Analyst and Assistant Chemical Examiner in the RFSL. She stated that blood, semen and any other fluid were not detected in Exbt. BIO 287 A (MO II) and Exbt. BIO 287 B (MO III) . Exbt. BIO 287A (MO II) is the underwear of the accused, marked as Exhibit-A by police and Exbt. BIO 287B (MO III) is the penile swab of the accused collected in two cotton clothes, marked as Exhibit-B by police.

17. PW-6 was the Station House Officer of Singtam Police Station on the relevant date when the FIR was filed by the father of the victim and he had registered the case.

18. PW-7 is the Judicial Magistrate who had recorded the statement of PW-1 under Section 164 Cr. P.C.

19. PW-9 is the father of PW-1. He stated that PW-1 was 16 years at the time of the incident and the accused is a fellow villager. He stated that three boys of the village brought his daughter and the accused to their house and they told him that they had personally seen the accused committing sexual assault on his daughter and accordingly, he had filed the written complaint (Exhibit-6). He had handed over the Birth Certificate (Exhibit-2) of PW-1 to the police.

20. PW-10 is a Gynecologist, posted at the relevant time in the District Hospital, Singtam, who had examined PW-1 at around 4.15 p.m. on 26.02.2017. She deposed that the undergarment worn by the victim was blood-stained and she had handed over the same to the police. She also deposed that victim was having menstrual cycle. She deposed that although there was no sign of use of force, she reserved her final opinion pending availability of FSL Report.

21. PW-11 deposed that PW-4, who had left their company a little earlier, informed over telephone that he had seen the accused along with the victim girl in a compromising position and asked them to come down to the spot where the accused and victim girl were found. By the time they reached there, the accused

and the victim had left the spot and as such they started looking for them and ultimately they found the accused committing sexual intercourse on PW-1 underneath a big boulder. On seeing them they arranged their clothes and they took both of them to the house of the victim girl. He deposed that on instruction of one elderly person present at the residence of the victim, Makha Police Outpost was informed and police accordingly came to the residence of victim girl and took them to Makha Police Outpost. He deposed that they had also accompanied them.

22. PW-12, who is the mother of the victim girl, stated that her daughter was 16 years old at the time of offence and she was studying in Class VII. She stated that on the fateful day her daughter told her that she was going to a friend's house and when she returned back home she found her husband with PW-3, PW-4 and PW-11 along with the accused. PW-3, PW-4 and PW-11 told her that the accused and victim girl were located by them at Rangrang Khola and the accused was found to be committing sexual assault on her daughter. On being asked, the girl confirmed the incident and stated that she was forcefully taken to the Rangrang Khola and the accused had committed sexual act on her. Thereafter, all of them had gone to the police station to lodge a complaint and accordingly, her husband had lodged a complaint at Singtam Police Station.

23. PW-13 was posted as a Medical Officer at Dikchu Primary Health Centre (PHC) and was also functioning as the Registrar, Births and Deaths at Dikchu PHC. She deposed that on a requisition (Exhibit-14) received from the IO of the case for authentication of the Birth Certificate issued by the Dikchu PHC vide Registration No. 169/01 in favour of the victim girl, she had verified the Birth Certificate with the register maintained by the Dikchu PHC and finding that the Birth Certificate was genuine and correct based on the records maintained there had issued a certificate (Exhibit-15) to that effect. In her cross-examination, she admitted that in Exhibit-2 the surname of the victim girl did not tally. She also admitted that the birth register is not part of case record.

24. PW-14 is the Medical Officer posted at District Hospital Singtam, who, on 26.12.2017 at around 03.40 p.m., had medically examined the appellant. On such examination he had found bruise and swelling on bridge of nose with bleeding from left nostril, bruise and swelling of lower lip, pain and tenderness over left thigh, pain and tenderness over right knee. He noticed no injuries on his private parts and found that he is capable of having sexual intercourse, which was confirmed by the appellant himself.

25. PW-15 is the I.O who had conducted investigation and had submitted the charge-sheet.

26. It would be appropriate to first take up the issue regarding the age of PW-1. In ***Lall Bahadur Kami*** (supra), it was observed at paragraph 20 as follows:

> *" 20. This Court is conscious and aware that the Birth Certificate of the Victim gains precedence over every other document as proof of age, however, we may beneficially refer to the Judgments hereinabove and hold that the entry in the Birth Certificate can be sought to be substantiated by entries made in the Births and Deaths Register, duly entered on the instructions of the parents or legal guardians. Such a Register is admittedly maintained in the Dentam Primary Health Centre, where Exhibit-4 was prepared but was not produced for the perusal of the learned Trial Court for unexplained reasons. We are, thus, constrained to hold that the evidence furnished casts a shadow on the probative value of Exhibit 4, thereby rendering it unfit for consideration."*

27. In the instant case though PW-13 stated to have verified the Birth Certificate of PW-1 from the Births and Deaths Register maintained by the PHC, the Register was not produced. According to PW-13, in Exhibit-2, the surname of the victim girl did not tally. It is not very clear from the judgment rendered in ***Padam Kumar Chettri*** (supra) as to whether the Register was produced before the Court. Therefore, following the judgment rendered in ***Lall Bahadur Kami*** (supra), which is directly on the point, it is held that Exhibit-2 cannot be relied upon for the

purpose of determining the age of PW-1. In this connection, it would also be relevant to note that PW-9 and PW-12, father and mother of the victim girl, respectively, in their cross-examination had stated that they do not remember the date, month and year on which their daughter was born. PW-12, however, stated that her daughter is 16 years old. What transpires from the above is that the parents could not even remember in which year PW-1 was born. Merely saying that the daughter is 16 years old will not make the daughter 16 years old when they cannot even recall the year in which the daughter was born. In view of the state of affairs on record regarding age of PW-1, I am of the considered opinion that the prosecution has failed to establish that PW-1 was a minor on the date of incident.

28. PW-1 sought to portray a picture that the accused had suddenly appeared and had taken her to a secluded place and thereafter had forcibly committed penetrative sexual assault on her. It is her version that she cried for help and on hearing her cries PW-3, PW-4 and PW-11 had reached there and had rescued her. PW-3 and PW-4, however, categorically stated that they did not hear any sound for help negating the version of PW-1.She stated that the accused had removed her skirt and underwear. However, in her statement under Section 164 Cr. P.C. she had stated that the accused had removed her pant. PW-4, who was the first witness to have seen the accused and the victim girl together, had stated that he had seen the accused holding the girl close to him with his arms near the school. PW-11, to whom the call was made by PW-4 in connection with the accused and the victim girl being found together, in his cross-examination, stated that PW-4 had told him that the accused and the victim were sitting beside the school. Their version belies the statement of PW-1 that the accused had suddenly appeared and dragged her to the river side. By the time PW-3, PW-4 and PW-11 had reached the school, the accused and the victim girl were no longer there. They tried to find the accused and the victim girl and finally found them near Rangrang Khola.

29. While PW-3 and PW-4 stated that they found the accused and the victim girl in nude condition, it has come out from evidence of PW-11 that the accused and

the victim girl were clothed below their waist and they had only arranged their clothes. He also admitted that he did not witness the incident of sexual act. PW-3, PW-4 and PW-11 were admittedly together and there is material contradiction with regard to witnessing the alleged penetrative sexual assault and in what state they were found. However, PW-3, PW-4 and PW-11 were unanimous that the victim girl did not tell them anything in connection with the incident.

30. PW-9, the father of the girl also stated that his daughter did not tell him anything with regard to the incident even when he had enquired regarding the incident. PW-12 had stated that on being enquired PW-1 had told her about the incident. PW-12 was together along with PW-3, PW-4, PW-9 and PW-11 and none of them had deposed that PW-12 had made any enquiry with PW-1.

31. In ***State of Himachal Pradesh vs. Manga Singh***, reported in ***(2019) 16 SCC 759***, the Hon'ble Supreme Court had stated as follows;

> *"10. The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration is required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix."*

32. In ***Sadashiv*** (supra), finding that the version given by the prosecution is unsupported by any medical evidence and the whole surrounding circumstances belie the case set up by the prosecutrix, the Hon'ble Supreme Court had acquitted the accused on benefit of doubt.

33. The appellant was taken to the police station from the residence of PW-1, where they were taken to straight from the place where the appellant and PW-1 were found. Penile swab and underwear worn by the appellant were collected by

PW-14 on that very day of the incident at around 4.20 p.m. The appellant had no opportunity to change the underwear and to have a wash. In these circumstances the evidence of PW-5 that blood, semen and any other fluid were not detected in the penile swab and the underwear of the accused assumes significance as the victim girl was having menstrual cycle.

34. The evidence of PW-3, PW-4 and PW-11, at whose instance the whole episode came to light, does not lend assurance to the evidence of PW-1 that the accused, by suddenly appearing had forcefully taken her away to a secluded place for committing penetrative sexual assault. It is also difficult for this Court to accept that PW-3 and PW-4 had witnessed the penetrative sexual assault committed by the accused on PW-1, as there are contradictions on material aspects with regard to the evidence of PW-3 and PW-4 with that of PW-11. What, however, is established on record from their evidence is that the accused and PW-1 were found in an intimate position.

35. In view of the above discussion, the appellant is held to be entitled to benefit of doubt. Accordingly, the appeal is allowed by setting aside the impugned judgment. The appellant is set at liberty.

Chief Justice

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