

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

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

Crl. Appeal No. 01 of 2021

Lall Bahadur Rai,
S/o Guman Singh Rai,
R/o Lower Yangtey,
Kabirthing, West Sikkim,
(At present Rongyek Jail)

..... Appellant

Versus

State of Sikkim

.....Respondent

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

Appearance:

Mr. N. Rai, Senior Advocate (Legal Aid Counsel) and Mr. Sushant Subba, Advocate (Legal Aid Counsel) for the Appellant.

Ms. Pema Bhutia, Assistant Public Prosecutor for the State Respondent.

Date of hearing : 06.12.2021
Date of judgment : 15.12.2021

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The appellant who was convicted by the learned Special Judge and sentenced under sections 376(2)(f), 376(2)(n) of the Indian Penal Code, 1860 (IPC) as well as under sections 5(j)(ii), 5(l) and 5(n) of the Protection of Children from Sexual Offences

Act, 2012 (POCSO Act) seeks to challenge his conviction and sentence in the present appeal.

2. The learned Special Judge opined that the appellant had committed aggravated penetrative sexual assault on his minor step daughter, i.e., the victim.

3. The learned Special Judge held on examination of the evidence of the father of the victim (PW-4), the principals of the schools attended by the victim (PW-7 and PW-8) along with the certificates issued by the principals regarding the victim's birth (Exhibits-8 & 11), the school admission registers of both the schools (Exhibits-9 & 12), that the victim was 17 years 6 months and 9 days old on 05.09.2018, when she was rushed to the hospital and she delivered a still born baby. The learned Special Judge did not rely upon the birth certificate (Exhibit-3) as it was made in the year 2017 when the date of birth of the victim was 24.02.2001 in spite of the fact that the Registrar, Births and Deaths (PW-11) explained during his cross-examination that there was provision for delayed registration even after the requirement of registering the birth within 22 days. It is evident that the victim was a child during the time when she was subjected to sexual violations by the appellant.

4. The learned Special Judge held that the evidence of the victim, who had deposed that ever since the time she was in class 2 the appellant had started committing penetrative sexual assault on her and did so till September, 2018 was consistent and clear. According to the victim (PW-1) she started living with

her mother and the appellant when she was a student of class 2. According to her, the appellant started committing penetrative sexual assault on her since then till September, 2018. She could not tell anyone about it as the appellant used to physically assault her mother which would scare her. The victim further deposed that due to the commission of penetrative sexual assault on her by the appellant she became pregnant. She confirmed that her date of birth was 24.02.2001 and Exhibit-3 was her birth certificate. The victim stood by her statement in spite of her cross-examination.

5. PW-2, the first informant, a co-villager of the victim, proved that on 05.09.2018 the victim was seriously sick and taken to the hospital by him along with the appellant and others where, an hour later, she delivered a still born baby. As the victim was unmarried and studying in class 12 he lodged the first information report (Exhibit-4). The biological father of the victim (PW-4) also confirmed this fact. He further deposed that the victim was born in the year 2001.

6. Dr. Sabin Rai (PW-10), the Medical Officer of the District Hospital, deposed that on 08.09.2018, he examined the appellant and found that there was nothing to suggest that he was not capable of performing sexual act. He further deposed that on 05.09.2018, Dr. Shyamaldip Gurung medically examined the victim in his presence and made the medical report (Exhibit-18). PW-10 also proved Dr. Shyamaldip Gurung's signature thereon stating that he was familiar with his

handwriting and his signature. He deposed that Dr. Shyamaldip Gurung had left the hospital to pursue his post graduation.

7. The medical report of the victim (Exhibit-18) reflected that the blood and hair samples of the still born child, the victim as well as the appellant were collected and sent to CFSL, Kolkata for DNA profiling, on consent. The report also reflected that the still born baby was delivered by the victim.

8. On receipt of the forensic examination report (Exhibit-29) dated 23.08.2019, the investigating officer (PW-13) filed supplementary charge sheet and thereafter examined Dr. Kshitij Chandel (PW-14). PW-14 who was the Examiner-cum-Reporting Officer, Biology Division, CFSL Kolkata proved that the genetic profile of the appellant was consistent as the biological father of the still born child of the victim.

9. The learned Special Judge thus concluded that the prosecution had been successful in proving the charges against the appellant under the various provisions of the POCSO Act as well as the IPC, as stated above.

10. Section 5(j)(ii) of the POCSO Act relates to penetrative sexual assault on a female child and making her pregnant as a consequence of sexual assault. Section 5(l) relates to commission of penetrative sexual assault on a child more than once or repeatedly. Section 5(n) relates to commission of penetrative sexual assault on a child by a person who is a relative of the child through blood or adoption or marriage or guardianship or in foster care or having domestic relationship

with the parent of the child or who is living in the same or shared household with the child.

11. Section 376(2)(f) of the IPC relates to commission of rape by a relative, guardian or teacher of, or a person in position of trust or authority towards the woman. Section 376(2)(n) relates to the commission of rape repeatedly on a woman.

12. The ingredients of each of these offences under the POCSO Act and the IPC have been cogently established by the prosecution. We have perused the evidence and the impugned judgment of conviction and find no fault in the conviction.

13. Mr. N. Rai, learned senior advocate for the appellant at this stage draws the attention of this court to section 42 of the POCSO Act and submits that the learned Special Judge should have sentenced the appellant only for those offences which provides for punishment which is greater in degree. Section 42 provides that where an act or omission constitutes an offence punishable under the POCSO Act and also, *inter alia*, under section 376 of the Indian Penal Code (45 of 1860), 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 the POCSO Act or under the Indian Penal Code as provides for punishment which is greater in degree.

14. The appellant has been convicted and sentenced under sections 5(l) and 5(n) of the POCSO Act as well as sections 376(2)(f) and 376(2)(n) of the IPC for commission of offences for

the same acts. During the relevant time, sections 376(2)(f) and 376(2)(n) of the IPC provided for rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine. Sections 5(n) and 5(l) of the POCSO Act was punishable under Section 6 thereof which provided for punishment with rigorous imprisonment for a term which shall not be less than 10 years but which may extend to imprisonment for life and shall also be liable to fine. In ***Kiran Karki @ Chettri Uncle vs. State of Sikkim***¹ the Division Bench of this court held that the punishment prescribed under section 376(2) IPC is greater in degree than under section 6 of the POCSO Act.

15. The appeal is partly allowed, the sentences under the sections 5 (l) and 5(n) of the POCSO Act are set aside on application of section 42 of the POCSO Act. The sentences under sections 376(2)(f) and 376(2)(n) of the IPC and 5(j)(ii) of the POCSO Act are upheld. The rest of the directions in the impugned order on sentence dated 26.02.2020 are also upheld including the direction for compensation.

¹ SLR(2019)SIKKIM 1088

16. A copy of this Judgment may be transmitted to the learned Special Court, for information, along with its records.

(Bhaskar Raj Pradhan)
Judge
15.12.2021

(Meenakshi Madan Rai)
Judge
15.12.2021

sdl Approved for reporting : **Yes**
Internet : **Yes**