THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

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

Crl. A. No. 01 of 2022

Subash Chandra Chettri,
aged about 48 years,
S/o late Dilli Ram Chettri,
R/o II- Thingling, Khecheopalri,
West Sikkim.
At present: Central Prison, Rongyek ..... Appellant

Versus

State of Sikkim ..... Respondent

Appearance:

Mr. B.K. Gupta, Advocate (Legal Aid Counsel) for the appellant.

Mr. S.K. Chettri, Additional Public Prosecutor for the respondent.

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

[from the judgment and order on sentence both dated 19.10.2021 passed by the learned Special Judge (POCSO), West Sikkim at Gyalshing in S.T. (P.O.C.S.O) Case No. 14 of 2020 (State of Sikkim vs. Subash Chandra Chettri)]

Date of hearing : 29.08.2022
Date of judgment : 07.09.2022

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The prosecution examined 18 witnesses to establish two charges framed by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012 (POCSO Act),

Gyalshing, under section 376 AB of the Indian Penal Code, 1860 (IPC) and section 5(m) of the POCSO Act on 23.10.2020. The prosecution was successful during trial and by the judgment and order on sentence, both dated 19.10.2021, the learned Special Judge (POCSO Act), West Sikkim at Gyalshing, convicted and sentenced the appellant under section 376 AB of the IPC and section 5(m) of the POCSO Act. The appeal is directed against the impugned judgment and order on sentence passed by the learned Special Judge.

2. Mr. B.K. Gupta, learned counsel for the appellant, drew the attention of this court to the medical report (exhibit-21) of the victim (PW-1) prepared by Dr. Tukki Dolma Bhutia (PW-15), which recorded that there were no visible external injuries and local examination revealed only redness over the labia minora, although the charge was of penetrative sexual assault. It was submitted that PW-4 was a vital prosecution witnesses who turned hostile and did not support the prosecution case. The learned counsel also drew the attention of the court to the deposition of PW-5 in which she deposed that the victim had told her mother in her presence in Nepali - “malai Subash Uncle le paisa dera jabarjasti naramro kaam garyo”. He also drew the attention of this court to the deposition of PW-9 in which she deposed that when she asked the victim as to what happened, she told her that the appellant had given her Rs.15/- and done ‘naramro kaam’. It was submitted that in the matter of ***Ash***

Bahadur Subba vs. State of Sikkim : Crl. A. No. 02 of 2021, a similar situation had been considered where the victim had stated that the accused had committed 'chara' on her and the Division Bench of this Court had held that the victim's understanding of the word 'chara' without further explanation cannot be assumed as the word may be used variously to describe sexual acts and may not necessarily be an expression of penetrative sexual assault.

3. Mr. S.K. Chettri, learned Additional Public Prosecutor, submitted that the impugned judgment and order on sentence are sound and need no interference. He took us to the charge framed and the deposition of the victim, the victim's mother (PW-3), victim's father (PW-2), PW-4, PW-5, PW-6, PW-9 and PW-12, and submitted that the prosecution had been able to establish the charges beyond reasonable doubt. He relied upon the judgment of the Supreme Court in ***Swaroop Singh vs. State of Madhya Pradesh***[1]**,** in which it was held that:-

> "**15.** In this context it will be worthwhile to refer to the principles laid down by this Court as to the manner in which the evidence of a rape victim should be evaluated to ascertain the truth. The said decision is reported in *State of Punjab* v. *Gurmit Singh* [(1996) 2 SCC 384 : 1996 SCC (Cri) 316] . Paras 8 and 21 are relevant which read as under: (SCC pp. 395-96 & 403)
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> "*8.* … The courts must, while evaluating evidence, remain alive to the fact that in a case of rape, no self-respecting woman would come forward in a court just to make a humiliating statement against her honour such as is involved

[1] (2013) 14 SCC 565

in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such which are of fatal nature, be allowed to throw out an otherwise reliable prosecution case. The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for *corroboration* of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some *assurance* of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a par with the evidence of an injured witness and to an extent is even more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding. Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case

> spoken of by the victim of sex crime strikes the judicial mind as probable. …
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> *21.* Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault—it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend *assurance* to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

4. Besides the victim, the prosecution also examined her mother and her father. All of them identified the appellant. The First Information Report (FIR) (exhibit-1) lodged by the victim on 09.07.2020 alleged that when he was committing rape on her, his wife came suddenly and saw them, compelling him to leave her.

5. The appellant's wife was also examined as PW-4. However, she was declared hostile and cross-examined by the prosecution.

6. PW-5, who also identified the appellant as her neighbour, was the witness who met the victim immediately after the incident and found her wailing and agitated. Although, initially the victim continued to cry and refused to divulge anything, when her niece (PW-9) asked the victim what happened she informed her that the appellant had given her money, opened her clothes and sexually assaulted her. Thereafter, PW-5 informed the victim's mother about it and in her presence told her that the appellant had given her money and sexually assaulted her. PW-5 also noticed some currency notes in her hand.

7. PW-8 visited the house of PW-5 who called out for him on the relevant day. He found her lying down on the bed and crying. On the request of the victim's mother, he carried the victim to her house. He along with PW-7 were seizure witnesses to certain seizures made by the Investigating Officer.

8. PW-9 was a child witness who deposed that the victim had told her that the appellant had done "naramro kaam" after giving her 15 rupees.

9. PW-11 was another minor who also testified against the appellant. She identified the appellant as the person who

lives above her house and the victim as her cousin. According to her, on the request of victim's mother, she accompanied her to PW-9's house on the relevant day where she found the victim crying and when she was asked she informed her that the appellant had done "naramro kaam" to her.

10. The victim's mother deposed that the victim was 12 years old and born on 21.07.2008. She identified the victim's birth certificate (exhibit-5). The victim's father also deposed that the victim was 12 years old born in the year 2008 in Yuksom Hospital from where her birth certificate (exhibit-5) had been issued. The age of the victim has been adequately proved. The Principal (PW-10) of the school that the victim attended, a nurse (PW-12) working in the Public Health Centre at Yuksom and a Lower Division Clerk (PW-16) working at Yuksom Public Health Centre as the In-charge Dealing Assistant for Births and Deaths Section, proved the birth certificate (exhibit-5) and the age of the victim as a minor below 12 years of age. The then Panchayat President (PW-17) was witness to the seizure of the birth certificate (exhibit-5) of the victim vide seizure memo (exhibit-6) from the father of the victim. The appellant does not contest the victim's age.

11. Dr. Jigmee W. Bhutia (PW-13) - Medical Officer, posted at the District Hospital Gyalshing, examined the appellant on 09.07.2020, itself. He recorded that the appellant's breath

smelt of alcohol and opined that he was capable of sexual activity.

12. Ms Jamyang Choden Bhutia (PW-14), the learned Judicial Magistrate on being satisfied that the victim desired to give her statement voluntarily recorded it under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.). She proved the questionnaire prepared by her (exhibit-3) as well as the victim's statement recorded under section 164 Cr.P.C. (exhibit-4).

13. Dr. Tukki Dolma Bhutia was the Gynaecologist who on 09.07.2020 examined the victim. The victim (PW-1) had given history of being sexually assaulted by the appellant at his residence and pain over her private parts followed by unconsciousness. On examination, she did not see any visible external injuries on the body but did find redness present over the labia minora. According to Dr. Tukki Dolma Bhutia, the victim's hymen was intact, fourchette and posterior commissure normal. During cross-examination by the defence, she stated that redness found on labia minora could have been caused as a result of sexual assault. She admitted that she had not given her final opinion in her medical report of the victim (exhibit-21).

14. Deputy Superintendent of Police C.P. Silal (PW-18) was the Investigating Officer who investigated the case and filed the charge-sheet.

15. Save minor discrepancies pointed out by the learned counsel for the appellant, the prosecution witnesses except the appellant's wife (PW-4), stood their ground and withstood the cross-examination by the defence. During cross-examination by the prosecution, the appellant's wife also admitted that the police had recorded her statement during investigation. She admitted that she had stated to the police that on the day of the incident she had returned from the field and heard the cries of a child upstairs; that when she heard a child crying she had rushed upstairs and through a crack in the 'ekra' plaster she saw the victim crying in their room and trip over a blanket; she had seen her husband pulling up his trousers; that she made the statement after seeing all these herself; that on seeing that, she asked them what was the 'tamasha' (*show*) and thereafter went to the victim's house to call her father; that she had found the father alone and found it awkward to tell her father; and that when she reached home after that she found the appellant lying on the bed and when she asked him about the victim, he told her that she had been taken to the house nearby.

16. The learned special Judge has examined the evidence in detail. She opined that the victim was a child below the age of 12 years. The learned Special Judge also considered the testimony of the victim firm and clear. That she had consistently deposed about the incident and as to how the appellant had inserted his penis to her vagina. The learned Special Judge

opined that this deposition was consistent to her statement recorded under section 164 Cr.P.C. which also alleged that the appellant had grabbed her, undressed her and thereafter inserted his penis to her vagina. She was of the opinion that the victim's deposition was corroborated by PW-5, PW-9 and PW-11. The learned Special Judge found that the prosecution witnesses corroborated each other in various circumstances proved by them. She relied upon the evidence of the appellant's wife and found her deposition, inspite of turning hostile, to be relevant in corroborating the version of the victim. The learned Special Judge opined that Dr. Tukki Doma Bhutia had noticed that there was redness over the labia minora of the victim and although mere redness could not *per se* be considered sufficient to prove rape it is not necessary that in order to prove rape the hymen must be ruptured and there must be visible injuries. She further opined that the redness noticed in the labia minora of the victim the same morning, soon after the incident, reinforces the case of the prosecution. The learned Special Judge held that inspite of the presumptions of sections 29 and 30 of the POCSO Act, the defence has not brought out any evidence to the contrary. It was held that the prosecution has proved by way of cogent and reliable evidence beyond reasonable doubt that the appellant had committed rape and aggravated penetrative sexual assault on the victim, a child who was below 12 years of age, and found him

guilty as charged under section 376 AB of the IPC and section 6 of the POCSO Act.

17. We find that the learned Special Judge has correctly appreciated the evidence and the law, and found the appellant guilty of the offences charged. The prosecution has been able to establish the case beyond reasonable doubt. The circumstances under which the incident occurred, the time, place and the manner are proved by prosecution witnesses who were present during the relevant time. The victim was certainly a child under the age of 12 years. This fact stands proved by the prosecution and not contested. The victim has withstood the cross-examination of the defence and there is no reason for us to doubt her version. The victim's testimony is not only consistent but fairly detailed, describing the ordeal she went through. There is sufficient corroboration to the victim's testimony by the other prosecution witnesses as correctly appreciated by the learned Special Judge. Both under sections 376 AB of the IPC as well as section 5 of the POCSO Act, a slight penetration without any visible injury is enough to constitute rape and aggravated penetrative sexual assault. Penetration to any extent is sufficient to constitute rape under IPC and penetrative sexual assault under the POCSO Act. The victim's deposition is specific, consistent and clear that the appellant had inserted his penis into her vagina. The redness on her labia minora noticed by Dr. Tukki Dolma Bhutia on 09.07.2020, the same day of the assault,

sufficiently corroborates the victim's version. There is no reason for us to doubt it. In the circumstances, we uphold the conviction of the appellant under section 376 AB of the IPC and section 6 of the POCSO Act.

18. The offence under section 376 AB of the IPC is punishable with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death. It also requires that the fine imposed shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Section 6 of the POCSO Act also provides identical punishment.

19. The learned Special Judge has sentenced the appellant for a minimum period of 20 years and fine of Rs.5000/- for each of the offences. We are of the view that the sentences imposed keeping in mind the facts of the case is adequate and the order on sentence needs no interference. We also uphold the quantum of compensation directed to be paid to the victim as well as the direction that the sentences shall run concurrently and that the period of sentence already undergone during investigation and trial be set off against the sentences imposed.

20. The appeal fails and is thus, rejected.

21. Crl. A. No. 01 of 2022 stands disposed of accordingly.

22. A copy of this judgment shall be forwarded to the learned Trial Court along with the original case records.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

Approved for reporting : **Yes/~~No~~**
Internet : **Yes/~~No~~**

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