THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 5th MAY, 2022

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

Crl.A. No.02 of 2021

Appellant : Ash Bahadur Subba

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Sudesh Joshi, Public Prosecutor with Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1(i). The Appellant, aged about 40 years, was accused of having committed the offence of aggravated penetrative sexual assault, as defined under Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), on the victim, aged about 10 years. Exhibit 2, the FIR, came to be lodged on 12-10-2019 by P.W.2, the victim's mother, alleging therein that on 05-10-2019, at around 3 p.m., she had gone to wash utensils, at a nearby water source, close to the house of the Appellant, having left her daughter the victim (P.W.1) alone at home. When she returned home after her chore and entered the house, suddenly she heard her child scream. Hurriedly she entered the room where she saw the Appellant committing penetrative sexual assault on the victim, mortified, she reprimanded the Appellant.

(ii) The concerned Police Station registered the FIR on the same day against the Appellant under Section 376 of the Indian Penal Code, 1860 (for short "IPC") read with Sections 6/10 of the POCSO Act. During investigation, the victim's statement under Sections 161 and 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") were recorded and she was medically examined by the Doctor, P.W.13. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 6 and 10 of the POCSO Act. The Learned Special Judge (POCSO Act) framed Charge against the Appellant under Section 5(m) punishable under Section 6 of the POCSO Act. The Appellant pleaded "not guilty" to the Charge. Trial accordingly commenced wherein fifteen Prosecution witnesses were examined to establish its case. On closure of Prosecution evidence, the accused was examined under Section 313 Cr.P.C. to enable him to explain the evidence incriminating him. The Learned Trial Court on consideration of the evidence on record convicted the Appellant of the offence under Section 5(m) punishable under Section 6 of the POCSO Act, 2012 by the impugned Judgment and Order on Sentence, both dated 11-11-2020, and sentenced him to undergo rigorous imprisonment for a term of 40 years and to pay fine of Rs.30,000/- (Rupees thirty thousand) only, with a default clause of imprisonment of 5 years.

2. Aggrieved thereof this Appeal has been filed assailing both the conviction and the sentence *supra*. In Appeal, it is contended by Learned Counsel for the Appellant that Exhibit 2, FIR was lodged belatedly on 12-10-2019, the incident allegedly having taken place on 05-10-2019, but the delay is unexplained. That, in Exhibit 1, the Section 164 Cr.P.C. statement of the victim, she has

enumerated the persons who are her family members leading to an assumption that her younger sister was also present in the house when the incident occurred hence she was not left alone as alleged by P.W.2. That, the Investigating Officer (I.O.), P.W.15 in his evidence has admitted that the vaginal swab of the victim and the penile swab of the Appellant were sent for chemical analysis to RFSL Saramsa, however neither the document nor the examiner were before the Court. The I.O. admitted that no bodily fluids, blood or semen could be detected on the items forwarded to the FSL, which thereby negatives the Prosecution case. The evidence of P.W.2 the victim's mother does not corroborate that of P.W.3 who followed her into the room where the alleged incident took place nor does the evidence of P.W.4 the victim's wife, who also reached the spot, support the Prosecution case. More importantly, the evidence of P.W.13 the Doctor who examined the victim found no traces of penetrative sexual assault. That, the Learned Trial Court, despite this Court having cautioned in the ratio of ***State of Sikkim*** vs. ***Sashidhar Sharma***[1] that the use of the word '*chara'* in the Nepali vernacular may be used variously to describe different sexual acts and may not necessarily be an expression of penetrative sexual assault, has proceeded to foist the Appellant with the commission of penetrative sexual assault only on the basis of the Appellant having used the word '*chara'*, without making an effort to understand the correct context of the word used by the victim. In the light of the above arguments and evidence, the impugned Judgment and Order on Sentence be set aside and the Appellant be acquitted of the offence.

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[1] 2019 SCC OnLine Sikk 154

3. While conceding to the arguments of Learned Counsel for the Appellant that the medical evidence does not support the Prosecution case and that the FSL report failed to find its way to the Learned Trial Court it was contended that the age of the victim is not disputed by the Appellant. That, mere non-existence of injuries on the genital of the victim does not necessarily rule out the commission of the offence under which he was convicted. That, the finding of the Learned Trial Court is based on the unwavering evidence of the Prosecutrix P.W.1 who asserted that the Appellant had committed penetrative sexual assault on her fortified by the evidence of P.W.2, who witnessed the Appellant committing the said act. Hence, the impugned Judgment of the Learned Trial Court requires no interference.

4. We have given due consideration to the rival submissions of Learned Counsel, closely examined the records including the evidence and perused the impugned Judgment and Order on Sentence.

5(i). The Learned Trial Court while giving its reasons in arriving at its conclusion has, Paragraphs 50 to 60 of the impugned Judgment discussed the evidence of the victim P.W.1, her mother P.W.2, Section 164 Cr.P.C. statement of the victim, the evidence of P.W.7, the Learned Judicial Magistrate and P.W.8, the Counsellor. In Paragraph 52 of the impugned Judgment extracted hereinbelow it is observed as follows;

> **"52.** The victim chose the use of the word *"chara" to* describe the act committed on her by the accused at the time of testifying before this Court and **despite efforts of the Court to gently coax the child to further describe the term *"chara"* and /or try to explain to the court exactly what the accused had done to her at the time, the**

> **victim remained silent and uncommunicative on the subject, which is but understandable given the nature of the case."**

In Paragraph 54 :

> **"54.** Often times it is found that in victims of rape and sexual abuse (especially child victims) and even witnesses other than a victim in Sikkim **use the term *"chara"*, a term in Nepali vernacular to refer to any act of sexual intercourse or even to refer to anything dirty or obscene. While in some cases the victim/witness is able to elucidate the term *"chara"* at other times such as in present case, the victim fails to give any further clarification...**……**"**

Paragraph 56 is also reproduced hereinbelow;

> **"56.** No doubt a statement recorded under Section 164, Cr.P.C cannot be considered substantive evidence. However it can be considered by a Court to either corroborate or contradict the statement of a witness. Therefore, on considering the testimony of the victim made before this Court, alongside her statement recorded under Section 164, Cr.PC (Exhibit-1) by the Ld. Judicial Magistrate, Soreng (PW7 who proved the contents of Exhibit-1), I find no hesitation whatsoever, in holding that the term "chara" used by the victim in her statement before this Court to describe the act, has been used by her to mean a sexual penetrative act and nothing else.**"**

(ii) At Paragraph 59, it is *inter alia* observed that it was found that in the FIR (Exhibit 2) P.W.2 has specifically reported that when she returned home, on entering the room she found the Appellant naked as also her daughter and he was having sexual intercourse with the victim. It is also reasoned by the Learned Trial Court that although P.W.3 in his cross-examination stated that he did not know why P.W.2 had yelled at his father, he nevertheless found the Appellant sitting on the bed at the place of occurrence. Consequently, the Court concluded that this circumstance

adequately proved the offence of penetrative sexual assault garnered in its opinion by the corroborative statement of P.W.8. The Learned Trial Court relied on the ratio of ***B. C. Deva Iias Dyava*** vs. ***State of Karnataka***[2] and ***Ranjit Hazarika*** vs. ***State of Assam***[3], wherein it was *inter alia* held that the absence of injury on the victim's private part would not belie her testimony if it was cogent and trustworthy evidence. She would also observe that it would be an impossibility for a child so young to conjure up such a horrific situation.

6. The question for consideration is whether the Learned Trial Court was correct in its reasonings leading to the conviction of the Appellant?

7(i). The Prosecution allegation against the Appellant is of penetrative sexual assault. The evidence of P.W.1 as recorded in the Learned Trial Court *inter alia* is that **"***Mama (accused) took me inside the house and put me on Dada's bed. He then removed my clothes as well as his own clothes and thereafter he did "Chara" to me (committed penetrative sexual assault). When I screamed my mother arrived and caught him in the act. On seeing us she shouted at Mama (accused). He then fled away from our house. My mother then took me to the Thana. I later had a stomach ache so I was also taken to the hospital.***"** The Learned Trial Court questioned the Prosecutrix as follows;

> **"***Q. No.4. Had you given your statement earlier?*
>
> *Ans. Yes, I also gave a statement in the Soreng Court. (Statement of the victim recorded under Section 164, Cr.PC shown to the victim). This is the same statement (marked Exhibit 1) and these are my*

[2] (2007) 12 SCC 122
[3] (1998) 8 SCC 635

> *thumb impressions (RTIs) which I affixed on the statement (collectively marked Exhibit 1(a) in two pages). I also gave my statement to the police.*"

(ii) In the first instance, it is evident that in the Court room the victim was only '*shown'* her Section 164 Cr.P.C. statement. It is not recorded that the contents of the statement were read over to her to enable her to either refresh her memory as per the provision of Section 159 of the Indian Evidence Act, 1872 or to confirm the contents. It is an impossibility to assume that a child of 9 years (as recorded by the Learned Trial Court), studying in Class III, as deposed by the victim, would be in a position to verify the contents of Exhibit 1 on being "shown" the document. The Learned Trial Court while examining a witness under the provision of the POCSO Act is required to be more careful and circumspect. In this context, the observations in ***Nipun Saxena*** vs. ***Union of India***[4] holds relevance and are extracted hereinabove;

> **"47.** Any litigant who enters the court feels intimidated by the atmosphere of the court. Children and women, especially those who have been subjected to sexual assault are virtually overwhelmed by the atmosphere in the courts. They are scared. They are so nervous that they, sometimes, are not even able to describe the nature of the crime accurately. When they are cross-examined in a hostile and intimidatory manner then the nervousness increases and the truth does not come out.**"**

(iii) In the light of this pronouncement, in the case at hand, it is unlikely that the child was aware of what she had stated to the Magistrate earlier or how "showing" her the Section 164 Cr.P.C. statement would enable her to understand or verify the contents. The evidence of P.W.7 has been relied on by the Learned Trial Court for proof of the contents of Exhibit 1 which itself is

[4] (2019) 2 SCC 703

erroneous. Beneficial reference can be made in this context to the observations in ***Malay Kumar Ganguly*** vs. ***Dr. Sukumar Mukherjee and Others***[5] wherein it was *inter alia* held that;

> **"37.** It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. **It is, however, trite that a document becomes inadmissible in evidence unless the author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a court of law.** The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken.**"**

(iv) Hence, the contents of Section 164 Cr.P.C. ought to have been identified by the victim and not P.W.7 who obviously cannot vouch for the truth of the contents. Further, it is now no more *res integra* that a statement under Section 164 Cr.P.C. is not substantive evidence. In ***R. Shaji*** vs. ***State of Kerala***[6] it was held as follows;

> **"26.** Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.
>
> **27.** So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a

[5] (2009) 9 SCC 221
[6] (2013) 14 SCC 266

> statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. …….
>
> **28.** Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.
>
> **29.** During the investigation, the police officer may sometimes feel that it is expedient to record the statement of a witness under Section 164 CrPC. This usually happens when the witnesses to a crime are clearly connected to the accused, or where the accused is very influential, owing to which the witnesses may be influenced. …….**"**

On the anvil of the above mentioned principles, the Section 164 Cr.P.C. statement of the victim is thus disregarded by this Court as being an unproven document.

(v) Secondly, as pointed out by Learned Counsel for the Appellant what the act of '*chara*' entailed has not been explained by the victim. The Learned Trial Court has rushed to assume sans reasoning that it was an act of penetrative sexual assault and recorded so, despite the fact that the witness refused to explain the act and what exactly the accused had done to her. This has been observed by the Court in the impugned Judgment at paragraph 52 extracted *supra.* It is relevant at this juncture to refer to the decision of this Court in ***Sashidhar Sharma*** (*supra*) wherein it has been explicitly elucidated that during evidence, the Learned Trial Courts have to make an effort by invoking the provision of Section 165 of the Indian Evidence Act, 1872, to elicit the correct context of the word used by the victim. That, the victim's understanding of the word '*chara*' cannot be assumed by the Court as the word may be used variously to describe different

sexual acts and may not necessarily be an expression of penetrative sexual assault. It was also observed that the understanding of an act of penetrative sexual assault by a child of approximately 10 years is also a question that baffles and remains unanswered. Despite such precautionary words and red flagging by this Court on interpreting the word '*Chara'*, the Learned Trial Court in its alacrity to come to the rescue of the child has decided on its own, without specific description of the act by the victim, to interpret the word as an act of penetrative sexual assault. This Court is all for the Trial Courts exhibiting sensitivity to the plight of a child victim but they cannot go overboard and stonewall the steps that are mandatorily to be complied with when analysing and interpreting the evidence given by the witnesses. If the victim was competent to testify she was also competent to explain the act and what it involved. If the act is not described, the Court cannot arrive at a conclusion based on its own assumptions.

(vi) P.W.2 in her evidence in Court *inter alia* stated that when she returned home, on entering the house, she saw both the victim and the accused naked on her son's bed. When both, she and her daughter screamed at the Appellant he ran away. Relevantly it may be noticed that, in Exhibit 2, the FIR, she had stated that on *hearing her child shouting* she went into the inner room and saw both the child and the Appellant naked and the Appellant was sexually assaulting the child. The fact that Exhibit 2 was the same FIR lodged by her with her signature Exhibit 2(a) on it could not be decimated in her cross-examination. She volunteered to state that it was scribed at her behest by one "Binod Police" at the Police Station. P.W.6, the said "Binod Police"

identified the contents of Exhibit 2 as the same contents drafted by him on the instructions of P.W.2 and later faired by P.W.10, although, the Prosecution chose not to examine P.W.10 on this aspect, there is no reason to doubt the filing of Exhibit 2 or its contents. Suffice it to clarify at this juncture that an FIR is not substantive evidence. In ***Krishna Mochi and Others*** vs. ***State of Bihar***[7] the Supreme Court enunciated that even if the first information report is not proved, it would not be a ground for acquittal, but the case would depend upon the evidence led by the Prosecution.

(vii) P.W.3 the son of the Appellant did not see the Appellant naked, he merely saw him sitting on the bed in a room in the house of P.W.2 and heard P.W.2 yelling at him. P.W.4 the wife of the Appellant who also reached the place did not support the Prosecution case with regard to the act of sexual assault.

(viii) P.W.13 examined the genital of the victim and prepared Exhibit 16 which reads as follows;

> **"**On examination : The patient was conscious, co-operative, well-oriented to time, place and person. Her vitals were table.
>
> On local examination : no fresh injuries seen on labia majora and minora. Pubic hair was absent. There was no tear. She had not worn undergarments at the time. There was no external injuries. After examination, her vaginal swab - two dry and two wet were taken and handed over to the Police for forensic analysis.
>
> ……..……..
>
> That on 07.01.2020 after receiving the RFSL report bearing Memo No.RFSL/2014/2019/ 1979 dated 29.11.2019 and going through the RFSL report, my final opinion was that there was nothing to suggest of forceful/recent sexual intercourse, however, sexual violence cannot be ruled out.**"**

(ix) Even if the evidence of P.W.1 and P.W.2 are to be taken into consideration this Court can only conclude that the

[7] AIR 2002 SC 1965

Appellant was naked and had undressed the child as well, limiting the offence to one under Section 18 of the POCSO Act for an attempt to commit an offence under Section 7.

8. The explanation given for the delay in lodging of the FIR by the I.O. is that P.W.2 did not report the matter earlier, for fear of being shouted at her by her son. It need requires no reiteration that the Hon'ble Supreme Court in ***State of Punjab*** vs. ***Gurmit Singh and Ors.***[8] has held that delay in lodging of the FIR in such cases does not vitiate the Prosecution case as follows;

> **"8...**.....
>
> The courts cannot overlook the fact that in sexual offences delay in the lodging of the FIR can be due to variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged.
>
> ....."

9. Further, another error that is apparent in the impugned Judgment of the Learned Trial Court is its observation in Paragraph 63 that in the "Charge-Sheet" the I.O. has sought to give the reasons for delay. That, he stated that the Complainant did not report the matter to the Police Station on the same day due to fear of getting scolded by her son. That this was reiterated by him before the Court. It is relevant to mention that a Charge-Sheet cannot be termed as a substantive piece of evidence as it is nothing but a collective opinion of the investigating officer. It forms a mere opinion of the investigating officer on the materials collected by him, as held by the Hon'ble Supreme Court in ***Rajesh***

[8] (1996) 2 SCC

Yadav and Another vs. ***State of U.P.***[9]. The Learned Trial Court therefore is to gauge the truth of the Prosecution case from the evidence of the I.O. and not by reference to the Charge-sheet.

10. In light of the above evidence and discussions, it transpires that the Prosecution has failed to prove its case under Section 5(m) of the POCSO Act. Indeed the victim was found naked on the bed as also the Appellant but while looking for corroboration in the evidence of the Doctor P.W.13 with regard to sexual assault no such corroboration is given added to which the Prosecution has failed to give reasons for not furnishing the FSL report before the Court. We are alive to the fact that it is now settled law that there does not necessarily have to be physical indications of the offence of penetrative sexual assault but at the same time it is to be borne in mind that the victim is aged about 9 years while the Appellant is a grown man of 40 years. In such a situation, the act of penetrative sexual assault on a child will have physical repercussions and the indications of such an assault would be apparent on the genital/private parts of the victim. Relevant reference in this context can be made to ***Modi's Medical Jurisprudence and Toxicology***, ***24th Edition***, in Chapter 31 – Sexual Offences, at Page 668, whereof a grown man commits offence of sexual assault on a victim, the following is likely to be detected;

> **"**(4) .....
>
> In girls under 14 years of age, the vaginal orifice is usually so small that it will hardly allow the passage of the little finger through the hymen. It is often difficult to distinguish between an indentation in a fimbriated hymen and a tear, unless the hymen is stretched by a finger tip, glass rod.
>
> The fourchette and posterior commissure are not usually injured in cases of rape, but they may be torn if the violence used is very great. The extent of injury

[9] 2022 SCC OnLine SC 150

> to the hymen and the genital canal depends upon the degree of disproportion between the genital organs of both the parties and the violence used on the female.
>
> In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.
>
> ……..**"**

11. This Court, therefore, is of the considered opinion that there was no penetrative sexual assault committed by the Appellant on the victim. The Prosecution case on this aspect has remained unproved. However, the offence of an attempt to commit "sexual assault" as defined under Section 18 of the POCSO Act cannot be ruled out and in light of the evidence on record has been proved by the Prosecution beyond a reasonable doubt.

12. At this juncture, it is essential to reproduce Section 222(2) of the Cr.P.C. which reads as follows;

> **"222. When offence proved included in offence charge**.—.....
>
> (2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.
> ……..**"**

13. In view of the provisions of Section 222(2) of the Cr.P.C., the Appellant is convicted under Section 18 of the POCSO Act read with Section 7 of the same Act. He is sentenced to undergo rigorous imprisonment for one year six months and to pay a fine Rs.10,000/- (Rupees ten thousand) only, in default thereof, to undergo simple imprisonment for a further period of six months, duly setting of the period of imprisonment already undergone by him.

14. Appeal allowed to the above stated extent and disposed of.

15. No order as to costs.

16. Copy of this Judgment be transmitted to the Learned Trial Court, for information, along with its records and a copy be sent forthwith to the Jail Authorities as also e-mailed.

(Bhaskar Raj Pradhan)
Judge
05-05-2022

(Meenakshi Madan Rai)
Judge
05-05-2022

Approved for reporting : **Yes**

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