THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 14th November, 2022

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl. A. No.07 of 2021

Appellant : Sanjay Manger

versus

Respondent : State of Sikkim

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

Appearance

Mr. Umesh Ranpal, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant on being convicted under Section 9(m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the "POCSO" Act), was sentenced to undergo simple imprisonment for five years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, under Section 10 of the POCSO Act with a default clause of imprisonment. The Learned Trial Court, South Sikkim, at Namchi, while convicting the Appellant recorded that it had relied mainly on the evidence of P.W 1 the minor victim and P.W 2, P.W 3, P.W 5 and the Investigating Officer.

2(i). The Prosecution case is that, on 20-03-2019, Exhibit 1 the First Information Report (for short the "FIR") was lodged by P.W 2, informing that the same morning around 3.30 a.m., his daughter aged about six years old had been sexually assaulted by the Appellant who had spent the night in his house.

(ii) On registration of the FIR, on the same date, the matter was taken up for investigation on completion of which, Charge-Sheet was filed against the Appellant under Section 8 of the POCSO Act. The Learned Trial Court on receipt of the Charge-Sheet framed Charges against the Appellant under Section 5(m) punishable under Section 6 of the POCSO Act, Section 9(m) punishable under Section 10 of the POCSO Act and Section 354 A (1)(i) of the Indian Penal Code, 1860 (hereinafter "IPC").

(iii) On his plea of "not guilty", the Prosecution examined nine witnesses which included the I.O of the case. The Appellant was then examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter "Cr.P.C") wherein he denied the incident and claimed to have been falsely implicated although he admitted that he had spent the night in the Complainant's house.

3. Learned Counsel for the Appellant, assailing the conviction and Sentence canvassed that the Appellant was indeed falsely implicated as the evidence of P.W 3 and P.W 5 indicates the animosity of P.W 2 and P.W 5, the victim's parents, towards the Appellant. Secondly, the age of the victim being six years has not been proved in view of the fact that the contents of the Birth Certificate, Exhibit 4, were not proved in terms of the legal provisions. Reliance on this aspect was placed on the ratio in ***Alamelu and Another*** vs. ***State Represented by Inspector of Police***[1]. That, the date of incident was said to be 20-03-2019 at around 3.30 a.m. and the victim was examined the same morning at 10.30 a.m. but the evidence of the Doctor P.W 7 clearly reveals that there were no injuries on the genital or person of the victim. The

[1] (2011) 2 SCC 385

Register of the Births and Deaths where the date of birth of the victim was allegedly entered was not seized or furnished before the Learned Trial Court without which it cannot be gauged as to whether P.W 7 was privy to the entries therein. The Prosecution also failed to furnish a true copy of the Register and did not enumerate the reasons for non-production of the Register. The evidence of P.W 2 and P.W 5 are also unreliable being contradictory since P.W 2 claimed to be present at home when the incident took place, while his wife P.W 5 contrarily admitted under cross-examination that P.W 2 was not present at the place of occurrence at the relevant time. The victim herself with clarity, under cross-examination admitted to being tutored by her parents. In view of the anomalies in the Prosecution's case and the specific statement of P.W 1 about having tutored, the Learned Trial Court erroneously convicted the Appellant. Hence, the impugned Judgment and Order on Sentence be set aside.

4. The Additional Public Prosecutor supporting the impugned Judgment and Sentence urged that the statement of the victim under Section 164 of the Cr.P.C and during deposition before the Learned Trial Court were consistent. The parents of the minor had also unequivocally deposed about the incident having occurred and the Appellant being the perpetrator. The age of the victim being six years was not demolished by any cross-examination. Hence, no reason emanates for interference of the Judgment and Order on Sentence.

5. Having heard Learned Counsel for the parties and perused all documents on record, the question for consideration

before this Court is; Whether the Appellant was guilty of the offence under Section 9(m) of the POCSO Act?

6(i). Dealing first with the age of the victim, in her deposition before the Learned Trial Court, the victim claimed to be six years old however her parents P.W 2 and P.W 5 failed to give any evidence with regard to the age of the victim. In ***Anish Rai*** vs. ***State of Sikkim***[2] this Court made reference to the ratiocination in ***Vishnu*** vs. ***State of Maharashtra***[3] wherein it was held as follows;

> "**24**. **In the case of determination of date of birth of the child, the best evidence is of the father and mother.** In the present case, the father and the mother – PW-1 and PW-13 categorically stated that PW-4 the prosecutrix was born on 29.11.1964, which is supported by the unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of the witness of fact tendered by PW-1 and PW-13, supported by unimpeachable documents. **Normally, the age recorded in the school certificate is considered to be the correct determination of age provided the parents furnish the correct age of the ward at the time of admission and it is authenticated.** ……."
>
> (emphasis supplied)

(ii) In ***Birad Mal Singhvi*** vs. ***Anand Purohit***[4], the Hon'ble Supreme Court observed as follows;

> "**14.** …… Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. **No doubt, Exs. 8, 9, 10, 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth**

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[2] SLR (2018) SIKKIM 889
[3] 2006 Cri. L. J. 303
[4] AIR 1988 SC 1796

> **of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document.** As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. **Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or someone having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved.**
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> **The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth or the person concerned.** If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.
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> **Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents.** Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid **two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in** the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi.
>
> ……."
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> (emphasis supplied)

(iii) Further, in ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[5] the Hon'ble Supreme Court while distinguishing between admissibility of a document and its probative value observed as follows;

[5] (2010) 9 SCC 209

"**18. Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stand fortified by the judgments of this Court in *Ram Prasad Sharma v. State of Bihar*** *[(1969) 2 SCC 359 : AIR 1970 SC 326], Ram Murti v. State of Haryana [(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], Dayaram v. Dawalatshah [(1971) 1 SCC 358 : AIR 1971 SC 681], Harpal Singh v. State of H.P. [(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], Ravinder Singh Gorkhi v. State of U.P. [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], Babloo Pasi v. State of Jharkhand [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], Desh Raj v. Bodh Raj [(2008) 2 SCC 186 : AIR 2008 SC 632] and Ram Suresh Singh v. Prabhat Singh [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 119].* **In these cases, it has been held that even if the entry was made in an official record by the official concerned in discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.**

19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain v. State of U.P. [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590]* and *Santenu Mitra v. State of W.B. [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].*

20. So far as the entries made in the official record by an official or person authorized in performance **of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value.** The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by an unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporations, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh v. Priya Brat Narain Sinha [AIR 1965 SC 282], Birad Mal Singhvi v. Anand Purohit [1988 Supp SCC 604 : AIR 1988 SC 1796], Vishnu v. State of Maharashtra [(2006) SCC 283 : (2006) 1 SCC (Cri)*

> *217] and Satpal Singh v. State of Haryana [(2010) 8 SCC 714 : JT (2010) 7 SC 500].*
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> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60, and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar v. Prithvi Singh [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063]* and *State of Punjab v. Mohinder Singh [(2005) 3 SCC 702 : AIR 2005 SC 1868]).”* (emphasis supplied)

(iv) On the edifice of the afore extracted portions of Judgments it is evident that although Section 74 of the Indian Evidence Act (hereinafter the “Evidence” Act) defines public documents of which the birth certificate Exhibit 4 would qualify falling within the ambit of Section 74(2) of the Evidence Act and although the document would be admissible under Section 35 of the Evidence Act, merely because the document is admissible it does not waive the requirement of proof of its contents. Admittedly the contents of Exhibit 4 thereof have not been proved in as much as the person who scribed the document or the signatory of the document were not summoned or examined as Prosecution witnesses to comply with the requirements of Section 67 of the Evidence Act. It may be reiterated here that admissibility of a document and its probative value stand on two different footing. Contrary to the arguments of the Learned Additional Public Prosecutor that no questions were put to the witnesses with regard to the Birth Certificate in cross-examination, it is evident that the Doctor P.W 7 has been cross-examined at length with regard to the authenticity of the Birth Certificate. Thus, I am not convinced of the veracity of the evidence of P.W 7 with regard to the age of the victim which lacks support from the

evidence of the victim's parents and the entries in Exhibit 4 clearly lack proof. The reason for non-production of the Births registration Register has not been explained by the Prosecution casting doubts on it very existence. Consequently, on this aspect the finding of the Learned Trial Court that the evidence of PW 7 who was the Medical Officer-cum-Birth and Death Registrar (In-charge) at Yangang, PHC, South Sikkim and that he had proved issuance of Exhibit-15, a certificate certifying the birth of the victim and had also proved Exhibit 4 as the Birth Certificate of the victim do not stand the test of the legal provisions and I cannot bring myself to agree with the finding of the Learned Trial Court. It is consequently disregarded.

7(i). While addressing the question of allegation of sexual assault, under cross-examination the victim has specifically stated that her parents used to dislike the accused prior to the alleged incident. Under cross-examination it is her statement that;

> "……. It is not a fact that I was not tutored by my family members to give the above statement against the accused person before this Court. ……."

Her statement has to be given due consideration in view of the fact that when she was examined during the trial her mother was allowed to accompany and stay with her for her convenience and comfort. The Learned Trial Court who tested the competence of the victim to testify before recording her evidence observed that she was not prevented from understanding the questions put to her and that she had given rational answers to questions put to her and was therefore found competent to testify. None of the Prosecution witnesses are witnesses to the incident. P.W 2 claims to have heard the scream of P.W 1 and when P.W 5 his wife, went

to the room to check, enroute she saw the Appellant coming out from their bed room. On enquiry the victim told her that the Appellant removed her clothes and touched her vagina. P.W 5 however under cross-examination admitted that her husband P.W 2 was not present at the P.O. at the relevant time. It was also her evidence that at the time of investigation she had not stated to the police that her daughter had taken the name of the accused as the perpetrator. That, in her statement recorded by the police she had not stated that the victim told her that her vagina was also paining, this allegation evidently was added in her evidence in the Learned Trial Court to strengthen her case. These statements are therefore afterthoughts made with the intent of her case to exacerbating the case against the Appellant. It is true that no witness is expected to give every minute detail of the incident in her Section 161 Cr.P.C statement, at the same time she cannot embellish her case by addition of new facts before the Learned Trial Court, which leads to doubts about the veracity of her evidence.

(ii) Along with the evidence of these witnesses it is relevant to consider that P.W 3 the Uncle of the victim, alike P.W 1, admitted under cross-examination that his sister P.W 2 and brother-in-law P.W 5 used to dislike the accused person coming to their house and did not share cordial relations with him. This witness being the brother of P.W 5 lives in the house of P.W 2 and P.W 5. On the relevant night the Appellant, his friend, was sleeping with him in his room. P.W 3 admitted to not seeing the Appellant sneaking out of his room to his sister’s bed room and returning back that night.

(iii) P.W 7 the Doctor who examined the victim at 10.30 a.m., the incident having occurred allegedly at around 3 a.m. opined as follow;

> "Perineum examination - Vulva seems to be normal. No redness. No laceration or abrasion seen externally. Labia majora - are normal. Hemorrhagic spots present near the clitoris. Whitish discharge seen on 12 o' clock position region."

Thus, it appears that there are no sign of any injury either on the genital or the person of the victim. Indeed, I am aware that mere absence of injury on the victim is not to be considered as an indicator of absence of sexual assault but it is to be considered along with the surrounding circumstances and statement of the victim and witnesses, which in the instant case fails to inspire confidence, and P.W 1 admits to being tutored by her parents.

(iv) The timing of the incident is also not specific. According to P.W 2, on 20-03-2019, he had gone to Khamdong, East Sikkim leaving his wife and minor daughter at home. He returned home at "odd hours" and when his wife P.W 5 came to the kitchen to serve him dinner leaving their minor daughter alone in the room, they suddenly heard her scream. His wife P.W 5, on the other hand, made an incongruous statement with regard to the time of the incident, as according to her, her husband returned home "at midnight around 3-4 a.m". Thereafter, she went to the kitchen to give food to her husband leaving her minor victim daughter in her bedroom. When she was giving food to her husband, they heard their minor victim daughter screaming and when she went to the room and found the victim crying and naked below her waist. The evidence of P.W 2 and P.W 5 therefore creates a doubt with regard to the time of the offence.

(v) A doubt infact arises about the incident having occurred at all since it is unbelievable that the Appellant who was sleeping in the room of P.W 3 would have the audacity to sexually assault the victim at an odd hour of the night when her parents were awake and in the kitchen of the house. The occurrence of the incident, in my considered opinion, also appears to be improbable for the reason that the parents did not take steps against the Appellant immediately considering that P.W 2, P.W 3 and P.W 5 all adults and related to each other were in the house and the Appellant was the guest. P.W 2 claims that his wife saw the Accused coming out of the room but he did not put any questions to the Accused about the circumstance while P.W 3 stated that he did not see the Accused sneaking out of the room that they were sharing. It is also inconceivable that the Appellant on the enquiry of P.W 5 would confess his guilt. The Prosecution evidence fails to inspire any confidence apart from being riddled as it is with contradictions.

8. Consequently in view of the foregoing discussions, the conviction and sentence imposed on the Appellant vide the impugned Judgment and Order on Sentence of the Learned Trial Court is evidently incorrect and are accordingly set aside.

9. The Appeal is allowed.

10. The Appellant is acquitted of the offence under Section 9(m) of the POCSO Act. He be set at liberty forthwith if not required to be detained in any other case.

11. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

12. No order as to costs.

13. Copy of this Judgment be forwarded to the Learned Trial Court along with its records and to the Jail Authority at the Central Prison, Rongyek, for information and compliance.

(Meenakshi Madan Rai)
Judge
14 -11-2022

Approved for reporting : **Yes**

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