

# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 23<sup>rd</sup> November, 2022

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

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Crl. A. No.09 of 2021

**Appellant** : Deo Kumar Subba

**versus**

**Respondent** : State of Sikkim

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

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**Appearance**

Ms. Gita Bista, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for the State-Respondent.

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## **J U D G M E N T**

**Meenakshi Madan Rai, J.**

**1.** Aggrieved with the Judgment and Order on Sentence in Sessions Trial (POCSO) Case No.02 of 2018, dated 30-06-2021, the Appellant assails both.

**2(i).** The Prosecution case arose on the basis of Exhibit 3, the First Information Report (hereinafter, the "FIR"), lodged by P.W 2, the father of the victim on 01-08-2017, before the Sadar Police Station, Gangtok, informing therein *inter alia* that he lives with his two daughters aged about fourteen and nine years. That, the Appellant is his neighbour. On 31-07-2017, at about 5 p.m when the victim P.W 1 had gone to the house of P.W 8 for an errand, the Appellant came to the courtyard of the house of P.W 8, caught hold of the victim and molested her by groping at her breasts. On the following day, 01-08-2017, he followed P.W 1 to school and at lunch time he sent a student to call her to the school's lower gate,

where, he again caught hold of her arms, gave her ₹40/- (forty) forcibly and attempted to molest her. On both the above occasions she managed to free herself. That, the same evening when P.W 1 reached home after school and entered her home, the Appellant also forcibly entered and tried to rape her. That, P.W 1 was alone at home at that time as P.W 2 was at work and his younger daughter was still at school. The victim managed to escape and ran towards the house of P.W 8 where she sought for help. She also narrated the incident to P.W 3, the younger brother of P.W 8. Assuming that the Appellant had left, she returned home but found him hiding near her house. On noticing P.W 1 entering her house, he also forced entry into her house, molested her and attempted to rape her. At that time, P.W 2 had called P.W 1 on her cell phone to enquire whether she had reached home, whereupon she narrated the entire incident to him. P.W 2 rushed home and found the Appellant who appeared to be inebriated, in the courtyard. Accordingly, P.W 2 lodged Exhibit 3.

**(ii)** Investigation into the matter by P.W 15, Sub-Inspector of Police, to whom the matter was endorsed, revealed that the Appellant had committed the offence as alleged in Exhibit 3. P.W 15 submitted Charge-Sheet against the Appellant under Sections 376/511/354(D)/342/448 of the Indian Penal Code, 1860 (hereinafter, the "IPC"), read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the "POCSO" Act). On receipt of the Charge-Sheet, the Learned Trial Court framed charge against the Appellant under Section 9(l) of the POCSO Act and Sections 354 D(1)(i), 451, 341, and 342 of the IPC.

**3(i).** The Appellant entered a plea of "not guilty" and sought trial. Fifteen prosecution witnesses were examined following which the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C") where he denied the incidents. He sought to and was permitted to examine three witnesses. The Judgment and Order on Sentence followed, whereby the Learned Trial Court, convicted the Appellant under Section 9(l) of the POCSO Act and sentenced him to undergo simple imprisonment for a period of five years and to pay a fine of Rs.10,000/-(Rupees ten thousand) only, in default thereof, to undergo further simple imprisonment for a period of six months under Section 10 of the same Act. He was also sentenced to undergo simple imprisonment for a period of two years under Section 354 D(1)(i)/(2) of IPC with fine of Rs.10,000/-(Rupees ten thousand) only, and default clause of imprisonment. He was further sentenced to undergo simple imprisonment for a period of two years with fine of Rs.10,000/- (Rupees ten thousand) only, under Section 451 of the IPC with default clause of imprisonment. The Sentences were ordered to run concurrently, setting aside the period of the imprisonment already undergone by the Appellant. The fine if recovered was to be paid as compensation to the victim.

**(ii)** It is the case of the Appellant before this Court that there are contradictions in the evidence of the prosecution witnesses. Learned Counsel for the Appellant contended that as per the victim she was alone at home when the Appellant assaulted her on 01-08-2017, whereas P.W 2 her father, in his evidence, has stated that he has two daughters and they go to the same school and reach home together. That, it is the Prosecution Case that, on

01-08-2017 the victim was called to the lower school gate where the Appellant suddenly grabbed her hand and touched her breasts but the Prosecution has failed to take into account that the school gate is crowded during the lunch time incapacitating the Appellant from committing such an offence. That instead of one, two Birth Certificates have been furnished by the Prosecution to establish the age of the victim, being Exhibit 5 and Document 'X', raising suspicions about the authenticity of Exhibit 5 and thereby the age of the victim. On these grounds, the Judgment of conviction and Order on Sentence deserve to be set aside.

**4.** Learned Additional Public Prosecutor while agreeing with the findings in the impugned Judgment and consequent Order on Sentence, contended that there are no anomalies in the prosecution evidence and the victim child was sexually assaulted by the Appellant on four occasions which the cross-examination has failed to decimate. The evidence of the victim P.W 1 finds support in the evidence of P.W 2, P.W 3, P.W 5 and P.W 8. That, P.W 3 has categorically deposed that the victim came crying to his residence seeking his help to remove the Appellant from her house. P.W 3 accordingly reached the house of the victim and saw the Appellant who appeared to be slightly intoxicated, coming out of the victim's house. He told the Appellant to return to his own home. P.W 8, the brother of P.W 3, has clearly stated that he had told P.W 3 to go to the house of the victim as requested by her and drive away the Appellant from there. P.W 8 however heard the victim cry for a second time from her residence, upon which he himself went to check and saw the Appellant in an intoxicated state, standing in the verandah of the victim's house. P.W 8 told

him to leave. The evidence of P.W 1 clearly indicates that on 31-07-2017 she was attacked by the Appellant in the courtyard of the house of P.W 8 when he tried to grope her breasts. On 01-08-2017, he repeated the act at the lower school gate, then followed her into her house after school and again repeated the act of groping and tried to disrobe her. The fourth incident occurred when P.W 3 had driven away the Appellant from her house on her request but when she returned home from the house of P.W 3, she found the Appellant hiding below the verandah of her house. He forcibly entered her house and molested her. At that juncture she received a call from her father on her mobile. This circumstance is also duly corroborated by her father P.W 2 in his evidence as well as in Exhibit 3 the FIR. When the victim was medically examined by the Doctor P.W 9 on the same day at 10.30 p.m, he *inter alia* found two superficial abrasions (nail marks/fresh) over the upper front (anterior) aspect of the neck. These injuries lend support to the allegations of the victim against the Appellant. In light of the entire evidence on record the Judgment and Order on Sentence requires no interference.

**5.** On the basis of evidence on record and the submissions put forth by Learned Counsel for the parties, it is now to be determined as to whether the Appellant committed the offences he was convicted under.

**6.** The evidence of P.W 1 clearly reveals that on 31-07-2017, the first incident of sexual assault took place when she was returning home from the courtyard of P.W 8 and the Appellant caught her hand and groped at her breasts. She did not inform her father of the incident being too embarrassed about it. The

three other incidents took place on 01-08-2017 at the places already indicated in the arguments of Learned Additional Public Prosecutor and duly recorded by the Learned Trial Court i.e., at the lower school gate, thereafter when she reached home and he forcibly entered therein. On being chased away by P.W 3 he evidently concealed himself below the verandah. When the victim returned to her house the fourth incident occurred, the Appellant having again forcibly entered the house and caught the victim and sexually assaulted her. His presence in the house was witnessed by P.W 3, P.W 8 and later also by P.W 2, her father, when he returned home and found the Accused still standing in the courtyard of their house. As correctly pointed out by the Learned Additional Public Prosecutor the abrasions found on the neck of the victim, by P.W 9, could well have been sustained by her due to the molestation inflicted by the Appellant.

**7.** The arguments of Learned Counsel for the Appellant that the Birth Certificate of the victim being Exhibit 10 and Document 'X' are doubtful and do not establish the age of the victim, does not appeal whatsoever to reason as Exhibit 5 was furnished by the Prosecution to indicate that the victim was born on 26-04-2003 and was fourteen years of age at the time of the incident. Although the contents of Exhibit 5 apparently were not proved as per the requirement of the Indian Evidence Act, 1872 (hereinafter, the "Evidence" Act), there was no cross-examination on that aspect. Hence, the document was admitted and its contents accepted as correct, thereby establishing the age of the victim. Document 'X' cannot be taken into consideration by this Court since it was not relied on by the Prosecution or for that

matter by the Appellant, neither it is in original. A photocopy of a document cannot be considered by the Court unless reasons for the non-production of the original are given by the party relying on the document. For this purpose one need not reiterate the provisions of Sections 64 and 65 of the Evidence Act.

**8.** Having considered the entire facts and circumstances on record and from the foregoing discussions, the Learned Trial Court has correctly convicted the Appellant under Section 9(l)/10 of the POCSO Act and Sections 451, 354 D(1)(i)/2 of the IPC.

**9.** He was acquitted of the offences under Sections 341/342 of the IPC by the Learned Trial Court.

**10.** Consequently, no reason arises to interfere with the findings of the Learned Trial Court and the Order on Sentence meted out to the Appellant.

**11.** The Appeal is dismissed and disposed of accordingly.

**12.** Pending applications, if any, stand disposed of.

**13.** No order as to costs.

**14.** Copy of this Judgment be forwarded to the Learned Trial Court along with its records.

**( Meenakshi Madan Rai )**  
**Judge**  
23-11-2022

Approved for reporting : **Yes**