

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 1st May, 2024

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

Crl.A. No.09 of 2022

Appellant : State of Sikkim

versus

Respondent : Pema Wangchuk Lepcha

Application under Section 378(1)(b) of the
Code of Criminal Procedure, 1973

Appearance

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan Sunwar and Mr. Shakil Raj Karki, Assistant Public Prosecutor for the Appellant.

Mr. Tshewang Namgyal Bhutia, Advocate (Legal Aid Counsel) for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The facts of the case leading to the instant Appeal are that the First Information Report (FIR), Exhibit 4, was lodged by PW-2, the Principal of the school where the victim was studying at the relevant time. It was reported in Exhibit 4 that, on observing PW-1, the victim, a student in the school, she appeared to be in physical discomfort. Accordingly, on the pretext of a medical examination she was taken to the Primary Health Centre (PHC) and made to undergo her urine examination, which tested positive for pregnancy. PW-1 told PW-2 that, on the evening of 15-08-2019 when she was returning home, the Accused/Respondent had physical relations with her in a nearby jungle at around 05.00 p.m. Based on Exhibit 4, a case under Section 376 of the Indian Penal Code, 1860 (hereinafter, the "IPC") read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter,

the "POCSO Act") was registered against the Respondent by the concerned Police Station and taken up for investigation. Finding sufficient *prima facie* materials against the Respondent, Charge-Sheet was submitted against him under Section 376 of the IPC, read with Section 6 of the POCSO Act. A supplementary Charge-Sheet was undertaken to be filed pursuant to a DNA test being conducted on the birth of the child which later came to be filed on 26-12-2020.

(i) On receipt of Charge-Sheet, the Learned Trial Court framed Charge against the Appellant under Sections 5(j)(ii) and 5(l) of the POCSO Act, punishable under Section 6 of the same Act and under Section 375 of the IPC, punishable under Section 376 of the IPC. On the Appellant entering a plea of "not guilty" he was tried for the offences charged with. During the trial, the Prosecution examined twenty-two witnesses including the Investigating Officer (I.O.) of the case. The accused was afforded an opportunity to explain the incriminating evidence against him, by his examination under Section 313 of the Code of Criminal Procedure, 1973 and his responses recorded. On consideration of the entire evidence before it, the impugned Judgment in Sessions Trial Case No.04 of 2020 (*State of Sikkim vs. Pema Wangchuk Lepcha*), dated 16-03-2021, was pronounced acquitting the Respondent of the charges framed against him.

2. The Prosecution case, shorn of irrelevant details is that, the mother of PW-1 having re-married, left for Nepal in January, 2020, leaving PW-1, allegedly 15 years at the time, in the care of her aunt, PW-9. From 03-03-2020 PW-1 attended school. On 05-03-2020 the physical appearance of PW-1 aroused the suspicion of

the teachers in the school. On the pretext of administering HPV Vaccine to her, she was taken to the PHC, where on conducting her urine test, she was found to be pregnant. Investigation revealed that, on 15-08-2019 at around 1500 hours the victim while returning home from school after attending the Independence Day function was waiting for a taxi. The taxi driven by the Respondent arrived at the spot where PW-1 was waiting. She boarded it along with PW-11 her friend, PW-6, his wife and daughter. All the other passengers alighted at their destinations before her. *En route* to her destination, the Respondent took PW-1 to a cave, below the road and sexually assaulted her. Charge-Sheet came to be filed against the Appellant for rape and aggravated penetrative sexual assault. On completion of trial, the Learned Trial Court pronounced the impugned Judgment.

3. Aggrieved with such acquittal the State-Appellant is before this Court urging that the clinching evidence of PW-1, leads to the irresistible conclusion that the Respondent had sexually assaulted the victim. Learned Additional Public Prosecutor contended that the victim had deposed that the Respondent had forcibly subjected her to the sexual act on 15-08-2019 which resulted in her pregnancy as revealed by her medical examination. The Respondent again in December, 2019, took her in his vehicle to a PMGSY road, parked the vehicle and committed penetrative sexual assault on her. The evidence of the victim stood undecimated in cross-examination. That, the evidence of a victim of sexual assault, stands at par with the evidence of an injured witness. Reliance on this aspect was placed on **Mohd. Imran Khan**

vs. **State Government (Govt. of NCT of Delhi)**¹ and **State of Punjab vs. Gurmit Singh and Others**². It was further argued that the Prosecution had established that the victim was a minor at the time of offence as proved by Exhibit 1 her Birth Certificate and the well-settled principle of law is that the consent of a minor is no consent. The argument of the Respondent before the Learned Trial Court that he was falsely implicated as medical evidence does not substantiate the Prosecution case is of no avail as the testimony of the victim is reliable and unwavering. Strength was drawn from the decisions in **B.C. Deva vs. State of Karnataka**³ and **Sudhansu Sekhar Sahoo vs. State of Orissa**⁴. That, the Learned Trial Court in the teeth of the evidence of PW-1, erred in acquitting the Respondent by ignoring the settled position of law that, the testimony of the victim in case of sexual offences is vital requiring no corroboration if it is found credible and the Court should act on the sole testimony of such victim, to convict the Respondent. Hence, the impugned Judgment be set aside and the Respondent be convicted of the charges framed against him.

4. *Per contra*, repelling the arguments put forth by Learned Additional Public Prosecutor for the State-Appellant, it was submitted by Learned Counsel for the Respondent that, the evidence of the victim is unreliable as the evidence of the other Prosecution witnesses are contrary to her evidence. According to PW-1 when she boarded the taxi she was alone in it with the Respondent, whereas PW-6 has deposed that on the relevant day his wife had reserved the Respondent's taxi, to drop him his wife

¹ (2011) 10 SCC 192

² (1996) 2 SCC 384

³ (2007) 10 SCC 743

⁴ (2002) 10 SCC 743

and daughter from the PHC, to their destination. As he was intoxicated at the relevant time he was not able to recollect the names of other passengers but he learnt later that the Respondent was arrested by the Police for impregnating the victim. PW-11, a student in the same school as PW-1 was also returning home on the same day after attending her school programme and she also boarded the same taxi with PW-1. Her evidence supported the evidence of PW-6. Their evidence is contrary to the evidence of PW-1.

(i) In the next leg of his argument, it was urged that the victim was unaware of her date of birth neither was her mother PW-5 able to vouchsafe for it. PW-5 claimed that Exhibit 1 is the birth certificate of the victim but her deposition is clearly untrue as she has admitted that the name of the mother in Exhibit 1 has been wrongly mentioned. That, in Exhibit 6, the school admission register, the date of admission of PW-1 to the school is "15-02-2011" and her date of birth is recorded as "21-03-2004", whereas in Exhibit 1, her date of birth is recorded as "22-03-2004". Thus, the disparity in the dates recorded in the above documents apart from the interpolation in Exhibit 1, lends suspicion to the Prosecution case. That, the records of the first school that PW-1 attended was not furnished by the Prosecution. It was next canvassed that the results of the DNA profiling indicate that the DNA profile of the new born baby of the victim did not match with the DNA profile of the Respondent. This has been established by Exhibit 23, the DNA profiling evidence for establishing paternity, which was duly identified by PW-22, the DNA examiner furnished by the Prosecution as its witness. The scientific evidence

establishes the non-involvement of the Respondent in the offence. Hence, the impugned Judgment of the Learned Trial Court warrants no interference.

5. This Court is now to determine "Whether the Learned Trial Court was in error in acquitting the Respondent of the offences that he was charged with?"

6. The Learned Trial Court formulated two points for determination, viz.,

(i) *Whether prosecutrix was minor at the time of commission of penetrative sexual assault/rape by accused?*

(ii) *Whether accused committed penetrative sexual assault/rape on a prosecutrix and made her pregnant? If so, whether accused is the father of new girl child born from prosecutrix?*

7. The Learned Trial Court observed that PWs 1 and 5 had not proved the contents of the birth certificate of PW-1 marked Exhibit 1. That, Exhibit 6, column 22 was proved by PW-2, but the said school was not the first school attended by the Prosecutrix. She had attended pre-school at the Integrated Child Development Scheme (ICDS). That, the records of the ICDS were not produced and proved by the Prosecution. That, the signature of the guardian did not appear in Exhibit 6 Column 22. That, PWs 17 and 21 deposed that based on the Register of Births and Deaths of the concerned PHC, Exhibit 11, the name of the Prosecutrix appeared in the births register, where her date of birth was recorded as "22-03-2024". However, neither the contents of Exhibit 11, nor the thumb impressions on the document were proved by both the witnesses. The place of birth of the Prosecutrix was also changed

from 'G' to 'P' but there were no initials of the Registrar, Births and Deaths to endorse such corrections. Although, as per PW-21 the Doctor who issued Exhibit 1, the father of PW-1 had made the corrections on Exhibit 11 but this found no mention in the remarks column of the document. That, on the inability of the Prosecution to prove the information in Exhibit 11, the authenticity of the entries therein were also suspect. Hence, the Prosecution failed to establish that the victim was sixteen years old at the time of the offence.

(i) The Learned Trial Court while discussing whether the Respondent committed penetrative sexual assault/rape on the Prosecutrix and made her pregnant *inter alia* observed that the results from the DNA profiling test, Exhibit 23 was sufficient to conclude that the Respondent is not the biological father of the alleged victim's child. Thus, the forensic evidence did not support the Prosecution case to establish the complicity of the Respondent in the offence.

8. Having considered the reasons put forth in the impugned Judgment on both points formulated by it for determination and having meticulously examined the entire evidence on record, we find no reason to differ from the observations therein. In the first instance, age of the victim has not been proved beyond a reasonable doubt in the absence of relevant documentary evidence, as discussed elaborately by the Learned Trial Court. The DNA profiling test, Exhibit 23, has sounded the death knell for the Prosecution case. DNA profiling a scientific test, assists in comparing a suspect's profile to DNA evidence, to assess the likelihood of their involvement in a crime,

in this case the paternity. The DNA profile of the victim's child and that of the Respondent did not match as clearly deposed by PW-22, the DNA Examiner who conducted the DNA Profiling Tests.

9. We are indeed aware that the evidence of a victim of sexual offence is to be placed on a different footing as held in the case of *Phool Singh vs. State of Madhya Pradesh*⁵ but at the same time the evidence should be credible enough to inspire the confidence of the Court and it should be of sterling quality for the Court to be able to rely on it completely, to base the conviction on. In the instant case, the very fact that the victim has stated that the Respondent was responsible for her pregnancy but the DNA profiling test which is a scientific forensic technique tells a different tale cannot be discounted. Despite the DNA test not fortifying the Prosecution case no further investigation was taken up on this aspect to establish the identity of the perpetrator of the offence. It is apparent that PW-1 has failed to disclose the name of the actual assailant thereby rendering her entire evidence as unreliable. The evidence of the victim fails the test of being of sterling quality. An innocent person cannot be picked up at random from the street by an alleged victim and made a sacrificial lamb on the altar of the lies of the victim.

10. In the end result, on consideration of all the evidence on record, we find that there is no error in the acquittal of the Respondent of the charges under Section 376 of the IPC read with Section 6 of the POCSO Act.

11. Consequently, we uphold the Judgment of the Learned Trial Court.

⁵ (2022) 2 SCC 74

- 12.** Appeal is dismissed and disposed of accordingly.
- 13.** No order as to costs.
- 14.** Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

(Bhaskar Raj Pradhan)
Judge
01-05-2024

(Meenakshi Madan Rai)
Judge
01-05-2024

Approved for reporting : **Yes**

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