

**THE HIGH COURT OF SIKKIM : GANGTOK**

(Criminal Appellate Jurisdiction)

Dated : 7th October, 2024

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


Crl.A. No.10 of 2022

Appellant : Dewman Subba**versus****Respondent** : State of SikkimAppeal under Section 374(2) of the
Code of Criminal Procedure, 1973

AppearanceMr. Gulshan Lama, Advocate (Legal Aid Counsel) for the
Appellant.Mr. Yadev Sharma, Additional Public Prosecutor for the State-
Respondent.

JUDGMENTMeenakshi Madan Rai, J.


1. The instant appeal pertains to the sodomy of PW-4, the victim, aged about ten years, by the Accused-Appellant, then aged about thirty-nine years. The FIR, Exbt 2, was lodged on 09-02-2021 by PW-3, the victim's father, informing therein that the Appellant had inserted his penis into the mouth and anus of the child, PW-4, during January, 2021. PW-5 his wife, informed PW-4 of the acts of sexual assault. The Complainant then verified it from the victim who had affirmed the fact to him. The incidents occurred in the month of January, 2021 and had been perpetrated on the victim around eight times. The FIR came to be registered against the Appellant under Sections 4 and 7 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act, 2012") and Section 377 of the Indian Penal Code, 1860 (hereinafter, "IPC"). Investigation was endorsed to PW-14, the Investigating Officer (IO) of the case, who on completion thereof



filed Charge-Sheet against the Appellant under Sections 4 and 7 of the POCSO Act, 2012 read with Sections 377 and 506 of the IPC. The Learned Special Judge, POCSO, framed Charge against the Appellant under Section 377 of the IPC and Sections 5(l) and 5(m) of the POCSO Act, 2012, both offences punishable under Section 6 of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (hereinafter, "POCSO Act, 2019") and also under Section 506 of the IPC. On a plea of "not guilty" by the Appellant, the trial commenced with the examination of fourteen witnesses.

(i) On analysing the entire evidence on record, the Learned Trial Court convicted the Appellant for the offences he was charged with, vide the impugned Judgment, dated 28-02-2022, in ST (POCSO) Case No.06 of 2021, in the Court of the Learned Special Judge, POCSO, Gyalshing. Vide the impugned Order on Sentence, dated 28-02-2022; (a) Under Section 377 of the IPC, the Appellant was sentenced to undergo rigorous imprisonment of ten years and fined ₹ 20,000/- (Rupees twenty thousand) only; (b) Under Section 506 of the IPC, he was sentenced to undergo rigorous imprisonment for a period of two years and fined ₹ 5,000/- (Rupees five thousand) only; (c) Under Section 5(l) and Section 5(m) both punishable under Section 6 of the POCSO Act, he was sentenced to undergo rigorous imprisonment for a period of twenty-five years, each, and fine of ₹ 20,000/- (Rupees twenty thousand) only and ₹ 10,000/- (Rupees ten thousand) only, respectively. The sentences of fine bore default stipulations, while the sentences of imprisonment were ordered to run concurrently, setting off the period of imprisonment already undergone. The Trial Court while arriving at its finding of conviction observed that,

the testimony of the victim was genuine, candid and a totally believable account of what he had undergone. That, a graphic account of how he was sodomized and sexually assaulted by the Appellant on more than one occasion was narrated by PW-4, which in the Trial Court's opinion was sufficient to convict the Appellant. The Trial Court also observed that there was no apparent reason as to why the child would make such a serious allegation against the Appellant without any basis, especially since the Appellant was well-known to the family of the victim. The statements of the victim being convincing and trustworthy required no corroboration, nevertheless his parents PW-3 and PW-5 corroborated his testimony and PW-6 also deposed that the child had told him that the Appellant had sexually assaulted him and his statement remained undecimated. The Court was of the view that the evidence established that the Appellant had visited the house of the victim when his parents were away, when PW-6 was tasked with the responsibility of looking after the victim and his brother on their parents' request. The victim had shown PW-5 the place of sexual abuse and detailed the acts committed on him and told her that every time they (parents) were away, the Appellant would sexually abuse him. The Trial Court found that when PW-5 confronted the Appellant about the incident he apologized and also requested her not to report the matter. PW-13 the Doctor who examined the victim also stated that during his examination that, the child gave a history of the last sexual act being perpetrated about 5/6 days ago. The Trial Court further observed that although the medical examination could not detect any visible injuries or signs of sexual assault, the witness opined that according to the




history and examination, sexual contact could not be ruled out. The Trial Court then relied on ***State of Himachal Pradesh vs. Sanjay Kumar alias Sunny***¹ and a plethora of other decisions and came to the ultimate conclusion that the Appellant was guilty of the commission of the offences as detailed *supra* and convicted him accordingly.

2. While assailing the Judgment and Order on Sentence, Learned Counsel for the Appellant contended that in the first instance the Prosecution allegation is that the incident occurred on 04-02-2021 and the medical examination of PW-4 took place on 09-02-2021, but PW-13 the Doctor failed to trace any injuries around the anal region of the victim. The last incident is said to have occurred in a room on a bed, but PW-14 the IO did not seize the bed sheet which could have shed light as to whether sexual assault indeed occurred. That, contradictions were found in the Section 164 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") statement of PW-4 and his deposition in Court, as in the former he stated that during the acts of sexual assault the Appellant would seize him by his throat and gag him, however during cross-examination he admitted that, the Appellant did not muffle his cries or close his mouth and he did not scream during the said incidents. In the absence of medical evidence and the vacillating statements of the victim rendering them unreliable, the Appellant deserves an acquittal. Hence, the impugned Judgment and Order on Sentence be set aside.

3. Learned Additional Public Prosecutor contesting the arguments advanced by Learned Counsel for the Appellant stated


¹ (2017) 2 SCC 51




that the victim's evidence was coherent and believable with regard to the sexual assault perpetrated on him. The evidence of PW-6 and the victim's parents PWs 3 and 5 corroborated the evidence of the victim. The impugned Judgment of conviction and Order on Sentence were therefore reasoned and brooked no interference.

4. The entire records having been carefully perused by us and the rival contentions heard *in extenso*. This Court is to determine whether the Learned Trial Court was correct in convicting the Appellant or whether an error emanated in such conclusion.

5. The evidence of PW-4 (victim) indicates that before recording his evidence the Learned Trial Court examined the ten year old by putting questions to him to assess his competence to depose in the Court room. After having examined the victim, the Learned Trial Court recorded that "*Having examined the victim, I find that he is fluent in English and understands all questions put to him. He is also capable of giving very rational answers to all questions put to him. Hence, I find he is competent to testify.*" As per Section 33 of the POCSO Act, 2012, five questions were put to the minor witness by the Trial Court after the questions were communicated to the Court by the Learned Special Public Prosecutor. The victim deposed *inter alia* that in the month of January the Appellant had sexually assaulted him eight times in his house. That, on the pretext of making PW-4 massage his back the Appellant would take him to a room and then sexually assault him. The first time the victim was taken by the Appellant to sleep with him saying that he was afraid to sleep alone. On one occasion his mother was also in the house and when she went to the kitchen,




the Appellant locked the door of the room and sexually assaulted him. The acts of sexual assault took place on eight different occasions. That, when his father and mother had gone to attend a wedding, his brother PW-4 and PW-6 were in the house, the Appellant came to the house in the evening while they were in the kitchen and took him to the room under the pretext of making beds. Once they were in the room, he again sexually assaulted him. The last time he sexually assaulted him was on the day his father returned from the wedding, his mother was in the house, but working in the kitchen. The Trial Court then asked him to explain what exactly he meant when he said that the Appellant had done '*chara*' to him, the answer to that was; the Appellant used to open his pants, make him bend and then insert his penis into the victim's anus and fondle his chest and pinch his nipples. When he used to cry out in pain, the Appellant used to squeeze his neck. He even used to urinate all over the victim's back after doing '*chara*'. When he told the Appellant that it hurt him, he used to squeeze his neck and threatened that if he told his parents and talked about in the village, he would kill him. In answer to the question put by the Court as to "What happened thereafter?", the victim further testified that finally when his father was not at home he confided in his mother and told her about what the Appellant was doing to him. His mother told his father about it, who then, took him to the "person who looks after their village" (Panchayat) and told him everything. Later, both he and his father went to the Police where he narrated everything to the Police. On being questioned by the Court as to whether he had anything else to say, the victim responded that he had given his statement earlier before another



Judge Madam who had asked him several questions before his statements were recorded. The victim then identified Exbt – 9 in two pages as the 'questionnaire' and his Section 164 Cr.P.C. statement and his thumb impression on the documents. He also identified the Appellant on the screen. His cross-examination did not decimate the fact of sexual assault.

(i) The evidence of PW-5 lends credence to the evidence of PW-4. As per PW-5, PW-4 told her about the incident and the fact that he had been sexually abused eight times by the Appellant. Her husband PW-3 returned home on 07-02-2021, whereupon PW-5 having mustered courage told him about the incidents. Her husband PW-3 on hearing the same, immediately went to the Panchayat to report the matter. The Panchayat, according to PW-5 then telephoned the Appellant's sister, who called PW-3 and tried to convince him to settle the matter. He was called to the "Panchayat Ghar" the next morning, however, the Panchayat and other villagers refused to settle the matter at the Panchayat level, after which PW-3 and PW-4 went to the Police Station. In fact, PW-4 had also told her that on one occasion when she was in the house and went into the kitchen, the Appellant locked the door of the room and sexually assaulted him. This finds support in the evidence of PW-5 who stated under cross-examination that on 04-02-2021 the Appellant visited their house and told her that his back was aching and took her younger son, the victim to the room.


(ii) PW-3 supported the evidence of PW-4 and PW-5 and added that, he had lodged the FIR after he went to the Panchayat who told him that it was a serious matter and could not be settled



at the Panchayat level and must be reported to the Police. The FIR Exbt 2 was identified by him.

(iii) PW-1 the Police Inspector of the concerned PS confirmed having received an oral report on 09-02-2021 which was reduced into writing under Section 154(1) of the Cr.P.C. from the father of the minor victim, aged about 10 years.

(iv) PW-6 was given the responsibility of staying in the house of PW-3 and PW-5 when they went to attend their relative's wedding and to take care of their two minor sons. After they left for the wedding he too left to collect fodder, while both the children were playing in the house. When PW-6 returned, the Appellant was in the house but went away and returned around 8 p.m. in a state of intoxication. He asked for some food and told them that he wanted to spend the night in the house. The two children and PW-6 slept in one room while the Appellant went to sleep in the other room. In the morning, when he woke the Appellant was not found in the house and when he asked the victim's elder brother he did not know where PW-4 was. On going to the next room, he saw the Appellant sleeping on the bed and PW-4 sitting on the same bed playing with a toy. When PW-6 asked him why he had come to that room, PW-4 told him that the Appellant had taken him at night, insisting that the victim accompany him to his room. PW-6 deposed that, on the last night before the parents returned, when the Appellant was not in the house, the victim told him that the Appellant had sexually assaulted him and during such sexual assault he used to squeeze his neck and urinate on his back. PW-4 told her of the incidents after which she went to confront the Appellant. Having carefully perused his cross-examination, it is



clear that the fact that PW-4 had informed him of the acts of sexual assault were not decimated and in fact he added that he came to know of the incidents of sexual assault only after the victim told him about it, but he did not witness any of the incidents.

(v) The age of the victim is not in dispute nor contested, it is established that the Birth Certificate of the victim was seized from the possession of PW-3 who during his evidence in Court identified it to be Exbt – 7. The Police had seized the document vide Exbt – 8, the property seizure memo which was witnessed by PW-7, an independent witness. PW-2 the District Medical Officer-cum-Registrar, Births and Deaths, authenticated the Birth Certificate of the victim after checking the Birth Register and having found the details of the victim at Sl. No.232(C)11. The original Birth Register was also furnished before the Learned Trial Court and the evidence of this witness stood the test of cross-examination. Hence, the date of birth of the victim was found to be “13-04-2011” with the name of the parents recorded in the original Birth Register along with their address. The offence having taken place between January-February, 2021, it is evident that the victim was about 10 years at the time of the offence.

6. On careful consideration of the entire evidence on record, we do not find any reason to disagree with the findings of the Learned Trial Court. Indeed, the medical examination may not have shown injuries on the victim, however the Supreme Court has held in ***State of Himachal Pradesh vs. Manga Singh***² that injuries are not necessary to establish the offence of rape and observed as follows;

² (2019) 16 SCC 759



“11. It is well settled by a catena of decisions of the Supreme Court that corroboration is not a sine qua non for conviction in a rape case. If the evidence of the victim does not suffer from any basic infirmity and the “probabilities factor” does not render it unworthy of credence. As a general rule, there is no reason to insist on corroboration except from medical evidence. However, having regard to the circumstances of the case, medical evidence may not be available. In such cases, solitary testimony of the prosecutrix would be sufficient to base the conviction, if it inspires the confidence of the court.”

(i) Reference in this context can also be made to Modi — A Textbook of Medical Jurisprudence and Toxicology, 24th Edition (Second Reprint 2013), in Chapter 31 of Section 1 — Sexual Offences, at Page 682, the relevant portion of which are as follows;

“Examination of the Passive Agent.—Written consent for medical examination should be obtained and a short history taken, before commencing a medical examination, preferably in the knee elbow position. The following signs may be discovered if the boy (passive agent) is not accustomed to sodomy:

(i) Abrasions on the skin near the anus with pain in walking and on defaecation, as well as, during examination. These injuries are extensive and well defined in cases where there is a great disproportion in size between the anal orifice of the victim and the virile member of the accused. **Hence, lesions will be most marked in children, while they may be almost absent in adults when there is no resistance to the anal coitus. These injuries, if slight, heal very rapidly in two or three days. In most of the cases brought before Modi, he had seen superficial abrasions, varying from 1/6” to 1” x 1/6” to 1/4”, external to the sphincter ani.** In some cases, there may be bruising of the parts round about the anus and the abrasions may extend into the anus beyond its sphincter.”

[emphasis supplied]

The medical examination of the victim took place on 09-02-2021 whereas the sexual assault was perpetrated on 04-02-2021 as per PW-4, hence in all likelihood the injuries would have healed when the victim was medically examined.

(ii) Besides all other parameters for proof of a Prosecution case remaining the same, purposive interpretation must be given to the provisions of the POCSO Act, 2012, the object of the



legislation and more especially the provisions of Sections 29 and 30 of the POCSO Act, 2012. When the statement of the victim regarding his sexual assault has withstood the prolix cross-examination and is duly corroborated by other evidence on record, it stands to reason that the Appellant had indeed committed the offence, besides he has failed to establish his innocence by proving that he had no such mental state with respect to the act charged with as required under Section 30 of the POCSO Act, 2012, nor was any animosity between the Appellant and PW-4 or his family brought to light during the trial.

7. Consequently, the impugned Judgment and Order on Sentence (*supra*), warrants no interference whatsoever by this Court and is accordingly upheld, save to the extent of reducing the Sentence under Sections 5(l) and 5(m) both punishable under Section 6 of the POCSO Act to twenty years rigorous imprisonment instead of twenty-five years imposed by the Learned Trial Court.

8. Appeal disposed of accordingly.

9. Copy of this Judgment be forwarded to the Learned Trial Court for information along with its records.

10. A copy of this Judgment also be made over to the Appellant/Convict through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority at the Central Prison, Rongyek, for information.

(Bhaskar Raj Pradhan)

Judge

07-10-2024

(Meenakshi Madan Rai)

Judge

07-10-2024

Approved for reporting : **Yes**