

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 21st February, 2024

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

Crl. A. No.11 of 2023

Appellant : Karma Loday Lepcha alias Kancha

versus

Respondent : State of Sikkim

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

Appearance

Mr. Bhusan Nepal, Advocate (Legal Aid Counsel) for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. The only point pressed in Appeal herein is that the Learned Special Judge (POCSO Act, 2012), Gangtok, in the impugned Judgment dated 29-03-2023, in Sessions Trial (POCSO) Case No.48 of 2019, erroneously convicted the Appellant under Section 5(m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act, 2012") punishable under Section 6 of the same Act, when the Learned Trial Court was seized of the fact that the victim was above twelve years old at the time of the offence as emanates from Paragraph 26 of its Judgment. That, this error is required to be rectified as the records nowhere indicate that the victim was below 12 (twelve) years of age when the offence was perpetrated on her. That, the Birth Certificate of the victim, Exhibit 1, also reveals that her date of birth is 17-03-

2003, and her evidence lends credence to this fact as according to her sometime during the year 2016 the first sexual assault took place, pursuant to which she delivered a baby girl on 04-11-2016. Thus, under no circumstance was she under 12 (twelve) years of age at the time of the offence. There is no challenge to the Judgment as regards the conviction and Order on Sentence under other provisions of the POCSO Act, 2012.

2. Learned Additional Public Prosecutor fairly conceded that an error has emanated in the impugned Judgment of the Learned Trial Court and hence, he has no objection to the submissions put forth by Learned Counsel for the Appellant.

3. We have heard the submissions put forth and perused all the documents on record.

4. The documents relied on by the Prosecution before the Learned Trial Court are not the subject matter of challenge before this Court. The documents on record reveal that Exhibit 5, the First Information Report (hereinafter, the "FIR"), was lodged on 01-06-2016 and endorsed to the Investigating Officer (I.O.) of the case (P.W.18) on the same date after it was registered against the Appellant. Exhibit 1 unequivocally reveals that the date of birth of the victim was 17-03-2003, duly supported by Exhibit 13, the Certificate issued by the Registrar of Births and Deaths to the effect that the victim's date of birth is 17-03-2003. The I.O. (P.W.18) in her evidence has categorically stated that her investigation revealed that the victim was fourteen years old at the time of the incident. The documents exhibited by the Prosecution have not been decimated in cross-examination. The victim delivered the child on 04-11-2016. The cross-examination of the victim before the Learned Trial Court does not demolish this fact. It is seen

from the records that the Learned Trial Court has rather carelessly framed charges against the Appellant by stating *inter alia* as follows;

“.....
Firstly:- That you, during and around January-February, 2015 and even thereafter, at 10th Mile, Lxxxxxx-Nxxxxxx, East Sikkim repeatedly committed penetrative sexual assault on the minor victim, then **aged about 11 years**(*you used to insert your penis into her vagina repeatedly*) and you thereby committed an offence of aggravated penetrative sexual assault under Section 5(l) of the Protection of Children from Sexual Offences Act, 2012(*In short, "the POCSO Act, 2012"*) which is punishable under Section 6 of the said Act and within the cognizance of this Court;

Secondly:- That you, during and around January-February, 2015 and even thereafter, at 10th Mile, Lxxxxxx-Nxxxxxx, East Sikkim(*repeatedly*) committed penetrative sexual assault on the minor victim, **who was then below 12 years of age**(*you used to insert you penis into her vagina repeatedly*) and you thereby committed an offence of aggravated penetrative sexual assault under Section 5(m) of the POCSO Act, 2012 which is punishable under Section 6 of the said Act and within the cognizance of this Court;

.....”
 (emphasis supplied)

There is no evidence whatsoever on record that the minor victim was eleven years at the time of the incident. This ought to have been evident to the Learned Trial Court even from a bare perusal of the FIR in which it is reported that the fourteen year old daughter of the Complainant had been sexually assaulted. It is a revelation of the egregious act of the Learned Trial Court with nary a care to detail, when matters under the POCSO Act have to be considered with utmost sensitivity to prevent miscarriage of justice.

(i) The records before this Court also reveal that in Exhibit 2 which is a form for recording statement of the victim, it is recorded as follows;

“.....
 The statement of Sharmila Subba aged about 14 years, taken on oath solemn affirmation before me

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....., Chief Judicial Magistrate, East Sikkim, at
Gangtok, on this the **09th day of June, 2015.**

.....”
(emphasis supplied)

Here is another glaring example of carelessness employed by the concerned Judicial Officer of the Learned Trial Court while recording the dates, when it is apparent that the FIR itself was lodged only on 01-06-2016, it is unfathomable as to how the Learned Magistrate could have recorded the statement on “09-06-2015”. Although, this is not the concern in this Appeal nevertheless it is pointed out for the reason that the Learned Trial Court has to be vigilant and conscientious when carrying out judicial works.

5. Be that as it may, having meticulously examined all documents and evidence on record, we have reached the inevitable finding that the victim was above twelve years when the offence was committed on her and this in fact is the finding of the Learned Trial Court in Paragraph 26 of the assailed Judgment.

6. In such circumstances, it concludes that the Learned Trial Court was in error in convicting the Appellant under Section 5(m) of the POCSO Act, 2012, punishable under Section 6 of the same Act.

(i) We accordingly, set aside the conviction of the Appellant under Section 5(m) of the POCSO Act, 2012, punishable under Section 6 of the same Act.

7. The Judgment and Order on Sentence of the Learned Trial Court stands modified to the above extent.

(i) The rest of the Judgment and Order on Sentence warrants no interference.

8. With the above observation, the Appeal stands disposed of.

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

(Bhaskar Raj Pradhan)
Judge
21-02-2024

(Meenakshi Madan Rai)
Judge
21-02-2024

Approved for reporting : **Yes**