

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 16th December, 2021

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

Crl.A. No.13 of 2020

Appellants : Sanjib Rai and Another

versus

Respondent : State of Sikkim

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

Appearance

Mr. Sunil Baraily, Advocate (Legal Aid Counsel) for the Appellants.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1. Both Appellants No.1 and 2 (for short, A1 and A2) herein were convicted vide impugned Judgment dated 22-10-2020 in Sessions Trial (POCSO) Case No.05 of 2019, under Section 376 of the Indian Penal Code, 1860 (for short "IPC") and sentenced to undergo imprisonment for 10 (ten) years, each, with fine of Rs.500/- (Rupees five hundred) only, each, and default clauses of imprisonment, vide impugned Order on Sentence dated 23-10-2020, for sexually assaulting the victim.

2(i). The Prosecution case as it unfolds is that on 13-09-2019, source information was received at the Police Station, that the minor girl was missing from her home from 11-09-2019 which had remained unreported. The Investigating Officer (I.O.), P.W.13 visited her parents to request them to lodge a First Information

Report (FIR). Meanwhile, the Police took necessary steps, traced and brought the victim, P.W.1 to the Police Station. P.W.2, an Outreach Worker, District Child Protection Unit (DCPU) was intimated about the situation and P.W.1 handed over to her for counselling, during which, P.W.1 revealed to P.W.2 that she had been with A1 for two days and had been sexually assaulted by him. On such revelation, P.W.2 lodged the FIR, Exhibit 4, on 13-09-2019.

(ii) Investigation revealed that on 11-09-2019, at around 0900 hours, the victim after school returned home, changed her clothes and went to the residence of A1 as they were already in a relationship. She stayed the night at his residence where he sexually assaulted her multiple times. The next morning, on 12-09-2019, A1 locked the victim in his room and left for work. On his return from work, he again sexually assaulted her and on the morning of 13-09-2019 he asked her to return home while he went to work. The victim then came out of the room and was traced by the Police personnel and brought to the Police Station.

(iii) Further, investigation revealed that in July, 2019, the victim had met A2 and had a relationship with him. A2 also lived in the same place/structure with A1 but in a separate room. That, in July, 2019, he too sexually assaulted the victim several times and in August the same year, she came to learn that she was pregnant upon which he gave her medication for termination of the pregnancy. Thereafter, due to problems at his work place he returned to his home town and severed all contact with the victim. While attempting to trace out A2, she allegedly met A1 which led to their relationship. During the course of investigation, the victim

was also medically examined by Dr. Dawa Dolma Bhutia, P.W.10. On completion of investigation, on finding *prima facie* materials against both A1 and A2, Charge-Sheet was submitted before the Learned Court of the Chief Judicial Magistrate under Section 376 of the IPC read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"). On receipt of the Charge-Sheet the Learned Chief Judicial Magistrate, North Sikkim, took cognizance of the offence and committed the case for trial before the Learned Special Judge (POCSO Act), North Sikkim, at Mangan.

(iv) The Learned Trial Court on receiving the File on committal framed Charge against A1 under Section 5(I) of the POCSO Act punishable under Section 6 of the POCSO Act and, against A2 under Sections 5(I) and 5(j)(ii) punishable under Section 6 of the POCSO Act. Both A1 and A2 took the plea of "not guilty" to the Charges upon which the trial commenced. The Prosecution examined 14 (fourteen) witnesses to establish its case. On closure of Prosecution evidence, both the Appellants were examined individually, under Section 313 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") and their responses recorded. They had no witness to examine.

(v) The Learned Trial Court took up three points for determination; (i) Whether the Prosecutrix was a minor at the time of incident? (ii) Whether A1 committed penetrative sexual assault/rape on the Prosecutrix at the place with effect from 11-09-2019 to 13-09-2019? (iii) Whether A2 committed penetrative sexual assault/rape on the Prosecutrix at his place in July, 2019 multiple times and in consequence of same she became pregnant

and compelled her to terminate it? (sic) On the first point, the Learned Trial Court concluded that Exhibit 3 the victim's Birth Certificate issued by the Registrar, Births and Deaths, North Sikkim and handed over to the Police by her parents and Exhibit 10 Report issued by the School Authority (P.W.7, the Headmaster) could not be relied on to prove her date of birth on grounds that the contents of the documents were not proved by the Prosecution. While considering points No.2 and 3 it was concluded that in view of the inability of the Prosecution to prove the victim's age and consequently her minority, the charges framed under Section 5(l) of the POCSO Act against A1 and Section 5(l) and 5(j)(ii) of the POCSO Act against A2 were not applicable. They were acquitted of these charges, but it was found that nevertheless both A1 and A2 had committed the offence of rape against the Prosecutrix. On due consideration of the evidence on record, the Learned Trial Court found both A1 and A2 guilty of the offence under Section 375 of the IPC, punishable under Section 376 of the IPC and convicted and sentenced them as reflected *supra*.

3. Learned Counsel for the Appellants put forth the arguments before this Court that it was the victim who had voluntarily gone to the place of residence of A1 and A2 and also voluntarily spent nights therein. The testimony of the victim was neither trustworthy nor unblemished in view of the contradictions which appear in her Section 164 Cr.P.C. statement and her deposition in Court. The Evidence of P.W.5 and P.W.12 do not support the evidence of P.W.1 thereby indicating that her testimony is a concocted story. That, in her Section 164 Cr.P.C. statement she has made no mention of A2 or of having been

sexually assaulted by him, but before the Learned Trial Court she had made an effort to falsely implicate him. The evidence of P.W.1 is unbelievable also for the reason that there was only one door for entry into the place of residence of A1 and A2 and she herself has testified that every room in that place was occupied. She could well have raised an alarm to obtain the assistance of the occupants in the event that she was raped, but her evidence reveals no such attempts leading to a conclusion that the acts with A1 and A2 were consensual. The I.O. has failed to investigate and identify the person who allegedly came to open the door of the room where she was allegedly confined by A1, raising doubt about her version and the Prosecution case. The Doctor's evidence reveals that there were no injuries on the person of the victim nor did she opine that the victim was forcibly sexually assaulted by any of the Appellants. No blood or semen was detected on M.O.I, the quilt forwarded for forensic tests. The Prosecution case has thus no legs to stand, the impugned Judgment and Order on Sentence be set aside and the Appeal dismissed.

4. *Per contra*, Learned Additional Public Prosecutor submits that the statement given by P.W.1 in her Section 164 Cr.P.C. is duly corroborated by her in her evidence before the Court. However, he fairly conceded that there was no evidence whatsoever on record to establish that she had been forcefully compelled or was taken forcibly by any of the Appellants and raped.

5. Learned Counsel for the parties were heard *in extenso* and the entire evidence on record as well as the documents examined carefully.

6. The questions that arise for determination by this Court are (i) Whether the Learned Trial Court has correctly arrived at the finding that the offence under the POCSO Act was not applicable to the Appellants and (ii) Whether they were individually guilty of the offence under Section 376 of the IPC of which they were convicted.

7. While addressing the first question, it is pertinent to mention at the outset that the Learned Trial Court concluded that there was no proof furnished by the Prosecution that the victim was a minor as the contents of Exhibit 3, her Birth Certificate and Exhibit 10 the report given by P.W.7 went unproved. This finding of the Learned Trial Court was not assailed by the State-Respondent and hence, has attained finality. There is thus no requirement to further examine this aspect of the Prosecution case. Accordingly, the finding of the Learned Trial Court warrants no interference.

8. Now to consider the second question flagged; Section 375 of the IPC deals with the offence of rape, while Section 376 of the IPC provides for the penalty for rape. The offence committed by the Appellants would fall within the ambit of Section 376(2)(n) of the IPC, viz., commits rape repeatedly on the same woman. They would thus be liable to be punished for imprisonment for a term which shall not be less than 10 (ten) years, but may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine.

9(i). P.W.2 is an Outreach Worker of the DCPU, North Sikkim and admittedly not a Counsellor. Nevertheless, the Police required her to appear at the Police Station to counsel the victim.

On disclosure by the victim that she (victim) had been subjected to sexual assault, P.W.2 lodged Exhibit 4 at the Police Station. It is trite to mention that there were no eye-witnesses to the alleged offences. The only evidence that can be relied on is that of the victim, consequently it would be essential to examine her evidence in its entirety to assess its veracity and whether it passes the test of being of sterling quality.

(ii) According to P.W.1, in the month of May, 2019, she met A2 at a place in North Sikkim where although he sought her mobile number, she did not share it with him. The following day, A2 invited her to the same place where she went accompanied by her cousin and friend. Three days later, she was again called by A2 to the same place and thereafter taken to his place under compulsion, where she went accompanied again by one '*didi*' and cousin. On reaching the place at around 7 p.m., they found A2 had one room and she was taken alone inside the same room. Her cousin and her '*didi*' remained in the room of A1. In the room of A2, he forcibly undressed her and committed penetrative sexual assault on her. Following this incident, he again took her 3/4 times to his room and repeatedly sexually assaulted her. At that time, she was unaware that A2 was a married man. After three days of the sexual assault, she did a home pregnancy test and found that she had conceived. She shared the information with A2 who suggested that she take medicines for termination of pregnancy, but did not bring the medicines for her. Later, she herself purchased it and took it. A2 after commission of the offence fled from the place after which she was unable to contact him. That, one day her father being angry on some issue beat her up, she left

her home and went to look for her sister in the place of A1 as her sister was his girlfriend. The room of A1 is located in the same place as that of A2. A1 come out of his room, took her there and made her rest on the plea that it was raining outside. He also made a bed for her and he himself decided to sleep on the floor. During the night, he came to her bed, undressed her and committed penetrative sexual assault. She stayed for two days in the room of A1 who locked her from outside. On finding the door locked, she knocked on it and one 'uncle' came and unlocked the door for her. She then went to the house of one 'didi' located close to the place of A1 where her brother came and took her in the Police vehicle to the Mangan Police Station. At the Police Station, her two sisters and A1 were present. She was taken to the Mangan District Hospital and medically examined by the Doctor. The Police also recorded her statement as did one 'Sir' in the Court building. She identified Exhibit 1, in three pages, as the preliminary questions put to her by the said 'Sir' and Exhibit 2 as the said statement given to him by her upon which she also affixed her thumb impression. Her cross-examination elicited the fact that one Bhim, Anup and Vten used to also reside in the same place which had several rooms but only one entrance. She admitted having visited the place of the said three persons. It was her further admission that in all the rooms of the place where A1 and A2 resided, there were occupants at the relevant time. That, after the alleged incident with A1, she went to the house of her sister and not to the Police Station.

(iii) The evidence of P.W.1 nowhere indicates that she was forcefully taken to the room of either A1 or A2. Her evidence also

reveals that after she met A2 she went to his place accompanied by her cousin and friend, repeatedly. Admittedly when she was allegedly being raped in the room by A2, her cousin and sister were in the room of A1. It is surprising that neither did her cousin and sister make an effort to find out why she was with A2 alone in his room for so long and she herself made no attempt to seek their help either during such a traumatic experience or after it. It is not the Prosecution case that after the alleged incident with A1 and A2, P.W.1 even made an effort to report the incident to the Police Station. How the question of compulsion by A2, arises is perplexing as three of them have gone with A2 to accompany him to his house without qualms, sans use of force. She went into the room of A2 without demur, no shouts for help were heard neither is it her case that she was dragged by A2 to his room. Her evidence therefore fails to inspire the confidence of this Court. Admittedly, there is only one entrance to the house, with several rooms allocated to different persons and the rooms are occupied at any given time by the residents as appears from the evidence of P.W.1 and the I.O. Anyone would therefore have heard the victim provided she had raised a cry for help, which evidently she did not. It is also unbelievable that after being sexually assaulted by A2 and on conducting a Urine Test after three days of the incident she found herself pregnant, this defies science and her allegation appears to be too far-fetched to be believable. The allegation against A1 also does not indicate that the sexual encounters with him were on account of the force that he had employed. She had stayed in his place for two days which was evidently of her own freewill. According to her, when she knocked on the door, one

uncle came and unlocked the door. The identity of this person is undisclosed by the Prosecution. The use of force by A1 and A2 on the victim have not been proved by any evidence whatsoever. What can be culled out from the evidence on record is that P.W.1 had gone to the rooms of A1 and A2 voluntarily and had consensual sex with them. Her statement under Section 164 Cr.P.C. reveals that in fact she had run away from her house on 11-09-2019 after being hit by her father on the back of her head. She then went to the house of A1 where the alleged rape took place. A2 finds no mention in her Section 164 Cr.P.C. statement and his involvement was revealed only during her evidence in Court which raises doubts about the truth of her deposition. In light of the lack of cogency in her evidence, she can in no way be termed as a sterling witness, for this Court to rely on her evidence unrestrainedly and without misgivings.

(iv) The evidence of P.W.3 the victim's mother lends no support to the Prosecution case neither does the evidence of P.W.4 the victim's father. P.W.5 is the sister of the victim. Contrary to the evidence of P.W.1, P.W.5 has not stated that she had accompanied the victim to the place of either A1 or to that of A2. Importantly, she has stated that the Prosecutrix visited A2 in his place out of her own freewill and P.W.5 had no idea about the relations between the victim and A1. Her cross-examination extracted the fact that the Prosecutrix used to have a number of boyfriends and most of the time she used to visit the boys called Bhim, Anup, Vten.

(v) Although during investigation one quilt, M.O.I was seized from the house of A1 in the presence of P.W.6 and P.W.9,

vide Exhibit 6, no body fluids were detected on M.O.I by P.W.14, the Junior Scientific Officer who examined the article. Hence, the evidence of these witnesses is of no consequence to the Prosecution case.

(vi) Dr. Dawa Dolma Bhutia P.W.10 medically examined the victim. She identified Exhibit 12 as the Medical Report prepared by her on examining the victim. Exhibit 12 reveals as follows;

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As per the victim's statement, she had gone to Mr. Sandeep Subba's place on 11/9/19, at night on her own. Before going to his place, she was scolded by her father for coming late. On 11/9/19, she stayed at Sandeep's place where her clothes were removed forcibly against her will and he had intercourse with her. Next morning i.e. on 12/9/19, he again had intercourse with her and thereafter on 12/9/19 night and today morning i.e. 13/9/19, again he had intercourse with her. After he left for work, she left the house next to Miss house. There she met her cousin brother and took her to Mangan Police Station.

She also gives (sic) a H/o of being being (sic) pregnant in the month of June/July, after having sexual intercourse with Tika for 1-2 weeks in June/July, she was given abortifacient drug for aborting the pregnancy. She hasn't passed urine or taken bath after having intercourse today morning.”

(vii) It thus emerges that the victim did not tell the Doctor that she was forcibly taken to the house of A1. She has reiterated that she was scolded by her father and had been hit by him on the head upon which she left her house. She appears to have deliberately gone to the house of A1 and had consensual sex with A1 on 11th and 12th September, 2019. On the morning of 13-09-2019 she went to the house of one resident instead of informing the Police of her alleged predicament as anyone traumatized by an incident would expectedly do. The fact that the act was consensual can also be culled out from her statement that she was unaware that A2 was a married man.

(viii) P.W.11 the Station House Officer of the concerned Police Station received Exhibit 4 from P.W.2. On receipt of the FIR he registered a case against both the Appellants under Section 376 of the IPC read with Section 6 of the POCSO Act and entrusted the investigation to P.W.13. He is unaware of the other facts of the case. P.W.12 also shed no light on the fact of sexual assault. She had seen the Prosecutrix and A2 sitting on one stone at the place they had gone together with P.W.12. As it was evening she asked P.W.1 to return home and suggested to A2 that he could call her cousin during the day time only. They all returned home together and later she heard of the pregnancy of the victim as a result of her relation with A2. It is her evidence that most of the time, the Prosecutrix used to stay outside her home during the night.

(ix) The I.O. P.W.13 in his evidence stated that after the victim was brought to the Police Station and her statement recorded, she was forwarded to a Shelter Home at Gangtok. That, his investigation revealed that the victim had love affairs with A1 and A2 who were friends. It was his admission under cross-examination that the rooms at the place of occurrence are covered by plain sheet (GCI sheets) and there were no concrete walls inside the said house. That, there are a number of rooms at the said place and apart from the Appellants other employees of the relevant Company also resided in the same house at the relevant time, although he had not mentioned their details in his investigation.

(x) P.W.14 the Junior Scientific Officer at RFSL had examined a number of articles forwarded to him including M.O.I,

but no clinching scientific evidence emerged to establish the complicity of A1 and A2 in the alleged offence.

10. On the anvil of all the discussions that have emanated above, it thus falls to conclude that no proof whatsoever was furnished by the Prosecution to establish that offence of rape was committed by A1 and A2 on the victim, P.W.1. The acts are evidently consensual. We are, therefore, inclined to disagree with the findings of the Learned Trial Court for the aforesaid reasons.

11. Consequently, the conviction and sentence imposed on A1 and A2 vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

12. The Appellants, A1 and A2, are acquitted of the offence that they were charged with individually.

13. Appeal allowed.

14. Appellants be released from custody forthwith unless required to be detained in connection with any other case.

15. Fine, if any, deposited by the Appellants in terms of the impugned Order on Sentence, be reimbursed to them.

16. No order as to costs.

17. Copy of this Judgment be transmitted to the Learned Trial Court, for information, along with its records and a copy be sent forthwith to the Jail Authorities as also e-mailed.

(Bhaskar Raj Pradhan)
Judge

16-12-2021

(Meenakshi Madan Rai)
Judge

16-12-2021

Approved for reporting : **Yes**