THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 25th August, 2020

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

Crl.A. No.15 of 2019

Appellants : Sangam Rai and Another

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Legal Aid Counsel for the Appellants.

Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. By the impugned Judgment, dated 29-06-2019, in Sessions Trial (POCSO) Case No.03 of 2017, both Appellants were convicted of the offence under Section 341/34 and Section 354/34 of the Indian Penal Code, 1860 (for short, "the IPC"). The impugned Order on Sentence directed each of the Appellants to undergo simple imprisonment for 15 (fifteen) days under Section 341/34 of the IPC and, simple imprisonment for one year each with a fine of Rs.3,000/- (Rupees three thousand) only, each, under Section 354/34 of the IPC. The sentence of fine bore a default clause of imprisonment. Aggrieved thereof, the Appellants seek the setting aside of the impugned Judgment and Order on Sentence.

2. Forwarding his arguments for the Appellants, Learned Counsel submitted that the occurrence of the incident is a far-fetched imaginary narrative of the Prosecution considering the improbabilities and the anomalies that are nestled in the Prosecution case. While walking this Court through the evidence of the Prosecution witnesses, it was submitted that there are apparent contradictions in the evidence of P.W.1 and P.W.2, as found in their statements under Section 164 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") and their evidence before the Court. That, the consistent stand of the Prosecution has been that P.W.1 and P.W.2 after the incident on 07-12-2006 spent the night in the house of P.W.10 and on the next date, they left for Jorethang, where they spent the night in the Jorethang Car Parking Plaza area. Contrarily, the evidence of P.W.7, a driver and relative of P.W.2 is to the effect that on 08-12-2016 after his duty was over, he found P.W.1 and P.W.2 in the Parking area and took them to his home, thereby demolishing the Prosecution stand of the two girls having spent the night at the parking lot, by their own witness. That apart, it is the evidence of P.W.1 and P.W.2 that P.W.3 their school friend had requested them to drop her home, which is in contradiction to the evidence of P.W.3 who stated that P.W.1 and P.W.2 desired to reach her to her home and she was unaware of their whereabouts after they reached her village. That, her evidence nowhere reveals that they reached her home. The next glaring anomaly that arises is that in Exhibit 7, the original FIR lodged by P.W.4 and P.W.5 the time

of offence is mentioned at "1300 hours", the formal FIR, Exhibit 8, reveals that the incident occurred at around 2 p.m., while the girls by their evidence seek to convince the Court that the incident took place late in the evening when it was dark by stating that they managed to escape from the clutches of the Appellants when the headlights of passing vehicles focused on the place of incident. That, the falsity in their evidence is apparent as in their statements under Section 164 Cr.P.C. they have nowhere stated that the incident took place in the late evening or for that matter when it was dark, but that it was 3.30 p.m. It is pertinent to note that P.W.1 makes no mention of any vehicle lights in her statement under Section 164 Cr.P.C. and stated that the incident took place at 3.30 p.m. P.W.2 in her Section 164 Cr.P.C. statement lends support to the statement of P.W.1 that the incident took place at 3.30 p.m., but P.W.2 in Court stated that the incident pertained to 5.30 p.m. of the relevant day. The further evidence of P.W.1 and P.W.2 is to the effect that after the incident they wanted to report the matter at the Sumbuk Police Out Post (O.P.), but no Police personnel was present at the Sumbuk O.P. However, the Investigating Officer (I.O.) P.W.23 has deposed that every Police O.P. is manned by Police personnel at any given point of time, rendering false the statement of P.W.1 and P.W.2. That, P.W.4 and P.W.5 the fathers of the two girls have stated that they went missing from 07-12-2016, but P.W.1 and P.W.2 did not inform their respective fathers of their whereabouts after they were allegedly molested, which casts a doubt on the veracity of the two girls' evidence.

That, the contradictory evidence on record and the statement of the Appellants in their examinations under Section 313 Cr.P.C. reveals that the two girls were caught smoking at the place of the alleged incident by the Appellants and to ward off the consequences of their unexpected behaviour they have foisted a false case against the Appellants which is borne out by the contradictory and inconsistent evidence on record. That, there seemingly was a verbal altercation between P.W.1 and P.W.2 on one side and the two Appellants and a Child in conflict with Law (for short, "CICL") on the other, but there is no evidence whatsoever of any physical scuffle that the Appellants resorted to nor is it borne out by the medical examination of P.W.1 and P.W.2 whereby no injuries were detected on them. That, the Learned Trial Court failed to take into consideration the cross-examination of the P.W.1 and P.W.2 or any of the Prosecution witnesses which in fact demolished the Prosecution case and hence the Learned Trial Court was in error in convicting and sentencing the Appellants, who thereby deserve an acquittal. To fortify his submissions, Learned Counsel placed reliance on ***Lal Bahadur Kami*** vs. ***The State of Sikkim***[1], ***Binod Sanyasi*** vs. ***State of Sikkim***[2] and ***Deepan Darjee*** vs. ***State of Sikkim***[3].

3. For his part Learned Additional Public Prosecutor while making strenuous efforts to support the Prosecution case fairly admitted that anomalies existed in the Prosecution case with regard to the time of the offence which was reflected in

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[1] 2017 SCC OnLine Sikk 173 : 2018 Cri.L.J. 439

[2] 2019 SCc OnLine Sikk 111

[3] 2019 SCC OnLine Sikkim 130

Exhibit 7, Exhibit 8 and the deposition of P.W.2 who stated that it was 5.30 p.m. That, these anomalies are trivial and deserve to be ignored. That, it is now settled law that undue importance should not be attached to the minor anomalies which exist in the Prosecution case, by the Court, if they do not substantially affect the Prosecution case. It is clear that the incident indeed occurred during the evening around 5.30 p.m., as per P.W.1 and P.W.2 and the vehicles passing by the place of incident had their head lights on which deterred the Appellants from continuing with their misdemeanour. That, the evidence of the Doctor also corroborates the evidence of P.W.1 and P.W.2 with regard to the molestation perpetrated on them by the Appellants, as during their medical examination they have informed the Doctor that they were sexually assaulted by the Appellants. That, mere absence of physical injuries on the two girls is no ground for disbelieving them. That, they were traumatized by the incident and being ashamed and afraid of narrating the incident to their parents instead of returning home they went to Jorethang. It was further contended that due to the trauma the two girls continued to remain out of their house till the morning of 10-12-2016. On being found by P.W.7 on 08-12-2016, they were able to tell him of the incident and call their parents to Jorethang on 10-12-2016. Hence, the Appellants are guilty as found by the Learned Trial Court and the Judgment and Order on Sentence suffers from no infirmities.

4. I have considered the rival contentions of Learned Counsel, perused all documents on record as also the evidence

and the impugned Judgment and Order on Sentence. I have also perused the citations made at the Bar.

5. The question for consideration before this Court is whether the evidence on record suffices to convict the Appellants of the offences charged with.

6. Before delving into the merits of the matter, I advert briefly to the facts of the Prosecution case.

(i) On 11-12-2016, at around 1310 hours, a written report was received from P.W.4 father of P.W.2 and P.W.5 father of the victim P.W.1, to the effect that in the afternoon of 07-12-2016 their children P.W.1 and P.W.2 had gone to reach P.W.3 to her residence. On their way home, they came across the two Appellants and a minor boy (CICL) near the View Point (place of occurrence). The trio obstructed the path of the minor girls and touched them inappropriately on various parts of their body including their genitals, while also attempting to undress them. The FIR, Exhibit 7 came to be lodged and registered on the same date. It was endorsed to the I.O. P.W.23 for investigation, on completion of which Charge-Sheet came to be filed against the Appellants and the CICL, under Sections 341, 354 and 34 of the IPC, read with Section 8 of the Protection of Children from Sexual Offences Act, 2012 (for short, POCSO Act, 2012).

(ii) For clarity, it is essential to mention here that in the instant matter P.W.1 is the victim having been allegedly molested by the two Appellants herein. P.W.2 was the victim of

molestation by the CICL whose trial was segregated and taken up before the Juvenile Justice Board.

(iii) The Learned Trial Court framed Charge against the Appellants under Section 341/34, Section 354B/34 and Section 354/34 of the IPC, read with Section 8 of the POCSO Act, 2012. Both the Appellants entered a plea of "not guilty" and claimed trial, the Prosecution therefore examined 24 (twenty-four) witnesses in a bid to establish their case, on closure of which both Appellants were examined under Section 313 of the Cr.P.C., followed by final arguments of the parties. The Learned Trial Court on consideration of the evidence on record pronounced the impugned Judgment and Order on Sentence.

7. Pausing here for a moment it is relevant to point out that the Prosecution case *inter alia* was that the victim P.W.1 was a minor, aged about 14 years at the time of the incident. The Learned Trial Court was not inclined to consider this ground as no original Birth Certificate of P.W.1 was furnished to buttress this contention. All that the Prosecution succeeded in offering was a photocopy of the document, which the Court disregarded as being inadequate evidence. On this count, the Court also disbelieved the evidence of P.W.18, the Doctor posted as the Chief Medical Officer, South Sikkim, at the relevant time, as he failed to produce the Birth Certificate Register allegedly containing entries of the date of birth of the victim. Consequently both Appellants were acquitted of the offence under Section 8 of the POCSO Act, 2012 read with Section 34 of

the IPC. This finding of the Learned Trial Court is unassailed by the Prosecution, hence discussions thereof stand truncated here.

8. The conviction of the Appellants is based on the testimony of P.W.1 and P.W.2. As a general Rule Courts can act even on the testimony of a sole witness provided her evidence is wholly reliable, cogent and consistent. In the impugned Judgment the Learned Trial Court has summed up the Prosecution case in two short Paragraphs being Paragraph 67 and Paragraph 70 which reads as follows;

> **"**67. It is admitted fact that there are minor contradiction in the statements of PW-1 and PW-2 but it is settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution case, may not prompt the court to reject the evidence in its entirely.
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> 70. The case in hand the evidence of PW-1*(victim)* and PW-2 clearly proved that both the accused persons with their common intention restrained the victim*(PW-1)* to go out of the said *chautara(resting shed)* by holding her hand and pulled down. Both the accused persons thereafter touched all over her body including her breast with sexual intent. They also pushed the victim on the ground and got on top of her and also fondled her body.**"**

9. From a reading of the above Paragraphs, it concludes that neither the cross-examination of P.W.1 and P.W.2 have been considered by the Learned Trial Court nor have the evidence of the other witnesses found place in the discussions which ensued in the impugned Judgment although the evidence of the Prosecution witnesses have been widely reproduced earlier on in the Judgment.

10. The Hon'ble Supreme Court in ***Vijay @ Chinee*** vs. ***State of Madhya Pradesh***[4] relied on by the Learned Trial Court has indeed held that minor contradictions and discrepancies are to be disregarded by the Courts for the reason that mental capabilities of a human being cannot be expected to be attuned to absorb all the details and that minor discrepancies are bound to occur. At the same time we must not lose sight of the caution spelled out in the same Judgment which requires the Courts to exercise care and caution and sift the truth from the untruth, examine whether there are exaggerations and improvements. On the anvil of this discretion vested on the Courts, I proceed to examine the evidence of the Prosecution witnesses.

11. On careful consideration of the evidence on record, it is indeed clear that there are anomalies in the evidence of the Prosecution witnesses. The FIR, Exhibit 7, lodged by P.W.4 and P.W.5, dated 11-12-2016, reveals that the incident alleged took place on 07-12-2016. As per the FIR, P.W.1 and P.W.2 reached the place of incident at around 1300 hours after dropping off their school friend to her house. When they reached the place of incident they found the Appellants and the CICL there, after which the alleged incident took place. While the Appellant No.1 and the CICL were known to both P.W.1 and P.W.2 being their co-villagers, the Appellant No.2 was not known to them. It is evident that, as per the FIR Exhibit 7, the time of occurrence of the incident is said to be "1300 hours", while Exhibit 8 the

[4] Criminal Appeal no.660 of 2008 : (2010) 8 SCC 191

formal FIR records the time of incident as "1400 hours". The evidence of P.W.1, under cross-examination, is to the effect that the incident occurred during the "day light" (*sic*), her deposition was recorded by the Court on 18-08-2017. P.W.2 came to be examined on 18-09-2017 and evidently made an effort to improve the Prosecution case by stating that it was around 5.30 p.m. when they reached the place of incident after dropping P.W.3 at her residence. P.W.23, the I.O. in his evidence has not revealed the time of the incident. Reverting back to the evidence of P.W.1 she has stated that **"***Due to the focus light (sic) of the second vehicle the two accused persons could not do any further indecent act upon me and I and my junior friend ran away from the chowtara.***"** and admitted under cross-examination that the meaning of the word "focus light" of the vehicle means the lights coming from the headlights of the vehicle. In the same breath, she admitted that the alleged incident occurred during the day time. P.W.2 has, as already stated, said that the incident took place around 5.30 p.m., but admits that the incident occurred during the day time. In other words, it emerges from their evidence that it was daytime when the incident occurred. If the evidence of P.W.1 that the vehicles which passed by had their headlights on is to be believed, then, it would appear that it was dark and the lights of the vehicles had been turned on, but the evidence of both the girls contrarily indicate that the incident took place during the daytime. It is pertinent to note that P.W.1 makes no mention of any vehicle lights in her statement under Section 164 Cr.P.C. and both

P.W.1 and P.W.2 stated that the incident took place at 3.30 p.m., but digressing from this statement P.W.2 in Court stated that the incident pertained to 5.30 p.m. of the relevant day. P.W.1 speaks of two passing vehicles, P.W.2 refers to three. While it is necessary to bear in mind that a statement recorded under Section 164 Cr.P.C. can never be used as substantive evidence, but it can be used both for contradiction and corroboration of a witness who made it. Both P.W.1 and P.W.2 were confronted with their statements made under Section 164 Cr.P.C. during cross-examination and the contradictory evidence that emerged were none too flattering for the Prosecution case and did little to enhance the confidence of this Court in the witnesses' persistent inconsistent stands. In the light of this anomalous evidence before the Court, it is not for the Court to draw assumptions of the time of the incident. It is the bounden duty of the Prosecution to convince the Court by leading unfaltering evidence of the time of the incident, which then has to be established beyond a reasonable doubt. These requirements are sadly lacking in the Prosecution case.

12. Both P.W.1 and P.W.2 in their evidence have stated that on the following day, i.e., 08-12-2016, after having spent the night of 07-12-2016 in the house of P.W.10, they went to Jorethang. Thereafter, on 09-12-2016 they verbally reported the incident to Jorethang Police Station. It is their unequivocal statement that P.W.7 accompanied them to the Police Station. Surprisingly their statements find no substantiation either in the evidence of P.W.7 or P.W.23. In fact, if their deposition is taken

to be the truth, then it would cast an aspersion on the Police personnel manning the Jorethang Police Station on 09-12-2016 as it could be presumed that they had failed to comply with the provisions of Section 154 of the Cr.P.C., which mandates that every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant, and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf. However, in my considered opinion, the evidence of P.W.1 and P.W.2 on this aspect is unbelievable and inspires no confidence as neither have they stated the time at which they went to the Police Station nor have they stated as to who they gave the information to. In contrast, P.W.7 states that the two girls after spending the night, i.e., on 08-12-2016, in his house, told him that they had come to Jorethang in connection with a School Project and spent the next night, i.e., 09-12-2016, also in his house informing him that their School Project was not yet completed. P.W.1 in her evidence stated that they did not inform P.W.7 of the incident. If that be so, the statement that P.W.7 accompanied them to the Police Station is incorrect and contradictory. The evidence of P.W.7 nowhere reveals that he had accompanied P.W.1 and P.W.2 to the Jorethang Police Station on 09-12-2016 and is evidently a false statement made

by the two girls. At no point of time between 08-12-2016 and the morning of 10-12-2016, when P.W.7 took them to the taxi stand in order to send them to their village, did they ever inform him of the alleged incident nor did they inform him that on 09-12-2016, they had verbally reported the incident at the Jorethang Police Station. It is admitted by both P.W.1 and P.W.2 under cross-examination that they did not inform P.W.7 of the incident during their stay in his house. It may relevantly be remarked here that, as per P.W.10, P.W.1 and P.W.2 informed her of the incident of molestation, but described the place of occurrence as near a 'Mandir', while P.W.1 under cross-examination admitted having narrated to P.W.10 about the incident, however P.W.2 denied having told P.W.10 of the incident. P.W.23 for his part supported the evidence of P.W.10 and P.W.1 pertaining to narration of the incident. This also points to the inconsistencies in the Prosecution case. P.W.10 has stated that the two girls arrived at her house at about 09.30 p.m. on 07-12-2016 after the alleged incident. P.W.1 and P.W.2 have not thrown any light on their whereabouts in the intervening hours between 2 p.m. and 09.30 p.m. Even assuming that the incident took place at 5.30 p.m., their whereabouts between 5.30 p.m. and 9.30 p.m. has neither been divulged by P.W.1 and P.W.2 nor does investigation shed any light on this aspect nor has P.W.23 made any statement in this regard.

13. The next point that rears its head for consideration is the stand taken by the I.O. that the two girls had spent the

night of 08-12-2016 at the Jorethang Parking Plaza. However, P.W.1 and P.W.2 have not stated in their evidence in Court that they spent the night at the Parking Plaza. Hence, it emerges that there is no evidence to establish that they had spent the night at Jorethang Car Plaza as sought to be made out by P.W.23. P.W.1 herself has stated that at Jorethang they first went to the Plaza where P.W.2 met her brother P.W.7, who took them to his house. P.W.2 has also denied having stated anything in her Section 164 Cr.P.C. statement about having spent a night in the Jorethang Car Plaza as, according to her, it would be a false statement.

14. Now, the question of which of the Appellants assaulted which of the two girls also appears rather nebulous since it is in the evidence of P.W.1 that both the Appellants herein assaulted her, while P.W.2 was assaulted by the CICL. The evidence of P.W.15, the Medical Officer who examined them contrarily states that both P.W.1 and P.W.2 alleged molestation on each of them, by the two Appellants and the CICL, thereby leading to doubts about the perpetrators of the alleged offence. That apart, the other contradictory evidence on record is that while P.W.1 and P.W.2 insist that P.W.3 had requested them to drop her home after school, P.W.3 denies this circumstance and has stated that they volunteered to reach her home. That, they are not even her friends, but only her schoolmates. The evidence on P.W.3 also reveals that she parted ways with P.W.1 and P.W.2 on reaching her village, therefore their claim of reaching P.W.3 to her house is evidently

a false statement. The evidence of P.W.6, P.W.7 and P.W.10 reveals that both the alleged girls showed no inclination of contacting their parents between 07-12-2016 and 09-12-2016. P.W.6 had met both the alleged girls in Jorethang but, according to him, they did not make any effort to communicate anything to him. P.W.7 the cousin of P.W.2 testified that even after P.W.1 and P.W.2 spent two nights in his home they did not express any desire to contact their family members either over telephone or cell phones. P.W.10 would depose that she and her parents own mobile phones but both P.W.1 and P.W.2 did not express any desire to contact their parents or inform them of the incident. The evidence of P.W.10 leads one to wonder why the two alleged girls opted to spend the night at her house as she has stated that the houses of the two girls were closer to their school than her house. P.W.23 has also lent credence to this evidence by stating that the houses of the alleged girls is about fifteen minutes walking distance from their school, while that of P.W.10 is about 40 to 50 minutes. According to the I.O., they did not go home as they were traumatised by the incident. The evidence of both PW 1 and 2 nowhere reveals that they were traumatised by the incident. It appears to be a figment of the imagination of the I.O. considering that P.W.11 the mother of P.W.1 has deposed that her daughter confides in her. The question of P.W.1 being unable to confide in her mother about the incident due to fear and shame is demolished by the statement of P.W.11. P.W.11 has also brought to light before this Court the conduct of the two girls by stating that after the

instant incident both of them had been kept in the custody of an NGO from where they made good their escape. In the light of the evidence that the Prosecution has furnished I find that the statement of P.W.1 and P.W.2 pertaining to their intention of lodging a complaint before the Sumbuk O.P. on 07-12-2016 is completely unreliable. Besides, the I.O. P.W.23 has testified that the Police O.P. is manned round the clock by Police personnel.

15. In the circumstances, after careful consideration of the entire evidence on record, contrary to the submissions of the Learned Additional Public Prosecutor that the anomalies in the Prosecution case are trivial and ought to be ignored, I find that it strikes at the root of the Prosecution case. P.W.1 and P.W.2 failed to return home on 07-12-2016 for reasons best known to them. It may be true that they encountered the Appellants and the CICL at the place of incident which gave them an excuse to spin a yarn about an evidently non-existent incident. I am of the considered opinion that there is no evidence whatsoever against the Appellants under the charges framed against them. The Learned Trial Court for its part failed to take into consideration the cross-examination of P.W.1 and P.W.2 which demolishes the Prosecution case. The evidence of P.W.3, P.W.6, P.W.7, P.W.10, P.W.11, P.W.15, have also not been considered at all by the Learned Trial Court as appears from the discussions which have ensued in the impugned Judgment, although their evidence, as already noticed, has been reproduced extensively earlier on in the impugned Judgment.

Hence, basing a conviction on the tremulous foundation of the inconsistent, uncorroborated and capricious evidence of P.W.1 and P.W.2 would deprive the Appellants of one fruitful year each of their lives. The Prosecution has failed by the evidence furnished, to establish its case beyond a reasonable doubt against the Appellants and the Learned Trial Court was in error in convicting and sentencing the Appellants.

16. Consequently, Appeal is allowed.

17. The conviction and sentence imposed on the Appellants vide the impugned Judgment and Order on Sentence of the Learned Trial Court are set aside.

18. The Appellants No.1 and 2 are acquitted of the offence charged with, i.e., under Section 341/34 and Section 354/34 of the IPC.

19. Both Appellants No.1 and 2 are on bail vide Order of this Court, dated 27-08-2019, in I.A. No.01 of 2019. They are discharged from their bail bonds.

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

21. No order as to costs.

22. Copy of this Judgment be forwarded forthwith to the Learned Trial Court for information and compliance.

MEENAKSHI MADAN RAI

Digitally signed by MEENAKSHI MADAN RAI
Date: 2020.08.25 12:02:23 +05'30'

(Meenakshi Madan Rai)
Judge
25-08-2020

ds Approved for reporting : **Yes**