THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 15th June, 2022

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

Crl.A. No.15 of 2021

Appellant : Binay Tamang

versus

Respondent : State of Sikkim

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

Appearance

Mr. Gulshan Lama, Advocate (Legal Aid) for the Appellant.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1(i). By filing this Appeal, the Judgment of the Learned Special Judge (POCSO), West Sikkim, at Gyalshing, dated 07-10-2021, in ST (POCSO) Case No.08 of 2020 (*State of Sikkim* vs. *Binay Tamang*), is being assailed. The Learned Trial Court convicted the Appellant of the offence under Sections 376(2)(f), 376(2)(n) and 376(3) of the Indian Penal Code, 1860 (for short "IPC") and under Sections 5(j)(ii), 5(l) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act, 2012") punishable under Section 6 of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (for short "POCSO Amendment Act, 2019").

(ii) By the impugned Order on Sentence of the same date, the Appellant was sentenced to undergo rigorous imprisonment of

25 years under Section 376(2)(f) of the IPC; 20 years under Section 376(2)(n) of the IPC; 30 years under Section 376(3) of the IPC; 30 years under Section 5(j)(ii)/6 of the POCSO Amendment Act, 2019; 20 years under Section 5(l)/6 of the POCSO Amendment Act, 2019; and 25 years under Section 5(n)/6 of the POCSO Amendment Act, 2019. Fine was imposed along with the sentences of imprisonment and bore default clauses of imprisonment. The sentences of imprisonment were ordered to run concurrently, setting off the period of imprisonment already undergone, in terms of Section 428 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.").

2. The matter has its genesis in the FIR, Exhibit 8, dated 11-02-2020 lodged by P.W.5, Dr. Geeta Rai, in-charge of the concerned Public Health Centre (PHC), informing the Officer-in-Charge of the jurisdictional Police Station, that the minor victim, P.W.4, 13 years of age, had been brought to the PHC with a complaint of having missed her period (menstrual cycle). On examination, she was found to be pregnant. Based on the said information, FIR No.02/20, dated 11-02-2020, was registered against the Appellant, aged 39 years and taken up for investigation. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376(2)(f), 376(2)(n) and 376(3) of the IPC and, under Sections 5(j)(ii), 5(l) and 5(n) of the POCSO Act, 2012 punishable under Section 6 of the POCSO Amendment Act, 2019. The Learned Trial Court took cognizance of the offences and framed Charges against the Appellant under the above-mentioned Sections. The Prosecution examined fifteen witnesses. Following the closure of the

Prosecution evidence, the Appellant was examined under Section 313 Cr.P.C. and his responses recorded. In his defence he claimed that he had been a paying guest in the house of the victim, paying a rent of Rs.1,500/- (Rupees one thousand and five hundred) only. He was not married to the victim's mother and when he wanted to return home she had told him she would see how he would do so. The Learned Trial Court on consideration of the evidence, pronounced both the impugned Judgment of Conviction and Order on Sentence.

3(i). Assailing both before this Court, Learned Counsel for the Appellant in the first prong of his arguments contended that the opinion of the Expert stating that the DNA of the fetus matched the DNA of the Appellant is beset with suspicion as the extraction of the blood samples of the Appellant, the victim and the fetus and the chain of safe custody thereof has not been detailed by the Prosecution. Exhibit 15 is the requisition dated 19-03-2020 for extraction of the Appellant's blood sample for DNA analysis but records do not reveal as to who the blood sample was handed over to by the Doctor who extracted it, apart from which there were no independent witnesses who saw the extraction or the containers in which the samples were kept. Similarly, vide Exhibit 17, the Investigating Officer (hereinafter, I.O.), P.W.15 made a requisition, dated 05-03-2020, for extraction of blood sample of the victim, but the records do not indicate who received the extracted sample. As per the I.O. vide Exhibit 33 the blood samples collected from the Appellant, the victim and the fetus of the victim were forwarded to the Centre for DNA Fingerprinting and Diagnostics (CDFD), Hyderabad, Telengana, but records are devoid of the date of such

forwarding, neither is there any evidence to show that the I.O. sealed the alleged samples, thus rendering the root of the Prosecution story suspicious.

(ii) In the second prong of his arguments, it was contended that although the FIR Exhibit 8 was 'lodged' against an unknown person, but it immediately came to be 'registered' against the Appellant sans proof of preliminary enquiry by the Police to indicate the complicity of the Appellant, hence, there was a concerted effort by the Prosecution to falsely implicate the Appellant.

(iii) In the third prong of his arguments, it was urged that the age of the victim remained unproved as the Birth Certificate, Exhibit 7 was merely handed over by P.W.3, the victim's mother, to the Police without adhering to the procedure prescribed for such seizure. For the foregoing reasons, the Prosecution has failed to prove its case beyond a reasonable doubt and the impugned Judgment on Conviction and Order on Sentence deserve to be set aside.

4. While conceding that the investigation was indeed shoddy and lacking, Learned Public Prosecutor however canvassed that the Court even in such a circumstance cannot acquit the Appellant as the DNA report supports the Prosecution case and the victim by her consistent statements both under Section 164 Cr.P.C. and her deposition in the Court, has established the Prosecution case. Consequently, the impugned Judgment of Conviction and Order on Sentence require no interference. In support of his contention, he placed reliance on ***Veerendra*** vs. ***State of Madhya Pradesh***[1] wherein it was *inter alia* held

[1] 2022 SCC OnLine SC 622

that there can be no doubt with respect to the position that a fair investigation is necessary for a fair trial, hence it is the duty of the investigating agency to adhere to the prescribed procedures in the matter of investigation and thereby to ensure a fair, competent and effective investigation. However, the accused is not entitled to an acquittal solely on ground of defects or shortcomings in investigation.

5. The submissions of Learned Counsel which were heard *in extenso* have been afforded due consideration and the records minutely perused.

6. The question that falls for consideration before this Court is; Whether the Appellant a 39 year old male had sexually assaulted the victim, aged about 13 years?

7(i) To determine this question, we may carefully examine the evidence of the Prosecution witnesses. As per P.W.4, the victim, a student of Class VIII, her step father the Appellant, used to force himself on her and sexually assaulted her every time when her mother was away from home, including Saturdays and Sundays when her mother would be out for work and the victim would be alone at home. In December, 2019 (her evidence was recorded on 06-07-2020) when her mother and sisters had gone to Darjeeling her step father raped her in their house during the day time, when no one was at home. When she resisted his advances he used to shout at her and she was too frightened to confide to anyone about the incidents. She went on to state that earlier in the year when her mother had gone to Rorathang (a place in East Sikkim) and her elder sisters had gone for their morning walk, then too, the Appellant raped her in the house. A few days later, she began

running a fever so she called her elder sisters who were working in the fields and told them that she was unwell. When they returned from work in the evening they took her to the Hospital where she was given medication and told to return to the Hospital in the morning. The next morning as she was still unwell, her sisters came and collected her from School and took her to the Hospital where she informed them that she had also missed her period (menstrual cycle). Her urine test was conducted, and her test for pregnancy was positive. When the Doctor enquired from her as to who was responsible for her condition she named her step father. She went on to state that the Appellant used to frequently touch her body in a "bad way" (indicating her chest and back). Later, after the doctor informed the Police she was again medically examined and her statements also recorded. The victim was shown her Section 164 Cr.P.C. statement in which she identified Exhibit 2 as the questionnaire and her right thumb impression marked Exhibit 2(b) on the document. She also identified Exhibit 1 as her statement and her RTIs marked on the said document. The statements given by the victim were not demolished under cross-examination. Exhibit 1, her Section 164 Cr.P.C. statement was recorded by the concerned Magistrate after the Magistrate examined her and was satisfied that the statements were being made voluntarily by her. Her deposition in the Court is duly corroborated by her statement under Section 164 Cr.P.C.

(ii) P.W.2 the Doctor of the District Hospital examined the victim on 11-02-2020 at around 2.50 p.m. The victim gave a history of sexual assault by her step father in the month of December, 2019 and on examining her, P.W.2 found the victim's

uterus enlarged, indicating pregnancy of 14 to 16 weeks. P.W.5, the Doctor in-charge of the concerned PHC at the relevant time, supported the evidence of P.W.4 with regard to the victim being found pregnant on conducting a pregnancy test, consequent upon which she lodged the FIR, Exhibit 8.

(iii) P.W.8 the elder sister of the victim would testify that she had taken the victim P.W.4 to the Hospital being indisposed and after P.W.4 was medically examined and her urine tested, she was found to be pregnant. Initially, when P.W.8 and P.W.5 enquired from the victim as to who was responsible for the pregnancy she refused to answer but on coaxing, she revealed the Appellant's complicity. P.W.8 identified Exhibit 7 as the Birth Certificate of the victim which was seized vide document Exhibit 16 and handed over to the Police. These facts withstood the test of cross-examination.

(iv) P.W.3, the victim's mother testified that the victim was born on "08-11-2006" and she identified Exhibit 7 as her Birth Certificate. Along with P.W.3, the authenticity of Exhibit 7 was vouched for by the evidence of P.W.6, P.W.11 and P.W.13. As per P.W.6 the Headmaster of the School which the victim was attending, the victim was admitted to the School in 2013 in Class I and it was the first School attended by her. When the Police requested him to authenticate the date of birth of the victim as per the school records, he checked the Admission Register Exhibit 11 and found her date of birth recorded therein as "08-11-2006". P.W.11, the Compounder posted at the PHC testified that in 2017 he was given the responsibility of preparing the Births and Deaths Certificates at the PHC by the Chief Medical Officer, District

Hospital. On 24-02-2020, on the requisition of the concerned Police Station he went through the Birth records, Exhibit 19, at the PHC and found that the victim's date of birth was recorded as "08-11-2006", vide Registration No.564/RBD/2006. P.W.13 also vouched for the date of birth of the victim stating that he had issued Exhibit 7 on 13-11-2006 when he was posted at the concerned PHC as the Medical Officer (I/C)-cum-Registrar. His evidence could not be decimated in cross-examination. The documentary evidence pertaining to the victim's age supported by the evidence of P.W.3, 6, 11, 13 prove beyond reasonable doubt that the victim was born on "08-11-2006". Hence, even if the argument of Learned Counsel for the Appellant that the procedure for seizure was not followed is considered and Exhibit 7 disregarded, the other evidence establish beyond any doubt the age of the victim as about 13 years.

(v) The Counsellor of the District Child Protection Unit under the Integrated Child Protection Scheme was examined as P.W.9. He counselled the victim on 12-02-2020. She narrated the history of sexual assault perpetrated on her by the Appellant. The evidence of P.W.9 indicated that the victim consistently narrated the events of sexual assault as stated in her deposition. His evidence stood the test of cross-examination.

8(i). P.W. 15, the I.O. deposed that a requisition was made to the Medico-Legal Consultant, STNM Hospital, P.W.10, for extraction of the blood from the fetus of the victim which was later received from P.W.10 in a packed and sealed envelope, as also the blood sample of the victim. He exhibited the requisition Exhibit 17 and identified his signature thereon. The requisition dated 05-03-

2020 is addressed to the Medico Legal Consultant of the STNM Hospital, by the I.O., duly endorsed by P.W.10 on the same date, acknowledging receipt. P.W.10, the Medico-Legal Consultant, STNM Hospital, deposed that on the requisition of P.W.15 he extracted the blood samples of both the fetus and the victim, for DNA analysis. The identification form of the victim, Exhibit 18 bearing his signature with details of blood extraction done by him was also identified by him. During cross-examination, it was not even suggested to P.W.10 that the blood samples were not kept in safe custody. Exhibit 18 is an identification form of CDFD, Hyderabad. It is signed by both P.W.10 and P.W.15, with the date 05-03-2020 endorsed under the signature of P.W.10.

(ii) The blood sample of the Appellant was extracted for DNA profiling, at the District Hospital Namchi, South Sikkim, as per P.W.15 and handed over to her by Dr. Leena D. Pradhan, P.W.7 in a small box which was packed and sealed. The requisition Exhibit 15 addressed by her to the Medical Officer, Namchi District Hospital, dated 19-03-2020, was identified by her and bore an endorsement by P.W.7 of the receipt thereof, on 09-03-2020 itself. P.W.7 supported the evidence of P.W.15 in the context of requisition for collection of blood sample of the Appellant. She accordingly extracted approximately 5 ml of blood from the Appellant and handed it over to the police and while doing so affixed her signature on the back of the sealed packet. She also identified Exhibit 14 as the blood identification form bearing her signature, with the date 19-03-2020 reflected therein and the signature of P.W.15.

(iii) According to P.W.15, the I.O., the blood samples could not be forwarded to the CDFD, Hyderabad, as the concerned authority could not receive it due to the lockdown, but it was sent after the lockdown vide Exhibit 33, the forwarding letter, in a box which was packed and sealed. The report of the CDFD, Hyderabad, is marked as Exhibit 23. Pursuant thereto, as per P.W.15, supplementary Charge-Sheet was filed. The cross-examination by the defence does not falsify the evidence of the I.O.

(iv) P.W.14 the DNA examiner in the laboratory of the CDFD, Hyderabad deposed that on 28-12-2020 the Case Exhibits was brought to CDFD along with forwarding letter dated 24-12-2020 and they received the blood samples for DNA Finger Printing in a sealed condition. On performing the DNA test, he concluded that the Appellant is the biological father of the fetus and the victim its biological mother. Nothing substantial was brought out in his cross-examination to contradict the evidence on this aspect. It was not even suggested to P.W.14 that the samples sent for DNA analysis had not been sealed and packed.

There is, therefore, nothing in the case records which would suggest either improper extraction, preservation or tampering of the blood samples.

9(i). In ***Sandeep*** vs. ***State of Uttar Pradesh***[2] it was contended that improper preservation of the fetus would have resulted in a wrong report to the effect that the accused was found to be the biological father of the fetus received from the deceased. The Supreme Court considered the deposition of the Junior Scientific Officer of the Central Forensic Laboratory which brought out the

[2] (2012) 6 SCC 107

fact that the blood samples of the accused had been received by him and necessary test was conducted, based on which the reports were forwarded. The test confirmed that the accused was the biological father of the fetus. The Supreme Court also noted the fact that the expert had stated that the sample had been received in a sealed condition. It was held that since the submission of improper preservation was not supported by any relevant material on record and the appellant had not been able to substantiate the argument with any supporting material, there was no substance in it.

(ii) In ***State*** vs. ***Navjot Sandhu***[3] the Supreme Court dealt with the challenge to the truth of the recoveries of the phone, on the ground that no independent witnesses were required to witness the recovery. The Learned Counsel had relied on the decision in ***Sahib Singh*** vs. ***State of Punjab***[4] and ***Kehar Singh*** vs. ***State (Delhi Admn.)***[5] to show that in the absence of independent witnesses being associated with search the seizure cannot be relied upon. The Supreme Court held that no such inflexible proposition was laid down in those cases. In ***Sanjay*** vs. ***State (NCT of Delhi)***[6] it was observed that, the fact that no independent witnesses were associated with recoveries is not a ground to disbelieve the Prosecution. Of course, close scrutiny of evidence is imperative in such circumstances. The Supreme Court further held that there is no law that the evidence of police officials in regard to seizure ought to be discarded.

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[3] (2005) 11 SCC 600
[4] (1996) 11 SCC 685
[5] (1988) 3 SCC 609
[6] (2001) 3 SCC 190

(iii) In ***Santosh Kumar Singh*** vs. ***State***[7] the Supreme Court repelled the argument that the vaginal swabs and slides taken from the dead body at the time of the post-mortem examination had been tampered with and there was some suspicion with regard to the blood samples taken by the Doctor and the DNA report too could not be relied, upon as farfetched as it meant that not only the investigating agency, but the Doctors who had taken the vaginal swabs and slides, the Doctors and other staff who had drawn the blood samples and the Scientist had all conspired to harm the Appellant.

10. In the instant case, the evidence of the victim regarding the incidents of sexual assaults also inspire confidence. It is settled law that the sole evidence of the victim suffices in such cases if the evidence is found to be of sterling quality. In ***Rai Sandeep alias Deepu*** vs. ***State of NCT of Delhi***[8] the Supreme Court while considering which witness would qualify as a sterling witness held as follows;

> **"22 [Ed.: Para 22 corrected vide Official Corrigendum No. F.3/Ed.B.J./48/2012 dated 18-8-2012.].** In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence

[7] (2010) 9 SCC 747

[8] (2012) 8 SCC 21

> committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.**"** **[emphasis supplied]**

11. P.W.4 has consistently in her evidence before the Court as well as in her statement under Section 164 Cr.P.C. held that the Appellant had sexually assaulted her. Initially he had only touched her inappropriately (accordingly to her; bad touch), but thereafter committed penetrative sexual assault on her. The specifics of the incidents have also been consistent. Her evidence having withstood the cross-examination we find it to be of sterling quality.

12. Indeed, the investigation of the case suffers from flaws and defects but at the same time as pointed out in ***Veerendra*** (*supra*) the sole reason for interference with the Judgment of Conviction cannot be for the reason that there are defects or shortcomings in investigation when all other factors point to the guilt of the Appellant, especially the evidence of the victim. The Appellant cannot be entitled to an acquittal on such grounds.

13. In light of the entire foregoing discussions, we are of the considered opinion that the impugned Judgment of Conviction of the Learned Trial Court suffers from no infirmity, warrants no interference and is thereby upheld.

14. Coming to the question of sentence, in ***Guru Basavaraj alias Benne Settappa*** vs. ***State of Karnataka***[9] the Supreme Court while considering the sentences warranted under Section 324 of the IPC held *inter alia* that it is the duty of the Court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on social order. The Supreme Court in ***Gopal Singh*** vs. ***State of Uttarakhand***[10] also held that just punishment is a collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside. The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect - propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum, bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. That, there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would be dependent on the facts of the case and rationalised judicial

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[9] (2012) 8 SCC 734

[10] (2013) 7 SCC 545

discretion. For every offence, a drastic measure cannot be thought of. Similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a Court. **The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinabove and also have been stated in a number of pronouncements of the Supreme Court. It is on such touchstone that the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment.**

15. In ***Yakub Abdul Razak Memon*** vs. ***State of Maharashtra***[11] it was observed by the Hon'ble Supreme Court that the Prosecution as well as the convict have a right to adduce evidence to show aggravating grounds to impose severe punishment or mitigating circumstances to impose a lesser sentence.

16. In light of the penalty imposed under the various provisions of law in the instant matter as reflected in the impugned Order on Sentence and considering the proportionality of the sentence to the offence, we are of the considered opinion that the parties should be afforded an opportunity to be heard on sentence.

17. List the matter accordingly.

(Bhaskar Raj Pradhan)
Judge
15-06-2022

(Meenakshi Madan Rai)
Judge
15-06-2022

ds Approved for reporting : **Yes**

[11] (2013) 13 SCC 1