

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 4th December, 2024

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 2023

Appellant : Txxxxx Rxx (victim's father
name redacted)

versus

Respondent : State of Sikkim

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

Appearance

Mr. Gita Bista, Advocate (Legal Aid Counsel) for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. The findings of the Court of the Learned Special Judge (POCSO Act, 2012), Gangtok, in Sessions Trial (POCSO) Case No.51 of 2019 (*State of Sikkim vs. Txxxxx Rxx*), are being questioned in this Appeal. The Appellant was convicted of the offences under Section 5(n) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act") and sentenced to rigorous imprisonment for a term of twenty years with fine of ₹ 5,000/- (Rupees five thousand) only. He was also convicted under Sections 9(l) and 9(n) both punishable under Section 10 of the POCSO Act and sentenced to rigorous imprisonment for a term of five years, each, and fine of ₹ 5,000/- (Rupees five thousand) only, each. The fines bore default stipulations.

2. The facts, shorn of details, leading to the indictment of the Appellant are that, on 16-09-2019, Exbt P-6/PW-4 the FIR, was

lodged by PW-5 the school teacher, where PW-1, the victim (purportedly a few months above fifteen years) was studying, informing that PW-1 was sexually assaulted by the Appellant, her father (aged about forty years). The FIR was registered on the same date, under Section 10 of the POCSO Act against the Appellant and endorsed to PW-7, the Investigating Officer (IO) of the jurisdictional police station for investigation, who on completion of investigation, submitted Charge-Sheet against the Appellant under Section 6 of the POCSO Act. The Learned Trial Court took cognizance of the offence and framed Charge against the Appellant for two counts under Section 5(n), under Section 5(l) and Section 5(m), all punishable under Section 6 of the POCSO Act; two counts under Section 9(n), one each under Section 9(l) and Section 9(m), all punishable under Section 10 of the POCSO Act; under Section 376(2)(n), Section 376(2)(f), Section 376(3) and Section 354 of the Indian Penal Code, 1860 (hereinafter, the "IPC"). The Charges were read over to the Appellant who entered a plea of "not guilty" and claimed trial. The Prosecution embarked on an effort to establish their case beyond reasonable doubt by examining seven witnesses. On closure of Prosecution evidence, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."), affording him an opportunity to explain the circumstances appearing against him. He explained that the allegations against him were untrue and that his daughter (the victim), being of an adamant nature had a fight with his second wife, her step mother, who she was jealous of and falsely implicated him despite his innocence. Thereafter, the final arguments of the parties were heard. The Learned Trial Court

having considered the entirety of the evidence on record pronounced the impugned Judgment of conviction, dated 19-04-2023 and the impugned Order on Sentence dated 20-04-2023.

3. The arguments advanced by Learned Counsel for the Appellant assailing the findings (*supra*) were as follows;

(i) The date of birth of the victim was not proved. She claimed to be fifteen years of age but the necessary documentary evidence was not furnished by the Prosecution as proof of her age.

(ii) Exbt P-7/PW-4, the formal FIR lodged by PW-5 is cryptic and fails to elucidate how the Appellant sexually assaulted the victim.

(iii) The evidence of PW-1 is lacking in the specifics of the acts of sexual assault, including the place and time.

(iv) That, the victim from Class 1 to Class 5, and thereafter from Class 6 to Class 8 in fact was living in hostels in a different district along with her step sisters, while her father resided with his second wife in another district. The victim used to visit them intermittently at their home along with her step sisters. Consequently, the allegations of sexual assault are unbelievable.

(v) If the Appellant was sexually assaulting her, he would have kept her at home where she would have had easily available, instead of sending her to a hostel.

(vi) The house that the Appellant was living with his second wife was very small, it would thus be impossible for five persons to be living in one house with the victim being sexually assaulted and the other persons unaware of such acts.

(vii) The inconsistencies in the evidence of PW-1 lead to the conclusion of a concocted story as she narrated to PW-5 that, she

was subjected to sexual assault from early childhood without specifying her age but later she stated that the offence started from 2015, at which time she would have been eleven years of age. In her Section 161 and Section 164 Cr.P.C. statements, she stated that the sexual assaults began from the year 2015. The evidence of PW-3, the doctor is that the victim told her that she was abused since last four years, thereby leading to vast anomalies in the victim's narration. To substantiate this point reliance was placed on **Lhendup Lepcha vs. State of Sikkim**¹ and **Pema Tshering Bhutia vs. State of Sikkim**².

(viii) PW-1 told the IO that her mother had passed away, whereas in her evidence before the Court she deposed that her mother left their home when she was little.

(ix) The victim also made allegations of being threatened by the Appellant not to disclose the incident, yet neither did she complain of the incident before the police station which admittedly was enroute to her school, from her home, nor did she raise a hue and cry subsequent to such incidents.

(x) PW-5, the Complainant is an interested witness as she had lodged the Complaint and sought to see a successful conclusion to it.

(xi) PW-3 the doctor has stated that the victim did not suffer from any psychological issues including stress disorders which normally follow such events thus belying the Prosecution case.

¹ 2022 SCC OnLine Sikk 57

² 2022 SCC OnLine Sikk 57

(xii) In light of the arguments advanced, the Learned Trial Court was in error in convicting the Appellant, hence the impugned Judgment and Order on Sentence be set aside.

4. Learned Additional Public Prosecutor contesting the arguments advanced, submitted that, the Prosecution has indeed proved its case beyond reasonable doubt. There was no reason for the victim to have falsely implicated her biological father. The Prosecution evidence was considered by the Learned Trial Court in its correct perspective which led to the impugned conviction and sentence, which thereby warrants no interference.

5. We find that the Learned Trial Court framed the following point for determination; Whether the Accused had subjected the victim to molestation and penetrative sexual assault for a long period of time? If so, whether the victim is a minor within the meaning of Section 2(d) of the POCSO Act, 2012?

(i) The Learned Trial Court assessed the evidence of PW-1 and PW-5, which according to him established sexual assault, duly corroborated by PW-3, the doctor, to whom the victim had stated that she was sexually assaulted by her father for the last four years. The Court concluded that the medical examination of the victim, which indicated an old tear on the posterior fourchette at the back of vulva, supported her assertion that she was sexually assaulted by her father.

(ii) While discussing the age of the victim the Learned Trial Court considered Exhibit-1, the birth certificate of the victim, which revealed that her date of birth was 01-03-2004, that this was verified with the live births register, maintained in the office of the Registrar of Births and Deaths of the concerned district and

therefore found to be correct. Ext-P10-A/PW-6 was the relevant entry of the victim's date of birth in the birth register. The school admission register Exbt-2 was proved by PW-2 the headmaster of the victim's school. Relying on such evidence, it was concluded that the victim was just over fifteen years and six months when the matter was reported at the police station and therefore a minor.

6. Having considered the arguments, perused the entire records furnished before this Court, including the impugned Judgment, this Court is to determine whether Prosecution has established its case of sexual assault on the victim allegedly a minor, by the Appellant, her biological father. For this reason, it is essential to examine the evidence of PW-1 the victim. Her mother left them when she was little. During the year 2015 she used to live with the Appellant in a rented accommodation/room, in East Sikkim. She was then studying in a school at South Sikkim. During the holidays and school vacations she used to come home to the rented room, where the Appellant used to sexually assault her, by touching her body and private parts and also inserted his genital into her's on many occasions. Thereafter, they shifted to residential quarters provided by her father's employer company, at which point of time she was studying in West Sikkim. When she came home during the holidays the Appellant used to repeat the acts as mentioned above. In the year 2019, she changed her school and started attending another school, in East Sikkim. On enquiry by PW-5 as to why she was not concentrating on her studies and why she remained frightened, she informed PW-5 that the Appellant was sexually assaulting her. She testified that her date of birth is 01-03-2004. Under cross-examination, it emerged

that her mother had left her when she was aged about 1½ years and then she was taken care of by the Appellant. Pausing here momentarily, during her deposition she claimed on the one hand that she did not know that the Appellant had remarried another woman in the year 2012, but in the same breath she stated that, while she was studying in a school in West Sikkim she used to reside with her step sisters, who are the daughters of her step mother, despite again asserting that she could not state whether the Appellant had married her step mother in the year 2011-2012. Her step mother, as per PW-1, used to live with the Appellant and she used to see her when she used to return home during the holidays at which time even her step sisters used to come home with her. She admitted that her educational and hostel/paying guest expenses were borne by her father and step mother. Admittedly, prior to 2019 she had always stayed in hostels as a paying guest, which included the hostels in South Sikkim and West Sikkim. Her cross-examination extracted the fact that, the residential quarters allotted to her father was located on the fourth floor of a building and visible on both sides of public roads. It was located next to the main staircase of the building where eight closely attached apartment/rooms existed. The noise from one room could be heard in the next room including music, talking, screaming, laughing or crying. It was in her evidence that the Appellant and her step mother used to sleep on the floor of the room where she slept on the bed. She also admitted that, she was aware that if anything untoward was done to her by the Appellant, she was to report it to the police station, which was a few seconds away from their residential quarters and was an "all women" police

station. Her step mother used to live with them and treat her very well but she never informed her step mother of the sexual assaults perpetrated on her by her father, neither did she reveal it to her friends or step sisters. She denied having been tutored by the police to depose falsely against her father but according to her she could not say what she had told the "Judge Sir" before whom her statement had been recorded (Section 164 Cr.P.C. statement). Her cross-examination revealed that she had not stated to the said Judge that in the year 2015 she was studying in South Sikkim and later shifted to a school in West Sikkim and then again to another school in East Sikkim.

(i) While analysing the evidence on record and while also remaining alive to the mandate of Section 29 of the POCSO Act, it is clear that the victim, has not given the specifics of the acts of sexual assault, the dates and the time and the number of occasions when the sexual assaults were perpetrated upon her, allegedly by the Appellant. We are constrained to voice our view that had the child been subjected to sexual assault by her biological father, she would surely have remembered the places of the incidents, and the frequency of its occurrence. The victim however was unable to throw light on these details. Her evidence also reveals that she had omitted to narrate to the police that she was in fact living away from her home, away from her father and step mother in a hostel along with her step sisters with whom she used to return home during vacations. Her denial of knowledge that her father had married her step mother is another point that needs to be considered as it is clear that her evidence is vacillating on this point, having earlier denied the marriage of her step mother and

the Appellant then admitting that she lived with her step mother, step sisters and her father and even shared their bedroom. She claims to be sexually assaulted from 2015 when her step mother was already residing with her father from 2012 thereby lending incongruity to her claims. Her step mother admittedly has not meted out any cruelty to her and was bearing the expenses of the education of PW-1 along with her father. Evidently, the family was living in cramped quarters. While mulling over this facet, it appears to be an impossibility for forced sexual encounters to have occurred, the sounds carrying through the walls to the adjacent rooms of the apartments and the father being employed, returning home only after work. The whereabouts of her step sisters during such sexual creates a gaping hole in the Prosecution case.

(ii) Although the statement under Section 164 Cr.P.C. was referred to by Learned Counsel for the Appellant to indicate that the statements made therein were not in tandem with the statement made by her before the Court, we are not inclined to consider the Section 164 Cr.P.C. statement as it does not comply with the statutory mandate of the Indian Evidence Act, 1872. It is trite to mention that this Court in **State of Sikkim vs. Pinto Bhutia**³ has discussed how a Section 164 Cr.P.C. statement has to be proved in the Court room viz.;

"6.

(i) It is now no more *res integra* that the contents of Section 164 Cr.P.C. statement are not substantive evidence and if the Court has to consider its contents then the author of the contents, in other words P.W.3, ought to be confronted with it and the provisions of Section 145 of the Evidence Act complied with. It is also trite law that the contents of Section 164 Cr.P.C. statement ought to have been identified by the victim and not P.W.12, the Learned Judicial Magistrate, who recorded it and who

³ 2023 SCC OnLine Sikk 41

obviously cannot vouch for the veracity of the contents. The Learned Trial Court was in error on this facet and failed to appreciate the legal perspective and provision correctly. The Court cannot reach an independent conclusion of the contents of any document without proof of its contents, as concluded by the Learned Trial Court in its observation regarding Section 145 of the Evidence Act and Section 164 Cr.P.C. extracted *supra*. It is an elementary requirement of the Evidence Act that the contents need to be proved in terms of the provisions of the Act. Beneficial reference in this context is made to the observations in **Malay Kumar Ganguly vs. Dr. Sukumar Mukherjee and Others** [(2009) 9 SCC 221] wherein it was *inter alia* held that;

"37. It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. **It is, however, trite that a document becomes inadmissible in evidence unless the author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross examination in a court of law.** The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken."

(emphasis supplied)

(ii) In **R. Shaji vs. State of Kerala** [(2013) 14 SCC 266] it was held as follows;

"26. Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.

28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence.”
(emphasis supplied)

(iii) On the anvil of the above mentioned principles, Exhibit 10, the Section 164 Cr.P.C. statement of the victim is thus disregarded by this Court as being an unproven document, for the foregoing reasons.”

(iii) None of the above parameters have been fulfilled by the Prosecution, hence the statement under Section 164 Cr.P.C. Exbt P-12/PW-7, is being disregarded.

(iv) PW-3 the doctor who examined PW-1 the victim was told by her that she had been sexually assaulted by her father since the last four years or so. Here too we find that the victim gave the doctor no specific dates or the years from when the sexual assaults commenced nor were there details of the last sexual assault. There were no fresh injuries or signs of sexual assault penetrative or otherwise on the victim, during her medical examination, except an old tear on the posterior fourchette at the back of the vulva. PW-3 having opined that it could be the result of other circumstances, besides penetrative sexual assault, we cannot hold that the Appellant was responsible for such injuries, lacking as the evidence of PW-1 does in the specifics of the sexual assault as already discussed above. The victim also did not suffer from stress disorder, post-traumatic stress disorder, nightmares or sleep problems as deposed by PW-3 which are normal reactions in victim of sexual assault, which thereby raises doubts about the Prosecution case.

(v) PW-5 the teacher, to whom the victim had stated that she was sexually assaulted by her father deposed that she had noticed the disturbed behaviour pattern of the child who was consistently getting into trouble, fighting with her friends and recalcitrant. Her evidence fails to establish the allegation of sexual assault being hearsay evidence and considered with the evidence of PW-1, fails to lend credence to the Prosecution case.

(vi) On examining the evidence of PW-7 the IO, it is apparent that during investigation she recorded the statement of PW-1 but she failed to carry out an independent investigation to verify whether the allegation that the step mother of PW-1 would be on night duty and that PW-1 could be sexually assaulted by the Appellant in her absence. The IO merely stated as follows; *".....Further during the course of investigation it was found that both her parents works at Sxx Pxxxxx Company but in different time shift and it was found that the accused used to commit the sexual assault while the step-mother was on night shift."*. Assuming that this was gospel truth, the whereabouts of the two step sisters during such periods are unaddressed. In fact the IO admitted under cross-examination that her investigation revealed that the Appellant used to go to work at 07.00 a.m and return home at around 06.00 p.m.

(vii) It is true that conviction can be based solely on the deposition of the victim, this is however qualified by the condition that the evidence of the victim is truthful, unwavering and thereby of sterling quality. Her evidence is to be found trustworthy and reliable by the Court.

(viii) The Supreme Court has discussed the requisites of a sterling witness in *Rai Sandeep vs. State (NCT of Delhi)*⁴ observed as follows;

"22. 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 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."

(ix) Having discussed the evidence of the victim in detail, we have reached the finding the evidence of the victim is neither

⁴ (2012) 8 SCC 21

consistent nor reliable and we conclude that her evidence is not that of a sterling witness.

(x) In the impugned Judgment, it is noticed that the Learned Trial Court was alive to the fact that the evidence of the witnesses was vacillating, as recorded in Paragraph 17 but chose to overlook the same.

(xi) In conclusion, we cannot bring ourselves to agree with the finding of the Learned Trial Court as recorded in Paragraphs 18 and 19 of the impugned Judgment which concluded that the victim was sexually assaulted by the Appellant.

(xii) With regard to the age of the victim, we find that PW-6 the Registrar of Births and Deaths Cell of the concerned district verified particulars of the minor victim as recorded in the live births register, maintained by the office and found the entries contained in the birth certificate in question to be correct. The original live births register was furnished before the Learned Trial Court. The Supreme Court in **CIDCO vs. Vasudha Gorakhnath Mandevlekar**⁵, has held that the entries made in the live birth register maintained are deemed to be correct and observed as follows;

"18. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent."

(xiii) In the instant matter, the concerned official having been examined and his evidence not decimated in cross-examination, we are inclined to believe the entries in Ext-10/PW-6, extract of live births register.

⁵ (2009) 7 SCC 283

- 7.** For the reasons that have emanated in the foregoing discussions, the allegation of sexual assault has remained unproved, hence the impugned Judgment and the impugned Order on Sentence of the Learned Trial Court are set aside.
- 8.** The Appeal is allowed.
- 9.** The Appellant is acquitted of all offences charged with.
- 10.** He be set at liberty forthwith, if not required in any other matter.
- 11.** Fine, if any, deposited by the Appellant in terms of the impugned Order on sentence, be reimbursed to him.
- 12.** No order as to costs.
- 13.** Copy of this Judgment be forwarded forthwith to the Learned Trial Court along with its records.
- 14.** A copy of this Judgment be made over to the Appellant through the Jail Superintendent, Central Prison, Rongyek and also to the Jail Authority at the Central Prison, Rongyek, for information and appropriate steps.

(Bhaskar Raj Pradhan)
Judge
04-12-2024

(Meenakshi Madan Rai)
Judge
04-12-2024

Approved for reporting : **Yes**