

THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

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

CRL. APPEAL No. 16 of 2021

Milan Kumar Rai,
Aged 37 years,
Son of Indra Bahadur Rai,
Resident of Sangadorjee,
West Sikkim.
At present lodged at Rongyek Jail, Gangtok.

.... **Appellant**

Versus

State of Sikkim

.... **Respondent**

**Appeal under section 374(4) of the Code of Criminal Procedure,
1973**

*[Against the impugned judgement and order on sentence dated 11.10.2021 passed by
the ld. Special Judge (POCSO) West Sikkim at Gyalshing in
S.T. (POCSO) Case No. 10 of 2020 : State of Sikkim vs. Milan Kumar Rai]*

Appearance:

Mr. Jorgay Namka, Advocate (Legal Aid Counsel) for the appellant.

Dr. Doma T. Bhutia, Public Prosecutor with Mr. S.K. Chettri,
Government Advocate and Mr Shakil Raj Karki, Assistant Government
Advocate for the Respondents.

Date of hearing : 21.09.2022

Date of judgment : 30.09.2022

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. Mr. Jorgay Namka, learned counsel for the appellant, sought to assail the impugned judgment dated 11.10.2021 passed in S.T. (POCSO) Case No. 10 of 2020 convicting the appellant under section 376(2)(n) and 376(3) of the Indian Penal Code, 1860 (IPC) as well as under section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) as amended by the POCSO Amendment

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

Act, 2019 on the ground that the victim's statement is not of sterling quality and is not corroborated by other evidence. It is argued that there is no evidence to suggest when and where the alleged offence took place. Mr. Namka submitted that the FIR (exhibit-1) was lodged on 02.05.2020 after recording the statement of the victim's mother who stated that she learnt about the incident in the year 2017 which transpired earlier. The mother of the victim, however, deposed before the court that it was in the year 2016 that the incident took place as informed to her. The victim, however, did not give any date or time of the incident and barely stated that the appellant opened her clothes, fondled her breasts and committed penetrative sexual assault on her in the dairy. She also deposed about having being raped ten times before without giving any further details. The learned counsel took us through the medical records which reflect that since the victim was unable to speak history could not be elicited. He also took us through the depositions of PW-8 - a Social Worker of the District Children Protection Unit (DCPU) and PW-10 - an Outreach Worker under the DCPU. Both the witnesses deposed that the victim was uncommunicative and did not communicate much. However, the same victim is said to have narrated the story before the learned Magistrate as well as in Court. It was further argued that the entire case of the prosecution *sans* the cryptic deposition of the victim is based on hearsay evidence which is not acceptable. It is argued that the FIR (exhibit-1) is based on a statement of the mother (PW-1) of the victim, according to which, she was informed about the incident by two ladies PW-11 and another who was not examined by the prosecution. PW-11, however, candidly admitted that she did not have any personal knowledge about the incident and did not depose or corroborate the

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

statement of the mother (PW-1) of the victim about the fact that she had informed her of what the victim had disclosed to her.

2. The learned Public Prosecutor on the other hand supported the impugned judgment and submitted that in cases like this where the victim suffers from certain disabilities it is incumbent upon the court to examine the evidence considering the social circumstances of the victim and of the area in which the crime has been committed. The stand of the father (PW-7) of the victim that since they had already settled the matter involving the victim and the appellant many years ago, he did not have anything to say about the incident reflects his indifferent attitude towards the victim who is voiceless in such circumstances. It is submitted that the victim's deposition has not been demolished by the defence and as such the presumptions under the POCSO would be available in favour of the victim. While replying to the argument of Mr. Namka, the learned Additional Advocate General took us once again to the deposition of the mother of the victim and pointed out that her deposition was based on the direct evidence of the victim and not hearsay as suggested. Since, the victim had deposed about the incident clearly, the statement of the mother of the victim to that extent cannot be termed hearsay. She also drew attention to the deposition of PW-15 who deposed about the meeting in the victim's house which was attended by a number of people from the village as well as the accused and the victim with their family members and relatives. PW-15 deposed that he heard the appellant deny the allegation but stated that in case the victim got pregnant, he would take the responsibility. It is argued that there was no reason for the appellant to take responsibility in case the victim got pregnant had he not committed

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

the offence. The learned Additional Advocate General relied upon the judgment of the Supreme Court in *Phool Singh vs. State of Madhya Pradesh*¹ and drew the attention of this court to paragraph 5.3 thereof which is the submission of the learned counsel for the state based on what was held by the Supreme Court in *State (NCT of Delhi) vs. Pankaj Chaudhary*². It was held that conviction can be sustained on the sole testimony of the prosecutrix if it inspires confidence and that there is no rule or practice that the evidence of the prosecutrix cannot be relied upon without corroboration.

3. 17 witnesses were examined by the prosecution. The defence did not lead any evidence after the examination of the appellant under section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The impugned judgment was delivered on 11.10.2021. It was held that the statement of the victim that whenever she used to be alone at home the appellant used to have forcible penetrative sex with her and that he did it several times, as well as the allegation, that he raped her in the dairy and at home was sufficient to prove that he had committed the offence on more than one occasion. Although, the learned Special Judge noticed the apparent lapse on the part of the investigating agency of not producing an important witness, it did not deter her in holding the appellant guilty as bad investigation was no ground for acquittal. The argument of the defence that the allegation of rape was cast upon the appellant due to the relationship he had with the victim's mother was dispelled by the learned Special Judge as in her opinion the argument was farfetched. She opined that even if they

¹ (2022) 2 SCC 74

² (2019) 11 SCC 575

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

had a love affair no mother would stake the reputation of a family at the cost of her minor girl child and that too as one such as the present victim, with her unfortunate ailments/condition merely on account of a soured relationship or to get even with the accused. The learned Special Judge noticed that the mother of the victim had failed to report the matter at the appropriate time and in fact settled it. She held that it would have remained unknown to the police had it not been the prompt action of the DCPU. The learned Special Judge held that once it is established that the victim is a child as defined under section 2(1)(d) of the POCSO then sections 29 and 30 come into play and as nothing contrary has been put up by the defence, presumption can be drawn against the appellant. Thus, the learned Special Judge found the appellant guilty of the offences as charged.

4. The mother of the victim deposed that she knew the appellant as her co-villager and the victim as her eldest daughter. She confirmed that the victim was 17 years old and was born on 30.10.2003. According to her, sometime in the year 2016 when she had taken her younger daughter to Gangtok hospital, her husband sent the victim to the dairy/milk collection centre situated above her house. When she returned after 10-12 days, she was informed by her relative - PW-11, that the victim told her that when the victim had gone to the milk collection centre the appellant had sexually assaulted her by removing her clothes and committing penetrative sexual assault. As she was not at home, the victim could not tell her father so she informed PW-11 who in turn informed the victim's mother's sister-in-law (not examined). According to the victim's mother, when she returned home, they informed her about the incident. She also deposed that since the victim was mentally slow, she wanted to

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

confirm the allegation before taking action. She therefore called the appellant to her house the next day and asked him, in the presence of the victim and her uncle-in-law (not examined). The appellant denied the allegation but the victim insisted that he had committed the offence. Her uncle-in-law decided and informed her brother-in-law who then brought some other members from the village, i.e., PW-13, PW-14 and PW-15, to her house along with the appellant. Although, she wanted to report the matter and informed them so, those present convinced her not to go to the police station as the appellant stated he would take responsibility if the victim became pregnant. As there were no eye witnesses to the incident, those present thought it fit to advise her to settle the matter amicably and a compromise document was prepared. Thereafter, in May 2020 some people from an NGO came to her house when the victim was not keeping well and mentally disturbed. They questioned the victim's mother and asked what happened. She told them about the compromise. They took the victim with them to a home. The victim's mother told them that after the compromise in 2016 as the victim seemed alright she did not report the matter. Moreover, since the incident had occurred a long time ago, she did not feel the necessity to report the matter after so many years. However, they returned after two days and inquired as to why she did not report the matter and warned her that if she did not do so they would do it themselves. She then went to the police station and lodged the FIR. She identified the birth certificate of the victim (exhibit-3) as the one handed over by her to the police.

5. During cross-examination, the mother of the victim admitted that the victim suffered from mental illness since childhood;

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

during her recent bout of illness in May 2020, she used to mutter to herself and roam around the village; that the appellant had married twice and in the year 2014 he was in his second marriage. She denied having a relationship with the appellant.

6. The learned Special Judge recorded that as the victim was a minor and had a history of mental illness, she in order to satisfy herself that she is capable of understanding questions put to her, put various questions and on being satisfied that although the victim was slow in speech was nevertheless able to fully understand all questions put to her and was also capable of giving rational answers. When the victim was asked to tell what happened to her earlier, she replied that the appellant opened her clothes at home as well as the dairy. When asked what happened after he opened her clothes, she answered that he did 'chara' to her. She further clarified that the appellant had fondled her breasts and committed penetrative sexual assault on her. She deposed that after that the appellant sometimes used to keep her locked up at the dairy, go to the shop and on his return do 'chara' to her. She further deposed that the appellant raped her at the dairy about 10 times. When the learned Special Judge asked if she had anything else to say, the victim deposed that he raped her when she was alone at home and he did this to her 10 times and when she used to shout, no one used to hear as her relatives would be away collecting fodder. When the victim was asked if she told anyone about it, she answered that she had informed Rxxx Chema as there was no one at home.

7. During cross-examination, the victim admitted that Rxxx Chema lived nearby; that she had three brothers and one younger sister; that she had not stated that the appellant had committed

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

penetrative sexual assault on her 10 times at home when her statement under section 164 Cr.P.C. was recorded; that in that statement she had stated that the appellant had caught her and had sex with her one day at the dairy; that she had not stated the number of times the appellant had sexually assaulted her in her statement recorded under section 161 Cr.P.C.

8. Dr. Pravritri Rai (PW-3) who examined the victim on 02.05.2020 was the Medical Officer. On her examination, she found no injuries on her body or in her private parts, breasts, mouth, throat and wrists. She also did not find any fresh injuries on her hymen or any bruising. She noticed that the margins were smooth and there was no bleeding. As the alleged sexual assault occurred in 2017, she was unable to detect any injuries. She also examined the appellant and did not notice any scratch marks, abrasions, bruises, cut injuries, secretions, smegma or foreign objects. She also did not find fresh or old injuries in his body.

9. Dr. Tukki Doma Bhutia (PW-4), the Gynaecologist examined the victim on 04.05.2020. She also recorded that there were no fresh injuries but noticed old hymenal tear at 5 O'clock position. During cross-examination, she admitted that she could not say whether the old hymenal tear was due to sexual assault.

10. Ms Jamyang Choden Bhutia (PW-5), the Judicial Magistrate recorded the victim's statement under 164 Cr.P.C. According to her, she examined the victim, conducted the preliminary examination and on being satisfied that she was competent to testify, recorded her statement.

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

11. N.L. Sharma (PW-6), the Registrar, Births and Deaths, proved the birth certificate of the victim and identified the signature of the doctor who issued it. According to him, he checked the records of the PHC and found that the date of birth of the victim was recorded as 30.10.2003 in the live birth register.

12. The victim's father (PW-7) had nothing to say regarding the incident as according to him they had already settled the matter involving the victim and the appellant many years ago. He also confirmed that the victim was 17 years old, born on 30.10.2003 and identified her birth certificate. During cross-examination, he admitted that the victim was mentally slow since she was a child. He also admitted that few years ago the victim used to live in Gangtok with her aunt and could not say when she returned from there. He also admitted that he did not believe the victim at the time when the matter was settled between her and the appellant. He admitted that he did not know the date of birth of the victim.

13. According to PW-8, on 30.04.2020 a complaint was received on the childline regarding a child's sexual abuse and that she was traumatised for about last two months. On 01.05.2020, she along with PW-10 was directed by the DCPO to accompany a childline member (not examined). They visited the house of the victim and met the parents, the victim and her siblings. The victim was uncommunicative, appeared pale and unhealthy with body odour and looked uncared for. When inquired, the mother informed her that when she had gone to Gangtok, the father had sent the victim to the milk collection centre where she was sexually abused by the appellant. When the victim informed the family and villagers, no one believed her

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

on account of her mental condition. The villagers advised the family to settle the matter which was accordingly compromised. Since, PW-8 found that the condition of the victim's home was not good, she telephoned the Chairperson, CWC, and on her advice and the consent of her parents, took the victim to a home. On the next day she was produced before the CWC and thereafter taken for medical examination after which she was given counselling. PW-8 thereafter submitted her intervention report (exhibit-15).

14. PW-10 also deposed about the complaint registered on 10.04.2020 on the childline. She deposed about how she along with DCPO and two police personnel had gone on 01.05.2020 to intervene in the case. She deposed about their interaction with the victim, her parents and other children. According to her as well, the victim being differently abled did not communicate much and so they counselled the mother and spoke to her privately who told them about the incident in the same manner as deposed by PW-8. During cross-examination, PW-10 admitted that the mother of the victim had informed them that the incident had occurred in the year 2017; that when they met the victim they found her mentally disturbed. She also admitted that her statement about the victim withdrawing after the incident and becoming uncommunicative was based on what was informed to them by the victim's mother.

15. Dr. Upashna Gurung (PW-9), the Senior Psychiatrist deposed that on 05.05.2020, the victim was admitted in the Psychiatric Ward for about a month during which period she had examined her. It was found that the victim was suffering from catatonic schizophrenia with mild mental retardation after conducting

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

an IQ test. During cross-examination, Dr. Upashna Gurung admitted that catatonia is a sub-type of schizophrenia where a patient is uncommunicative, unresponsive to mental commands, pain stimuli and maintains certain postures for long periods of time. She also admitted that when one suffers from schizophrenia the patient has hallucinations, delusions with poor self care with disrupted biological functions such as sleep, appetite, bowel and bladder functions. She admitted that catatonic schizophrenia is a mental illness and mental disorder and that the victim was also suffering from mild mental retardation.

16. PW-11 deposed that she had no personal knowledge about the incident. She admitted in cross-examination that the victim had not told her anything about the incident.

17. PW-12, the ASHA Worker, also identified the appellant. According to her, on the request of the victim's mother she conducted a pregnancy test on the victim which was negative. She could not however recall exactly when she had conducted the test.

18. PW-13, the Ex-Panchayat of the area, deposed that sometime in 2015, he was called by the victim's uncle to the victim's mother's house. When he reached the victim's house other villagers were also present. He learnt that the meeting had been called regarding the incident involving the victim and the appellant. As he reached a little late the matter had already been settled and he had no idea about the terms of settlement. During cross-examination, he admitted that the victim's mother's brother-in-law had once told him that he suspected that the victim's mother had an affair with the appellant and that he would often visit her house.

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

19. PW-14 identified the appellant as his relative. He also deposed about the year 2015 when the victim's uncle called him to the house of the victim. He reached there at around 6:30 p.m. where he found the victim, her parents, the appellant and others who had already settled the matter when he had reached. During cross-examination, PW-14 stated that the victim often used to tell him and his wife that her brother and parents used to beat and ill treat her and further that she used to come to the church and cry.

20. PW-15 also spoke about the year 2015 when the victim's uncle had called him to the victim's house. When he reached there after dark he found the room full of people from the village, the accused with his relatives and the victim with her relatives. However, when he reached the matter had already been settled. He heard the appellant deny the allegation but stating that in case the victim got pregnant he would take the responsibility. During cross-examination, PW-15 also admitted that there used to be rumour in village about the appellant being involved in a relationship with the mother of the victim.

21. The Principal of the school (PW-16) in which the victim had studied deposed that she was asked to verify the date of birth of the victim and on checking the school records found that her date of birth was recorded as 30.10.2003.

22. The Investigating Officer (PW-17) deposed about the investigation of the case by him and the submission of the charge-sheet. During cross-examination, he admitted that he learnt during

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

investigation that the victim had been kept in a pathetic condition at home; that no specific dates or months of the alleged offences had been given in the case; that during the investigation the victim was uncommunicative; that he did not find any witness to state that the victim used to go to the milk collection centre or had seen her there; that he had not been able to procure the compromise deed; that there was nothing to show that the appellant was working at the milk collection centre in the year 2016-17.

23. The appellant during his examination under section 313 Cr.P.C. denied the allegation against him. He also stated that the allegation of sexual abuse by him was false and that the victim had made similar accusation earlier while studying in school against another boy.

24. On examination of the various judgments of the Supreme Court referred to in **Phool Singh** supra, it is clear that conviction on the sole testimony of the victim when her deposition is found to be trustworthy, unblemished, credible and of sterling quality is permissible. A prosecutrix of a sex offence cannot be put on par with an accomplice as she is a victim of crime. She is undoubtedly a competent witness and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must be attached in the evaluation of her evidence. The court must be alive and conscious that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. Keeping this in mind, if the court feels satisfied that it can act on the evidence of the prosecutrix alone, there is no rule of law or practice which required it to look for corroboration. In **Phool Singh**

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

supra, relied upon by the Public Prosecutor, the Supreme Court noticed that the prosecutrix had fully supported the case of the prosecution; that she had been consistent right from the beginning; that nothing had been specifically pointed out why the sole testimony of the prosecutrix should not be believed; even after thorough cross-examination, she has stood by what she had stated and had fully supported the case of the prosecution. In such circumstances, the Supreme Court held that they see no reason to doubt the credibility and/or trustworthiness of the prosecutrix. It was also held that the submission of the defence that no other independent witnesses have been examined and/or supported the case of the prosecution and the conviction on the basis of the sole testimony of the prosecutrix cannot be sustained is concerned, had no substance.

25. It is certain that the victim was a child. The learned counsel for the appellant did not contest this fact. The prosecution has proved it with satisfactory evidence. The facts of the present case however, is a confusion of assertions some direct and some hearsay made by the prosecution witnesses. The victim's statement is cryptic as rightfully pointed out by Mr. Namka and does not have any details as to time and place to verify the truthfulness of the statement. A victim's statement can be the basis of a conviction if it inspires confidence. The Supreme Court opines that the victim's statement must be that of a sterling witness and such a statement should be of a very high quality and calibre, whose version should therefore be unassailable. Although, we are in agreement with the submission of the learned Public Prosecutor that the victim's deposition and the surrounding circumstances including the social conditioning must be kept in mind while appreciating the evidence in the case of this nature

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

we cannot be unmindful of the fact that this is a criminal case and therefore it is incumbent upon the prosecution to prove its case beyond reasonable doubt. However, the prosecution evidence itself establishes that the victim suffered catatonic schizophrenia and thus prone to hallucinations and delusions. On a reading of the 164 Cr.P.C. statement recorded of the victim (exhibit-4) as well as the deposition it is noticed that both are extremely cryptic giving no scope to us to weigh the truthfulness of the statements. The statement and the deposition although both cryptic vary in its details. It would be difficult to conclude with absolute certainty that what the victim states in her deposition is not coloured by hallucination as she was certainly suffering from catatonic schizophrenia. There are other evidences which suggest that there could be other reasons which could have led to the present prosecution. Although, these evidences does not inspire us to believe them with absolute certainty nevertheless it is evidence led by the prosecution and they are bound by it. The other evidence led by the prosecution does not take the case further and it is unclear even in the end of the trial as to when, exactly where and how the incident/incidents occurred. According to the mother of the victim herself the incident occurred several years ago. There are varying references of the time line when the incident/incidents are said to have occurred. Even that information is hearsay. Quite clearly, the medical evidence could not enlighten the case further. It is one thing to sympathise with the condition of the victim and yet another to hold an accused person guilty of an alleged crime without absolute certainty. Most of the other depositions are based on what they heard from the mother of the victim as the victim was uncommunicative. Admittedly, the mother was not present when the victim is said to

Crl. A. No.16 of 2021
Milan Kumar Rai vs. State of Sikkim

have disclosed to two ladies about the incident. The prosecution could not bring one of the ladies before the court. The other lady PW-11 had nothing to depose as according to her she had no personal knowledge. In fact, she went to the extent of admitting during cross-examination that the victim had not told her anything about the incident. Even if we consider that the victim had disclosed the fact to her mother it would not take the case further due to the compelling evidence led by the prosecution regarding her mental status which was also deposed to be true by the parents of the victim. What the victim deposed before the court may be true. However, 'may be' cannot be the bench mark in a criminal prosecution. We are required to hold a person guilty only after the prosecution convincingly lays before the court clear evidence to establish the guilt of the accused beyond reasonable doubt. The prosecution has failed to do so. This may have been because of the delay in lodging the FIR. We cannot base our judgment on surmises and conjectures.

26. In the circumstances, we are unhesitant to hold that the prosecution has failed to establish the case beyond reasonable doubt as required. The appeal is allowed. The impugned judgment and order on sentence are set aside. The appellant is set free if he is not required in any other case.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

Approved for reporting : **Yes**
Internet : **Yes**