THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 3rd May, 2024

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

Crl. A. No.16 of 2023

Appellant : Padam Bahadur Chettri

versus

Respondent : State of Sikkim

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

Appearance

Ms. Zola Megi, Advocate (Legal Aid Counsel) for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. Being aggrieved by the Judgment of the Court of the Special Judge (POCSO Act, 2012), Gangtok, dated 19-06-2023, in Sessions Trial (POCSO) Case No.25 of 2019, this Appeal assails it. The Appellant was convicted of the offence under Section 9(m) punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and consequently sentenced to undergo simple imprisonment for five years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only. A default clause of imprisonment was imposed in the event of non-payment of fine. He was acquitted of the offence under Sections 9(a)(iii) and 9(l) of the POCSO Act.

2. Learned Counsel for the Appellant raised the argument that at the relevant time the Appellant was inebriated and in no condition to have committed the alleged offence against PW-1. He remained asleep during the entire journey after he boarded the

taxi, as vouched for by the evidence of PW-4, the taxi driver. Learned Counsel urged that the Prosecution case is unreliable as the vacillating statements of PW-6 *viz.,* in the FIR Exhibit P-6/PW-6 where she stated that it was PW-1 who had informed her at around 07.30 p.m. that, the Appellant had touched his private part repeatedly, while before the Court she claimed to have herself noticed that the Appellant had placed his hands between her son's legs and on his genital, raises doubts about the veracity of the Prosecution case. As PW-1 corroborated the evidence of PW-6, regarding the incident as having been witnessed by her, his statement is also rendered contradictory to the contents of Exhibit P-6/PW-6. That, the evidence of PW-1 reveals that he was seated in the middle of the rear seat with his mother seated to his left and the Appellant to his right, while another passenger was in the front seat of the vehicle. That, an offender would choose an isolated place to commit such an offence and it is unbelievable that the Appellant would attempt to sexually assault a minor in a taxi with his mother seated in close proximity while travelling in a taxi filled with passengers. That, PW-1 told PW-2 the Doctor who examined him, that his co-passenger had fondled and 'pinched' his private part. That, PW-1 thus introduced a previously undisclosed allegation as neither PW-1 nor PW-6 have alleged that the Appellant had also pinched the genital of PW-1, therefore the authenticity of the Prosecution case is suspect. PW-5 who examined the Appellant on 11-05-2019, at 12.10 p.m., found him to be smelling of alcohol, fortifying the evidence of PW-4, thereby vouching for the Appellant's inability to commit the offence. That, the cross-examination of PW-4 indicates that in fact PW-6 was

arguing with the Appellant inside the vehicle before the journey commenced as the Appellant was drunk, which consequently led to PW-6 implicating him by a false allegation. As per PW-4, the Appellant habitually drank and fell asleep after boarding his taxi. That, PW-6 has also categorically deposed that the Appellant was drunk. Considering the condition of the Appellant, the offence of sexual assault cannot be foisted on him which he had no intention of committing. Learned Counsel for the Appellant speculated that in all likelihood, while asleep, he had unwittingly placed his hand on the victim's leg which may have touched his genital, sans sexual intent, thus the requirement of Section 7 of the POCSO Act remained unfulfilled. That, the Learned Trial Court failed to appreciate that the Appellant being in a drunken stupor could not have committed the offence. Besides, the Prosecution failed to prove that the victim was below twelve years of age on which ground he deserves an acquittal under Section 9(m) of the POCSO Act. Hence, the impugned Judgment and order on sentence be set aside. In support of her submissions Learned Counsel placed reliance on ***Shiva Kala Subba*** vs. ***State of Sikkim***[1]; ***Attorney General for India*** vs. ***Satish and Another***[2] and ***Sanjay Manger*** vs. ***State of Sikkim***[3].

3. *Per contra*, it was contended by Learned Additional Public Prosecutor that PW-6 is the eye-witness to the incident and the evidence of PW-1 and PW-6 corroborate each other with regard to the incident. That, minor discrepancies pertaining to the statement in Exhibit P-6/PW-6 and that of PWs 1 and 6 as sought to be emphasised by the Appellant ought to be disregarded. That,

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[1] 2019 SCC OnLine Sikk 51
[2] (2022) 5 SCC 545
[3] 2022 SCC OnLine Sikk 111

the evidence of PW-5, the Doctor, who examined the Appellant reveals that he was not intoxicated at the time of offence. That, the incident took place under cover of darkness, augmented by the cramped conditions in the car, enabling the Appellant to commit the offence. That, the argument with regard to the date of birth of the victim is misplaced, as the evidence of PW-3 proves that the victim was born on 18-05-2008. In view of the foregoing arguments, the Judgment and order on conviction is in consonance with law, suffering from no infirmity.

4. The rival contentions of Learned Counsel were heard *in extenso* and all documents, evidence and the impugned Judgment perused. This Court is to determine whether the Learned Trial Court arrived at a correct finding regarding the involvement of the Appellant in the offence for which he was convicted and sentenced.

5. The facts of the Prosecution case as it unfolds are that, on 10-05-2019, at around 2050 hours, PW-6 the victim's mother, lodged Exhibit P-6/PW-6 the FIR, before the Sadar PS, complaining that while they were travelling in a taxi from Children's Park to Bojoghari, her ten year old son was sexually assaulted by a drunken man, by touching her son's private part repeatedly until her son PW-1 informed her of it, at around 07.30 p.m. Sadar PS case was registered against the Appellant under Section 10 of the POCSO Act and endorsed to PW-10 for investigation.

6. On completion of investigation, Charge-sheet was submitted against the Appellant under Section 10 of the POCSO Act. The Learned Trial Court framed Charge against the Appellant under Sections 9(a)(iii), 9(l) and Section 9(m) of the POCSO Act, all punishable under Section 10 of the said Act to which he entered

a plea of "not guilty" and claimed trial. Ten witnesses were examined by the Prosecution to prove its case.

7. The evidence on record reveals that on 10-05-2019 when PW-1 and his mother were returning home in a taxi, they were seated in its rear seat with PW-6 to the left of the victim and the Appellant to his right. *En route* the Appellant suddenly started putting his hands on the body of the minor victim, including on his penis. As he did so repeatedly, PW-6, noticed it and asked the driver to stop the taxi. She reprimanded the Appellant for his actions and also hit him with her umbrella after which she complained of the incident to the nearby Police personnel. PWs 1 and 6 thereafter along with PW-9, a bystander went to the Police Station, where PW-6 lodged Exhibit P-6/PW-6. The following morning, PW-1 was taken to the hospital for medical examination. The evidence of PW-1 regarding the incident and the seating arrangement in the taxi is corroborated by PW-6, according to whom the Appellant was drunk and when she requested him to make place in the taxi for them, he responded rudely with derogatory remarks. That, her son narrated to her that the Appellant had been teasing and harassing him all through the journey and threatened him by a show of the Appellant's fists. PW-8 the second SHO at the Police Station received the Exhibit P-6/ PW-6 from PW-6. PW-10 was the Investigating Officer (IO), who on investigation found that the Appellant had touched the private part of the victim which was noticed by his mother. That, before the vehicle began its journey from the taxi stand the mother of the victim had an altercation with the Appellant who was drunk. PW-4, the driver of the vehicle stated under cross-examination that the

mother of the victim was fighting with the Appellant inside the vehicle even before he started it as the Appellant was totally intoxicated. That, the Appellant habitually drank as usual and fell asleep in his vehicle on the day of the alleged incident. That, neither PW-1 nor PW-6 complained about the Appellant putting his hands on the penis of the victim during the journey.

8. Apart from the evidence of PWs 1, 4, 6, 9 and 10, PW-2 the Doctor who examined the victim, deposed that, the victim had given a history of being fondled and pinched in his private part by a co-passenger. PW-2 who conducted the medical examination of PW-1 at 10.50 p.m. on 10-05-2019, opined that,

> **"***On local examination there was tenderness in his scrotum. No injuries were found on his person at the time of his examination. I also recommended some medicine to him.***"**

Under cross-examination, he stated;

> **"***It is not a fact that on local examination I did not find tenderness in the scrotum of the victim.***"**

From the evidence of PWs 1 and 6, the fact of the incident has been brought to light and the tenderness on the scrotum of the victim as found by PW-2 has established that the Appellant had fondled the genital of the victim.

9. The evidence of PW-5 the Doctor who examined the Appellant at 12.10 a.m., on 11-05-2019, found as follows;

> **"**……
>
> On systematic examination : Central nervous system:- He was conscious and oriented to time, place and person; cardiovascular system was normal. Respiratory system was also normal. Per abdomen examination was also normal. However, the patient was smelling of alcohol but he could walk in the straight line. He was able to do past pointing.
>
> Based on the clinical examination and history smell of alcohol was present however the person was not under the influence of alcohol. No fresh injury was noted over the body or the genitals. ……**"**

The examination of the Appellant was inconclusive with regard to his state of intoxication.

10. Now, while addressing the question of whether the victim was below twelve years of age on the date of the incident, it needs no reiteration that the Supreme Court in ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[4], observed that, for determining the age of a person the best evidence is that of his/her parents, if supported by unimpeachable documents. PW-6 identified Exhibit P-8/PW-6 as the birth certificate of her son, nevertheless neither PW-6 nor any of the Prosecution witnesses proved the contents of the document in terms of Section 67 of the Evidence Act, 1872 (hereinafter, the "Evidence Act"). As per the Prosecution case PW-3, the school Principal had issued Exhibit 4, said to be a certificate, stating that the date of birth of the minor was 18-05-2008. However, the cross-examination of PW-3 reveals that she did not receive any written requisition from the Police requiring her to furnish details of birth of the victim. She had not issued any letter to the Police with regard to the details of the birth certificate of the victim, thereby soundly demolishing the existence of Exhibit 4. She also did not furnish the school register in the Court during her evidence, neither was she shown the birth certificate of the victim. As per the IO, PW-10 he seized the birth certificate of the minor victim, vide property seizure memo Exhibit P-14/PW-10 and claimed that Exhibit P-14(a) was the signature of the victim's father. He also identified Exhibit P-8/PW-6 as the birth certificate of the minor and the signature of the victim's father and two witnesses as Exhibit P-8(a), Exhibit P-8(b) and Exhibit P-8(c)

[4] (2010) 9 SCC 209

as the signatures of those persons. However, these persons were not listed as Prosecution witnesses. No reasons for non-production of these persons as witnesses were provided, leading this Court to draw an adverse inference against the Prosecution case under Section 114 *Illustration* (g) of the Evidence Act. No other witness has buttressed the Prosecution case regarding the date of birth of PW-1, save himself, which is unfortified by documentary evidence. In the foregoing circumstances, it cannot be heard to say that the age of the victim was proved by any Prosecution witnesses with the aid of unimpeachable documentary evidence.

(i) Reference by the Learned Trial Court to the Judgment of this Court in ***State of Sikkim*** vs. ***Girjaman Rai and Others***[5] to brace his finding about the age of minority of PW-1 is erroneous. The Learned Trial Court was of the view that the evidence of the victim's mother is to be taken as best evidence in terms of the observation of this Court in ***Girjaman Rai*** (*supra*). This is clearly misplaced reliance and misinterpretation of the observation of this Court for the reason that, this Court has specifically observed therein as follows;

> **"27.** Mere production of a birth certificate without even authenticating the same by proving it through its maker is however, not enough to prove the age of the victim. The age of the victim must be proved by leading clinching evidence. The cogency of the evidence led would ultimately help the Court in determining the age of the victim.
>
> **28.** The victim did not depose about her age or her date of birth during her examination. In cross-examination she admitted that she did not know her date of birth. The victim's parents did not depose about the victim's age or her date of birth. The father of the victim identified the birth certificate after he was declared hostile. However, during cross-examination by the defence the father of the victim stated that he did not know the date of birth of the victim. There is no evidence of either the parents or

[5] 2019 SCC OnLine 50

> the victim herself about her age. The cross-examination of the prosecution witnesses by the defence does not reflect that they had not raised any doubt about the age of the victim.
>
> **29.** The Learned Special Judge found it unsafe to rely upon the birth certificate to come to a finding that the date of birth of the victim is 10.02.2000 since the parents as well as the victim did not know the victims age or her date of birth. The finding of the learned Special Judge that the prosecution had failed to prove the contents of the birth certificate cannot be faulted.**"**

(ii) On the edifice of the foregoing evidence and discussions, I am of the considered view that the Prosecution has failed to establish that the victim was below twelve years at the time of the offence. Consequently, the Appellant cannot be held liable for the offence under Section 9(m) of the POCSO Act. On this aspect I have to disagree with the finding of the Learned Trial Court.

11. The aspect of the age of the victim having been settled, it is essential to now consider the provision of Section 7 of the POCSO Act which defines "sexual assault" and reads as follows;

> **"7. Sexual Assault**.—Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.**"**

12. The "sexual intent" of an act committed by the accused is the first ingredient to be considered by the Court when an accused is booked for the offence under Sections 7 of the POCSO Act. The expression "sexual intent" has not been specifically elucidated in Section 7 of the Act, it therefore cannot be confined to any pre-determined perception. The Supreme Court in ***Satish*** (*supra*) observed that;

> **"36.** ..... As per the rule of construction contained in the maxim "*ut res magis valeat quam pereat*", the construction of a rule should give effect to the rule rather than destroying it. Any narrow and pedantic interpretation of the provision which would defeat the object of the provision, cannot be accepted. It is also needless to say that where the intention of the legislature cannot be given effect to, the courts would accept the bolder construction for the purpose of bringing about an effective result. ……
>
> …….
>
> **38.** The act of touching any sexual part of the body of a child with sexual intent or any other act involving physical contact with sexual intent, could not be trivialised or held insignificant or peripheral so as to exclude such act from the purview of "sexual assault" under Section 7. As held by this Court in *Balram Kumawat* v. *Union of India* [(2003) 7 SCC 628], the law would have to be interpreted having regard to the subject-matter of the offence and to the object of the law it seeks to achieve. The purpose of the law cannot be to allow the offender to sneak out of the meshes of law.**"**

(i) The Court further went on to hold that;

> **"**.....
>
> **64.** The aim of such statutory construction was put, pithily and simply in *Swantraj* v. *State of Maharashtra* [(1975) 3 SCC 322]: (SCC p. 323, para 1)
>
> > "*1*. Every legislation is a social document and judicial construction seeks to decipher the statutory mission, language permitting, taking the one from the rule in *Heydon case* [(1584) 3 Co Rep 7a]' [*Maxwell on the Interpretation of Statutes*, 12th Edn. (1969) pp. 40, 96.] of suppressing the evil and advancing the remedy."
>
> …….
>
> **77.** A close analysis of Section 7 reveals that it is broadly divided into two limbs. Sexual assault, under the first limb is defined as the *touching* by a person — *with sexual intent* — of four specific body parts (vagina, penis, anus or breast) of a child, or making a child *touch* any of those body parts of "such person" (i.e. a clear reference to the offender) or of "any other person" (i.e. other than the child, or the offender). In the second limb, sexual assault is the doing of "*any other act with sexual intent which involves physical contact without penetration*".
>
> …….
>
> **81.** Parliamentary intent and emphasis, however, is that the offending behaviour (whether the touch or other act involving physical contact), should be motivated with *sexual intent*. Parliament moved beyond the four sexual body parts, and covered acts of a general nature, which *when done with sexual intent*, are criminalised by the second limb of Section

> 7. **The specific mention of the four body parts of the child in the first limb, and the use of the controlling expression "sexual intent" mean that every touch of those four body parts is prima facie suspect.**
>
> **82. The circumstances in which touch or physical contact occurs would be determinative of whether it is motivated by "sexual intent". There could be a good explanation for such physical contact which include the nature of the relationship between the child and the offender, the length of the contact, its purposefulness; also, if there was a legitimate non-sexual purpose for the contact. Also relevant is where it takes place and the conduct of the offender before and after such contact. In this regard, it would be useful to always keep in mind that "sexual intent" is not defined, but fact-dependent—as the Explanation to Section 11 specifies.**
>
> ....." **[emphasis supplied]**

The above extractions lucidly explain what Section 7 of the POCSO Act and "sexual intent" thereof entails. It is important to notice that the Supreme Court has emphasised that, the specific mention of the four body parts in Section 7 in its first limb and the use of the controlling expression "sexual intent" means that, every touch on those four body part is *prima facie* suspect, unless proved otherwise.

13. Learned Counsel for the Appellant sought to garner strength from the decisions in ***Shiva Kala Subba*** (*supra*) and ***Sanjay Manger*** (*supra*) of this Court. In ***Sanjay Manger*** (*supra*), this Court dealt with an allegation of aggravated sexual assault by the Appellant on an alleged minor victim. He was acquitted of the offence under Section 9(m) of the POCSO Act as the evidence furnished by the Prosecution failed to be cogent and was riddled with contradictions.

(i) In ***Shiva Kala Subba*** (*supra*), this Court was concerned with the allegation of aggravated penetrative sexual assault under Sections 5(m) and 5(n) of the POCSO Act read with Section 323 of the Indian Penal Code, 1860 (hereinafter, the "IPC"). The perpetrator was allegedly the aunt of the minor victim. The

Prosecution failed to establish sexual intent in the acts of the Appellant against the victim and she was acquitted of the offences under Sections 5(m) and 5(n) of the POCSO Act but her conviction under Section 323 of the IPC was upheld. These cases are distinguishable from the Appeal under consideration, suffice it to state that every Judgment deals with a peculiar set of facts, circumstances, evidence and nuances and the reasons propounded in each individual case thereby cannot have universal application.

14. Learned Counsel for the Appellant had taken a plea that the Appellant was so drunk that he was unaware of the consequences of his act. At this juncture, I refer to Section 86 of the IPC which provides as follows;

> **"86. Offence requiring a particular intent or knowledge committed by one who is intoxicated**.— In cases where an act done is not an offence unless done with a particular knowledge or intent, a person who does the act in a state of intoxication shall be liable to be dealt with as if he had the same knowledge as he would have had if he had not been intoxicated, unless the thing which intoxicated him was administered to him without his knowledge or against his will.**"**

15. In ***Basdev*** vs. ***State of Pepsu***[6] the Supreme Court as far back as in 1956 was considering the provision of Section 86 of the IPC in a matter where the Appellant therein had shot and killed a young boy aged about 15 years when all of them had gone to attend a wedding. The Appellant who was drunk and intoxicated asked the young boy to step aside to enable the Appellant to occupy a convenient seat. When the boy failed to move, the Appellant whipped out a pistol and fatally shot the boy in the abdomen. The plea taken was that he was drunk and unaware of the consequences of his act. The Supreme Court discussed a

[6] AIR 1956 SC 488

plethora of cases and observed that Coleridge J., in ***Reg*** vs. ***Monkhouse***[7], *inter alia* had held as follows;

> **"**(9) …….
>
> **The inquiry as to intent is far less simple than that as to whether an act has been committed, because you cannot look into a man's mind to see what was passing there at any given time. What he intends can only be judged of by what he does or says, and if he says nothing, then his act alone must guide you to your decision.** It is a general rule in criminal law, and one founded on common sense, that juries are to presume a man to do what is the natural consequence of his act. The consequence is sometimes so apparent as to leave no doubt of the intention. A man could not put a pistol which he knew to be loaded to another's head, and fire it off, without intending to kill him; but even there the state of mind of the party is most material to be considered. For instance, if such an act were done by a born idiot, the intent to kill could not be inferred from the act. So, if the defendant is proved to have been intoxicated, the question becomes a more subtle one; but it is of the same kind, namely, was he rendered by intoxication entirely incapable of forming the intent charged?
>
> ……..**"[emphasis supplied]**

(i) It was further observed as follows;

> **"**……..
>
> Drunkenness is ordinarily neither a defence nor excuse for crime, and where it is available as a partial answer to a charge, it rests on the prisoner to prove it, and it is not enough that he was excited or rendered more irritable, unless the intoxication was such as to prevent his restraining himself from committing the act in question, or to take away from him the power of forming any specific intention. Such a state of drunkenness may no doubt exist.**"**

(ii) Reference was also made therein to the decision of the House of Lord's in ***Director of Public Prosecutions*** v. ***Beard***[8] in which the accused had ravished a girl of 13 years of age and drunkenness was pleaded as a defence. The House of Lord's laid down three rules;

> **"**(13) ……..
>
> (*1*) That insanity, whether produced by drunkenness or otherwise, is a defence to the crime charged;

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[7] (1849) 4 Cox CC 55
[8] 1920 AC 479 (F)

> **(*2*) That evidence of drunkenness which renders the accused incapable of forming the specific intent essential to constitute the crime should be taken into consideration with the other facts proved in order to determine whether or not he had this intent;**
>
> **(*3*) That evidence of drunkenness falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to some violent passion, does not rebut the presumption that a man intends the natural consequences of his acts.**
>
> **[emphasis supplied]"**

It concludes that, while taking the plea of drunkenness it must be proved that the mind of the Appellant was so effected thereby incapacitating him from forming the specific intent essential to constitute the crime, and from understanding his act or the consequences thereof.

16. From the evidence traversed in the instant case it stands to reason that in the first instance the Appellant has failed to prove his incapacity on account of his alleged drunkenness which rendered him incapable of forming a specific intent, that he was unaware of the act perpetrated by him on the young victim, who he thereby traumatised and scarred for life. His "sexual intent" can be gauged by his act of touching the genital of PW-1, for which he had no explanation, the tenderness in the victim's scrotum indicates the length of the contact and its purpose and there was no legitimate non-sexual purpose for the contact. In the absence of evidence to rebut such intention and bearing in mind the pronouncement in ***Satish*** (*supra*) that sexual intent is not defined but "fact-dependent", the only conclusion for the act of the Appellant would be of sexual intent.

17. It is imperative here to also consider the provisions of the POCSO Act. It is clear that Section 30 of the POCSO Act casts a reverse burden on the Appellant inasmuch as it requires that in

any prosecution for any offences under the Act which requires culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state. The accused is to prove in his defence that he had no such mental state with respect to the Act charged as an offence in the prosecution. Section 30(2) of the Act mandates that such fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when the existence is established by a preponderance of probability. The explanation to the Section reads as follows;

> **"***Explanation*.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.**"**

18. The evidence on record nowhere indicates that the Appellant made an attempt to discharge the burden cast on him either under Section 86 of IPC or Section 30 of the POCSO Act, leading to the inevitable condition that although he was intoxicated he was not incapacitated from understanding the act committed by him and the consequences of such act. The nature of his act of having fondled the genital of the victim suffices to establish "sexual intent", which is the essential ingredient for an offence under Section 7 of the POCSO Act.

19. Resultant,

(i) the Appellant stands convicted of the offence under Section 7 of the POCSO Act punishable under Section 8 of the same Act.

(ii) He is sentenced to undergo simple imprisonment of three years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only, under Section 7 punishable under Section 8 of the POCSO Act. In

default thereof, to undergo further simple imprisonment of two months.

(iii) The conviction of the Appellant under Section 9(m) punishable under Section 10 of the POCSO Act in terms of the impugned Judgment and the consequent impugned sentence is set aside.

(iv) The acquittal of the Appellant by the Learned Trial Court under Section 9(a)(iii) and 9(l) of the POCSO Act is upheld.

20. Appeal partly allowed.

21. No order as to costs.

22. Copy of this Judgment be forwarded to the Learned Trial Court for information along with its records.

(Meenakshi Madan Rai)
Judge
03-05-2024

Approved for reporting : **Yes**

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