



THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 14th August, 2024

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

Crl.A. No.18 of 2023

Appellant : Ramesh Rai

versus

Respondent : State of Sikkim

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

Appearance

Mr. D. K. Siwakoti, Advocate (Legal Aid Counsel) for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. Once again the prospect of determining an Appeal where the allegation is of an adult having sexually assaulted a minor girl child, aged about twelve years, stares us in the face, leading us to mull over moral turpitude and moral decadence in our society.

2. On 22-04-2020, the concerned Childline, through a source, received information that a child (PW-1) had been sexually assaulted by her stepfather. The team member of the Childline (PW-9) went to the area for verification and found that the minor child had been sexually assaulted by the Appellant. During counselling, the victim PW-1, revealed that the Appellant had been sexually assaulting her since a year ago but the incidents remained undisclosed by her, to her family members, due to fear of dire reprisal held out by the Appellant to the victim, should she reveal the acts perpetrated on her by him. On the night of 21-04-2020, when the child complained of sudden pain and began to cry, her



mother PW-3, enquired of her as to the reason for her crying, whereby she narrated the ordeal of her being subjected to sexual assault by the Appellant, her stepfather since a year back. Consequently, Exbt P-4/PW-9 the FIR, came to be lodged by PW-9 at the concerned Police Station. Investigation was endorsed to PW-13 the Investigating Officer (IO), after the registration of the FIR on the same day, under Section 376 of the Indian Penal Code, 1860 (hereinafter, the "IPC"), read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"), against the Appellant. On completion of the investigation, Charge-Sheet was submitted against the Appellant under Section 376 of the IPC read with Section 6 of the POCSO Act by the IO, who on his investigation found that the Appellant had been sexually assaulting the minor as alleged. The facts as stated in Exbt P-4/PW-9 is the crux of the Prosecution case. The Appellant at the time of the incident was around 45 years of age.

(i) The Court of the Learned Special Judge, POCSO Act, Gangtok, Sikkim, on finding a *prima facie* case against the Appellant, framed Charge against him under Section 5(m) and Section 5(n), both Sections punishable under Section 6 of the POCSO Act and under Section 376(2)(n), Section 376(2)(f) and Section 376(3) of the IPC. The Appellant having understood the Charges framed against him entered a plea of "not guilty". Accordingly, trial commenced. The Prosecution examined thirteen witnesses to establish its case. On closure of the Prosecution evidence, the incriminating evidence appearing against the Appellant was put to him under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."). He claimed innocence



and asserted that the evidence against him was untrue. Thereafter, the final arguments of the parties were heard and vide Judgment dated 05-07-2023, in Sessions Trial (POCSO) Case No.21 of 2020 (*State of Sikkim vs. Ramesh Rai*), the Learned Trial Court convicted the Appellant of the offences under Section 5(m) and Section 5(n) punishable under Section 6 of the POCSO Act and under Section 376(2)(n), Section 376(2)(f) and Section 376(3) of the IPC. The sentences meted to the Appellant on 10-07-2023 were;

- (a) Rigorous imprisonment for a period of twenty years and fine of ₹ 5,000/- (Rupees five thousand) only, for each of the offences under Section 5(m) and Section 5(n), both punishable under Section 6 of the POCSO Act. Both the sentences of fine bore default stipulations.
- (b) The sentences of imprisonment imposed were ordered to run concurrently setting off the period already undergone by the Appellant during the investigation and trial.
- (c) The Learned Trial Court further observed that as the punishment prescribed under Sections 376(2)(n), 376(2)(f) and 376(3) of the IPC are covered by the aforementioned provisions of the POCSO Act, the Appellant was not to be penalised twice for the same offences, under two different legislations.
- (d) A sum of ₹ 4,00,000/- (Rupees four lakhs) only, was recommended to be awarded to the victim as compensation.

3. Learned Counsel for the Appellant advanced the contention that in the first instance the Charge under Section 5(m) of the POCSO Act would not sustain against the Appellant as the Prosecution evidence itself had established that she was aged about 14 to 15.5 years at the time of the alleged incident. That, PW-6 Consultant Radiologist-cum-Head of Department, Radiology



Department, vouched for the same, which was duly considered by the Trial Court. Hence, the Charge and conviction handed out by the Trial Court under Section 5(m) of the POCSO Act is erroneous. That, as far as the offence under Section 5(n) of the POCSO Act is concerned, it was conceded that the Appellant is the stepfather of the child, having been married to her mother, however it was asserted that there was no Prosecution evidence to prove that “penetrative” sexual assault had been perpetrated, by the Appellant, on the victim. Such allegation was not made in Exbt P-4/PW-9 nor did the medical examination of the victim Exbt P-3/PW-8 allude to such a circumstance. Besides, admittedly the parents and the victim shared a single bedroom where such acts would have been an impossibility. Hence, the offence of penetrative sexual assault not having been proved, the Trial Court was in error in having convicted the Appellant under Section 5(n) of the POCSO Act. Learned Counsel for the Appellant however fairly conceded that sexual assault perpetrated on PW-1 by the Appellant could not be ruled out.

4. Learned Additional Public Prosecutor, while relying on the evidence of PWs 1, 3, 9 and 10 contended that penetrative sexual assault had been established by the evidence of these witnesses, more especially PW-10, who was an eye-witness to one such incident. That, the Learned Trial Court having correctly concluded that the Appellant had committed the offences under Sections 5(m) and 5(n) of the POCSO Act, the Judgment and Order on Sentence of the Learned Trial Court be upheld.

5. After carefully considering the submissions advanced, it is apparent that the FIR Exbt P-4/PW-9, dated 22-04-2020, the



contents of which have already been set forth hereinabove, was lodged by PW-9 at the concerned Police Station, making allegations against the Appellant.

6. It would be essential to consider whether the Learned Trial Court had correctly framed Charge against the Appellant under Section 5(m) of the POCSO Act which reads as follows;

"5. Aggravated penetrative sexual assault.–

.....
 (m) whoever commits penetrative sexual assault on a child below **twelve** years; or"
[emphasis supplied]

(i) In this context, at Paragraphs 21 and 22 of the impugned Judgment it was observed that;

"21. According to the victim's mother, **the victim was born on 01.02.2007 which means that she was 13 years old at the time of the incident.** However, there is no documentary proof and the victim's mother does not have her birth certificate. Therefore, to determine her age, the prosecution has relied on the victim's ossification test report (Exhibit-1) which was prepared by PW-6. **According to the Radiologist (PW-6), the bone-age of the victim was between 14 to 15.5 years as on 24.04.2020."**

22. Applying the margin of error principle of two years on either side (see *Jaya Mala v. Home Secretary, Government of J&K and Others, (1982) 2 SCC 538*), **the victim's age as on 24.04.2020 could be held to be 17.5 years. Since the incidents were continuing ones, her age during the said period could be safely considered to be between 16.5 to 17.5 years.** Therefore, the question whether the victim is a child within the meaning of Section 2(d) of the POCSO Act, 2012 is answered in affirmative."
[emphasis supplied]

(ii) The Learned Trial Court therefore was of the view that the age of the victim at the time of the commission of the offences which it opined were continuing offences, was between 16.5 to 17.5 years and therefore she was a child below the age of eighteen years. However, the Trial Court lost sight of the fact that the requisite ingredient for an offence under Section 5(m) of the POCSO Act is that the victim child is to be below twelve years of age. Consideration of the observations (*supra*) made by the Trial



Court thus reveals that it failed to determine as to whether the victim was below twelve years at the time of the incident. Section 5(m) of the POCSO Act specifically deals with “*aggravated penetrative sexual assault on a child below twelve years*”. In this context, the evidence establishes that the last offence took place sometime around 22-04-2020. The bone age of the victim was assessed on 24-04-2020, to be 14 to 15.5 years by PW-6, the Consultant Radiologist-cum-Head of Department of Radiology at the concerned Government hospital. This Court while applying the “margin of error” principle as also employed by the Trial Court and while extending the benefit of two years to the victim on the lower side, it falls to reason that the victim would have been aged anywhere between 12 to 13.5 in 2018, when the offences allegedly commenced, as established by her undecimated testimony. What emerges with clarity, based on the ossification test is that she “*was not below twelve years of age*” at the time of the offence. Nevertheless the Charge framed under Section 5(m) surely cannot be said to be erroneous, as at the stage of framing of Charge the Court would consider the *prima facie* materials placed before it and would not be seised of the entire evidence. It is only subsequently that the Court would have to reach a finding about the age of the victim, based on the Prosecution evidence or otherwise furnished before it. In these circumstances, we are of the considered view that on conclusion of trial the conviction under Section 5(m) of the POCSO Act was indeed erroneous in light of the foregoing discussions.

(iii) Now, with regard to Section 5(n) of the POCSO Act, admittedly the Appellant is the stepfather of PW-1. The question



whether he had committed penetrative sexual assault on the victim is the moot question which the Prosecution was to establish by evidence. The Learned Trial Court based on the evidence of PW-1 and PW-10, concluded that the Appellant had committed penetrative sexual assault on the victim. PW-1 in her deposition has stated that the Appellant used to put his penis in her vagina from the year 2018 and that he did so on several occasions and mostly during the night when her mother would be asleep. Under cross-examination, it was her admission that the FIR nowhere states that she was subjected to "penetrative sexual assault" by the Appellant. The evidence of PW-3 (the victim's mother) relied on by the Prosecution, lends no succour to the case of penetrative sexual assault. PW-3 was categorical in her statement that one night while they were asleep she heard PW-1 screaming and woke up. She saw that the Appellant was already awake. When she asked the Appellant what had happened, he told her that he had woken up to attend nature's call. As per PW-3, the next morning PW-1 told her elder sister PW-4, that during the night the Appellant used to come to her bed that she shared with PW-4. Pertinently it may be clarified here that, it is in the evidence of PW-1 that PW-4 her sister, lived elsewhere, and visited home occasionally, during which time she shared the bed of PW-1. It is the further statement of PW-3 that though she enquired from PW-1 she did not tell her about any untoward acts having been perpetrated on her by the Appellant. In fact, the cross-examination of PW-3 reveals that she did not see the Appellant sexually assaulting the minor victim nor did the victim tell her about the alleged incidents of sexual assault committed on her by the Appellant. Concededly, PW-3 came to



learn of it from their house owner, hence the evidence of PW-3 lends no strength whatsoever to the Prosecution case. According to PW-4 (the victim's elder sister) she witnessed the Appellant and her mother involved in an altercation the night after the incident and her mother enquiring from PW-1 as to what had transpired the previous night. PW-4 heard PW-1 tell PW-3 that the Appellant had "put his hand on her body during the previous night". No light was shed by this witness (PW-4) on the aspect of penetrative sexual assault. PW-9 in her evidence stated that during the time when she counselled PW-1, she was told that the Appellant had subjected her to penetrative sexual assault several times. PW-10 said to be the eye-witness stated that when she was residing at the house of the victim and cleaning the windows of her house, she saw PW-1 and the Appellant in the other room from the ventilator. The said room being adjacent to her house. She saw the Appellant holding PW-1 by her waist. He had locked her legs by his own legs and they were lying in on a bed. She saw the Appellant touching the breasts of PW-1. On seeing PW-10 the Appellant let go of PW-1, from his clutches where upon PW-1 went running to PW-10 and cried. Later, she met PW-4 and told her about the incident. PW-4 then enquired from the victim as to what had transpired. PW-1 disclosed to them that the Appellant was "trying" to have sexual intercourse with her and that he had raped her and had sexual intercourse with her in the past at the house where they had earlier resided and that she could do nothing about it.

(iv) Despite the claims of penetrative sexual assault made by PW-1 and of PW-9 the team member of the Childline stating that PW-1 had told her of the penetrative assault perpetrated on



her by the Appellant, the evidence of PW-8 the doctor, does not indicate the commission of penetrative sexual assault on PW-1 at any point of time. The Prosecution has failed to extract any evidence of penetrative sexual assault from this witness. Exbt P-3/PW-8 is the report prepared by PW-8 which *inter alia* reads as follows;

“.....

Forwarded by Sadar P.S. Escorted by Devi Maya Darnal.

Identification mark – Seen on ® hand – dorsal aspect
 – bare of thumb.

History as per victim – She states that she has been **sexually assaulted** by her step father since one year over different occasions.

The last **sexual assault** happened on 21/4/2020 at 3 am at their current resident.

As per the victim there was no penetration intercourse during the last encounter. (21/4/2020)

O/E – Pt was oriented to TPP

BP – 120/80 mmtly

L/E – Pubic hair ⊕, non matted

PR – 96/min

– Secondary sexual character well developed.

S/E – Rs }
 Cw } NAD
 PA }
 CNS }

– Vagina has no signs of inflammation no cut/laceration seen.

– Pt is clinically fit and of sound mind.

.....” **[emphasis supplied]**

(v) PW-10 witnessed the incident from afar, in view of which we are not inclined to rely on her evidence so far as penetrative sexual assault is considered. The improbability of the offence of penetrative sexual assault having occurred is augmented by the evidence of PW-1 who deposed that such incidents took place during the night when her mother would be asleep and that they all resided in one rented room. It is also imperative to notice that she has not given details of the number of incidents and places where it was perpetrated.



7. Consequently, considering the entire evidence on record holistically, we have reached a finding that the Prosecution has failed to establish the offence of aggravated penetrative sexual assault, on the child, PW-1 by the Appellant, her stepfather as required under Section 5(n) of the POCSO Act.

8. That having been said, it is essential to emphasise that the fact of "sexual assault" *per se* by the Appellant, on the victim, has been established. The evidence as discussed above, especially of PW-1 and PW-10 on this aspect is clinching, thus we find that the Appellant committed the offence under Section 9(n) of the POCSO Act which reads as follows;

"9. Aggravated sexual assault.—

.....
 (n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child; or"

9. Invoking the provisions of Section 222(2) of the Cr.P.C., the Appellant is accordingly;

- (a) convicted of the offence under Section 9(n) punishable under Section 10 of the POCSO Act.
- (b) He is acquitted of the offence under Section 5(m) and Section 5(n) punishable under Section 6 of the POCSO Act and, Section 376(2)(n), Section 376(2)(f) and Section 376(3) of the IPC.

10. The Judgment of the Learned Trial Court is modified to the above extent.

11. Appeal is partly allowed.

12. As the Appellant vide the impugned Judgment and Order on Sentence was convicted and sentenced for a higher



offence and considering that the proviso to Section 386(e) of the Cr.P.C. requires that the Appellant be put to notice *only* when the sentence is to be enhanced, the sentence for an offence under Section 9(n) punishable under Section 10 of the POCSO Act being lesser than that meted out under Section 5(m) and Section 5(n) of the POCSO Act, we impose the following sentence on the Appellant;

- (i) The Appellant is sentenced to undergo simple imprisonment for five years and to pay a fine of ₹ 2,000/- (Rupees two thousand) only, under Section 9(n) punishable under Section 10 of the POCSO Act. In default of payment of fine, to undergo simple imprisonment of one month. The period of imprisonment imposed on him today is set off against the period of imprisonment already undergone by him during investigation, as under-trial prisoner and on his conviction by the impugned Judgment and Order on Sentence.

13. Appeal disposed of accordingly.

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

15. A copy of this Order also be made over to the Appellant/Convict through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority at the Central Prison, Rongyek, for information and appropriate steps.

(Bhaskar Raj Pradhan)
Judge
14-08-2024

(Meenakshi Madan Rai)
Judge
14-08-2024

Approved for reporting : **Yes**