THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DIVISION BENCH : THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.19 of 2019

Appellant : Bhakta Bahadur Subba

versus

Respondent : State of Sikkim

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

Appearance

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

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

Date of Hearing : 03-09-2020

Date of Judgment : 14-09-2020

J U D G M E N T

Meenakshi Madan Rai, J.

1. By preferring this appeal the Judgment and Order on Sentence, both dated 26-07-2019, in Sessions Trial (POCSO) Case No.10 of 2018 are assailed. The learned Trial Court subjected the appellant to trial under four counts of the Indian Penal Code, 1860 (hereinafter, "IPC") and three counts of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, **"**POCSO Act, 2012**"**). On completion of trial, the appellant was convicted on all seven counts as follows;

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(i) For the offence under Section 354 of the IPC, the convict was sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rs.1,000/- (Rupees one thousand) only;

(ii) For the offence under Section 376(2)(n) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/- (Rupees five thousand) only;

(iii) For the offence under Section 376(3) of the IPC, he was sentenced to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only;

(iv) For the offence under Section 506 of the IPC, he was sentenced to undergo simple imprisonment for a period of one year and six months and to pay a fine of Rs.1,000/- (Rupees one thousand) only;

(v) For the offence under Section 5(j)(ii) of the POCSO Act, 2012, the convict was sentenced under Section 6 of the POCSO Act, 2012, to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/- (Rupees five thousand) only;

(vi) For the offence under Section 5(l) of the POCSO Act, 2012, the convict was sentenced under Section 6 of the POCSO Act, 2012, to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.5,000/- (Rupees five thousand) only; and

(vii) For the offence under Section 7 of the POCSO Act, 2012, the convict was sentenced under Section 8 of the POCSO Act, 2012, the convict was sentenced to undergo simple imprisonment for a period of two years and to pay a fine of Rs.1,000/- (Rupees one thousand) only.

All the sentences of fine carried a default clause of imprisonment. Aggrieved thereof, the appellant is before this Court.

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2(i). The facts of the prosecution case, briefly narrated, are that on 14-03-2018, at around 0730 hours, written information was received at the concerned police station from

P.W.2, a Para Legal Volunteer (PLV) of the area where the offence had occurred, stating that the victim P.W.1, aged about 16 years, was sexually assaulted by the appellant for the last 5/6 months. That, on 13-03-2018, the concerned Ward Panchayat, P.W.3, brought it to the notice of the informant, who in turn, enquired about it from the victim P.W.1 and after obtaining information from the victim, immediately lodged the First Information Report (FIR), Exhibit 3. The FIR was registered as a criminal case on 14-03-2018, under Section 376 of the IPC read with Section 6 of the POCSO Act, 2012, against the appellant. The matter was duly investigated into by P.W.13, the Investigating Officer (I.O.). Investigation, *inter alia*, revealed that repeated sexual assault perpetrated by the appellant, aged about 52 years, on the minor victim, aged about 15 years 8 months, led to her pregnancy.

(ii) Charge-Sheet was filed against the appellant under Section 376 of the IPC read with Section 5(j)(ii) of the POCSO Act, 2012. The learned Trial Court framed Charges against the appellant under Section 376(2)(i), Section 376(2)(n), Section 354, Section 506 of the IPC, Section 5(j)(ii)/6, Section 5(l)/6, and Section 7/8 of the POCSO Act, 2012. On a plea of "not guilty" by the appellant, the Prosecution embarked on the exercise of examining thirteen witnesses to prove its case beyond all reasonable doubt. On closure of Prosecution evidence the appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C") wherein he reiterated his innocence. However, he had no witness to

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examine. Pursuant thereto, the final arguments of the rival parties were heard and the learned Trial Court on due consideration of the evidence on record convicted and sentenced the appellant as detailed *supra*.

3. Learned Legal Aid Counsel for the appellant in an effort to establish the innocence of the appellant contended before this Court that, as per P.W.2, he was telephonically called by P.W.3 to her home, and on reaching there she informed him that the victim was pregnant and made enquiries about initiating legal proceedings. That P.W.2, P.W.3, P.W.4 and P.W.10 have stated that the victim was pregnant, but P.W.1, the victim, has nowhere stated that she told the said witnesses that the appellant had sexually assaulted her. The statement of the victim nowhere indicates that the appellant was responsible for the offence. The victim is unaware as to who lodged the FIR, added to which that there is no DNA report of the infant delivered by the victim to establish paternity, leading to doubts about the veracity of the Prosecution case. That, in the absence of cogent evidence to link the appellant to the offences, the benefit of doubt ought to be extended to him and he deserves to be acquitted of the offences under which he was convicted. Urging an alternative argument, learned Counsel contended that should this Court come to a finding that the appellant is guilty of the offences, the sentence imposed on him be reduced on the ground that the sexual assault took place only once and it was not perpetrated repeatedly. That, the appellant has no criminal antecedents and is now aged about 54 years. Incarcerating him

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for twenty long years would deprive him of the company and comfort of his family in his old age when he would require it the most, hence, sympathetic consideration be given by the Court on this aspect.

4. *Per contra*, learned Additional Public Prosecutor submitted that the impugned Judgment and Order on Sentence warrants no interference in view of the admission of the appellant of the minority of the victim which has been proved by the Prosecution and in consideration of the evidence of the victim herself where she has unequivocally stated that the appellant had sexually assaulted her from the time she was in Class VII. That, the offence of sexual assault was not a single encounter, but consistently perpetrated on the victim by the appellant resulting in her pregnancy and delivery of a child. That, the victim's evidence in Court is duly corroborated by her Section 164 Cr.P.C. statement before the learned Magistrate which stood un-decimated by her cross-examination. That, mere non-production of the DNA report does not absolve the appellant of the crime committed by him in view of the cogent and consistent statements of the victim. That, it is now settled law that the Courts can rely on the statement of the victim alone and convict the offender if her evidence is cogent, consistent and coherent. Hence, the appeal deserves a dismissal.

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5. We have heard at length the rival contentions and given our due consideration.

6. The only question that arises for consideration herein is whether the learned Trial Court erred in convicting the appellant under the offences charged?

7. In order to answer this query it is necessary to carefully examine the evidence on record.

(i) P.W.1 is the minor victim. On the date that her evidence was recorded before the learned Trial Court, i.e., 06-08-2018, she was aged about 16 years. The learned Trial Court while relying on the birth certificate, Exhibit 6, issued by the District Registrar, Births & Deaths of the concerned Hospital, Government of Sikkim, found that the victim was born on 14-06-2002. The learned Trial Court also observed that the seizure of the birth certificate had been duly proved by P.W.2 and P.W.3 from the possession of P.W.6. The veracity of the evidence of P.W.6 was duly corroborated by P.W.12, the District Medical Superintendent. That, the victim was a minor is not contested by the appellant, and in view of this admission, no further discussion need arise on the minority of the victim.

(ii) So far as the question of the appellant being the perpetrator of the offence is concerned, we may carefully examine the evidence of P.W.1 the victim. According to her, the appellant was a frequent visitor to the house where she was residing. That, she had been brought to live in the said house since 12-12-2013 and admitted to Class VI of the Government Senior Secondary School in the area. She studied there till February, 2018. That, while she was in Class VII, one evening at her home when she was locking the hens in their coop, the

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appellant came to where she was and started touching her all over her body, fondled her breasts and took off her track pants. Thereafter, despite her protest he raped her. Two-three days later when she was preparing fodder for the cows at the cowshed, he came there and forcefully raped her. Although she warned him that if he repeated the act she would inform the house owner, the appellant instead threatened to kill her if she reported the matter to either the house owner or any other person. Thereafter, he would frequent the house, when no one else was around and raped her at various places in and around the house at different points of time till February, 2018. According to her, the lady Panchayat, P.W.3 requested an Accredited Social Health Activist (ASHA) volunteer, P.W.10, to conduct a urine pregnancy test on her (P.W.1), the report of which tested positive for pregnancy. When P.W.3 asked her how the pregnancy came about, she told her that the appellant was responsible for the same. Thereafter, P.W.2 came to the house where P.W.1 was residing and P.W.1, P.W.2 and P.W.4 went to the Police Station where the lady police personnel enquired from her about her pregnancy. She then narrated the incident to the police personnel in the presence of P.W.4, her mother. That, later her statement came to be recorded by a "Judge Madam", which she identified as Exhibit 1. That, on 06-06-2018, she delivered a baby girl at STNM Hospital, Gangtok. Although it was the argument of learned Counsel for the appellant that the minor victim was unaware of who lodged the FIR and thereby the authenticity of the incident could not be gauged, however, we are

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of the considered opinion, that such ignorance does not demolish the Prosecution case. Her evidence-in-chief was to the effect that she had gone to the Police Station with P.W.2 and P.W.4. The veracity of her statement regarding her presence at the police station with the other Prosecution witnesses was not even tested in cross-examination. The victim under cross-examination has admitted that she had made her statements pertaining to the incident, to the police, in the presence of her mother, P.W.4. The fact remains that the FIR, Exhibit 3, was lodged by P.W.2 who has stated as much, duly supported by the evidence of P.W.4 who had accompanied him to the police station. The acts of sexual assault by the appellant on the victim have been cogently deposed by the victim and withstood the lengthy cross-examination. Obviously there are no witnesses to the acts of the appellant perpetrated on the minor victim. However, the lack of witnesses by itself does not absolve the appellant of the crime. It is now no more *res integra* that the evidence of the victim suffices to convict the offender if it is cogent, consistent and trustworthy.

(iii) In this context, we may beneficially refer to the ratiocination in ***Rajinder alias Raju vs. State of Himachal Pradesh***[1], wherein the Hon'ble Supreme Court observed as follows;

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> **"19.** In the context of Indian culture, a woman—victim of sexual aggression—would rather suffer silently than to falsely implicate somebody. Any statement of rape is an extremely humiliating experience for a woman and until she is a victim of sex crime, she would not blame anyone but the real culprit. While appreciating the evidence of the prosecutrix, the courts must always keep in mind that no self-respecting woman would put her

[1] (2009) 16 SCC 69

> honour at stake by falsely alleging commission of rape on her and therefore, ordinarily a look for corroboration of her testimony is unnecessary and uncalled for. But for high improbability in the prosecution case, the conviction in the case of sex crime may be based on the sole testimony of the prosecutrix. It has been rightly said that corroborative evidence is not an imperative component of judicial credence in every case of rape nor the absence of injuries on the private parts of the victim can be construed as evidence of consent.**"**

In a later Judgment in ***State of Himachal Pradesh*** vs. ***Manga Singh***[2], the Hon'ble Supreme Court reiterated the same observation and held as follows;

> **"10.** The conviction can be sustained on the sole testimony of the prosecutrix, if it inspires confidence. The conviction can be based solely on the solitary evidence of the prosecutrix and no corroboration be required unless there are compelling reasons which necessitate the courts to insist for corroboration of her statement. Corroboration of the testimony of the prosecutrix is not a requirement of law, but a guidance of prudence under the given facts and circumstances. Minor contractions or small discrepancies should not be a ground for throwing the evidence of the prosecutrix.**"**

(iv) While considering the testimony of the other Prosecution witnesses, it is evident that P.W.2, P.W.3, P.W.4 and P.W.10 have indeed fortified the evidence of the victim P.W.1. According to P.W.2, after he was called on 13-03-2018 by P.W.3 to her house, he was informed that the victim was pregnant and P.W.3 enquired from him about the legal proceedings. P.W.2 then called the victim and enquired about her pregnancy. Although at first the victim was reluctant to divulge her ordeal however later she stated that the appellant was responsible for her condition. P.W.2 also summoned the appellant at that time and enquired about the incident from him. That, he initially responded with

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[2] (2019) 16 SCC 759

denials but when confronted in the presence of the victim, he admitted to the acts of penetrative sexual assault perpetrated by him on her. Consequent thereto, P.W.2 took the appellant also to the police station where Exhibit 3 came to be lodged. The evidence of P.W.2 finds support in the evidence of P.W.3, who being the Ward Panchayat, was informed that at the relevant time the victim was studying in Class IX of the Government Senior Secondary School, but was reluctant to go to school. She noticed that the victim's stomach was bulging and suspecting that she was pregnant she called P.W.10 to conduct a urine pregnancy test, which confirmed her suspicions. On enquiry from the victim, she informed P.W.3 that the appellant was responsible for the pregnancy. The appellant on enquiry by P.W.2 admitted as much. P.W.4, the victim's mother, was also called to the residence of P.W.3 where P.W.3 informed her that the victim was pregnant and the appellant was responsible for the pregnancy. P.W.4 lent support to the statement of P.W.3 regarding her presence in the house of P.W.3. The evidence of P.W.5, P.W.6 and P.W.12 pertain to the date of birth of the victim and in view of the admission of minority of the victim their evidence is of no relevance for the purposes of this appeal. P.W.7, the doctor had examined the appellant and found that there was nothing to suggest that the appellant was incapable of sexual intercourse. P.W.8 recorded the Section 164 Cr.P.C. statement of the victim which was duly identified by her and corroborated by the evidence of P.W.1. P.W.9, the Gynecologist, examined the victim on 14-03-2018, at around 11.50 p.m. The victim, according to

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the witness, gave her a history of sexual contact by the appellant for the last two years. A urine pregnancy test was advised which tested positive for pregnancy and an ultrasonography (USG) conducted on the victim confirmed the pregnancy and the fetal well being. The Doctor opined that, as per the history and clinical findings, the fetal size was suggestive of 32-34 weeks pregnancy, duly confirmed by the USG report prepared by the Radiologist at the STNM Hospital, dated 12-04-2018. P.W.10, the ASHA worker, supported the evidence of P.W.3 regarding the urine pregnancy test conducted by her on the victim as requested by P.W.3, and the result thereof. The I.O., P.W.13, during his investigation found that the appellant had reportedly been sexually assaulting the victim since the last two years and threatened her of dire consequences if she revealed the fact to anyone. The evidence-in-chief of P.Ws 1, 2, 3, 4, 9, 10 and P.W.13 remained unscathed in cross-examination.

8. We now relevantly refer to the provision of Section 29 of the POCSO Act, which lays down as hereinbelow;

> **"29. Presumption as to certain offences**.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.**"**

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The section is self-explanatory requiring no further elucidation. Following this provision is Section 30 of the POCSO Act which casts a reverse burden on the Appellant and thereby affords him the opportunity of disproving that he had such mental state *with respect to the act charged as an offence in that*

Prosecution. The appellant has failed to take advantage of this provision of law by furnishing any evidence to demolish the Prosecution case.

9. Hence, the Prosecution case of the appellant being the perpetrator of the offences as charged, on the minor victim, consequent upon which she became pregnant and delivered a child in June 2018, withstood cross-examination and was consequently proved beyond a reasonable doubt.

10. In the light of the foregoing discussions, no reason whatsoever emanates for this Court to interfere with the findings of the learned Trial Court. While considering the prayer for reduction of sentence made by learned Counsel for the appellant, in the light of the facts and circumstances of the Prosecution case, we are not inclined to interfere with the penalty imposed by the impugned Order on Sentence.

11. Consequently, the Appeal fails and is dismissed.

12. No order as to costs.

13. Copy of this Judgment be sent to the Learned Trial Court.

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(Meenakshi Madan Rai)
Judge

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(Arup Kumar Goswami)
Chief Justice

Approved for reporting : **Yes**

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