

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 24th April, 2024

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

Crl. A. No.19 of 2022

Appellant : Pema Tshering Lepcha @ Mikmar

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Senior, Advocate (Legal Aid Counsel) with
Ms. Rinchen Ongmu Bhutia, Advocate for the Respondent.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1. The facts of the Prosecution case are that, on 31-03-2022, Exhibit P-1/PW-1, a Complaint was lodged by PW-1, the teacher of the school, where the victim, PW-6 was a Class VIII student. According to PW-1, she was informed by PW-6 that the Appellant had sexually harassed her on 29-03-2022 at around 03.00 p.m. at her residence, by touching her body and breasts. PW-1 then informed the Principal of the school, PW-2 and also lodged Exhibit P1/PW-1. Pursuant thereto, the criminal justice system was set into motion by registration of the case against the Appellant under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"). Investigation by the Investigating Officer (I.O.), PW-15, found *prima facie* materials against the Appellant under Section 354 of the Indian Penal Code, 1860 (hereinafter, the "IPC"), read with Section 10 of the POCSO Act. Charge-Sheet was submitted before the Court of

the Learned Special Judge (POCSO Act), North Sikkim, at Mangan. The Learned Trial Court framed charge against the Appellant under Section 9(I) of the POCSO Act, punishable under Section 10 of the same Act and under Section 354 of the IPC. The Appellant sought a trial after entering a plea of "not guilty" to the charges. Fifteen witnesses furnished by the Prosecution, including the I.O. of the case were examined and thereafter the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."). Pertinently, after the final hearing was concluded the Learned Trial Court added a charge against the Appellant under Section 354B of the IPC, by invoking its powers under Section 216 of the Cr.P.C. On being satisfied that no prejudice was caused to either party and both parties having raised no objection to such addition, the charge under Section 354B of the IPC was read over to the Appellant to which he again pleaded innocence and claimed trial. The Learned Trial Court on analyzing the entire evidence on record concluded that the Prosecution had proved its case beyond a reasonable doubt against the Appellant, under Section 354 and Section 354B of the IPC and convicted him accordingly. The Appellant was however acquitted of the offence under Section 9(I) of the POCSO Act, punishable under Section 10 of the same Act on the age of minority of the victim not being proved, vide its Judgment, dated 05-08-2022, in Sessions Trial (POCSO Act) Case No.08 of 2022 (*State of Sikkim vs. Pema Tshering Lepcha @ Mikmar*). By the Order on Sentence of the same date, the Appellant was sentenced to undergo simple imprisonment for a period of one year under Section 354 of the IPC and to pay a fine of ₹ 500/- (Rupees five hundred) only. For the offence under Section 354B of the IPC, he was sentenced to undergo simple

imprisonment for a period of three years and to pay a fine of ₹ 1,000/-(Rupees five hundred) only. Both sentences of fine bore default clauses of imprisonment and the period of incarceration were ordered to run concurrently. The fine, if recovered, was ordered to be paid as compensation to the minor victim.

2. Aggrieved by the Judgment and the Order on Sentence, the Appellant is before this Court urging that, the charge under Section 354B of the IPC was added rather belatedly when the stage was for pronouncement of Judgment with no opportunity afforded to the Appellant to cross-examine the Prosecution witnesses on the added charge. The charge under Section 354B of the IPC pertains specifically to disrobing of the victim by the Appellant. An opportunity ought to have been extended to the Appellant to defend himself on the fresh charge, in the absence of which, he is prejudiced having been sentenced to suffer a longer period of imprisonment under Section 354B of the IPC without having defended himself for the charge added by the Learned Trial Court. Hence, the impugned Judgment be set aside and the Appellant be acquitted of the charges framed against him.

3. Learned Additional Public Prosecutor for the State-Respondent, while contesting the arguments advanced by Learned Counsel for the Appellant, contended that Section 216 of the Cr.P.C. can be invoked any time during the trial by the Learned Trial Court. That, so far as the allegation of prejudice caused to the Appellant is concerned, it is evident that the charge framed for the first time under Section 9(l) of the POCSO Act detailed the offence committed by the Appellant, *viz.*; that in the guise of teaching her how to cut flowers he had lifted her in his arms, taken her inside the store room, where he touched her breasts, kissed

her on her arms and neck and then tried to pull down her trousers as well as his own trousers. Thus, when the evidence was led by the Prosecution the Appellant had sufficient notice of the fact that the charge also included use of force against the victim with intent to disrobe her and the Appellant had put up his defence accordingly during cross-examination. That, the Judgment and Order on Sentence being legally sound and having caused no prejudice to the Appellant ought not to be disturbed.

4. The Prosecution case pertains to the allegation of the Appellant, aged about thirty-five years, sexually assaulting the victim alleged to have been twelve years at the time of the incident and attempting to disrobe her during such assault by the use of criminal force.

5. This Court is now to determine whether a failure of justice has been occasioned by the Learned Trial Court framing the additional charge under Section 354B of the IPC, after hearing the final arguments of the parties and by the Court's failure to afford the Appellant the opportunity of cross-examining the Prosecution witnesses after adding the charge.

(i) If so, whether the conviction of the Appellant is justified.

(ii) Firstly, a perusal of the day to day orders of the Learned Trial Court reveals that on 15-07-2022 the Prosecution closed its evidence and the Appellant was examined under Section 313 of the Cr.P.C on the same date. On the next date fixed i.e., 21-07-2022 the final arguments of the parties was heard. The date fixed for Judgment was 28-07-2022. However, before the Judgment could be pronounced on 28-07-2022, the Court noted in its order dated 27-07-2022, apparently erroneously, that the date

was fixed for Judgment. Be that as it may, the Learned Trial Court went on to record on 27-07-2022 as follows;

“..... At the outset, on perusal of the charge sheet and the other relevant materials, it is seen that charge ought to have been framed under Section 354B IPC for assault or use of criminal force to women with intent to disrobe.

My Ld. Predecessor had framed charge only under Section 10, POCSO Act and under Section 354 IPC. This Court taking the recourse to Section 216 which is on alternation or addition of charge, hereby frames additional charge against the accused under Section 354B IPC on finding *prima facie* material.

Ld. Counsels for the parties concedes to the same.

.....
On perusal of the charge framed by my Ld. Predecessor on 07.06.2022, the first charge framed is for the offence defined under Section 9(I) and punishable under Section 10 POCSO Act. While framing the charge, my Ld. Predecessor has mentioned the *prima facie* material of the accused allegedly trying to disrobe the victim (tried to pull down her trouser). Therefore, it is apparent that the accused was aware of this fact and no prejudice is thus being caused to the accused nor the prosecution by addition of this charge.

As per Section 216 (3) Cr.P.C. this Court is satisfied that by framing of this additional charge, no prejudice is caused to the accused in his defence nor to the prosecutor conducting the case and hence, the trial shall proceed accordingly.

Ld. Counsels for the parties also submitted the same.

Now to come up for Judgment on 05.08.2022.

.....”

6. Firstly, while dealing with the powers vested in the Learned Trial Court under Section 216 of the Cr.P.C. a two judge bench of the Supreme Court in ***P. Kartikalakshmi vs. Sri Ganesh and Another***¹ considered the framing of an additional charge for an offence under Section 417 of the IPC in addition to the earlier charge of Section 376 of the IPC. The Court *inter alia* held that Section 216 of the Cr.P.C. empowers the Court to alter or add any charge at any time before the Judgment is pronounced. That, the power vested in the Court is exclusive to the Court and there is no right in any party to seek for such addition or alteration by filing any application as a matter of right. It may be noted that if there was an omission in the framing of the charge and if it comes to the

¹ (2017) 3 SCC 347

knowledge of the Court trying the offence, the power is always vested in the Court, as provided under Section 216 of the Cr.P.C., to either alter or add the charge and that such power is available with the Court at any time before the Judgment is pronounced. It is an enabling provision for Court to exercise its power under such contingencies which comes to its notice or is brought to its notice.

7. In *Central Bureau of Investigation vs. Karimullah Osan Khan*², the Supreme Court held that Section 216 of the Cr.P.C. gives considerable power to the trial Court, that even after the completion of evidence, arguments being heard and Judgment being reserved it can alter and add to any charge subject to the conditions mentioned therein. The expressions "at any time" and before the "Judgment is pronounced" would indicate that the power is very wide and can be exercised, in appropriate cases, in the interest of justice, but at the same time the Courts should also see that its orders would not prejudice the accused.

8. The above decisions have illustrated the powers of the Court under Section 216 of the Cr.P.C. and hence it can be exercised by the Court as and when the Court deems it necessary.

9. Section 464 of the Cr.P.C. deals with effect of omission to frame, or absence, or error in, charge. The said section is extracted hereinbelow for convenient reference as follows;

"464. Effect of omission to frame, or absence of, or error in, charge.—(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—

(a) In the case of an omission to frame a charge, order that a charge be framed and that the

² (2014) 11 SCC 538

- trial be recommenced from the point immediately after the framing of the charge;
- (b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit :

Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.”

(i) Section 465 of the Cr.P.C. provides for finding or sentence when reversible by reason of error or omission or irregularity.

“465. Finding or sentence when reversible by reason of error, omission or irregularity.—(1) Subject to the provisions hereinbefore contained, on finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered by a Court of appeal, confirmation or revision on account of any error, omission or irregularity in the complaint, summons, warrant, proclamation, order, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code, or any error, or irregularity in any sanction for the prosecution, unless in the opinion of that Court, a failure of justice has in fact been occasioned thereby.

(2) In determining whether any error, omission or irregularity in any proceeding under this Code, or any error, or irregularity in any sanction for the prosecution has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings.”

(ii) It follows that Section 464 of the Cr.P.C. covers every case in which there is a departure from the rules set out in chapter 17. These departures range from errors, omissions and irregularities in charges that are framed, to charges that might have been framed and were not and include a total omission to frame a charge at all at any stage of the trial.

10. In ***Willie (William) Slaney vs. State of Madhya Pradesh***³, the Court ruled that a mere defect in charge is no ground for setting aside conviction. Procedural laws are designed to subserve the ends of justice and not to frustrate them by mere technicalities. The object of the charge is to give an accused notice of the matter

³ 1956 AIR SC 116

he is charged with. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges framed were defective. In judging a question of prejudice, as of guilt, the Court must act with a broad vision and look to the substance and not to technicalities and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly.

11. In *State of Sikkim vs. Kul Chandra Baral*⁴, this High Court observed that;

“6.The object of a charge is to warn the accused of the case he is to answer. In other words, charge is an accusation made against a person in respect of an offence alleged to have been committed by him. In order to hold that error, omission or irregularity in the charge is not curable, the accused has to show that by such error, omission or irregularity a failure of justice has in fact been occasioned. Whether there is a failure of justice or not is a question of fact. In the case at hand the respondent had opportunity to cross-examine the witnesses and in fact he cross-examined the PWs.”

12. Thus, it is evident that in order to judge whether a failure of justice has been occasioned it will be relevant to examine whether the accused was aware of the basic ingredients of the offence for which he was charged and convicted and whether the main facts sought to be established against him were explained to him clearly and whether he got a fair chance to defend himself [See *Dalbir Singh vs. State of U.P* (AIR 2004 SC 1990)].

13. Now, it would be imperative to examine the charge framed against the Appellant and the evidence, to consider all of the above.

(i) On 07-06-2022, the Learned Trial Court framed the following charge;

⁴ 2005 CRI. L. J. 1027

“CHARGES WITH TWO HEADS

I, N.G. Sherpa, Special Judge, POCSO Act, North Sikkim at Mangan do hereby charge you Pema Tshering Lepcha @ Mikmar as follows:

1 (a) Firstly:- That you on 29.03.2022 at around 2 p.m. at open field below the house of the Aunt of prosecutrix Ms Pxxxxx Lxxxxx, Bxxxxxxxx, North Sikkim called her and told that you had already shifted her cow for grazing on a pasture and she needn't look after it. The prosecutrix then asked you to break sugarcane for her. Accordingly, you gave two sugarcane to her, she then took it and going back to home, in the meantime, you caught hold up of her from back and fondled her breast then she shouted in her defence, as a result of which you let her free then she came running to home.

You again came to the residence of prosecutrix where she was alone and pouring water on to plants and flowers. You then in the guise of teaching her how to cut flowers, lifter her in your arms and took inside store room where you touched her breast, kissed on her arms and neck and even tried to pull down her trouser/pant and yourself. Fortunately, she hit with sickle on your arms and managed to escape from you clutches thereby committed an offence falls under Section 9 (I) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of the said act and within the cognizance of this Court.

(b) Secondly:- That you, in the same date, month, year, time and place for the purpose mentioned used criminal force twice to the prosecutrix with the intent to outrage her modesty thereby committed an offence falls under 354 of the Indian Penal Code, 1860.

(c) And I hereby direct you to be tried by this Court on the said charges.

Q 1. Have you understood the above charges?

Ans : Yes

Q 2. Do you plead guilty or claim trial?

Ans : No, I do not plead guilty and claimed to be tried (*sic.*).

Dated this the 07th day of June, 2022.”

From a bare reading of the questions put to the Appellant after the charges were explained to him reveal that he understood the charges framed against him and the import thereof.

(ii) On 27-07-2022, an additional charge was framed by the Learned Trial Court against the Appellant, *viz.*;

“ADDITIONAL CHARGE

I, Sonam Denka Wangdi, Special Judge, POCSO Act, North Sikkim at Mangan do hereby charge you, Pema Tshering Lepcha, s/o Dawa Chhyopen Lepcha, r/o Kalaw, Upper Ringhim, North Sikkim as follows:

That you again on 29.03.2022 showed up at the prosecutrix's house and started teaching her how to cut the flowers. Thereafter, taking advantage of the victim being alone in the house, you lifted her in your arms and took her inside the store room and started touching her breast, kissing her on her arms and neck and tried to pull down her trousers as well as yours and thereby committed an offence

falls under Section 354B of Indian Penal Code, 1860 and within the cognizance of this Court.

And I hereby direct you to be tried by this Court on the said charge.

Q.No. 1. Have you understood the above charge?

Ans : Yes, I have understood the charge.

Q.No. 2. Do you plead guilty or claim trial?

Ans : I do not plead guilty and claim trial.

Dated this the 27th day of July, 2022.”

Similarly, after the added charge (*supra*) was read over to him, he claimed to have understood the charge. As per the order of the Learned Trial Court, dated 27-07-2022 extracted earlier, no prejudice was caused to the Appellant by such additional charge, Learned Counsel for the parties were in agreement with the Court and no objection was raised by Learned Counsel for the Appellant nor claim made for re-cross-examination of the Prosecution witnesses.

(iii) Reverting now to the evidence recorded by the Learned Trial Court prior to the additional charge, it is apparent that the Appellant had sufficient opportunity of cross-examination even on the question of attempting to disrobe the victim as appears hereinbelow.

(iv) PW-4 gave evidence regarding the fact of the Prosecutrix informing her of being disrobed. Her evidence *inter alia* is as follows;

“1. It was on 29.03.2022, prosecutrix informed me over phone through mobile of Pxxxxxx Lxxxxx stating that accused molested her by pressing breast and also tried to pull down her trouser by pressing body.”

Under cross-examination the witness stated *inter alia* as hereinunder;

“1. It is true that I was not physically present at home at the time of alleged incident, as such, I cannot say whether accused actually committed the said offence as alleged by the prosecutrix by him or not (*sic.*).”

(v) The Prosecutrix was examined as PW-6 and her statement with regard to the disrobing was as extracted hereinbelow;

“3. In the store room, Aku Mikmar tried to remove my trouser as well as his. He kissed me all over my body as well as my breast area. I had a sickle in my hand and with that I hit him on the back and ran away from there.”

Her cross-examination in this context was that;

- “4. It is not a fact that the accused did not grope me from the back and fondle my breast near the sugarcane field. It is not a fact that I did not scream when the accused did that to me.
- 5. It is not a fact that there are other people also residing near my Aunt’s house apart from the house of Aku Mikmar’s grandfather.
- 6. It is true that I was holding the sickle (MO-I) when Aku Mikmar lifted me and carried me to the store room. It is not a fact that whatever I have narrated in my examination-in-chief against the accused is false. It is not a fact that I have made the statement against the accused for personal monetary gain from the accused.”

14. Ordinarily when an additional charge is framed against the accused, an opportunity of further cross-examination of witnesses would be extended to him, provided the additional charge introduces offences that were not included in the earlier charge. It emanates in no uncertain terms that the Appellant was put to notice about the charges which he was to face in the charge framed on 07-06-2022 itself as the facts of his attempt at disrobing the victim by use of criminal force was inserted in the charge. The examination-in-chief of the two witnesses (*supra*) reveal that the Prosecution brought out the fact of the attempt to disrobe the Prosecutrix by the Appellant. The Appellant had sufficient opportunity to cross-examine the witnesses on that aspect as is seen from the evidence of the witnesses and cross-examination thereof. No question of disrobing were put to the other Prosecution witnesses, in such circumstances the question of cross-examination

would find no place. In light of the above position, it does not behove the Appellant to claim that any prejudice was caused to him or that any error, omission or irregularity had arisen in the charges framed against him. It cannot be denied that the Appellant was well aware of the charges framed against him and the offences he was being tried for and that a fair trial was afforded to him. The charges contained no ambiguity and were explained to him fairly and clearly. Procedural laws are for the purpose of subserving the ends of justice and technicalities ought not to be obstacles to hinder the path of justice being meted out. I am inclined to hold that the substance of the matter ought to be given precedence. Having examined all the relevant documents, I am of the considered opinion that no prejudice on any count was caused to the Appellant. The conviction thereby of the Appellant cannot be said to be unjustified. The two questions formulated by this Court are determined accordingly.

15. In light of the above facts and circumstances, I see no reason to interfere with the findings of the Learned Trial Court. Consequently, the Judgment and Order on Sentence are upheld.

16. Appeal dismissed and disposed of accordingly.

17. No order as to costs.

18. Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

(Meenakshi Madan Rai)

Judge

24-04-2024

Approved for reporting : **Yes**