

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DIVISION BENCH: THE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Crl. A. No. 20 of 2019

D. K. xxx (name withheld),
Son of xxx (name withheld),
Resident of Txxx (name withheld),
West Sikkim.

*Presently lodged at Central Prison,
Rongyek, East Sikkim.*

..... Appellant

versus

State of Sikkim

..... Respondent

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

Appearance:

Mr. Umesh Ranpal, Legal Aid Counsel for the Appellant.

Dr. Doma T. Bhutia, Public Prosecutor with Mr. S.K. Chettri,
Additional Public Prosecutor, for the Respondent.

Date of hearing : 24.06.2020 & 25.06.2020

Date of judgment : 19.08.2020

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The appellant seeks to assail the judgment and order on sentence, both dated 25.07.2019, passed by the learned Special Judge (POCSO), Gyalshing, West Sikkim, in S.T. (POCSO) Case No. 20 of 2018 (*State of Sikkim vs. D.Kxxx (name withheld) & Others*), convicting him under sections 5(l), 5(m) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentencing him for thirty years of rigorous imprisonment and payment of fine of Rs.10,000/- for

each of the offences with a direction that sentences shall run concurrently. The victim was his step daughter.

2. The learned Special Judge while considering the evidence led during the trial posed three questions to be answered. Two of those questions - whether the appellant, step father of the victim, repeatedly committed penetrative sexual assault on her and whether she was below the age of 12 years, are relevant for deciding the present appeal. Both the questions were answered in the affirmative. Mr. Umesh Ranpal, learned counsel for the appellant, challenges both these findings.

3. The learned Special Judge held that the explicit statements of the victim left no doubt whatsoever that the appellant committed penetrative sexual assault on the victim repeatedly. The learned Special Judge found corroboration from the evidence of Dr. Tukki Dolma Bhutia (PW-8), the Gynaecologist, who, while examining the victim noted that she had given history of her father rubbing his private part on her private part. Although, there were no injuries on the victim and her hymen was found intact when examined by Dr. Tukki Dolma Bhutia (PW-8), the learned Special Judge opined that this was not surprising since the victim was medically examined only in the month of August 2018, whereas the alleged assaults occurred between December 2017 to January 2018, by which time any evidence of injuries sustained would have long disappeared or healed. The learned Special Judge found further corroboration from the testimony of Sub Inspector Ankita Pradhan (PW-7) as she deposed about receiving the first information report from one doctor K.C. (name

withheld). Further corroboration was found in the evidence of the learned Chief Judicial Magistrate (PW-3) who recorded the victim's statement under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.). The learned Special Judge examined the provisions of sections 29 and 30 of the POCSO Act and held that although an opportunity was granted to the appellant, he did not put up any defence and thus, the charge stood proved.

4. The learned Special Judge also opined that the victim was in fact a child below 12 years when she was sexually victimised by the appellant. While holding so, the learned Special Judge noted that the defence counsel had not agitated the issue of the age of the victim; the birth certificate (Exhibit-11) is found to have been issued on 22.02.2015 by the Registrar, Births & Deaths, in which the date of birth of the victim was recorded as 28.02.2010; the authenticity of the birth certificate (Exhibit-11) was confirmed by Hemant Khati (PW-5), the Acting Registrar, Births & Death Cell. Although, the original register was not brought or exhibited, the learned Special Judge was of the opinion that there was no motive for him to authenticate a false document or commit perjury and therefore, found no reason to disbelieve him and that the Head Master (PW-4) of the victim's school had also corroborated that the victim's date of birth was in fact 28.02.2010.

5. Mr. Umesh Ranpal vehemently argued that the finding of the learned Special Judge regarding the proof of age of the victim was incorrect. He submitted that the victim's statement due to her tender

age could not be relied upon and that the medical certificate had, in fact, not been proved.

6. The victim deposed that she was attending school, reading in class-III and was 9 years old. The defence did not cross-examine the victim on this aspect. Besides the victim, no one who could have any special knowledge regarding the age of the victim was examined by the prosecution. The birth certificate (Exhibit-11) was not proved by the maker of the certificate. The custodian of the birth certificate (Exhibit-11) was also not examined. The victim was not asked to identify her birth certificate. PW-2 and PW-6 are the two witnesses who had signed on the seizure memo (Exhibit-3) during the seizure of the birth certificate (Exhibit-11) from one R.B. (name withheld). Both PW-2 and PW-3 did not have any idea what Exhibit-3 was. PW-6 went on to further state during cross-examination that he was not sure whether it was the same birth certificate seen by him on the relevant day. Hemant Khati (PW-5), the Acting Registrar, Births & Deaths Cell, Government of Sikkim, was examined by the prosecution. However, he did not depose anything about the birth certificate (Exhibit-11). He only deposed that he was asked by the Investigating Officer (IO) to authenticate the birth certificate and after having verified the Births & Deaths register, found the victim's date of birth recorded as 28.02.2010. During cross-examination, however, he admitted that he had been working only for the previous six months and that the letter (Exhibit-9) which he had issued to the IO regarding the date of birth of the victim was not prepared by him and further that he had not verified from the register of Births & Deaths. He also admitted that

neither the relevant extract of the register nor the copy thereof was enclosed by him with the letter (Exhibit-9) to show the existence of such register and the details therein. He further admitted that he had also not produced the original register before the court. Hemant Khati (PW-5) was not deposing from his personal knowledge. Date of birth of a person is a question of fact which is required to be proved by cogent evidence. The prosecution ought to have placed the Births & Deaths register to prove the entry therein. The proof of correctness of what was recorded therein was to be proved by placing the material on which the age was recorded.

7. Besides the aforesaid witnesses, the prosecution also examined the Head Master (PW-4) of the school of the victim. He also did not have any special knowledge about the age of the victim save what may have been recorded in the school admission register. He deposed that on 29.08.2018, the IO had filed a requisition (Exhibit-7) for authentication of the age of the victim after which he had gone through the school admission register and found her date of birth recorded in the said register as 28.02.2010 and accordingly, he had issued a letter (Exhibit-8) to the IO certifying the date of birth of the victim. During cross-examination, he admitted that in the letter (Exhibit-8) he had only mentioned that the victim was studying in class-III and apart from the above details he had not stated anything else in the said certificate. He also admitted that he had not enclosed the extract of the school admission register or a copy thereof. He further admitted he had not brought the school register before the court. Although, the Head Master admitted in cross-examination that

he had not given any further details besides the fact that the victim was studying in class-III, a perusal of the letter (Exhibit-8) reflects that the admission was not true as in the said letter (Exhibit-8), it is clearly mentioned that her date of birth as recorded in the school admission register is 28.02.2020. The Hon'ble Supreme Court has repeatedly held that to render a document admissible under section 35 of the Evidence Act, 1872, three conditions must be satisfied: firstly, entry that is relied on must be one in a public or other official book, register or record; secondly, it must be an entry stating a fact in issue or relevant fact; and thirdly, it must be made by a public servant in discharge of his official duty or any other person in performance of a duty especially enjoying by law. An entry relating to date of birth made in the school register is relevant and admissible under section 35 but the entry regarding the age of a person in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. A document may be admissible, but as to whether the entry contained therein has any probative value would be required to be examined. The correctness of the entries in the official record by an authorised person would depend on whose information such entries stood recorded and what was his source of information. The entry in school register requires to be proved in accordance with law. The school register was not produced leave alone the material from which those entries were made. Examining the present facts in view of settled law, we must, without hesitation, hold that the birth certificate was in fact not proved nor was the date of birth of the victim as purportedly recorded in the school register of the victim's school.

8. That leaves the sole testimony of the victim about her age being 9 years old. The appellant was the step father of the victim. It is quite obvious that he would know her age or at least the fact that she was a minor. The victim was cross-examined by the defence. Had the victim been a major, the defence would have definitely questioned the victim regarding her assertion that she was 9 years old. They did not do so. The victim's deposition that she was 9 years old remained unquestioned. Although, we do agree that the victim's knowledge about her age may not be her primary knowledge, the conduct of the appellant of not questioning the victim's deposition that she was 9 years old would be relevant under section 8 of the Indian Evidence Act, 1872. Physical appearance of a child of 9 years and an adult girl would be noticeably different and when the victim was in the witness box, a suggestion, at least, would have been given if the victim was or appeared to be a major. We are, therefore, of the considered view that the victim was in fact 9 years old at the time of her deposition before the court as stated by her.

9. The victim identified the appellant in court. The victim deposed, "*..... I do not remember the exact date and month but one Thursday, my appa (father) while I was sleeping with my sister took me to his room and committed "chara" (penetrative sexual assault) on me. This continued one month, i.e., from the month of December to January.....*" The recording of the deposition does not make it clear whether the words in brackets after the word "chara", i.e., (penetrative sexual assault) was the statement of the victim or if it was the translation by the learned Special Judge. The word "chara" in

Nepali may be used to describe a number of things, vulgar including, but not limited to penetrative sexual assault. If the victim had explained the word “chara” in Nepali it would have been advisable to record the depositions of the victim in her own words and then supply the translation. During cross-examination, the victim admitted that her “Appa” used to love her and never raised his hands on her. She also admitted that she used to sleep with her sister. She agreed to the suggestion that when her “Appa” used to allegedly take her to his room continuously for a month, neither her sister sleeping next to her nor anyone in the house, i.e., her grandparents and brothers came to know about the same. She admitted that she did not shout or made any hue and cry or sought help during the time of alleged incident or thereafter. She admitted that her movements were neither restricted by the appellant nor had he covered her mouth during the time of the alleged incidents or thereafter to refrain her from shouting or seeking help. She admitted that they lived in a kutchha house and if one shouts or talks loudly in one room it can easily be overheard in the next room. She also admitted that she did not sustain any injury either in her genital area or in the body as a result of the alleged sexual assault. When the defence put it to her that in fact the appellant had not committed penetrative sexual assault on her, she denied the same. Although, during her examination-in-chief, she had exhibited her statement recorded under section 164 Cr.P.C. during cross-examination, she admitted that she did not know the contents of the document and that she had merely affixed her thumb impression. She also admitted that she was not read over and explained the contents thereof. She denied the suggestion that she was a tutored witness.

10. Subarna Rai (PW-3), the learned Chief Judicial Magistrate, deposed that she had recorded the statement of the victim under section 164 Cr.P.C. after ascertaining that it was being voluntarily made. She identified the statement (Exhibit-1). During her cross-examination, she admitted that the victim did not state before her that while she was sleeping, she was allegedly taken by the appellant to his room.

11. The first informant, who lodged the first information report (FIR) (Exhibit-12), was not examined as she was also charge-sheeted by the police for having failed to report about the commission of the offence by the appellant to the police.

12. Sub Inspector Ankita Pradhan (PW-7) deposed that she had received the FIR (Exhibit-12) and registered a zero FIR at the police station. She also deposed about the contents of the FIR lodged by Dr. K.P. The learned Special Judge has relied upon this part of the statement as corroborative evidence. Since the statement is attributed to Dr. K.P. who was not examined, we are of the view that the statement will have to be discarded.

13. Dr. Tukki Doma Bhutia (PW-8), who examined the victim, prepared her medical report (Exhibit-15). She noted that the victim had given history of her father rubbing his private part on her private part and that there were no history of bleeding or pain after the incidents. She noted that the victim had no visible fresh or old injuries over her body; labia majora and minora were normal, hymen was intact, fourchette and posterior commissure was normal and no

bleeding, discharge or redness was seen. During cross-examination, Dr. Tukki Dolma Bhutia (PW-8) admitted that there was nothing on the body of the victim to suggest that she was subjected to sexual assault. She also admitted that she did not know if the victim's statement given to her about her father rubbing his private on her private part was voluntarily or not. The learned Special Judge was correct in holding that it was not surprising that since the victim was examined after several months, any evidence of injuries sustained could have long disappeared. However, this fact does not help the prosecution case.

14. Dr. Suman Gurung (PW-9), the Medical Officer at the District Hospital, examined the appellant on 27.08.2018. He noted that the prepuce was retracted over the glans and no smegma was seen, penile shaft and glans were normally developed and no abnormality was seen, testis and scrotum were normally developed, pubic hair was normally developed, no local injuries old or new were seen in the genital region. From the history and physical examination, he opined that there was nothing to suggest that he was not capable to perform sexual act.

15. Police Inspector Kinga T. Bhutia (PW-10) was the Station House Officer who received the zero FIR and registered PS case No. 29/2018 dated 26.08.2018 under section 376 IPC read with section 6 of the POCSO Act and endorsed the case to Sub Inspector Tsheda D. Bhutia (PW-11), the Investigating Officer, for investigation. During cross-examination, he admitted that the complainant did not appear

before him to lodge the FIR (Exhibit-12) and that he had registered the case on the basis of what was forwarded to him by the police station.

16. Sub Inspector Tsheda D. Bhutia (PW-11) admitted that the complaint was lodged after almost ten months of the alleged incident and that there are no witnesses to prove that the victim used to live with her grandparents. He agreed with the opinion of the Medical Officer with regard to the medical examination of the victim in the medical report (Exhibit-15).

17. A studied examination of the evidence brought forth by the prosecution leads us to hold that they have been able to prove that the appellant was the step father of the 9 years old victim and that he had in fact committed aggravated sexual assault on her more than once as described under sections 9(l), 9(m) and 9(n) liable for punishment under section 10 of the POCSO Act applying the presumption under section 29 of the POCSO Act.

18. We are unable to agree with the conclusion arrived at by the learned Special Judge that prosecution has been able to establish that the appellant had committed aggravated penetrative sexual assault although strong suspicion does arise that he did so. The cryptic evidence of the victim which was also not supported by medical evidence does not make us comfortable to uphold the conviction of the appellant.

19. Consequently, although the appellant was charged only under sections 5(l), 5(m) and 5(n) of the POCSO Act, we are of the

considered view that justice would be served if the appellant was charged under 9(l), 9(m) and 9(n) of the POCSO Act, which are lesser but similar offences than what he was charged for. The appellant is thus convicted under section 9(l), 9(m) and 9(n) of the POCSO Act and sentenced to seven years of rigorous imprisonment for each of the offences. The sentences shall run concurrently. The period of detention already undergone by the appellant be set off.

20. The appeal is partly allowed and the impugned judgment and order on sentence, both dated 25.07.2019, are modified to the above extent. The award of victim compensation, consequently, is also modified. It is directed that the victim shall be awarded a compensation amount of rupees fifty thousand only, which amount shall be kept in a fixed deposit in her name payable on her attaining majority.

21. Criminal Appeal No. 20 of 2019 stands disposed of.

22. The registry may transmit a copy of this judgment to the learned trial court for information and compliance.

23. The original records of the learned trial court, if any, may be returned forthwith.

(**Bhaskar Raj Pradhan**)
Judge

(**Arup Kumar Goswami**)
Chief Justice

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

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