THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 31st July, 2024

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

Crl.A. No.22 of 2023

Appellant : Ealsona Rai alias Sonam

versus

Respondent : State of Sikkim

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

Appearance

Mr. Jorgay Namka, Senior Advocate (Legal Aid Counsel) for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant, aged about twenty-four years at the time of the offence i.e., October, 2018, was charged under Section 3(a)/4 of the Protection of Children from Sexual Offence Act, 2012 (hereinafter, the "POCSO Act") and Sections 363, 340 and 506 of the Indian Penal Code, 1860 (hereinafter, the "IPC"). He was convicted of the offence under Section 3(a)/18 of the POCSO Act, by the Court of Learned Special Judge (POCSO Act, 2012), Gangtok, Sikkim, in Sessions Trial (POCSO) Case No.05 of 2019, (*State of Sikkim vs. Ealsona Rai alias Sonam*), vide the Judgment, dated 10-05-2023, for attempting to commit penetrative sexual assault on the thirteen year old victim, PW-1. He was sentenced by the Order dated 23-05-2023, to undergo simple imprisonment for a period of ten years and to pay a fine of ₹ 5,000/-(Rupees five thousand) only, under Section 18 for attempting to commit offence under Section 3(a) of the POCSO Act. The fine bore a default

stipulation. Both the Judgment of conviction and the Order on Sentence are assailed herein.

2. The pleas taken by Learned Counsel for the Appellant is that the Appellant lived with his parents in their home and it would have been an impossibility for him to have taken the minor victim home and attempted to commit such a heinous offence. The incident allegedly took place on 11-10-2018 and the victim was examined on 12-10-2018 but PW-7 the doctor, found no fresh injuries on the person or genital of PW-1. That, PW-10 DNA Examiner, CFSL, Kolkata, in his evidence, with clarity opined that human semen could not be detected in the vaginal wash of the victim analysed by him. Admitting that PW-10 found human semen on the bed sheet of the Appellant, it was contended that the bed belonged to the Appellant, besides which the age of the semen was not mentioned. PW-5 the doctor, who examined the Appellant found no physical injuries on him or on his genital to indicate that he had committed the offence or that the victim had tried to defend herself. In light of the evidence on record, there is nothing to establish that the Appellant had committed the offence at all.

3. Learned Additional Public Prosecutor submitted that the statement of the victim is consistent with regard to the attempts made by the Appellant to commit the offence of penetrative sexual assault on her. That, human semen was found on the bed sheet as established by the evidence of PW-10. PW-7 who examined PW-1 reveals that there was redness and tenderness present over the vaginal orifice and hence the Prosecution has established its case and the Judgment of the Learned Trial Court brooks no interference.

4. We have heard the submissions of Learned Counsel *in extenso* examined the evidence and documents on record.

(i) The Prosecution narrative is that, PW-2 the paternal uncle of the victim, lodged the FIR Exbt P3/PW-2 on 12-10-2018, complaining that his niece (PW-1), the daughter of his younger brother, who was attending school from his home, left home on 11-10-2018 for school at around 07.30 a.m., but did not return home that evening. The next day he went to her school to look for her and discovered that she had not attended school the previous day but was in school on that day. He brought her home with him and enquired as to what had transpired on 11-10-2018. She told him that she had gone with one taxi driver (the Appellant) and had stayed overnight with him and had physical relations, the next morning the Appellant dropped her off to school. The FIR was registered on the same day under Section 363 of the IPC, read with Section 4 of the POCSO Act against the Appellant. PW-11 Investigating Officer (IO), took up the investigation and submitted Charge-Sheet against the Appellant under Sections 363/342 of the IPC read with Section 4 of the POCSO Act before the Learned Trial Court, which framed Charge against the Appellant under Section 3(a)/4 of the POCSO Act, under Sections 363, 340 and 506 of the IPC. Trial commenced after the Appellant entered a plea of "not guilty", upon which the Prosecution examined eleven witnesses.

(ii) The evidence on record is to be minutely examined, to consider whether there was any error in the finding of the Learned Trial Court. The victim was examined on 29-09-2022, by which time she was eighteen years old, while the offence allegedly took place on 11-10-2018 when she was a minor. According to PW-1,

she had met the Appellant while reaching her younger brother to school in the Appellant's taxi. He invited her to accompany him for a drive. After driving around Gangtok he parked his vehicle locking her inside and went elsewhere, when he returned it was dark and late and she told him that she had to go home but he took her to his home and to his room which had one bed only, so they shared the bed. She placed a pillow between them but woke up at night to find that the Appellant was trying to penetrate his genital into hers. Before day break they both left the house and she was dropped off at the market. Later she went to school where her uncle PW-2 was waiting for her and took her to the Police Station, where he reported the matter. It was her admission under cross-examination that she had voluntarily gone with the Appellant. She was also confronted with the contents of her Section 164 Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C.") statement.

(iii) The other witnesses were not privy to the offence committed by the Appellant. All that PW-2 could state in support of the Prosecution case was that PW-1 did not return home that relevant evening, accordingly the next day he ventured out to look for her in her school. He found her but she did not disclose anything to him. After PW-2 requested the teachers to help him, PW-1 revealed the incident to them. He added that PW-1 gave the contact number of the Appellant, who told PW-2 that he was at Singtam. PW-2 told him to report to Gangtok by 03.00 p.m. As the Appellant failed to do so PW-2 lodged the FIR. PW-4 and PW-8 were witness to the seizure of MO-I, the bed sheet. PW-7 the doctor, found on local examination of PW-1 that there was redness and tenderness present over the vaginal orifice and her cross-

examination on that aspect extracted the fact that such redness and tenderness over the vaginal orifice can also be due to some disease.

(iv) The Learned Trial Court in the impugned Judgment observed as follows;

> **"17.** It cannot be ascertained from the deposition of the victim and PW-7 that the accused had committed penetrative sexual assault on her. However, it is clear that he had "tried" to commit penetrative sexual assault. This is corroborated by the forensic report (Exhibit-P13/PW-10) that human semen belonging to the accused was present on the bed-sheet (M.O.-I) on which they had slept the relevant night. The fact that the victim had gone to attend her classes on the following morning as a normal course would show that she had not been raped. Therefore, the question whether the accused and the victim had sexual intercourse in the house of the accused on 11.10.2018 is answered in negative. It is found that the accused had attempted to have sexual intercourse with the victim but did not succeed.**"**

5. Having meticulously examined the evidence of the witnesses which has been consistent and cogent with regard to the offence committed on the victim and having perused the impugned Judgment and the reasons attributed to the findings therein, we find no reason to interfere with the conclusion of the Learned Trial Court, who was of the view that the Appellant was guilty of the offence under Section 3(a)/18 of the POCSO Act.

6. That, having been said while examining the evidence on record and perusing the impugned Judgment, we find that the Learned Trial Court has acquitted the Appellant of the offence under Sections 340, 363 and 506 of the IPC. At Paragraph 20 of the impugned Judgment it is recorded as follows;

> **"20.** It is evident from the evidence on record that there is no evidence to show that the accused had kidnapped the victim or threatened her, or had kept her under wrongful confinement. On the contrary, the victim had accompanied the accused voluntary (sic.). Hence, the accused is entitled to acquittal from the

charges under Sections 340, 363 and 506 of the I.P.C.**"**

In this context, it is imperative to notice the provision of Section 361 of the IPC, which reads as follows;

> **"361. Kidnapping from lawful guardianship.**— Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.
>
> *Explanation*.— The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.
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> *Exception.*— This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.**"**

(i) Thus, the ingredients for the offence of kidnapping are that; (i) there must be taking or enticing of a minor or a person of unsound mind; (ii) the minor must be under sixteen years of age if a male, or under eighteen years of age, if a female; (iii) the taking or enticing must be out of the keeping of the lawful guardian of the minor or person of unsound mind; and (iv) the taking or enticing must be without the consent of such guardian. Relevantly, the Learned Trial Court was in no doubt that PW-1 was a minor aged about thirteen years at the time of the incident. In ***Parkash*** vs. ***State of Haryana***[1] the Supreme Court observed *inter alia* that;

> **"6.** ..... **On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial:** it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuation by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the Section.**"** **[emphasis supplied]**

[1] AIR 2004 SC 227

It is thus clear that the "taking" need not be by force, actual or constructive and the section makes it immaterial whether the girl consents or not. If she is taken out from the lawful guardianship without the consent of such guardian the offence under Section 361 of the IPC is committed. The evidence of the victim is indicative of the fact that as it was late by the time the Appellant returned to his car, having left her locked inside. When she told him that she needed to go home he instead took her to his house. Thus, in the first instance there was a refusal on the Appellant's part to drop her home on her request. As she did not protest further it was assumed by the Learned Trial Court that she consented but the fact that a minor was taken out from her uncle's guardianship without his consent attracts the provisions of Section 361 of the IPC punishable under Section 363 of the IPC, against the Appellant. She may have gone with the Appellant of her own will and consent but it is settled law that consent of a minor is no consent. On this aspect reference is made to the decision of the Supreme Court in ***Satish Kumar Jayanti Lal Dabgar*** vs. ***State of Gujarat***[2] wherein it was observed as follows;

> **"15.** The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl

[2] (2015) 7 SCC 359

> below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.**"**

(ii) The Learned Trial Court had framed charge against the Appellant under Section 363 of the IPC, he was therefore aware of the charge of kidnapping.

(iii) Now, the question is as the Learned Trial Court had acquitted the Appellant of the offence under Section 363 would it be apposite for this Court to convict him for the said offence *sans* an Appeal filed by the Prosecution against acquittal. The answer lies in the decision of the Supreme Court in ***Nadir Khan*** vs. ***The State (Delhi Administration)***[3], where the Supreme Court held as follows;

> **"4.** It is well known and has been ever recognised that the High Court is not required to act in revision merely through a conduit application at the instance of an aggrieved party. The High Court, as an effective instrument for administration of criminal justice, keeps a constant vigil and wherever it finds that justice has suffered, it takes upon itself as its bounden duty to suo motu act where there is flagrant abuse of the law. The character of the offence and the nature of disposal of a particular case by the subordinate court prompts remedial action on the part of the High Court for the ultimate social good of the community, even though the State may be slow or silent in preferring an appeal provided for under the new Code. ……..**"**

(iv) In ***Ballu and Another*** vs. ***State of Madhya Pradesh***[4], the Supreme Court held as follows;

> **"9.** Apart from that, it is to be noted that the present case is a case of reversal of acquittal. The law with regard to interference by the Appellate Court is very well crystallized. Unless the finding of acquittal is found to be perverse or impossible, interference with the same would not be warranted. Though, there are a catena of judgments on the issue, we will only refer to two judgments which the High Court itself has reproduced in the impugned judgment, which are as reproduced below:

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[3] (1975) 2 SCC 406
[4] 2024 SCC OnLine SC 481

> "13. In case of *Sadhu Saran Singh* v. *State of U.P.* (2016) 4 SCC 357, the Supreme Court has held that:—
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> "In an appeal against acquittal where the presumption of innocence in favour of the accused is reinforced, the appellate Court would interfere with the order of acquittal only when there is perversity of fact and law. **However, we believe that the paramount consideration of the Court is to do substantial justice and avoid miscarriage of justice which can arise by acquitting the accused who is guilty of an offence. A miscarriage of justice that may occur by the acquittal of the guilty is no less than from the conviction of an innocent. Appellate Court, while enunciating the principles with regard to the scope of powers of the appellate Court in an appeal against acquittal, has no absolute restriction in law to review and relook the entire evidence on which the order of acquittal is founded**."
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> 14. Similar, In case of *Harljan Bhala Teja* v. *State of Gujarat* (2016) 12 SCC 665, the Supreme Court has held that:—
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> "No doubt, where, on appreciation of evidence on record, two views are possible, and the trial court has taken a view of acquittal, the appellate court should not interfere with the same. **However, this does not mean that in all the cases where the trial court has recorded acquittal, the same should not be interfered with, even if the view is perverse.** Where the view taken by the trial court is against the weight of evidence on record, or perverse, it is always open far the appellate court to express the right conclusion after re-appreciating the evidence If the charge is proved beyond reasonable doubt on record, and convict the accused.".**"** **[emphasis supplied]**

7. Ultimately, we are of the considered view that the finding of the Learned Trial Court that the Appellant was not guilty of the offence of kidnapping is perverse, being against the weight of evidence and flies in the face of the mandate of the law as discussed elaborately hereinabove.

8. Consequently, we find the Appellant is also guilty of the offence under Section 361 of the IPC punishable under Section 363 of the IPC and convict him accordingly for the offence of kidnapping.

9. However, we are in agreement with the Learned Trial Court that he cannot be convicted of the offences under Section 506 and 340 of the IPC for lack of evidence and is accordingly acquitted of the said offences.

10. The Appellant is put to Notice of his conviction under Section 361 of the IPC.

11. List for hearing on sentence for the offence under Section 361 of the IPC on an appropriate date.

12. Appeal dismissed.

13. Copy of this Judgment be forwarded to the Learned Trial Court for information.

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

(Bhaskar Raj Pradhan)
Judge
31-07-2024

(Meenakshi Madan Rai)
Judge
31-07-2024

Approved for reporting : **Yes**

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