

# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 5<sup>th</sup> June, 2024

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

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CrI.A. No.24 of 2023

**Appellant** : Phurba Lepcha

**versus**

**Respondent** : State of Sikkim

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

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**Appearance**

Mr. Dewen Sharma Luitel, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

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## **JUDGMENT**

Meenakshi Madan Rai, J.

**1.** The genesis of the Prosecution case lies in Exhibit P-8/PW-9, the FIR, lodged before the concerned Police Station, on 17-06-2021, by PW-10 the victim's father, who informed therein that on 16-06-2021, at around 4 p.m., PW-1 the victim, his son (aged about 9 years) had gone to play in the house of the Appellant/convict (aged about 27 years). He returned home crying at around 5 p.m. On his enquiry, the victim narrated that the Appellant lured him into his house with the promise of sweets, took him inside the room, closed the door and inserted his genital into his mouth as well as into his anus. After a long duration, the Appellant opened the door, upon which the victim fled home, rushed to the wash room and thereafter informed PW-10 that his anus was hurting. On such complaint, the Police Station registered the FIR against the Appellant under Section 363 of the Indian Penal Code, 1860 (hereinafter, "IPC"), read with Sections 4/6 of the

Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act") and endorsed it to PW-11 for investigation. Charge-Sheet was filed against the Appellant under Sections 363/377 of the IPC read with Sections 4/6 of the POCSO Act, 2012 on completion of the investigation.

**(i)** The Learned Special Judge (POCSO Act, 2012), East Sikkim, at Gangtok, framed Charges against the Appellant under Sections 5(m) and 5(l) of the POCSO Act, both punishable under Section 6 of the same Act and under Sections 377 and 342 of the IPC, to which the Appellant while pleading "not guilty" sought a trial. The Prosecution set out to examine eleven witnesses to establish its case. Thereafter, the Learned Trial Court on examination of the Appellant under Section 313 of the Code of Criminal Procedure, 1973, hearing the opposing arguments of the Learned Counsel for the parties and analysing the evidence on record, convicted the Appellant under Sections 5(m)/6 of the POCSO Act, but acquitted him of the offence under Section 5(l) of the POCSO Act and Section 342 IPC. It was further observed that as the Appellant is not required to be convicted twice for the same offence under two different legislations, therefore, he was acquitted of the offence under Section 377 of the IPC. The convict was sentenced to undergo rigorous imprisonment for a term of twenty years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only, for the offence under Section 5(m) punishable under Section 6 of the POCSO Act, with a default stipulation of imprisonment, duly setting off the period of imprisonment undergone during investigation and trial.

**2.** Learned Counsel for the Appellant before this Court contended that the Appellant was falsely implicated in the offence

as he had beaten the victim for having damaged the bamboo stakes supporting the bean stalks, in his kitchen yard. That, PW-5 the Doctor who examined the victim had opined that tenderness over the anal orifice in children can be due to various other reasons. The impugned Judgment reveals that apart from the evidence of the victim, the Court relied erroneously on the hearsay evidence of PWs 2, 3 and 4. The alleged offence is said to have occurred on 16-06-2021 and the FIR was lodged on 17-06-2021 at around 12.11 p.m., but the delay remained unexplained. That, Exhibit P-10/PW-10 the sketch map of the area prepared by PW-11, indicates that, the mud house of the Appellant is situated near the road side, rendering it an impossibility for the Appellant to have committed such an offence, much less during the day time. It was urged by Learned Counsel for the Appellant that there are variations with regard to the evidence of PW-8 and PW-10 of the events that occurred after the incident, i.e., PW-8 stated that she immediately went to the Pakyong Thana to report the matter, whereas PW-10 stated that the same day they went and reported the matter to PW-7. That, PW-2 stated that he saw the mother of the minor victim crying and he called the local Panchayat, while PW-3 stated that he also saw PW-8 crying and suggested that she lodge the FIR. That, the contradictory evidence furnished fails to establish the Prosecution case beyond a reasonable doubt. That, the age of the victim being five years at the time of offence has also not been established by tangible proof. Hence, the Appellant who was convicted on tenuous grounds deserves an acquittal.

**3.** *Per contra*, Learned Additional Public Prosecutor urged that PW-10 had lodged the FIR on the basis of the narration of the incident by PW-1, which bear no anomalies. PWs 2, 3 and 4 have

advised the victim's mother PW-8 to lodge the FIR which has been proved. That above all, PW-5 has on her medical examination of the victim found that there was tenderness in the area where the Appellant is said to have inserted his genital. That, the impugned Judgment and Order on Sentence passed by the Learned Trial Court thereby ought to be upheld.

**4.** We have given due consideration to the submissions put forth by Learned Counsel for the parties. The evidence on record has been carefully examined by us.

**5.** Whether the Appellant committed the offence is the question that calls for determination in the instant matter.

**6.** As per the victim, he often used to visit the house of the Appellant and on the relevant day the Appellant had committed the act of sexual assault on him as already described. The victim went on to depose that he had witnessed the Appellant inserting his fingers in the anus of his younger sister in their toilet a few days before the sexual assault on him. He denied being tutored by his mother to depose against the Appellant. PW-2 was the villager, that PW-8 the victim's mother, ran into, after the incident occurred who advised her to call the local Panchayat. According to PW-2, PW-8 was crying at the relevant time. PW-3 a co-villager of PW-8 was in his shop that relevant afternoon when PW-8 narrated to him the incident of sexual assault, upon which he suggested that she lodge a complaint before the Police. According to PW-4, the Panchayat of the area, PW-2 called her on her cell phone, informing her that a baby of their village had been raped. She thereafter spoke to PW-8 and told her to report the matter to the Police. Dr. Roshni Tamang, PW-5 examined the Appellant on 17-06-2021 at around 1230 hours and found that he had no injuries on his person

including his private parts, smegma was however absent. She also examined PW-1 and stated as follows;

“..... In connection with this case I had also examined the minor victim on the same afternoon at around 1300 hours. He disclosed before me that the concerned accused had inserted his penis into his(*child's*) mouth and anus. On his genital examination I found tenderness around his genital orifice. It allowed tip of the little finger. There was however no other injury. Anal penetration as such could not be ruled out. Exhibit 2 is the medical report of the minor victim prepared by me. ....”

Although she admitted under cross-examination that tenderness around the anal orifice could be due to various results, that, however the minor had revealed to her that the Appellant had inserted his penis into his anus and mouth. PW-8 had herself heard her child, the victim, returning home and screaming that he was raped, after which he rushed into the toilet saying he was nauseous and his anus was burning. On her enquiry as to what had happened, the victim told her that the Appellant had raped him. That, he had inserted his penis into the victim's anus. Shortly thereafter, the Appellant also arrived at their home and when they confronted him, he apologised and asked to be forgiven. Her husband PW-10 declined to exonerate him and reported the matter at the Police Station. PW-10 supported the evidence of PW-8 and deposed that, he reported the matter to PW-7, the husband of PW-4 (Panchyat Member) who advised him to lodge the FIR. PW-7 thus corroborated the evidence of PW-10. The evidence of the Prosecution witnesses were not decimated during cross-examination.

**(i)** PW-9, the Consultant Radiologist at the Government Hospital in Gangtok conducted the Bone Age Estimation Test in respect of the minor victim as PW-6, the Additional Medical Superintendent-cum-Registrar, Births and Death, STNM Hospital,

Gangtok, had deposed that on checking their Live Birth Register the date of birth of the victim could not be found for the year 2011. According to PW-9, he conducted the necessary X-rays on the minor victim and stated *inter alia* as follows;

“..... In connection with this case I had conducted the bone-age estimation test in respect of the minor victim who had been produced before me on 28.07.2021, referred By Emergency medical Officer on duty. This is the requisition form marked Exhibit P-5/PW8.

I caused the necessary x-rays to be done. As per his x-rays I noticed the following:-

- (1) three carpal bones are clearly seen and two other carpal bones are poorly seen;
- (2) epiphysis around wrist, knee and elbow are not fused;

Based on the above findings I have given my report as the bone age of the minor is between 6 to 8 years. I accordingly prepared the report. ....”

Hence, it was established that the victim was aged about 6 to 8 years old.

**7.** The Learned Trial Court in the impugned Judgment was discussed the evidence of witnesses furnished by the Prosecution and concluded that from the discussions he had found the Appellant had inserted his penis into the victim’s mouth and anus on 16-06-2021. Learned Trial Court also found that the victim’s age was established by the ossification test.

**8.** Although minor contradictions with regard to the evidence of PW-8 and PW-10 as to which person PW-8 spoke to and the date of lodging of FIR were sought to be highlighted by Learned Counsel for the Appellant, in our considered view, these inconsequential discrepancies do not dispel the credibility of the Prosecution case and deserve to be ignored. On this facet, the Supreme Court in ***Kuriya and Another vs. State of Rajasthan***<sup>1</sup> held as follows;

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<sup>1</sup> (2012) 10 SCC 433

"30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in *Kathi Bharat Vajsur v. State of Gujarat* [(2012) 5 SCC 724], *Narayan Chetanram Chaudhary v. State of Maharashtra* [(2000) 8 SCC 457], *Gura Singh v. State of Rajasthan* [(2001) 2 SCC 205] and *Sukhchain Singh v. State of Haryana* [(2002) 5 SCC 100]."

9. The argument of Learned Counsel for the Appellant pertaining to delay in the lodging of the FIR holds no water for the reason that the offence took place on the evening of 16-06-2021 and was reported on 17-06-2021 at around 12.11 p.m. Relevantly, it may be stated that delay in lodging an FIR in such cases does not vitiate the Prosecution case. The Supreme Court in ***State of Himachal Pradesh vs. Prem Singh***<sup>2</sup> held as follows;

"6. So far as the delay in lodging the FIR is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition-bound society prevalent in India, more particularly rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR. ...."

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<sup>2</sup> (2009) 1 SCC 420

**10.** The argument that the incident could not have occurred on account of the proximity of the road to the house of the Appellant is an obnoxious argument. There is no evidence furnished to establish that there were pedestrians on the foot path, besides the offence took place inside a room. No investigation was conducted to consider whether sounds or screaming from inside the house were audible outside. The argument is therefore of no assistance to the Appellant's case.

**11.** Having meticulously examined and considered the evidence on record, we are of the considered opinion that the Prosecution has established its case beyond all reasonable doubt and there is no reason for us to differ from the findings of the Learned Trial Court.

**12.** Consequently, the impugned Judgment is upheld as also the Order on Sentence.

**13.** Appeal dismissed and disposed of accordingly.

**14.** No order as to costs.

**15.** Copy of this Judgment be forwarded to the Learned Trial Court for information along with its records.

**16.** Copy of this Judgment also be forwarded to the Jail Authority at the Central Prison, Rongyek, by e-mail for information and necessary steps along with a soft copy to the Jail Superintendent for making it over to the Appellant /Convict.

**( Bhaskar Raj Pradhan )**  
**Judge**  
05-06-2024

**( Meenakshi Madan Rai )**  
**Judge**  
05-06-2024

Approved for reporting : **Yes**