THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 19th November, 2024

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

Crl.A. No.26 of 2023

Appellant : Anga Bahadur Gurung

versus

Respondent : State of Sikkim

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

Appearance

Mr. Umesh Ranpal, Advocate (Legal Aid Counsel) for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. Dissatisfied and aggrieved by the Judgment, dated 29-08-2023, in S.T. (POCSO) Case No.08 of 2022, of the Court of the Learned Special Judge (POCSO), West Sikkim, at Gyalshing, vide which the Appellant was convicted of the offence under Section 7 punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act, 2012") and under Section 354A(2) of the Indian Penal Code, 1860 (hereinafter, the "IPC"), and sentenced thereto, the instant Appeal has been preferred.

2. By an Order on Sentence of the same date, he was sentenced to undergo simple imprisonment for a term of three years and fined ₹ 5,000/- (Rupees five thousand) only, with a default clause of imprisonment, under Section 7, punishable under Section 8 of the POCSO Act, 2012 and rigorous imprisonment for a term of one year under Section 354A(2) of the IPC. The sentences

were ordered to run concurrently. The fine imposed was ordered to be paid to the victim in terms of Section 357(1)(b) of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.").

3. Learned Counsel for the Appellant/Convict contended that sexual intent which is the *sine qua non* for an offence under Section 7 of the POCSO Act, 2012, has not been proved by the Prosecution. That, the evidence points to the fact that the Appellant was seated with his wife in the second seat of the vehicle with the victim seated next to his wife, and inadvertently he may have touched the victim in view of the space constraint with four people accommodated in the second seat. However, there was no sexual intent as provided under Section 7 of the POCSO Act, 2012. It is also evident that there was animosity between the victim and the Appellant as she had requested him to exchange seats with her when he boarded the vehicle as she would be alighting earlier than him, but he had refused such exchange. Disgruntled by such refusal, false implication could not be ruled out. That, the Prosecution evidence does not support the case of the victim as PW-2 has admitted that he could not say whether the Appellant had touched the victim inappropriately. PWs 3, 4 and 7 who were the other passengers, travelling in the same vehicle also admitted as much. Hence, the Learned Trial Court erred in holding that the Appellant had touched the victim with sexual intent having touched her breast, despite being requested by the child to refrain from such acts. It was further urged that the age of the victim was not established, consequently no offence under the POCSO Act, 2012, was made out against the Appellant. Hence, the impugned

Judgment be set aside and the Appellant be acquitted of all charges.

4. Resisting the arguments advanced by Learned Counsel for the Appellant, Learned Additional Public Prosecutor canvassed that, the victim had been consistent in her evidence before the Court and in her Section 164 Cr.P.C. statement, regarding the fact of the Appellant having touched her inappropriately, which itself suffices as proof of sexual intent. That, the act was witnessed by PW-2 whose evidence on that account was not demolished by cross-examination. PW-7 had also stated that the victim had told the Appellant to sit properly while PW-4 had witnessed the victim crying after she (PW-1) asked the driver to stop the vehicle. To fortify his argument regarding sexual intent, Learned Additional Public Prosecutor placed reliance on the Judgment of this Court in ***Padam Bahadur Chettri*** vs. ***State of Sikkim***[1]. Hence, the conclusion arrived at by the Learned Trial Court warrants no interference and the Appeal deserves a dismissal.

5. Before delving into the merits of the matter, the facts of the Prosecution case are stated briefly. On 12-04-2022, at around 1545 hours, PW-1 the victim, lodged a written report, Exbt 1, before the jurisdictional Police Station (P.S.) informing therein that on the same day around 1230 hours, when she was returning home from her school in a taxi, one of the male co-passengers touched her body in an indecent manner. As he repeated the act, the minor victim shouted at him, had the vehicle stopped and reported the matter to the PS. FIR No.04/2022 was accordingly registered on the same date at the P.S., against an unknown

[1] Crl.A. No.16 of 2023 decided on 03-05-2024

person, under Section 354 of the IPC, read with Sections 7/8 of the POCSO Act, 2012. Investigation was taken up by PW-13, the Sub-Inspector, who on completion of investigation submitted Charge-Sheet against the Appellant, under the aforementioned sections of law. The Learned Trial Court on taking cognizance of the matter, framed Charge against the Appellant under Section 7 punishable under Section 8 of the POCSO Act, 2012 and Section 354A(1)(i) punishable under Section 354A(2) of the IPC. The Charge having been read over to the Appellant, he entered a plea of "not guilty". Consequently, the Prosecution examined thirteen witnesses to establish its case. On closure of Prosecution evidence, the Appellant came to be examined under Section 313 of the Cr.P.C. to enable him to explain the incriminating evidence appearing against him. He denied the circumstances that were put to him and claimed that he was innocent and was falsely implicated. The final arguments were thereafter heard. On consideration of the entire evidence on record, the Learned Trial Court convicted and sentenced the Appellant as reflected *supra*.

6. Having given due consideration to the entire evidence on record, it is clear that the victim had boarded a taxi vehicle prior to the Appellant and his wife. When the Appellant was boarding the vehicle he pushed the victim on her shoulder. The wife of the Appellant was seated between the victim and the Appellant, both of whom, as per PW-1, were smelling of alcohol. The Appellant without reason punched the victim on her left shoulder and when she protested, he did not respond. His wife remained stoically silent. After some time when the vehicle reached a place called "S Golai", the Appellant on the pretext of hugging his wife, touched

the victim's left breast, which shocked her and she cried out and shouted at him. The driver consequently stopped the vehicle and PW-1 called up her uncle (Mama) who on arrival accompanied her to the PS and lodged the Complaint Exbt 1, which was duly proved. Her evidence with regard to the Appellant having touched her inappropriately was not decimated in cross-examination. Section 164 of the Cr.P.C. statement of the victim is not considered as although she was shown the document which she identified, she was not confronted with the contents thereof. In ***State of Sikkim*** vs. ***Pintso Bhutia***[2] this Court while discussing proof of Section 164 Cr.P.C. observed as follows;

> **"*6.*** .....
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> ***(i)*** It is now no more *res integra* that the contents of Section 164 Cr.P.C. statement are not substantive evidence and if the Court has to consider its contents then the author of the contents, in other words P.W.3, ought to be confronted with it and the provisions of Section 145 of the Evidence Act complied with. It is also trite law that the contents of Section 164 Cr.P.C. statement ought to have been identified by the victim and not P.W.12, the Learned Judicial Magistrate, who recorded it and who obviously cannot vouch for the veracity of the contents. The Learned Trial Court was in error on this facet and failed to appreciate the legal perspective and provision correctly. The Court cannot reach an independent conclusion of the contents of any document without proof of its contents, as concluded by the Learned Trial Court in its observation regarding Section 145 of the Evidence Act and Section 164 Cr.P.C. extracted *supra*. It is an elementary requirement of the Evidence Act that the contents need to be proved in terms of the provisions of the Act. Beneficial reference in this context is made to the observations in ***Malay Kumar Ganguly*** vs. ***Dr. Sukumar Mukherjee and Others*** [(2009) 9 SCC 221] wherein it was *inter alia* held that;
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> > **"37.** It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. **It is, however, trite that a document becomes inadmissible in evidence unless the author thereof is examined; the contents thereof cannot be**

[2] 2023 SCC OnLine Sikk 41

> **held to have been proved unless he is examined and subjected to cross examination in a court of law.** The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken**."**
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> **(emphasis supplied)**

(ii) In ***R. Shaji*** vs. ***State of Kerala*** [(2013) 14 SCC 266] it was held as follows;

> **"26.** Evidence given in a court under oath has great sanctity, which is why the same is called substantive evidence. Statements under Section 161 CrPC can be used only for the purpose of contradiction and statements under Section 164 CrPC can be used for both corroboration and contradiction. In a case where the Magistrate has to perform the duty of recording a statement under Section 164 CrPC, he is under an obligation to elicit all information which the witness wishes to disclose, as a witness who may be an illiterate, rustic villager may not be aware of the purpose for which he has been brought, and what he must disclose in his statements under Section 164 CrPC. Hence, the Magistrate should ask the witness explanatory questions and obtain all possible information in relation to the said case.
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> **27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted. .....**
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> **28. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 CrPC can be relied upon for the purpose of corroborating statements made by witnesses in the committal court or even to contradict the same. As the defence had no opportunity to cross-examine the witnesses whose statements are recorded under Section 164 CrPC, such statements cannot be treated as substantive evidence."**
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> **(emphasis supplied)**

(iii) On the anvil of the above mentioned principles, Exhibit 10, the Section 164 Cr.P.C. statement of the victim is thus disregarded by this Court as being an unproven document, for the foregoing reasons**."**

On the same principles enunciated *supra*, the Section 164 Cr.P.C. statement of the victim in the instant matter is disregarded.

7. Now examining the evidence of the relevant witnesses, PW-2 appears to have been seated behind the victim and the

Appellant and witnessed that the Appellant while hugging his wife touched the body of the girl, who shouted at him as to why he was hitting and touching her body. The driver on hearing the girl cry, stopped the vehicle and confronted the Appellant about his misbehaviour with PW-1. This fact was not decimated in cross-examination. PW-7 stated that the victim had told the Appellant to sit properly as she was having problems with his improper way of sitting.

8. Having considered the Prosecution evidence, it is emanates without doubt that the Appellant had touched the victim on her left breast. Considering the body part of the victim that the Appellant had touched, it stands to reason that it was with sexual intent.

9. As no evidence established the drunkenness of the Appellant there is no necessity to discuss the provisions of Section 85 of the IPC or its applicability.

10. Although Learned Counsel for the Appellant had questioned the age of the victim as the maker of Exbt 6, the Birth Certificate, of the victim was not examined, the evidence on record indicates that PW-8 the victim's mother stated that she had obtained the second Birth Certificate, Exbt 6, from the concerned Primary Heath Centre (PHC). According to her, the victim's date of birth is 25-07-2005. PW-9 the Medical Officer (I/C)-cum-Registrar, Births and Deaths, on a requisition from PW-13 checked and verified the Births and Deaths Register of their PHC and found the birth details of the child in the said Register. The original Birth Register was brought by PW-9 to the Court which was marked as Exbt 9. There is no contention raised by the Appellant that the

Birth Register furnished was a false and fabricated document nor was cross-examination conducted on this aspect. Exbt 9A contained the birth details of the victim. Hence, Exbt 6 tallied with Exbt 9 proves that the date of birth of the victim was 25-07-2005. The witness also elucidated that after verifying the Birth Certificate of the child from the records she prepared a report authenticating the Birth Certificate to be correct and furnished it to the Police. During the process of authentication, she found that the second Birth Certificate had been issued as the first Birth Certificate was misplaced and the name of the mother which was erroneously recorded was also corrected. The witness deposed that the Birth Certificate is a genuine and valid document issued from their PHC. There is no reason to doubt the authenticity of the Birth Certificate or the Birth Register both of which are unimpeachable evidence. PW-8 under cross-examination has asserted that the date of birth of the victim is 25-07-2005 and Exbt 6 is the Birth Certificate of the victim.

11. In ***CIDCO*** vs. ***Vasudha Gorakhnath Mandevlekar***[3], it was held that;

> **"18.** The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent. ……."

12. Hence, the offence having occurred on 12-04-2022 it is clear that the victim was aged about 17 years at the time of the offence and there emanates no reason to doubt the veracity of Exbt 6 supported as it is by Exbt 9.

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[3] (2009) 7 SCC 283

13. In light of the foregoing discussions, I have no reason to disagree with the findings of the Learned Trial Court. The impugned Judgment and Order on Sentence warrants no interference and is accordingly upheld.

14. Appeal dismissed and disposed of accordingly.

15. No order as to costs.

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

17. A copy of this Judgment be made over to the Appellant/Convict through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority for information.

(Meenakshi Madan Rai)
Judge
19-11-2024

Approved for reporting : **Yes**

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