

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 8th June, 2022

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

Crl.A. No.32 of 2017

Appellant : Binod Tamang

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. Rai, Senior Advocate (Legal Aid Counsel) with Mr. Yozan Rai and Ms. Tara Devi Chettri, Advocates for the Appellant.

Mr. Thinlay Dorjee Bhutia, Additional Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1(i). The Appellant, in ST (POCSO) case No. 10 of 2015, **State of Sikkim vs. Binod Tamang** was charged with the offence under Section 3(a) of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), along with Section 376(2)(i) and Section 363 of the Indian Penal Code, 1860 (for short "IPC").

(ii) Vide the impugned Judgment dated 30-10-2017, he was convicted of the offences under Section 3(a) of the POCSO Act and Section 376(2)(i) of the IPC but acquitted of the offence under Section 363 of the IPC. The impugned Order on sentence dated 30-10-2017, directed the Appellant to undergo simple imprisonment for a period of seven years and to pay a fine of Rs.1,000/- (Rupees one thousand) only, under Section 3(a) of the POCSO Act punishable under Section 4 of the same Act. Under Section

376(2)(i), he was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2,000/- (Rupees two thousand) only. The sentences of imprisonment were ordered to run concurrently. The sentences of fine bore default clauses of imprisonment. Aggrieved thereof, the Appellant is before this Court assailing the Judgment and Order on sentence.

2(i). Learned Senior Counsel for the Appellant while placing reliance on the ratio in **T. T. Antony v. State of Kerala and Others**¹ and **Mangala Mishra @ Dawa Tamang @ Jack vs. State of Sikkim**², contended that there can be no second First Information Report (for short "FIR") in respect of the same cognizable offence, same incident or occurrence. That, in the instant case there are two FIRs and two Charge-Sheets filed, the first FIR having been lodged on 17-11-2013, for which the Charge-Sheet was submitted on 27-02-2014, while the second FIR was lodged on 13-01-2015 and the Charge-Sheet submitted on 04-02-2015. That, the second FIR is hit by the provisions of Section 162 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C") and cannot be considered by the Court. That, further investigation after the lodging of the second FIR was taken up without the permission of the Magistrate and is therefore legally untenable, this contention was buttressed by the ratiocination in **Anju Chaudhary vs. State of Uttar Pradesh and Another**³ and **Vikash Gupta vs. State of Punjab**⁴.

(ii) In the next leg of his arguments it was contended that the age of the victim was not proved which is evident from the deposition of P.W. 11 and P.W. 12, who have unambiguously stated that they had not seen the birth certificate being seized although

¹ AIR 2001 SC 2637

² SLR (2018) SIKKIM 1373

³ (2013) 6 SCC 384

⁴ 2002 CRI. L. J. 4165

the Prosecution asserts that they were seizure witnesses. They had only signed on the seizure memo Exhibit 4 and failed to identify the birth certificate Exhibit 18, hence, no weight can be attached to the document as proof of the victim's age, on this count reliance was placed on the ratio in ***Sandeep Tamang vs. State of Sikkim***⁵ of this Court and ***Lall Bahadur Kami vs. State of Sikkim***⁶. That infact the act alleged to be sexual assault was a consensual act between the victim and the Appellant and the Appellant cannot be foisted with the offence of rape, for which reliance was placed on ***Dr. Dhruvaram Murlidhar Sonar vs. State of Maharashtra and Others***⁷. That in view of the above facts and circumstances the Prosecution case has not been proved beyond a reasonable doubt besides being besieged with technical infirmities, hence the impugned Judgment and Order on sentence deserves to be set aside and the Appellant acquitted of all charges.

(iii) The concluding argument of Learned Senior Counsel for the Appellant was that the Appellant has no criminal antecedents and he and the victim in the intervening period, since the lodging of the FIR, have three children between them. Should the Appellant be incarcerated for the number of years as ordered in the impugned Order of sentence then the Appellant will ofcourse suffer his incarceration, but his wife and three minor children who are all dependant on him will have to bear the brunt of his incarceration and untold misery as the Appellant is the only earning member of his family. That, should this Court not be inclined to set aside the Judgment and Order of the Learned Trial Court then the sentence

⁵ Crl. A. No. 23 of 2015 decided on 24-06-2016

⁶ SLR (2017) SIKKIM 585

⁷ AIR 2019 SC 327

of the Appellant be suspended or the Appellant be released on probation of good conduct.

(iv) Refuting the arguments *supra*, the Additional Public Prosecutor for his part contended that the issues pertaining to the age of the victim and the filing of the second FIR and further investigation without the permission of the concerned Magistrate were not raised at all before the Learned Trial Court and hence cannot be raised for the first time in Appeal, on this count strength was drawn from the ratio in ***Sancha Hang Limboo vs. State of Sikkim***⁸.

(v) That, the victim was a minor has clearly been proved by Exhibit 18, her birth certificate duly proved by P.W. 22, who certified the contents of the birth certificate from the records of the Department concerned and the testimony of the victim herself. Besides, the Appellant in his Section 313 Cr.P.C statement, at Question no.14 has clearly admitted that he had sexual intercourse with the victim, during their stay at his house where he had taken the victim thereby clinching the Prosecution case. Hence, the Judgment and Order on sentence of the Learned Trial Court warrants no interference.

3. After carefully considering the rival submissions of the Learned Counsel of the parties and perusal of the evidence and documents on Record, this Court is to determine whether the Learned Trial Court was correct in concluding that the Appellant had committed the offences that he was convicted under.

4(i). Before delving into the merits of the matter, it is imperative to briefly discuss the facts of the case. On 17-11-2013, P.W.2 lodged an FIR, Exhibit 11, before the Police Station informing

⁸ SLR(2018) SIKKIM 1

the Police that the victim, his relative, aged about 13 years had gone to her maternal uncle's home but failed to return home after nine to ten days. On enquiry, they came to learn that she had been taken by an unknown boy. The Police Station registered the case as FIR T.P.S case no.14(11)13 dated 17-11-2013 under Sections 363/366 IPC against the accused and endorsed it for investigation to ASI K.B. Gurung, Investigating Officer (for short "I.O.").

(ii) On completion of investigation, Charge-Sheet was submitted by the I.O. on 27-02-2014 against the Appellant, under Sections 363/366 of the IPC, the cognizance of which was declined by the Special Judge (POCSO) Act, South Sikkim at Namchi on jurisdictional grounds, the minor victim being a resident of a place in South Sikkim but having been allegedly kidnapped from the lawful guardianship of her uncle under the East District jurisdiction. The matter was reverted by the Learned Special Judge (POCSO) Act, South Sikkim to the Prosecution Branch for appropriate steps which in turn handed it over to the Rangpo Police Station. The Station House Officer (for short "SHO"), Rangpo Police Station registered Rangpo PS Case FIR No.01(01)15, dated 13-01-2015 under Sections 363/366 of the IPC against the accused and endorsed it to the PSI Avinash Lamichaney, I.O. P.W.21, for further investigation. The SHO then filed Exhibit 16 before the Learned Chief Judicial Magistrate, East and North at Gangtok (for short "CJM") informing her of the chain of events as narrated above. On completion of investigation the I.O. submitted Charge-Sheet against the Appellant under Sections 363/366/376 of the IPC read with Section 4 of the POCSO Act.

5. The Learned Special Judge (POCSO) Act, East Sikkim at Gangtok framed charges against the Appellant under Section 3(a) of the POCSO Act and Section 376(2)(i)/363 of the IPC. The Prosecution examined 22 (twenty-two) witnesses to prove its case beyond a reasonable doubt. On closure of Prosecution evidence, the Appellant was examined under Section 313 of the Cr.P.C to enable him to explain the incriminating evidence appearing against him. He admitted to the fact of sexual intercourse with the victim but claimed to be innocent and falsely implicated in the case. Pursuant thereto, the final arguments of the parties were heard followed by the impugned Judgment and Order on sentence.

6.(i). It may relevantly be noticed that the SHO, Rangpo Police Station has vide Exhibit 16 infact informed the CJM, East and North at Gangtok that pursuant to the lodging of the FIR on 17-11-2013, which was registered at a Police Station in the South District, the I.O. submitted the Charge-Sheet before the Learned Special Judge (POCSO) Act, South Sikkim who refused to take cognizance on jurisdictional grounds citing Section 177 and Section 181(2) of the Cr.P.C. The registration of the FIR, Exhibit 16 at the Rangpo Police Station being an information to the CJM can in no manner be categorised as a second FIR of the incident. It was merely due to a technical question raised by the concerned Court that the FIR, Exhibit 11 and the Charge-Sheet were returned for steps to be taken by the Prosecuting Agency under the correct jurisdiction. Consequently, the SHO registered it as FIR No.01(01)15 dated 13-01-2015 and then informed the CJM of the development. With regard to the SHO directing P.W.21 to further investigate into the matter, it was argued by the Learned Senior Counsel that there can

be no further investigation into the case under the provisions of Section 173 of the Cr.P.C without an order from the concerned Magistrate. We have perused the contents of the Section 173 of the Cr.P.C Section 173(8) which is relevant and is reproduced herein below;

"173. Report of police officer on completion of investigation.-

.....
(8) Nothing in this section shall be deemed to preclude further investigation in respect of an offence after a report under sub-section (2) has been forwarded to the Magistrate and, where upon such investigation, the officer in charge of the police station obtains further evidence, oral or documentary, he shall forward to the Magistrate a further report or reports regarding such evidence in the form prescribed; and the provisions of sub-sections (2) to (6) shall, as far as may be, apply in relation to such report or reports as they apply in relation to a report forwarded under sub-section (2)."

(ii) Hence a perusal of 173(8) of the Cr.P.C nowhere lays down that the police is precluded from further investigation into the matter *sans* permission of the concerned Magistrate. The I.O. of the Police Station if he receives further evidence, oral or documentary, may forward such material to the Magistrate for further report or reports regarding such evidence. In ***Popular Muthiah vs. State represented by Inspector of Police***⁹, the Hon'ble Supreme Court has held that when the power under Section 173(8) of the Cr.P.C is exercised the Court ordinarily should not interfere with the statutory powers of the investigating agency. That, the Court cannot issue directions to the investigating agency from a particular angle or by a particular agency. Thus, the power of the Police to continue further investigation even after laying the final report is recognized under Section 173(8) of the Cr.P.C as also held in ***Sri Bhagwan Samardha Sreepada Vallabha Venkata Vishwandadha***

⁹ (2006) 7 SCC 296

Maharaj vs. State of Andhra Pradesh and Others¹⁰. Hence no error emanates in the SHO directing P.W.21 to further investigate the matter. He had not issued orders for re-investigation.

(iii) Coming to the contention that the age of the victim was not proved we are in absolute disagreement with Learned Senior Counsel. Reliance was placed by the Appellant on ***Sandeep Tamang*** (*supra*) [the Judgment was pronounced by a Single Judge Bench of (Rai, J)], where the Court disbelieved that the victim was a minor on grounds that the parents of the victim were not made witnesses to prove the victim's age, neither was the authority who issued the victim's birth certificate made a witness to test the authenticity of the document. The school admission register of the victim also found no place in the Prosecution evidence, besides, the seizure of the birth certificate went unproved. The facts and circumstances herein can be differentiated for the reason that shall follow later herein below. In ***Lall Bahadur Kami*** (*supra*) a Division Bench of this Court had again disbelieved the birth certificate of the victim for the reason that the Prosecution witnesses could not vouchsafe for the truth of the contents of the document. In the instant matter Exhibit 18 is the birth certificate of the victim wherein her date of birth is reflected as 15-12-2000, duly registered on 03-01-2001. We have, in a catena of decisions of this Court, held that subsequent registration of a birth certificate does not take away from the veracity of the document, all that is required to establish the *bona fides* of the Prosecution case is that the concerned document should be *ante litem motam*, which means, before the litigation commences. In the instant case the FIR was registered

¹⁰ 1999 CRI. L. J. 3661 (SC)

only in the year 2013 while the birth of the victim was registered much prior in time i.e., on 03-01-2001, hence its veracity cannot be doubted. P.W.22, Dr. Tsering Laden Bhutia who was posted as Chief Medical Officer at the concerned District Hospital deposed that on the receipt of requisition Exhibit 19, dated 18-03-2014, requiring her to verify the authenticity of the birth certificate Exhibit 18, she verified its contents by examining the records maintained by the Department, including the counter foil of Exhibit 18 maintained in her Department for the period 04-12-2000 to 31-12-2002. On such verification, finding the birth certificate to be a genuine document, she thus certified Exhibit 18 accordingly. The fact that she verified the authenticity of the certificate was not decimated in cross-examination. The cross-examination of P.W.19 and P.W.21 I.O's of the case has not demolished the fact that Exhibit 18 is a genuine document. The victim herself deposed that at the time of the incident in 2013, she was aged about 13 years. That, on enquiry by the Appellant too she informed him that she was 13 years old.

(iv) The victim under cross-examination went on to state as follows:-

.....
It is true that on 13-11-2013 my aunt told me to go home but I instead of going home visited the accused.

It is true that I was the one who insisted on getting married with the accused.

It is true that while going to Kalimpong I along with the accused travelled in a taxi vehicle. It is true that the vehicle stopped two to three times in different places.

It is true that I used to frequently visit the accused at Duga with the pretext of visiting my aunt.

.....
It is true that accused never came to visit me at my place of residence.

It is true that prior to eloping with the accused, I met the accused. It is true that on the

date of eloping when I met the accused, he was not ready to get married with me.

It is true that the accused on several occasion tried to explain to me to go back home but it was me who kept on insisting him to get married.

It is true that when we reached Kalimpong, the accused's friend explained us (sic) that it was not right age for me to get married, thereafter, we came back.

It is true that when we came back, I stayed at the house of the accused where his parents were also there.

It is true when we were sleeping together, the accused person did not forced me to have sexual intercourse.

.....
It is true that the entire incident occurred due to my own insistence and the accused did not force me to elope with me or to have sexual intercourse.

It is true that I did not have sexual intercourse with the accused.

....."
(emphasis supplied)

(v) Thus, the cross-examination of the victim indicates that despite her age, it was at her insistence that the Appellant took her and married her, although it does not condone the act of the Appellant as it is settled law that consent of the minor is no consent. Reliance placed by Learned Senior Counsel for the Appellant in **Dr. Dhruvaram Murlidhar Sonar** (*supra*) is of no assistance to the Appellant's plea of consensual sex as the matter deals with consensual sex between two adults and therefore irrelevant for the present purpose which is concerned with the sexual assault of a minor.

7. The evidence of the victim P.W.1 regarding the incident is fortified by the evidence of P.W.2, the complainant who deposed that he came to learn about the fact that the victim was missing from her paternal uncle's place when her uncle requested him to lodge a missing complaint, which led to the filing of Exhibit-12, P.W.3 the victim's maternal aunt also supported the evidence of P.W.1 and P.W.2 as according to her, the victim who is related to

her had come to her residence during the period of offence. Although she was asked to go back home after she stayed with them for 15 days, she refused to do so. On the day of the incident she came to learn from P.W.7 the aunt of the Appellant that the victim had been taken by the Appellant. She also went on to depose that the Appellant and the victim now have twins. P.W.4 the Appellant's sister, was introduced to the victim by the Appellant as his friend and since they had arrived at her residence in the evening, of a date and month which she did not recollect, she allowed them to stay overnight at her residence, where she prepared a separate bed for the Appellant while the victim slept with her that night. She went on to fortify the evidence of P.W.3 that the victim and the Appellant now have twins.

8. The evidence of P.W.5 was that a "Milapatra" Exhibit 3, was executed between the family members of the Appellant and the victim, which he witnessed and affixed his thumb impression thereon. P.W.8 supported the evidence of P.W.5 who along with P.W.10 and P.W.13 also witnessed the execution of Exhibit 3. P.W.8 deposed that the document was executed between the parents of the victim and the Appellant in which it was stated that until the victim attains the age of majority she would be residing with her parents. Both P.W.8 and her husband P.W.20 signed on Exhibit 3 as witnesses being a Member of the Panchayat and the Panchayat President of the area respectively. P.W.9 too supported the evidence of P.W.5 and P.W.8 with regard to execution of Exhibit 3. She went on to state that the victim and the Appellant now have twins. The evidence of the witnesses indicate that the

parents had thus compromised the matter on the terms reflected in Exhibit 3.

9. The Section 164 Cr.P.C statement of the victim recorded by P.W.15, the Learned Judicial Magistrate, South District is not being taken into consideration as the document was not relied on by any party either for corroboration or contradiction.

10. The victim was medically examined by P.W.17, the Consultant, Gynaecology and Obstetrics Department, STNM Hospital, Gangtok. The examination of the victim yielded the following results;

“On local examination, there was no perineal and anal injury, hymen was absent.....

Her vaginal wash was taken and was sent for presence of living or non-living spermatozoa.

The Pathological Report showed presence of non-motile spermatozoa as reported by Priyadarshini Pradhan, Pathologist.

.....
Clinical findings and lab reports confirms that sexual intercourse had taken place two days to one week prior to examination of the victim.

Accordingly, I prepared the Medical Examination Report, Exbt. 14 under my signature Exbt. 14(a).”

Under cross-examination it was his testimony that there was no sign of any forceful penetration.

11. The I.O. ASI K.B. Gurung P.W.19 investigated the case after the matter was endorsed to him, on registration of Exhibit 11 the FIR, at the Police Station in the South District. According to him, his investigation revealed that the victim had on her own will proceeded to a place in East Sikkim and she had not lodged the FIR in the instant case.

12. P.W.21 was the I.O. who conducted the investigation after the matter was registered at Rangpo Police Station. According, to him based on the evidence collected by his predecessor, I.O. ASI K.B.Gurung and on the basis of the evidence

that he had collected in the course of investigation of the case, he submitted Charge-Sheet against the Appellant under Section 363/366/376 of the IPC read with Section 4 of the POCSO Act, 2012. His cross-examination would reveal that the Appellant never visited the residence of the victim. That the FIR was lodged ten days after the incident. It needs no reiteration that it is settled law that an FIR lodged belatedly in such cases cannot be suspect as it requires prior contemplation before being filed, bearing in mind the dignity of the victim and societal repercussions.

13. On consideration of the entire facts, circumstance and evidence placed before this Court including the documentary evidence this Court is indeed constrained to opine that no error emanates in the findings of the Learned Trial Court arrived at in its impugned Judgment and Order on Sentence.

14. The only question remaining for consideration is whether the benefit of the Section 4 of the Probation of Offenders Act, 1958 (for short "Probation Act") can be extended to the Appellant. On consideration of the submissions of Learned Senior Counsel for the Appellant that the Appellant and the victim have three children between them and should he be incarcerated for a long period the innocent will indeed bear the brunt of his incarceration, in this situation, considering the prayers, the facts and circumstances of the case revealed above which led the Appellant to commit the offence, the fact that an earning member of the family will be undergoing imprisonment and bearing in mind that the Appellant is a first offender with no criminal antecedents, we deem it expedient to invoke the provisions of Section 4 of the

Probation Act and release the Appellant on probation of good conduct.

15. The Hon'ble Supreme Court in *Lakhvir Singh and Others vs. State of Punjab and Another*¹¹, has held that the legal position insofar as invocation of Section 4 of the Probation Act is concerned has been analysed in *Ishar Das vs. State of Punjab* [(1973) 2 SCC 65] elucidating that the non obstante clause in Section 4 of the Probation Act reflected the legislative intent that provisions of the Act have effect notwithstanding any other law in force at that time. The observation in *Ramji Missar* [AIR 1963 SC 1088] was cited with approval to the effect that in case of any ambiguity, the beneficial provisions of the Act should receive wide interpretation and should not be read in a restricted sense.

16. Accordingly, the Appeal is allowed in part as follows:-

(i) The conviction is confirmed.

(ii) So far as the sentencing is concerned, instead of sentencing the Appellant at once to any punishment, we direct that the Appellant be released on entering into a bond with two sureties before the Court of the Learned Special Judge (POCSO) Act, East Sikkim at Gangtok to the satisfaction of the Learned Judge, to appear and receive sentence when called upon to do so during a period of one year. He shall keep the peace and be of good behaviour. The Learned Special Judge (POCSO) Act, East Sikkim at Gangtok shall ensure that the provisions of the proviso to Section 4 of the Probation Act are duly adhered to when requiring sureties to enter into a bond. Let the Appellant appear before the Court of the

¹¹ (2021) 2 SCC 763

Learned Special Judge (POCSO) Act, East Sikkim at Gangtok on or before 13-06-2022, for the above stated purpose.

17. The Appellant shall remain under the supervision of the SHO Rangpo Police Station for one year.

18. Appeal disposed of accordingly.

19. Judgment be transmitted to Special Judge (POCSO) Act, East Sikkim at Gangtok and SHO, Rangpo Police Station for information and compliance.

20. Records of the Learned Trial Court be remitted forthwith to it.

(Bhaskar Raj Pradhan)
Judge
08-06-2022

(Meenakshi Madan Rai)
Judge
08-06-2022

Approved for reporting : **Yes**