

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 28th October, 2024

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

Crl.A. No.38 of 2023

Appellant : State of Sikkim

versus

Respondent : Prem Bahadur Biswakarma

Appeal under Section 378(1)(b) of the
Code of Criminal Procedure, 1973

Appearance

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

Mr. Bhusan Nepal, Advocate (Amicus Curiae) for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Respondent was acquitted of the charges framed against him under Section 451 of the Indian Penal Code, 1860 (hereinafter, the "IPC"); Section 5(m) punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act") read with Section 511 of the IPC, as also under Section 7 punishable under Section 8 of the POCSO Act, vide the impugned Judgment, dated 27-04-2021, in Sessions Trial (POCSO) Case No.26 of 2018 (*State of Sikkim vs. Prem Bahadur Biswakarma*), by the Court of the Learned Special Judge (POCSO), East Sikkim, at Gangtok. Aggrieved, the State-Appellant has assailed the Judgment.

(i) The Prosecution case commenced with the lodging of the FIR Ext 1, by PW-2 the Principal of the School, where PW-1 the victim was a student. It was reported therein that PW-2 learnt through two of her teachers PW-3 and PW-5 that, PW-1 aged about

eleven years, who was living in the house of PW-4 and PW-7 and attending school, was "physically abused" by the Respondent a worker in the house of the paternal uncle of PW-4. The victim had confided in her teachers that the incident had occurred during the month of May, 2018.

(ii) Ext 1 was registered before the concerned Police Station, on the same date, against the Respondent, under Section 354 of the IPC read with Section 8 of the POCSO Act. Investigation into the matter was taken up by PW-13, who submitted Charge-Sheet against the Respondent under Section 354 of the IPC and Section 8 of the POCSO Act.

(iii) The Learned Trial Court on 12-10-2018 framed Charge against the Respondent under Sections 7/8 of the POCSO Act; Section 5(m) punishable under Section 10 of the POCSO Act [(sic.) an offence under Section 5 and any of its subsections is punishable under Section 6 of the POCSO Act and not Section 10 of the POCSO Act], read with Section 511 of the IPC and Section 451 of the IPC. The Respondent took the plea of "not guilty" to the charges and claimed trial. Thirteen witnesses were examined by the Prosecution. The Respondent was then examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."), affording him an opportunity of explaining the incriminating evidence appearing against him. On analysing the entire evidence on record the Learned Trial Court acquitted the Respondent of all charges by concluding that the evidence of PW-1 did not inspire any confidence. That, there were material improvements in her claims against the Respondent while deposing before the Court. That, the discrepancies and improvements go to

the root of the case and affect her credibility. That although, the Counsel for the Respondent did not specifically invite the attention of the victim to her statement given before the Magistrate (Section 164 Cr.P.C. statement), she nonetheless categorically deposed that she had given the statement which could therefore not be overlooked by the Court. The Court also observed discrepancies in her statement under Section 164 of the Cr.P.C. and before the Court. It was observed that the medical evidence did not support the Prosecution case neither did the other Prosecution witnesses fortify the Prosecution case. The Learned Court discussed the evidence of the Prosecution witnesses and thereafter on finding no evidence against the Respondent acquitted him of all charges.

2. It is contended by Learned Additional Public Prosecutor that the victim in her testimony has detailed the commission of the offence. That, lack of injuries on the genital, anal area and person of the victim was due to the fact that the assault occurred in the month of May, 2018, but was belatedly reported only on June 5, 2018. The Section 164 Cr.P.C. statement of the victim recorded two days after the lodging of Ext 1 reveals that she had been subjected to sexual assault by the Respondent. Her evidence before the Court is cogent and consistent with regard to the incident. PWs 3 and 5 who she narrated the incident to have supported her evidence. PW-4 has also clearly stated that the Respondent had subjected her to sexual assault. Hence, the Learned Trial Court ought not to have acquitted the Respondent when such a heinous crime had been committed by a twenty-seven year old man on a child of eleven years.

3. *Per contra*, Learned Counsel for the Respondent contended that the acquittal was the result of the victim's evidence being incoherent, vacillating and deserved no consideration. Reliance was placed on the decisions of this Court ***Kishore Gurung vs. State of Sikkim***¹ and ***Lhendup Lepcha vs. State of Sikkim***² to buttress his submissions. That, the impugned Judgment thereby warranted no interference.

4. Having heard Learned Counsel for the parties it is to be seen whether the Learned Trial Court was in error in having acquitted the Respondent of the offences charged with.

(i) PW-1 was the victim of the offence who the Trial Court found competent to testify after putting some questions to her, to which she is said to have given rational answers. She identified the Respondent as a domestic help in the adjacent house of one of the neighbours' of PW-4 (her employer) where she was residing. The Respondent according to PW-1 frequented the house of PW-4. She did not recollect either the date, month or year of the incident but during her stay in the house of PW-4 the Respondent used to come to the house, remove her trousers, lay her on the bed, remove his trousers and insert his private part into her anus. That, it was painful when she used to pass stool. She thought of complaining to PW-4 but refrained from doing so as the Respondent had warned her not to disclose the incident to anyone. That, the Respondent had committed such acts on her on a number of occasions of which she later complained to her school teachers. She was called to the Police Station and interviewed by the Police and her statement recorded. She was then forwarded to the

¹ 2023 SCC OnLine Sikk 28

² 2022 SCC OnLine Sikk 57

Hospital, at Gangtok, where she was examined by the doctor. She also made a statement relating to the case before a lady Magistrate at Gangtok and affixed her thumb impression on the document. She was taken to the jail for identification of the Respondent whom she identified from the line of other inmates. Under cross-examination however she admitted that whatever she had stated before the Magistrate was "not true and correct". That, prior to the incident she along with her friend used to play games on the mobile phones of the Respondent. That, the Respondent had sexually assaulted her in the presence of her friend.

(ii) The victim as evident did not disclose the number of occasions when such incidents took place nor did she recall the date and month of the incident despite her evidence having been recorded within six months of the alleged date of incident. It is a well settled principle that the corroboration of the testimony of a child witness is not necessary, it is merely a measure of caution and prudence as a child witness could be susceptible to tutoring. The Court is thus to carefully scrutinize the evidence of the child witness and assess whether there is a possibility of an untruth being stated.

(iii) In tandem with the evidence of PW-1, it would be essential to examine the evidence of PWs 3 and 5 who were allegedly told of the incident by the victim. PW-3 sometime in the month of June, 2018, being the class teacher of the victim's class allowed PW-1 to go to the Primary Health Sub-Centre (PHSC) for medical check-up as she complained of stomach ache. After she returned PW-3 with PW-5 enquired from PW-1 as to what was happening to her. She disclosed that one individual who resided in

the neighbourhood of her residence was "sexually harassing and abusing her". She also stated that she had been sexually harassed by another older man in the past. Under cross-examination it came to be extracted from the witness that the medical prescription of the victim was checked by one of the school staff after the victim returned and on checking it she did not find any complaint of sexual molestation etc.

(iv) PW-5 was the person who had perused the prescription after PW-1 returned from her visit to the PHSC. Her evidence reveals that the victim had sought leave to go to the hospital as she was reportedly having severe itching and burning sensation in her private part. PW-5 advised her to take leave from PW-3 her class teacher. PW-5 being suspicious about her ailment asked her as to what exactly had happened to her, to which PW-1 told her that on earlier occasions her grandfather had committed penetrative sexual assault on her and molested her younger brother. Her uncle had also molested her. She added that, "*.....Lately, the male domestic help of her neighbour had also tried to pull her by her hand and tried to take her to his room.....*". The cross-examination of PW-5 elicited the information that during enquiry from the victim she did not state that the said domestic help had touched her private parts.

(v) PW-4 is the constable in whose house the victim was living. According to her the Respondent was working as a domestic help in the house of her paternal uncle. PW-4 came to learn through the medical officer of the concerned PHSC that the victim had been sexually abused earlier by another man as reportedly narrated by the victim to the doctor/medical officer during her

medical check-up. Later, when she enquired from the victim, she told PW-4 that the Respondent had touched her body from behind while he had come to their house as she had his Mobile. In cross-examination, PW-4 admitted that when she enquired from the victim, the victim told her that the Respondent touched her on her shoulder from behind.

(vi) PW-2 was narrated the said facts of the case by PWs 3 and 5 her teachers, upon which she lodged Ext 1 the FIR. She admitted that Ext 1 was lodged on the basis of information received from the two teachers.

(vii) PWs 6 and 7 were witnesses to the seizure of the birth certificate. Although PW-6 was declared hostile however under cross-examination it was admitted by her that the police personnel came to the house of PW-4 on 22-07-2018 and seized the birth certificate of the victim dated 24-04-2008. PW-7 deposed that he was a witness to the seizure of Exhibit 6 the birth certificate of the victim.

(viii) It appears from the evidence recorded that there was no serious contest about the age of the victim nor was any argument raised before this Court. Trial Court on the aspect of the age has merely recorded as follows;

"22. Be that as it may, the evidence of PW7 & PW4 would make it clear that the birth certificate of PW1 was seized in the matter....."

There were no further discussions on the age of the victim apart from the above sentences. Although Exhibit 6 the birth certificate of the victim, appears to have been seized by the Prosecution the contents thereof have remained unproved by any evidence. The document reflects her date of birth as 29-02-2008.

PW-4 merely stated that as per the birth certificate of the victim Exhibit 6, the victim’s date of birth was recorded as 29-02-2008. PW-7 admitted that he had no personal knowledge about the present case except the seizure of the birth certificate of the victim. The victim claims to be eleven years old but the Court has not recorded any finding about the physical appearance of the victim in terms of the principles mentioned in Section 94(1) of the Juvenile Justice (Care and Protection of Children) Act, 2015. Nonetheless, the age not being contested by either party it stands to reason that it is accepted that the date of birth in Exhibit 6 was correctly recorded.

(ix) PW-9 was the doctor who examined the victim on 05-06-2018 at around 10.00 p.m. and prepared Ext 9 the medical report of the victim. She found no fresh injuries on the victim at the time of her examination. Ext 9 the document prepared by her reveals as follows;

“.....
Brief History states that she was molested in May 2018 by one Prem Biswakarma at Mencho East Sikkim on 2nd.5.2018 at 2 pm.
 On Examination Conscious, oriented Cooperative vitally stable.
 Head neck back abdo chest limbs showed no signs of old or fresh injuries.
 Local examination :- Mous.(sic.) perineum labial folds, urethra no injury no tenderness no bleeding Anal site – no injury.
 No bleeding, Hymen intact. Vaginal wash taken as requested by police. Undergarments handed over to police blood sample taken handed over to police.
 Conclusion:- 11yrs old girl with no sign of recent forceful sexual assault.
”

(x) Having meticulously examined the evidence of the witness, it is necessary to remark here that the victim claims to have been sexually assaulted several times by the Respondent while in her evidence she has detailed only one incident which stands supported by her narration to PW-9 as recorded in Ext 9.

The history recorded in Ext 9 is that she was molested in May, 2018. The victim while narrating the history to the doctor, did not state that she was sexually molested several times by the Respondent. The victim made no mention of having taken permission from school and her class teacher PW-3 to have herself examined at the PHSC. PW-3 has stated that she allowed the victim out of the class for medical examination as she complained of stomach pain. Contrarily the evidence of PW-5 reveals that PW-1 complained of severe itching and burning sensation in her private parts, these disparate statements give rise to doubts about what ailment PW-1 suffered from or whether she was actually ailing at all. PW-9 found no recent forceful sexual assault on PW-1. It is worth noticing that although she complained to PW-3 of being sexually harassed and abused by the Respondent, no details of the sexual harassment or abuse were given. Her claims that her friend was present during the sexual assault lacked evidence and no such friend was examined to lend credence to her claims. The victim also makes no mention of the kind of sexual assault that was allegedly perpetrated on her by the Respondent although to PW-5 she has clearly stated that her grandfather had sexually assaulted her. The Learned Trial Court took into consideration the Section 164 Cr.P.C. statement of the victim noting that there were material discrepancies in her statement with that recorded in Court. We are unable to agree with this reason put forth by the Learned Trial Court for considering the document. The document was neither identified by the victim nor by the Magistrate who recorded the evidence. The Magistrate was also not examined as a Prosecution witness although she was listed as a witness and the Court vide it

Orders dated 12-09-2019 and 17-09-2019 had recorded that the Judicial Officer was posted to some other district. Thereafter, the other orders are bereft of the fate of the witness, revealing a lackadaisical attitude on the part of both the Court and the Prosecution. The Court is required to be vigilant in such matters as also the Prosecution, whose witness has gone unexamined *sans* any submissions seeking to tender her as a witness.

(xi) PW-1 stated to PW-4 that the Respondent merely touched her on her shoulder from behind and took back his mobile phone from her. A touch on her shoulder in our considered view does not tantamount to sexual assault nor does it indicate sexual intent. PW-1 also qualified her statement of such touch by adding that, the Respondent took back his mobile phone. Secondly, we are of the considered view that it would be travesty of justice to rely on such vacillating evidence of PW-1 to various witnesses, augmented by the fact that the medical evidence reveals that PW-1 was devoid of any injuries in her genital or anal region. In such circumstances no error arises in the acquittal of the Respondent by the Learned Trial Court.

5. Before concluding, it may be pointed out that the Trial Court had framed charge under Section 5(m) punishable under Section 6 of the POCSO Act read with Section 511 of the IPC. Section 511 of the IPC deals with punishment for attempting to commit offence punishable with imprisonment for life or other imprisonment, however it is clarified here that for an attempt to commit an offence under the POCSO Act the relevant Section under the POCSO Act is Section 18 which reads as follows;

"18. Punishment for attempt to commit an offence.—Whoever attempts to commit any offence punishable under this Act or to cause such an offence to be

committed, and in such attempt, does any act towards the commission of the offence, shall be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence or with fine or with both.”

Hence, for an attempt to commit an offence under any provision of the POCSO Act Section 18 of the said Act is the correct section to be invoked and not Section 511 of the IPC.

6. In view of the foregoing discussions, we find no reason to interfere with the impugned Judgment. Appeal is dismissed.

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

(Bhaskar Raj Pradhan)
Judge
28-10-2024

(Meenakshi Madan Rai)
Judge
28-10-2024

Approved for reporting : **Yes**