

THE HIGH COURT OF SIKKIM : GANGTOK
(Criminal Appellate Jurisdiction)

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

Crl.A. No.39 of 2023

Appellant : Madan Gurung

versus

Respondent : State of Sikkim

Appeal 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.

Date of Hearing : 05-11-2025
Judgment reserved : 05-11-2025
Judgment pronounced & uploaded : 01-12-2025

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant calls into question the Judgment of the Special Judge (POCSO Act, 2012), dated 27-09-2023, in S.T. (POCSO) Case No.50 of 2019, by which he was convicted for the offence under Section 376 Indian Penal Code (IPC) and sentenced to undergo rigorous imprisonment for a term of ten years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only, under the said provision of law with a default stipulation.

2. It is submitted by Learned Counsel for the Appellant that, the Appellant has not committed the offence of rape on the alleged victim, who is his daughter and that, he has in his examination under Section 313 of Code of Criminal Procedure, 1973 (Cr.P.C.), clearly denied such allegations made against him. It has emerged in the evidence of PW-7, wife of the Appellant, that, the victim was in the habit of going around with the boys and was not

interested in her education. The witness has also deposed that, the victim did not complain to her about the Appellant touching her inappropriately. That, the allegations against the Appellant by the victim emanate from the fact that the Appellant was a strict father. The victim was not amenable to his discipline or to doing household chores and has thereby implicated him falsely in the said offence. The evidence of the victim lacks fortification by any other Prosecution witness and thus fails to support their case of penetrative sexual assault. The Appellant in the facts and circumstances deserves an acquittal.

3. Learned Additional Public Prosecutor contrarily contended that, the victim's evidence is consistent with regard to the allegations of penetrative sexual assault perpetrated on her by the Appellant in 2012 and 2013, both in her Section 164 Cr.P.C. statement and in her testimony before the Court. That, PW-5 the Appellant's son and PW-6 the Appellant's daughter-in-law, have categorically supported the Prosecution case. They have deposed that PW-7, the wife of the Appellant, had herself told them that the Appellant was guilty of the offence of penetrative sexual assault against the victim, which she had witnessed. Hence, there is no evidence which would mitigate the case against the Appellant. In such circumstances, there is no reason to interfere with the Judgment of Conviction and Order on Sentence of the Learned Trial Court.

4. The facts of the Prosecution case *inter alia* are that, the victim was working as a help/nanny in the house of PW-8, who is the Complainant in the instant matter. On 18-06-2016, the minor son of PW-8 suffered an injury while under the watch of the victim

on account of which PW-8 reprimanded her. The victim left the house of PW-8 on that day. On the next day, 19-06-2016, PW-8 was rummaging through the belongings of the victim, when she came across a letter, Exbt-1, addressed to her by the victim. In the said letter, the victim had detailed the fact of penetrative sexual assault committed on her, by her father. That, same evening, i.e., 19-06-2016, the victim returned to the house of PW-8. On her return, PW-8 made enquiries from her regarding the information contained in the letter. On 20-06-2016, PW-8 lodged the FIR Exbt-9, on the basis of which the Police registered a case bearing No.196/2016, dated 20-06-2016, under Section 376 of the IPC read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012), against the Appellant and endorsed it to PW-14, an SI at the concerned PS, for investigation.

(i) Having completed the investigation, PW-14 submitted Charge-Sheet against the Appellant under Section 376 IPC read with Section 6 of the POCSO Act, 2012. The Learned Trial Court framed Charges against the Appellant under eleven heads, variously, under Sections 5(n) and 5(l) read with Section 6 of the POCSO Act, 2012, Sections 9(n) and 9(l) read with Section 10 of the POCSO Act, 2012 and Sections 376(2)(f) and 376(2)(n) of the IPC and Section 354 of the IPC. The Charges were read over to the Appellant, who having understood the Charges, entered a plea of "not guilty" and claimed trial. The trial progressed with the examination of fourteen witnesses furnished by the Prosecution, followed by the examination of the Appellant under Section 313 of the Cr.P.C. During such examination, he sought to examine himself and one witness in support of his case. Both were examined as DW-1 and DW-2. On

closure of defence evidence, the final arguments of the parties were heard and the impugned Judgment and Order on Sentence pronounced.

5. That having been said, in the first instance, we deem it essential to deal with the Charges framed by the Trial Court which reads as follows;

“Firstly:-

Secondly:-

Thirdly:-

Fourthly:-

Fifthly:- That you, during the year 2013, at Pxxx Hxxxx, Gxxxxxx, East Sikkim being the father of the minor victim above **repeatedly committed penetrative sexual assault on her**(*you put your penis into her vagina*) and you thereby committed an offence of aggravated penetrative sexual assault under Section 5(n) of the POCSO Act, 2012 which is punishable under Section 6 of the said Act and within the cognizance of this Court;

Sixthly:- That you, during the year 2013, at Pxxx Hxxxx, Gxxxxxx, East Sikkim being the father of the minor victim above **repeatedly committed rape on her**(*you put your penis into her vagina*) and you thereby committed an offence punishable under Section 376(2)(f) of the IPC and within the cognizance of this Court;

Seventhly:- That you, during the year 2013, at Pxxx Hxxxx, Gxxxxxx, East Sikkim **repeatedly committed penetrative sexual assault on the minor victim above**(*you put your penis into her vagina*) and you thereby committed an offence of aggravated penetrative sexual assault under Section 5(l) of the POCSO Act, 2012 which is punishable under Section 6 of the said Act and within the cognizance of this Court;

Eighthly:- That you, during the year 2013, at Pxxx Hxxxx, Gxxxxxx, East Sikkim **repeatedly committed rape on the minor victim above**(*you put your penis into her vagina*) and you thereby committed an offence punishable under Section 376(2)(n) of the IPC, 1860 and within the cognizance of this Court;

Ninthly:- That you, during the year 2012, at Sxxxxx, East Sikkim being the father of the minor victim above repeatedly committed sexual assault on her(*you used to repeatedly put your hands on her body and kiss her*) and you thereby committed an offence of aggravated sexual assault under Section 9(n) of the POCSO Act, 2012 which is punishable under Section 10 of the said Act and within the cognizance of this Court;

Tenthly:- That you, during the year 2012, at Sxxxxx, East Sikkim repeatedly committed sexual

assault on the minor victim above(*you used to repeatedly put your hands on her body and kiss her*) and you thereby committed an offence of aggravated sexual assault under Section 9(I) of the POCSO Act, 2012 which is punishable under Section 10 of the said Act and within the cognizance of this Court; and

Lastly:- That you, during the year 2012, at Sxxxxx, East Sikkim repeatedly used criminal force against the minor victim above(*you used to repeatedly put your hands on her body and kiss her*) with intent to outrage her modesty and did, in fact, outrage her modesty and you thereby committed an offence punishable under Section 354 of the IPC, 1860 and within the cognizance of this Court.” [emphasis supplied]

6. To say the least, the Charges are rather unhappily framed. Section 228 of the Cr.P.C. deals with framing of Charge in a trial before a Court of Session. In ***State (NCT of Delhi) vs. Shiv Charan Bansal and Others***¹ the Supreme Court has observed *inter alia* that the Court is required to evaluate the material and documents on record with a view to finding out if the facts emerging therefrom taken at the face value disclose the ingredients constituting the alleged offence.

7. The documents furnished before the Sessions Court at the time of framing of Charges reveal that during investigation, the victim had disclosed that she was assaulted sexually by the Appellant once in 2013. Unfortunately, the Trial Court has in the Charges framed against the Appellant erroneously noted that during the year 2013 the Appellant “repeatedly” committed penetrative sexual assault on the victim. Suffice it to mention here that we are only expressing our concern at the lackadaisical manner in which the Trial Court has proceeded to frame the Charges by not even considering whether the offence in 2013 was committed on a single occasion or repeatedly. The Trial Court is required to be circumspect when framing Charges as it forms the foundation for the trial.

¹ (2020) 2 SCC 290

8. The points for determination considered by the Trial Court were, whether the accused subjected his daughter (victim) to penetrative sexual assault on multiple occasions from 2012 to 2015? If so, whether she is a minor within the meaning of Section 2(d) of the POCSO Act, 2012? The Trial Court after considering all evidence on record reached a finding that in the absence of reliable document to support the victim's age, concluded that she was not a minor. In the said circumstance, the Appellant could not be convicted for offences under the POCSO Act, 2012, however he was found guilty of the offence of rape simpliciter under Section 376 IPC and convicted and sentenced as detailed *supra*.

9. This Court is now to consider whether the Trial Court was correct in its eventual finding, which led to the Appellant's conviction and whether sexual assault extended up to 2015 as considered by the Trial Court, when the documents and the evidence of the victim suggested that the offences of penetrative sexual assault occurred only in the years 2012, 2013 and not 2015.

10. Of the fourteen witnesses examined by the Prosecution, it is the victim PW-1 who had to bear the trauma of an invasion of her personal space, her body, by the Appellant who was her father no less. At the time of her evidence before the Court on 22-03-2021, she was twenty-four years old, the offences were of the year 2012 and 2013. There is no dispute with regard to the finding of the Trial Court that, the Prosecution failed to establish that the victim was a minor when the offence was perpetrated on her, given the lack of evidence on the side of the Prosecution. We are inclined to agree with the finding of the Trial Court on this aspect as it is clear that, PW-2 the School Principal where the victim was studying

has admitted in her evidence that the victim had taken admission in her School on 20-02-2014 in Class IX and the victim's date of birth was recorded as 17-04-1997. It was however her further admission that Exhibit 6, a copy of the relevant page/portion of the Register (produced by her in Court) contained the entries pertaining to the minor victim, but she could not say who was the author of the concerned entries as she was not in the School at that point of time. Her cross-examination extracted the fact that, Exhibit 6 did not bear details of the basis of the entry pertaining to the victim. She could not state whether the entry Exhibit 6(a) was correct or not. PW-5 the victim's blood brother did not throw light on the age of the victim nor did PW-6 his wife who is the sister-in-law of the victim, enlighten the Court on this aspect. PW-7, the wife of the Appellant, did not give any evidence with regard to the age of the victim and the Appellant himself claimed that the victim was born in Nepal in 1997 *sans* any documentary evidence. Hence, this facet is decided in terms of the decision of the Trial Court.

11. While addressing the issue of the offence of penetrative sexual assault committed by the Appellant on the victim PW-1, she has unwaveringly stated that during the year 2012 when they were living in rented accommodation in a place in East Sikkim, along with second wife of the Appellant and their daughter, the Appellant committed penetrative sexual assault on two occasions. In the year 2013, when they had shifted to another rented accommodation, he again committed penetrative sexual assault on her once. Then in the year 2014, she was taken to Nepal by PW-7 her step-mother and PW-6 her sister-in-law. On her return from Nepal she started working as a nanny in the house of PW-8. Her cross-examination

failed to decimate the examination-in-chief pertaining to the penetrative sexual assaults committed on her by the Appellant and other facts stated by her. In fact, in her cross-examination while confronted with statements specifically extracted from her Section 164 Cr.P.C. regarding the penetrative sexual assaults on her by the Appellant, she asserted that she had told the Magistrate, who recorded her statement, that, the Appellant tried to kiss her on her mouth, put his hands on her chest and inserted his genital into hers. That, he had repeated the same acts in the second rented accommodation to which they had shifted from the first such accommodation. In our considered view, the evidence of the witness has been consistent and thereby we are inclined to term it as being of sterling quality. Her evidence is also fortified by the evidence of PW-5 her brother, who deposed that, sometime in the year 2014 the minor victim and PW-7 his step mother came to his house, where PW-7 told him that the Appellant had done something wrong to the minor victim. That, she had seen the Appellant sleeping with the minor victim one morning when she returned from her morning walk. This statement stood the test of cross-examination. The evidence of PW-6 lends substantiation to the above statements. She deposed that they came to learn from PW-7 that he had done something "bad" to the minor. When they enquired from the minor she told them that she was raped by the Appellant. The evidence of PW-6 withstood the cross-examination. PW-8 is the Complainant, who had taken the initiative to complain to the Police on finding Exbt-1, the letter addressed to her by the victim, where the victim had laid bare the conduct of the Appellant towards her and the commission of penetrative sexual assault by

him on her, i.e., the victim, by the Appellant. She had handed over the concerned letter to the Police. She admitted that whatever she had stated in her examination-in-chief was also stated by her in her FIR before the Police. Although an effort was made by the Prosecution to prove that the victim was a habitual liar by way of furnishing PW-9 as a witness, who stated that, the victim had the habit of lying, nevertheless no instances of her having lied at any point in time to PW-9 was detailed by the witness and we therefore deem her evidence to be irrelevant.

(i) PW-10 the Doctor who examined the victim on 21-06-2016 observed that, there were no fresh injuries on the private part of the victim, which would indeed be true, for the reason that, the incidents of sexual assault took place in the year 2012 and 2013 and therefore her body would exhibit no fresh injuries on any part thereof in the year 2016. However, it has emerged in his cross-examination that there was an old tear in the hymen, indicating that, she was probably subjected to penetrative sexual assault earlier in time.

(ii) PW-11 the Consultant Radiologist observed that the victim could be of any age, above twenty years, when he examined her on 25-06-2016.

(iii) The Police witnesses PWs 12, 13 and 14 have been consistent with regard to their stand that PW-8 brought Exbt-1 to the Police Station, whereupon the matter came to be registered against the Appellant and PW-14 during her investigation observed that the Complainant had lodged the FIR. The Appellant was found to have committed the offence of penetrative sexual assault after all due enquiries were made by the Investigating Officer.

12. In the facts and circumstances of the instant case, we are of the considered view that the Judgment of the Trial Court warrants no interference, save to the extent that the offence of penetrative sexual assaults pertained to the year 2012 and 2013 and did not extend to 2015. We also observe that the conviction ought not to have been under Section 376 IPC simpliciter, but under Section 376(2)(f) and Section 376(2)(n) of IPC. Each of the Sections make provision for separate terms of imprisonment. However, the Trial Court handed out conviction only under a blanket provision of Section 376 IPC without specifying the Sub-Sections and sentenced him only under the said Section. In our considered view, this is an error committed by the Trial Court.

13. The Learned Trial Court ought to have been mindful of the penal provision, convicted the Appellant as per law and handed out sentence as directed by law. Where minimum sentence is prescribed by the law it has to be applied without exception. In ***Mohd. Hasim vs. State of Uttar Pradesh and Others***², the Supreme Court in Paragraph 19 it was held as follows;

"19. The learned counsel would submit that the legislature has stipulated for imposition of sentence of imprisonment for a term which shall not be less than six months and the proviso only states that sentence can be reduced for a term of less than six months and, therefore, it has to be construed as minimum sentence. The said submission does not impress us in view of the authorities in ***Arvind Mohan Sinha*** [(1974) 4 SCC 222] and ***Ratan Lal Arora*** [(2004) 4 SCC 590]. **We may further elaborate that when the legislature has prescribed minimum sentence without discretion, the same cannot be reduced by the courts. In such cases, imposition of minimum sentence, be it imprisonment or fine, is mandatory and leaves no discretion to the court.** However, sometimes the legislation prescribes a minimum sentence but grants discretion and the courts, for reasons to be recorded in writing, may award a lower sentence or not award a sentence of imprisonment. Such

² (2017) 2 SCC 198

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discretion includes the discretion not to send the accused to prison. **Minimum sentence means a sentence which must be imposed without leaving any discretion to the court. It means a quantum of punishment which cannot be reduced below the period fixed.** If the sentence can be reduced to nil, then the statute does not prescribe a minimum sentence. **A provision that gives discretion to the court not to award minimum sentence cannot be equated with a provision which prescribes minimum sentence. The two provisions, therefore, are not identical and have different implications,** which should be recognised and accepted for the PO Act.”

[emphasis supplied]

(i) In *Harendra Nath Chakraborty* vs. *State of West Bengal*³, the Supreme Court in Paragraphs 27 and 28 held as follows;

“**27.** The appellant was dealing with an essential commodity like kerosene. **If Parliament has provided for a minimum sentence, the same should ordinarily be imposed save and except some exceptional cases which may justify invocation of the proviso appended thereto.**

28. In India, we do not have any statutory sentencing policy as has been noticed by this Court in *State of Punjab v. Prem Sagar* [(2008) 7 SCC 550]. Ordinarily, the legislative sentencing policy as laid down in some special Acts where the parliamentary intent has been expressed in unequivocal terms should be applied. Sentence of less than the minimum period prescribed by Parliament may be imposed only in exceptional cases. No such case has been made out herein.”

[emphasis supplied]

(ii) In *Dhananjay Chatterjee alias Dhana* vs. *State of W.B.*⁴ it was observed by the Supreme Court that;

“**15.** In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.”

14. That having been said, at this juncture, it is essential to point out that the State-Respondent has unfortunately failed to take

³ (2009) 2 SCC 758

⁴ (1994) 2 SCC 220

recourse to the provisions of Section 377 of the Cr.P.C. which provides for appeal by the State Government against sentence, although it is a clear case where the Appellant has been inadequately sentenced. Such lackadaisical attitude by the State-Respondent leads to a failure of justice as not only are the rights of an Accused to be protected but the victim is also entitled to her rights. We say no further.

15. The Judgment and sentence of the Trial Court is accordingly upheld.

16. Appeal is dismissed and disposed of accordingly.

17. No order as to costs.

18. Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

19. 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.

(Bhaskar Raj Pradhan)
Judge
01-12-2025

(Meenakshi Madan Rai)
Judge
01-12-2025

Approved for reporting : **Yes**