

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 5th July, 2024

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

Crl. A. No.40 of 2023

Appellant : Deepak Chettri

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. Yadev Sharma, Additional Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. This Appeal pertains to the sexual assault of a six year old boy child, by a twenty-seven year old man, after alluring the minor with some edibles. The Prosecution case is that the Appellant was working in the house of PW-5, the elder paternal uncle of the victim PW-1, as a domestic help since two months prior to the incident. On the relevant day, the Appellant came to the house of PW-1, with eggs and "chips" and asked him to accompany the Appellant to the nearby jungle. There, on the pretext of playing some game, the Appellant inserted his genital into the mouth of PW-1. Later, he took him home and told him not to disclose the incident to anyone. PW-1 however told PW-6, his uncle, who paid scant attention. Later, he told PW-2, his mother who in turn informed his father PW-8, which led to the lodging of Ext-2, on 05-08-2020, to the effect that on 03-08-2020, PW-1 disclosed to him that the Appellant took him to a nearby jungle and

sexually assaulted him. The Police Station registered a case against the Appellant under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"), on the same date and endorsed it to PW-10, the Investigating Officer (IO) for investigation, on completion of which he submitted Charge-Sheet against the Appellant under Section 8 of the POCSO Act.

2. Charge was framed against the Appellant under Section 363 of the Indian Penal Code, 1860 (hereinafter, the "IPC") and Section 3(a)/4 and Section 5(l)/6 of the POCSO Act. Ten Prosecution witness came to be examined to establish its case beyond a reasonable doubt. The Learned Trial Court on analysing the evidence before it observed that PW-1 identified the Appellant as the offender, deposed of the way the incident was perpetrated on him in his statement under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C.") and in his deposition before the Court. That, he could not be said to have been tutored and his evidence inspired the confidence of the Court. That, the Appellant for his part failed to rebut the presumption as provided under Section 30 of the POCSO Act. That, no explanation was forthcoming in his response under Section 313 of the Cr.P.C. Consequently, the Court of the Learned Special Judge (POCSO Act, 2012), at Namchi, Sikkim, in Sessions Trial (POCSO) Case No.08 of 2021, (*State of Sikkim vs. Deepak Chettri*), vide its Judgment, dated 28-09-2023, convicted the Appellant under Section 3(a)/4 of the POCSO Act and sentenced him to undergo simple imprisonment for a period of ten years, the fine imposed was half the earnings that would accrue on his working in the prison, payable to the victim. A

default stipulation followed. He was acquitted under Section 5(l) of the POCSO Act and Section 363 of the IPC.

3. Assailing the finding of the Learned Trial Court, Learned Counsel for the Appellant argued that there was a delay in the lodging of the FIR, the offence was allegedly committed on 03-08-2020 but the FIR was lodged only on 05-08-2020, *sans* explanation for the delay. That, PW-1 in his evidence stated that he told "O *dada*", *pusai* (uncle) and his father about the incident, contrarily PW-2 his mother stated that the victim told her about the incident. That, PW-1 deposed that he was going for his tuition when the incident took place, while PW-2 stated that it was when PW-1 returned from the tuition as told to her by PW-1. Neither "O *dada*" nor *pusai* were listed as Prosecution witnesses to test the veracity of the statements of PW-1. That, the informant of the details in the original school admission register to prove the date of birth of the victim was not examined. In view of the foregoing anomalies, the Prosecution case deserves a dismissal and the Appellant an acquittal.

4. *Per contra*, supporting the finding of the Learned Trial Court, Learned Additional Public Prosecutor contended that the evidence of PW-1 has been consistent regarding the incident. PW-2 and PW-4 have vouched for the veracity of the crime, having been told of it by PW-1. The evidence of these witnesses are supported by the evidence of PW-5 another uncle of the victim and PW-6 the third uncle of the victim who was told by PW-1 that the Appellant had inserted his penis inside his mouth. That, the date of birth of the victim has been duly established by furnishing the original school admission register as also the birth certificate of the

victim. PW-9 the doctor, who examined the victim was given a history of the offence by the victim himself. Hence, in light of the cogent and consistent evidence, the impugned Judgment and Order on Sentence of the Learned Trial Court brooks no interference.

5. The evidence on record has been carefully perused and considered by us and the submissions advanced by Learned Counsel for the parties also afforded careful consideration. The only question that falls for consideration is whether the Learned Trial Court was correct in arriving at its finding of conviction and handing out the consequent sentence.

6. While considering the question of the age of the victim, Ext-7 the birth certificate of the victim was handed over by his father PW-8, to the Police. PW-8 did not disclose the contents of Ext-7 but stated that his son was aged about seven years when the incident occurred. No cross-examination was conducted to test the veracity of the contents of Ext-7 or the evidence regarding the victim's age, consequently the contents of the document is accepted in its entirety and his date of birth accepted as 28-02-2014.

7. The Learned Trial Court has correctly noted in Paragraph 14(c) of the impugned Judgment that;

"14(c).The defence could not demolish PW 8's evidence with regard to the handing over of the original birth certificate of PW 1 to the police, during PW 8's cross-examination the defence also could not disprove Exhibit 7 and Exhibit 8, and no cross-examination on Exhibit 7 and Exhibit 8 was conducted. As reiterated above, the defence has not disputed the age of the victim....."

8. The Learned Trial Court also relied on the evidence of PW-7, who proved Exbt-3, the requisition for entries in the school admission register for age of proof of the victim, received by him from PW-10. PW-7 furnished Ext-5, the entry details of the date of

birth of PW-1. The Learned Trial Court in Paragraph 14(c) of its Judgment was satisfied that the date of birth of PW-1 was 28-02-2014. Useful reference on this aspect is made to the observation of this Court in ***Sancha Hang Limboo vs. State of Sikkim***¹, where it was held that a document having remained unchallenged in cross-examination in the Trial Court cannot be challenged at the stage of Appeal. It was elucidated as follows;

"15. Therefore, can the authenticity of the contents of Exhibit 2 be raised now? The answer would have to be in the negative. In this context, we may beneficially turn to the ratio in ***Sham Lal alias Kuldip vs. Sanjeev Kumar and Others*** [(2009) 12 SCC 454] where the Hon'ble Supreme Court while considering whether there was a validly executed Will in favour of the Defendants No.1 and 2, discussed as follows;

"21. One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:

"On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."

The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.

22. It has been held in *Dasondha Singh v. Zalam Singh* [(1997) 1 PLR 735 (P&H)] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit."

[emphasis supplied]

This ratiocination would aptly apply to the present circumstances and hence the Appellant cannot now bring to question the contents of Exhibit 2 before this Court, the issue having not been raised before the Learned Trial Court."

9. Having examined the evidence on record with regard to the victim's age, we find no reason to differ from the Learned Trial Court on this facet.

¹ SLR (2018) SIKKIM 1

10. So far as the occurrence of the incident is concerned, the minor discrepancies which do not affect the crux of the Prosecution case are to be disregarded. This observation has been made by the Supreme Court in *Kalabhai Hamirbhai Kachhot vs. State of Gujarat*² as follows;

"24. Further, in *Narayan Chetanram Chaudhary v. State of Maharashtra* [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546], this Court has considered the effect of the minor contradictions in the depositions of witnesses while appreciating the evidence in criminal trial. In the aforesaid judgment it is held that only contradictions in material particulars and not minor contradictions can be a ground to discredit the testimony of the witnesses. Relevant portion of para 42 of the judgment reads as under: (SCC p. 483)

"42. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. The omission in the police statement by itself would not necessarily render the testimony of witness unreliable. When the version given by the witness in the court is different in material particulars from that disclosed in his earlier statements, the case of the prosecution becomes doubtful and not otherwise. Minor contradictions are bound to appear in the statements of truthful witnesses as memory sometimes plays false and the sense of observation differ from person to person. The omissions in the earlier statement if found to be of trivial details, as in the present case, the same would not cause any dent in the testimony of PW 2. Even if there is contradiction of statement of a witness on any material point, that is no ground to reject the whole of the testimony of such witness." "

11. The evidence of PW-1 was recorded on 07-07-2021 the incident having occurred on 03-08-2020, which means after a lapse of around one year. Indeed, this Court is aware that at the relevant time the COVID-19 pandemic was surging and social distancing was the essential norm. This appears to be the reason for the delay in recording of the evidence of the victim. This aspect is being highlighted for the reason that the POCSO Act provides at Section 35 as follows;

² (2021) 19 SCC 555

“35. Period for recording of evidence of child and disposal of case.—(1) The evidence of the child shall be recorded within a period of thirty days of the Special Court taking cognizance of the offence and reasons for delay, if any, shall be recorded by the Special Court.

(2) The Special Court shall complete the trial, as far as possible, within a period of one year from the date of taking cognizance of the offence.”

Consequently, the Learned Trial Court in its Order dated 10-05-2021 has delineated the reasons for not having recorded the evidence of the victim within a period of thirty days. We cannot fault this observation.

12. Now, while addressing the question of commission of the offence, there can be no scintilla of doubt regarding the evidence of the victim PW-1, which has been cogent and consistent pertaining to the incident. According to him when he was going for tuition, *en route* he met the Appellant who told him that he would buy him some sweets. He accompanied him to the shop where the Appellant bought one egg for himself and one “kurkure” for the victim. After walking a little above the shop, the Appellant told him that they would play a game of sucking and thereafter he inserted his penis into the child’s mouth. He repeated the act and then carried the child back home. PW-1 narrated the incident to his “*O dada*”, his uncle and his father about the incident. His evidence has been duly corroborated by PW-4 his uncle, who vouched for the fact that the victim had told him about the incident, PW-6 another uncle was also told of the incident by the victim and PW-8 his father. Their evidence withstood the cross-examination.

13. In such circumstances, we find that there is no reason to doubt the veracity of the Prosecution case. The impugned Judgment and the Order on Sentence, both are accordingly upheld.

14. Appeal dismissed and disposed of accordingly.

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

(Bhaskar Raj Pradhan)
Judge
05-07-2024

(Meenakshi Madan Rai)
Judge
05-07-2024

Approved for reporting : **Yes**

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