

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 23rd May, 2023

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

Crl.A. No.11 of 2022

Appellant : State of Sikkim

versus

Respondent : Pintso Bhutia

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

Appearance

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the State-Appellant.

Mr. Udai. P. Sharma, Advocate (Legal Aid Counsel) for the Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The question that falls for determination before this Court is; Whether the impugned Judgment, dated 27-04-2021, in Sessions Trial (POCSO) Case No.10 of 2018, of the Learned Special Judge (POCSO), East Sikkim, at Gangtok, acquitting the Accused/Respondent can be said to be perverse, the word "perverse" meaning "against the weight of evidence".

(i) The Prosecution narrative is that, Exhibit 1, the First Information Report (for short, the "FIR"), was lodged by P.W.1, the Ward Panchayat of the concerned area, before the concerned Police Station, on 18-12-2017, on having received a verbal report from P.W.4, the victim's mother, informing him that the Respondent had attempted rape on the victim, P.W.3, aged about 10 years, on 17-12-2017, around 05.30 a.m. at the house of P.W.13, her aunt. Exhibit 1 was duly registered on the same date, under Section 8 of

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the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO" Act), against the Respondent and endorsed to P.W.15, the Investigating Officer (I.O.) for investigation, on completion of which, Charge-Sheet was submitted against the Respondent under Section 354A(1)(i) of the Indian Penal Code, 1860 (hereinafter, the "IPC") read with Section 8 of the POCSO Act. The Learned Trial Court on taking cognizance of the offence, proceeded to frame charge against the Respondent under Section 9(m) of the POCSO Act, punishable under Section 10 to which the Respondent entered a plea of "not guilty". Trial commenced and 15 Prosecution witnesses including the I.O. of the case deposed in order to prove the Prosecution case. On closure of Prosecution evidence, the Court examined the Respondent under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."), enabling him to explain the incriminating circumstances appearing in the evidence against him. He claimed to have been falsely implicated in the case by the victim and her mother and denied having sexually assaulted the victim. He chose not to examine any witness. The verbal arguments of Learned Counsel for the parties were then heard. On consideration of all the evidence on record, the Learned Trial Court acquitted the Respondent of the offence that he was Charged with.

2. Learned Additional Public Prosecutor for the State-Appellant canvassed the contention that the victim at the relevant time was 10 years old, while the Respondent was a married man, aged about 39 years and had children. The date of offence was 17-12-2017 and the FIR came to be lodged immediately on 18-12-2017, after the victim confided in her mother about the sexual assault. That, the victim has unwaveringly stated in her evidence

before the Court and also in her Section 164 Cr.P.C. statement that the Respondent had pinched her right breast and as it caused her pain, she got up from the bed and went outside the room. On returning to her home that day she narrated the incident to her mother. She was then taken to the Police Station by her mother and P.W.1. Thereafter, P.W.11, the Doctor examined the victim and found pain and tenderness on the victim's right breast, which was recorded by her in Exhibit 7. That, P.W.8, the Childline Team Member, corroborated the evidence of the victim, to the effect that, she was told by P.W.3 that the Respondent had inserted his hand inside her clothing and pinched her breast, while she was watching videos at the residence of her relative on the relevant morning. She showed her the pinch mark on one of her breasts'. That, P.W.4, the victim's mother also corroborated the statement of P.W.3 to the effect that, her daughter had narrated to her that the Respondent had pinched her on her breast and had tried to insert his hand on her private part. The mother had also removed the jumper which the victim was wearing and found that one of her breasts' was swollen, the evidence of the P.W.3, P.Ws 4, 8, 11 and 15, the I.O., are all corroborative. That, in ***Sunil Kumar Sambhudayal Gupta (Dr.) and Others vs. State of Maharashtra***¹, it was held that the evidence of the victim is sufficient to convict the Respondent. Hence, the impugned Judgment of acquittal be set aside and the Respondent be convicted of the offence under Section 9(m) of the POCSO Act.

3. The arguments in *contra* raised by Learned Legal Aid Counsel for the Respondent was that the victim and the Respondent were not alone in the room when the act was allegedly

¹ (2010) 13 SCC 657

committed. One Kumar Tamang who had spent the night in the same house was not examined by the Prosecution, leading to an adverse inference against the Prosecution case. That, there are inconsistencies in the statement of the victim, P.W.3, P.Ws 1 and 4, as P.Ws 1 and 4, have stated that the Respondent attempted to rape P.W.3, while P.W.3 herself has made no such allegation and only speaks of the Respondent pinching her breast. There are anomalies with regard to which breast was pinched since P.W.11, the Doctor, has stated that there was pain and tenderness present on the victim's right breast, which P.W.3 confirmed in her Section 164 Cr.P.C. statement, but contrarily in Court said it was the left one. That, P.W.11, in her cross-examination deposed that, breast tenderness could be due to hormonal changes and there were no external injuries on the body of the victim. P.W.8 could not state on which side the breast was swollen. P.W.13, the house owner has stated that nothing untoward happened in her house that night and neither did the Respondent commit any offence in her house. Hence, the impugned Judgment warrants no interference and the Appeal be dismissed.

4. The reasons put forth for acquittal of the Respondent by the Learned Trial Court were as follows;

(i) The evidence of the victim did not inspire confidence, was shaky and unworthy of any credence.

(ii) That, according to her statement in Court, on the morning of the incident when she was in bed playing video games, on her mother's cell phone, the Respondent suddenly came to her bed and pinched her '*left breast*' with his hand with sexual intent.

(iii) That, in her statement under Section 164 Cr.P.C. (Exhibit 10), she had accused the Respondent of suddenly coming

to her bed and pinching her '*right breast*', by putting his hand under her jacket.

(iv) The Court also observed that, when P.W.3 informed her mother, P.W.4, about the incident, she told her that apart from pinching her breast, the Respondent had even tried to insert his hand into her private part (vagina).

(v) That, in Exhibit 10, the victim made no mention of the Respondent having attempted to commit rape on her or having tried to insert his hand into her private part, but P.W.4 has stated so in her evidence.

(vi) That, in the FIR lodged by P.W.1 at the instance of P.W.3 and P.W.4, it was alleged that the Respondent had tried to commit rape on P.W.3, contrary to the evidence of P.W.3.

(vii) That, from Exhibit 10, it was noticed that P.W.3 stated that initially her aunt P.W.13 was also watching the video with her. Suddenly, the Respondent came there and forced P.W.13 to leave the room asking her to light the incense sticks. After much persuasion, P.W.13 left the room.

(viii) In Court, P.W.3 had not whispered anything with regard to P.W.13 being with her on the concerned morning and about the Respondent having insisted upon P.W.13 to leave the room.

(ix) P.W.13 gave no evidence of the Respondent persuading her to leave the room neither was she declared 'hostile' by the Prosecution.

(x) P.W.3 left her aunt's house after having tea. That, her conduct and demeanour did not suggest that she was nervous or affected by the alleged act of the Respondent which the Court found highly unusual given her tender age.

(xi) That, all the facts and circumstances above, militate against her bald claims.

(xii) That, P.W.13, her aunt and P.W.2, her aunt's husband, respectively, did not note anything unusual on the concerned morning.

(xiii) The other witnesses examined by the Prosecution, according to the Learned Trial Court, had not deposed anything worthy on the basis of which the Respondent could be held guilty of any sexual assault, while at the same time recording that as per P.W.8, the concerned Childline Team Member, who had counselled the victim at the child's residence in connection with this case, had found P.W.3 initially in a state of trauma.

(xiv) The Learned Trial Court noted that P.W.11, Dr. Deepika Gurung had examined P.W.3 and found pain and tenderness on the victim's 'right breast', but disbelieved such evidence, as P.W.3 had claimed before the Court that the Respondent had pinched her 'left breast'.

(xv) The Court however noted and was thereby aware that, P.W.3 during the counselling narrated to P.W.8 that the Respondent had inserted his hand inside her clothes and pinched her breast, on the concerned morning.

(xvi) The Court also observed that the statement of P.W.3, Exhibit 10, varied with what she had stated before the Court and opined that it would not matter whether formalities prescribed under Section 145 of the Indian Evidence Act, 1872 (hereinafter, the "Evidence Act") was complied with or not, as it was the duty of the Court to go through the Section 164 Cr.P.C. statement.

(xvii) The Court opined that the material variations and discrepancies go to the root of the case and affect the victim's credibility. Reference was made to *Sujoy Sen alias Sujoy Kr. Sen vs. State of W.B.², Jang Singh and Others vs. State of Rajasthan³* and *Yudhishtir vs. State of Madhya Pradesh⁴*.

5. In consideration of the grounds put forth by the Learned Trial Court for disbelieving the evidence of the Prosecutrix, I have carefully perused the above Judgments relied on by the Learned Trial Court. It is worth noticing that in *Jang Singh (supra)*, the Supreme Court found that the Prosecution case hinged solely upon the oral testimony of P.W.1, who had lodged the FIR, stating that two persons had died. In his evidence, however, he stated that after lodging the FIR while he was at the Police Station, the Sub-Inspector arrived at the Hospital and said one of the persons was in Hospital, while one died. This circumstance was found to be "unimaginable" by the Supreme Court, who found P.W.1 to be an untruthful witness and acquitted the Appellant.

(i) In the case at hand, there is no such erroneous statement made in the FIR, it is only the language employed. Instead of P.W.1 reporting it as "sexual assault", he has used the words "attempted rape", besides, he is a hearsay witness and did not witness the incident. The offence, whether described as a sexual assault or attempt to rape indicates a sexual offence affecting the human body, that too perpetrated on a child. Only the evidence furnished would indicate the exact nature of the offence.

² (2007) 6 SCC 32

³ (2001) 9 SCC 704

⁴ (1971) 3 SCC 436

(ii) In *Sujoy Sen (supra)*, the murder of a girl was based on circumstantial evidence. The Supreme Court discussed the evidence and found that the FIR was lodged by the father of the deceased, who had not stated that he saw the accused leaving the house of the deceased, when the informant was entering. He stated so, only subsequently, in his evidence before the Trial Court that, the accused was leaving his house when he entered. The Supreme Court held that the discrepancy in the FIR was a major discrepancy, had the first informant seen the accused entering into the house at the time of the incident, he would have definitely mentioned the fact in the FIR. The Appellant was found entitled to the benefit of the doubt.

(iii) In the case at hand, there is no such glaring discrepancy in the FIR for the reason already discussed above. The language used in the FIR ought not to divert the attention of the Court from the evidence of the victim pertaining to the incident, which has been cogent and consistent. Apart from which, the Court is required to give purposive interpretation to the provisions of the POCSO Act. The purpose of enacting the POCSO was to have a self contained comprehensive legislation *inter alia* to provide for protection of children from the offences of sexual assault, sexual harassment and pornography, with due regard to safeguarding the interest and well being of the child at every stage of the judicial process. Disbelieving a minor's evidence despite its consistency and cogency defeats the purpose of the legislation. The Court cannot be pedantic in its appreciation of the victim's evidence.

(iv) In *Yudhishtir (supra)*, the Appellants were convicted by the Trial Court under Section 302 read with Section 34 of the IPC,

which was confirmed by the High Court. The Supreme Court found that the evidence given by P.Ws 1, 3, 4, 5, 6 and 7 clearly establishes that the Appellants were seen running away from the house by the back door. But that circumstance, the Court observed, by itself without any direct evidence, regarding their participation in the crime or any other circumstantial evidence, which will conclusively lead to an inference of their participation, will not justify a Court in finding them guilty of an offence of murder.

(v) The circumstances of that case are not even relevant or applicable to the facts and circumstances of the instant matter, which is not based on circumstantial evidence.

(vi) That having been said, in the first instance it is relevant to note that the Learned Trial Court reached a finding that the victim was below 10 years of age at the time of the incident based on Exhibit 5, her Birth Certificate. Her date of birth therein is reflected as 01-11-2008. While examining the evidence on record, P.W.1 reveals that on 18-12-2017, the victim's mother approached him and verbally reported that the Accused had sexually assaulted her victim daughter, aged 10 years. Cross-examination could not decimate this statement. It is also worth noticing that to a common man hailing from a village, the act of the Respondent perhaps was equivalent to an 'attempt to rape'. While sifting the chaff from the grain of the Prosecution evidence on record, it categorically emanates that the Respondent had perpetrated the act on the victim.

(vii) The victim deposed that, she was pinched on her breast, this evidence is buttressed by the evidence of the Doctor, P.W.11, who examined the victim on 18-12-2017, a day after the

incident and found pain and tenderness present on the victim's right breast. The evidence of P.W.8, lends further credence to the Prosecution case as it is her testimony that when she went to counsel the victim on 20-12-2017, she found her in a state of trauma. P.W.3 told her during counselling that the Respondent had pinched her breast and showed her the pinch mark on one of the breasts'. The Learned Trial Court despite noting the evidence of P.W.8 as seen from the impugned Judgment blindsided it. P.W.4 on removing the jacket of P.W.3 had also seen the swollen breast. It is relevant to notice that the evidence of P.Ws 3, 8 and 11 have not been decimated in cross-examination. No evidence was furnished by the Respondent to indicate that the victim could have conjured up the incident nor is it the Respondent's case that they had acrimonious relations between the victim's family and that of the Respondent, or for that matter any other reason, nor is it the Respondent's case that the victim was tutored.

(viii) The Court observed that the victim did not appear to be nervous or affected by the alleged act, thereby insinuating that such an act did not take place. It is worth remarking that the Court failed to appreciate the shock and consternation that the child evidently experienced which left her dumbstruck for some time and made her reticent about discussing it even with her mother. That apart, the psychology of every person to a traumatic incident differs and consequently so does the reaction. There is no strait jacket formula for reactions to sexual assaults, more so, when the victim is a bare 10 year old and unable to comprehend the perverse act of an adult married man.

(ix) There cannot be mathematical precision in the evidence furnished by different witnesses, articulated by each in their own

individual style and manner, but consistency pertaining to the crux of the case indeed subsists in the evidence of the Prosecution witnesses, and does not affect the core of the Prosecution case, being that of sexual assault.

(x) In *Sunil Kumar (supra)*, it was held that;

“30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. **Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety.** The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons.(Vide *State v. Saravanan* [(2008) 17 SCC 587].)

.....

40. In exceptional cases where there are compelling circumstances, and the judgment under appeal is found to be perverse, the appellate court can interfere with the order of acquittal. The findings of fact recorded by a court can be held to be perverse if the findings have been arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant/inadmissible material. A finding may also be said to be perverse if it is “against the weight of evidence”, or if the finding so outrageously defies logic as to suffer from the vice of irrationality. (See *Balak Ram v. State of U.P.* [(1975) 3 SCC 219], *Shailendra Pratap v. State of U.P.* [(2003) 1 SCC 761], *Budh Singh v. State of U.P.* [(2006) 9 SCC 731], *S. Rama Krishna v. S. Rami Reddy* [(2008) 5 SCC 535], *Arulvelu Singh v. State* [(2009) 10 SCC 206], *Ram Singh v. State of H.P.* [(2010) 2 SCC 445] and *Babu v. State of Kerala* [(2010) 9 SCC 189].)”
 (emphasis supplied)

(xi) Hence, minor contradictions such as which breast was pinched and whether the victim mentioned about P.W.13 being persuaded to leave the room do not affect the core of the case.

6. Further, the Learned Trial Court instead of considering that the victim had not been confronted with her Section 164 Cr.P.C. statement proceeded to observe as extracted below;

“18. It may further be pointed out that though the Ld. Legal Aid Counsel for the accused did not specifically invite the attention of PW3 to the contents of her statement given before the Ld. Magistrate, she has nonetheless herself categorically deposed that she had given the said statement. Further, it has been identified by PW12. This Court cannot, therefore, overlook the same. It would not matter here whether the formalities prescribed under Section 145 of the Indian

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Evidence Act, 1872 were observed or not. Rather, it becomes the duty of the Court to go through such statement.”

(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*⁵ wherein it was *inter alia* held that;

“**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 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.”
(emphasis supplied)

⁵ (2009) 9 SCC 221

(ii) In *R. Shaji vs. State of Kerala*⁶ 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.

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.

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." (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.

7. Reliance by the Learned Trial Court on *State of Rajasthan vs. Kartar Singh*⁷ is erroneous while discussing Section 145 of the Indian Evidence Act, for the reason that the witness therein Mst. Kartar Kaur was confronted with the statement made before the Committal Court. The Public Prosecutor had read to the witness the whole of the witness's statement before the Committal Court and asked her whether it was her statement. She admitted that it was a true record of what she had stated before the Committal Court,

⁶ (2013) 14 SCC 266

⁷ AIR 1970 SC 1305

but it was a false statement, given under Police pressure. This was not what transpired in the instant case as revealed by the foregoing discussions.

(i) In *Bhagwan Singh vs. The State of Punjab*⁸ also referred to by the Learned Trial Court, the Supreme Court while referring to the evidence of one witness therein, Jagir Singh, who had been examined as P.W.4 found on examination of his evidence that the formalities prescribed by Section 145 of the Evidence Act were complied with. His cross-examination shows that every circumstance intended to be used as contradiction was put to him point by point and passage by passage. The Supreme Court observed that immediately after the witness had been questioned about each separate fact point by point, the whole statement was read out to him and he admitted that he had made it in the Committing Court. Accordingly, the procedure adopted there was in substantial compliance of Section 145 of the Evidence Act. The Court clarified that all that is required is that the witness be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in fair and reasonable manner. The Court was satisfied that this was done in the said case. It is no one's case that P.W.3 herein was confronted with the contents of Exhibit 10 for contradiction or corroboration.

8. Besides, it is evident that the victim is a mere 10 year old child at the time of offence, her level of articulation and understanding of the act perpetrated on her has to be taken into consideration. The Learned Trial Court failed to consider that the evidence in Court was recorded six months after the statement of

⁸ AIR 1952 SC 214

the victim Exhibit 10 was recorded, which in any event as discussed *supra* bore no evidentiary value. The Learned Trial Court was also of the view that P.Ws 2 and 13 did not witness anything untoward, despite evidence pointing with clarity to the fact that both were not in the room when the incident took place. The Learned Trial Court failed to appreciate that the victim nowhere stated that the Appellant perpetrated other acts of sexual assault, besides the act referred to by her, as she was the only witness to the assault perpetrated on her. Besides, she was not even confronted with the contents of Exhibit 1 to enable her to affirm or deny the words used therein. The victim cannot be foisted with the responsibility of exacerbation of the act of the Respondent as narrated to P.W.1, by her perhaps well intentioned mother, P.W.4.

9. The observation of the Learned Trial Court that other witnesses had not given evidence to enable conviction of the Respondent is superfluous as there were no eye witnesses to the incident. It is settled law that if the evidence of the witness is cogent, consistent and unwavering she qualifies as a sterling witness, upon whose evidence conviction of the perpetrator can be based. I am of the considered opinion that the witness P.W.3 is indeed a sterling witness.

10. In light of the aforementioned circumstances and the detailed discussions, the irresistible conclusion would be that the Respondent had sexually assaulted the minor victim.

11. The impugned Judgment of the Learned Trial Court is set aside being perverse/against the weight of evidence.

12. The Respondent is convicted under Section 9(m) of the POCSO Act punishable under Section 10.

13. Let the Respondent surrender before this Court by 02.00 p.m. today, for hearing on Sentence.

(Meenakshi Madan Rai)
Judge

23-05-2023

Approved for reporting : **Yes**