

# THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED : 30<sup>th</sup> November, 2022

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

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Crl.A. No.11 of 2021

**Appellant** : Suman Gurung

**versus**

**Respondent** : State of Sikkim

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

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## Appearance

Mr. Jorgay Namka, Senior Advocate (Legal Aid Counsel) for the Appellant.

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

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## J U D G M E N T

Meenakshi Madan Rai, J.

**1.** The Appellant was convicted of the offences under Section 376(2)(n) and Section 376(3) of the Indian Penal Code, 1860 (hereinafter, the "IPC"), with Section 5(j)(ii) and Section 5(l), punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter the "POCSO" Act), vide the Judgment dated 15-07-2021, in Sessions Trial (POCSO) Case No.07 of 2020, by the Court of Learned Special Judge (POCSO), West Sikkim, at Gyalshing.

**2.** The Order on Sentence dated 16-07-2021, meted out the following to the Appellant;

"a. For commission of the offence under Section 376(2)(n), IPC, 1860, the convict is sentenced to undergo RI of the minimum sentence prescribed, of a term of 10 years and to pay a fine of Rs.5,000/-. In

default of payment of fine, the convict shall undergo RI for one year.

b. for commission of the offence under Section 376(3), IPC, 1860 the convict is sentenced to undergo RI for the minimum sentence prescribed, of a term of 20 years and to pay a fine of Rs.10,000/-. In default of payment of fine, the convict shall undergo RI for two years.

c. for commission of offence as defined under Section 5(j)(ii) punishable under Section 6 of POCSO (Amendment) Act, 2019 the convict is sentenced to undergo RI for the minimum sentence prescribed, of a term of 20 years and to pay a fine of Rs.10,000/-. In default of payment of fine, the convict shall undergo RI for two years.

d. for commission of offence as defined under Section 5(l) punishable under Section 6 of the POCSO (Amendment) Act, 2019, the convict is sentenced to undergo RI for the minimum sentence prescribed, of a term of 20 years and to pay a fine of Rs.5,000/-. In default of payment of fine, the convict shall undergo RI for one year.

6. All of the above sentences shall run concurrently. However, the period of sentence already undergone by the convict during investigation and trial shall be set off against this sentence of imprisonment as provided under Section 428, Cr.PC, 1973.

7. The fine paid shall be paid to the victim to meet the medical expenses incurred during the pregnancy and birth of the child by the victim and for her rehabilitation, as provided under sub-section (2) of Section 6 of the POCSO (Amendment) Act, 2019."

**3.** The limited challenge in this Appeal is to the length of incarceration meted out to the Appellant by the Learned Trial Court under the various provisions of law for which he was convicted. Learned Senior Counsel for the Appellant submits that he does not assail the Judgment of conviction but is only aggrieved by the Sentence handed out to the Appellant which is inequitable and harsh, considering that a child was born from the relationship as proved by Exhibit 19. That, the child and the mother the alleged victim, are suffering on account of the absence of the care and protection of the Appellant as presently there is no one to provide for them. That, infact both, the Appellant then aged twenty seven years and the victim who was sixteen years, were in love and the

sexual act was consensual but the case arose only on account of the First Information Report (hereinafter, the "FIR"), Exhibit 7, that the father of the victim lodged, complaining of sexual assault on his daughter. Learned Senior Counsel for the Appellant sought for a reduction of the sentence to mitigate the sufferings of the victim.

**4.** Learned Public Prosecutor for the State-Respondent objected to the contentions put forth by Learned Senior Counsel for the Appellant on grounds that only the minimum sentence prescribed by law has been imposed, apart from which, consent of a minor is no consent and the submissions deserve an outright rejection.

**5(i).** Having heard Learned Counsel for the parties it would be apposite to remark here that the Hon'ble Supreme Court in a plethora of cases has laid down that the minimum sentence prescribed by the statute has to be imposed on the guilty and cannot be reduced.

**(ii)** In *Mohd. Hasim vs. State of Uttar Pradesh and Others*<sup>1</sup>, the Hon'ble Supreme Court in Paragraph 19 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*<sup>2</sup> and *Ratan Lal Arora*<sup>3</sup>. 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 discretion includes the discretion

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<sup>1</sup> (2017) 2 SCC 198

<sup>2</sup> (1974) 4 SCC 222

<sup>3</sup> (2004) 4 SCC 590

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.

**(iii)** In *Harendra Nath Chakraborty vs. State of West Bengal*<sup>4</sup>, the Hon'ble 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 vs. Prem Sagar*<sup>5</sup>. 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."

**6.** In light of the provisions of law, the principles of law enunciated and extracted above and having duly perused and considered the Sentences imposed by the Learned Trial Court, it is evident that only the minimum imprisonment prescribed by the Statute has been meted out by the Learned Trial Court to the Appellant. Any Order of this Court cannot fly in the face of the Statute or the settled position of law.

**7.** Consequently, the prayers of the Appellant cannot be considered and are thereby rejected.

**8.** The Appeal is dismissed and disposed of accordingly.

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<sup>4</sup> (2009) 2 SCC 758

<sup>5</sup> (2008) 7 SCC 550

- 9.** Pending applications, if any, stand disposed of.
- 10.** No order as to costs.
- 11.** Copy of this Judgment be forwarded to the Learned Trial Court along with its records.

**( Bhaskar Raj Pradhan )**  
**Judge**  
30-11-2022

**( Meenakshi Madan Rai )**  
**Judge**  
30-11-2022

Approved for reporting : **Yes**