THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Dated : 7th April, 2025

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

Crl. A. No.05 of 2024

Appellant : Bikash Rai

versus

Respondent : State of Sikkim

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

Appearance

Mr. Safal Sharma, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Shakil Raj Karki, Additional Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. Two minor girls aged about nine years and twelve years respectively are said to be the victims of sexual assault, allegedly perpetrated on them by the Appellant, a thirty-one year old male, on 02-07-2021. The Court of the Learned Special Judge (POSCO Act, 2012), Gangtok, Sikkim, having conducted and completed the trial, found the Appellant guilty of the offences under Section 7, punishable under Section 8 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POSCO Act") and under Section 9(m) punishable under Section 10 of the POCSO Act, vide the impugned Judgment dated 29-11-2023, in ST (POCSO) Case No.40 of 2021 (*State of Sikkim* vs. *Bikash Rai*). On 30-11-2023, the impugned Order of Sentence was pronounced directing the Appellant to undergo rigorous imprisonment for a period of five years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only, for the first offence (*supra*) and to undergo

rigorous imprisonment for a term of seven years and pay a fine of ₹ 5,000/- (Rupees five thousand) only, for the latter offence (*supra*). Both sentences of fine bore default stipulations.

2. Aggrieved thereof, the Appellant is before this Court. Learned Counsel for the Appellant argued that there are contradictions in the evidence of the victims, PW-1 and PW-2, thereby rendering their testimonies as unreliable. PW-1 did not state that after the arrival of PW-2 at her residence, the Appellant did anything untoward to her, neither did she tell PW-2 on her arrival that, the Appellant had touched her anywhere on her person. She merely narrated to PW-2 that the Appellant had chased her around the house. PW-2 however not only deposed that the Appellant grabbed her shoulder and put his hand on her chest on two occasions but that he did so even to PW-1, who however has not mentioned such fact in her deposition. That, PW-1 in her evidence to PW-7 has exacerbated the facts by telling PW-7 that the Appellant had also touched her shoulder, thus in view of the anomalies pointed out, their evidence not being of sterling quality, ought to be rejected. Besides, one *Sxxxxxx didi* to whom both PW-1 and PW-2 allegedly narrated the incidents was not furnished as a Prosecution witness, casting doubts on the Prosecution version. The Appellant, for his part furnished DW-1 as an alibi to establish that both of them were working together during the entire day, constructing a water channel, in the same village and hence the Learned Trial Court was in error in disbelieving the evidence of DW-1, merely on the ground that two other men said to have been working alongside the Appellant and DW-1 were never brought as witnesses by the Appellant. It was ultimately urged by Learned Counsel that, the Prosecution has

failed to establish that there was any sexual intent behind the alleged touching of the victims by the Appellant on the relevant day. The medical evidence of the victims and the Appellant too, are devoid of any proof of sexual assault and the Appellant for all the grounds enumerated hereinabove may be acquitted, duly setting aside the impugned Judgment of conviction and Order on Sentence.

3. Contesting the arguments *supra*, Learned Additional Public Prosecutor contended that the evidence of PW-1 and PW-2 are corroborated by the evidence of PW-3 and PW-4, the father and the mother of the minor victim PW-1. That, the evidence of DW-1 also established that, the Appellant was not with him constantly at the construction site of the water channel and the incident occurred at around 01.00 p.m. apparently when the Appellant went for lunch. There is no error in the finding of the Learned Trial Court and the impugned Judgment and Order on Sentence require no interference, hence the Appeal be dismissed.

4. The arguments were heard *in extenso* and all documents and evidence on record perused. The facts briefly stated are that, on 03-07-2021, at 0015 hours, PW-3 the father of PW-1 lodged Exbt-3, the FIR, informing therein that the Appellant had sexually assaulted his minor daughter, aged about nine years at his house (PW-3's) and later when the second victim, PW-2, also arrived there, she too was sexually assaulted by the Appellant. On completion of investigation and submission of Charge-Sheet against the Appellant under Section 10 of the POCSO Act, the Learned Trial Court framed Charge against the Appellant under Section 9(m) punishable under Section 10 of the POCSO Act, under Section 7 punishable under Section 8 of the POCSO Act and for two

counts under Section 11(i) punishable under Section 12 of the POCSO Act and two counts under Section 354 of the Indian Penal Code, 1860 (hereinafter, the "IPC"). The Appellant entered a plea of "not guilty" and claimed trial, following which the Prosecution examined thirteen witnesses including the Investigating Officer (IO) of the case. The Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C.") to enable him to explain the circumstances appearing against him and his responses recorded. He sought to examine one witness, DW-1. Thereafter, on hearing the final arguments, the Learned Trial Court pronounced the impugned Judgment of conviction and Order on Sentence having determined "Whether on 02-07-2021 around 01.00 p.m. the accused came to the house of the victim no.1 and molested both the victims with sexual intent? If so, whether the victims are minors within the meaning of Section 2(d) of the POCSO Act, 2012?"

(i) Answering both questions in the affirmative, the Learned Trial Court observed that the evidence of PW-1 and PW-2 finds corroboration with that of the other witnesses and the Appellant had indeed touched the victims with sexual intent. Both the victims were also found to be minors in terms of the age given in their respective birth certificates, being Exbt-1 and Exbt-2. The age of the victims is undisputed herein and thus this issue merits no further discussion.

(ii) The only question for consideration is whether the Learned Trial Court correctly arrived at the finding that both the victims had been sexually assaulted by the Appellant. It is in the evidence of both the witnesses that the Appellant was reeking of alcohol and seemed inebriated at the relevant time, in the house of

PW-3. PW-1 in no uncertain terms has stated that the Appellant put his hand on her body including her chest and her back and her cross-examination extracted the assertion that, it was not done by him in an affectionate manner. It was her categorical statement that the touch of the Appellant was a "bad touch". That apart, he also urinated in the toilet in front of her (PW-1), while leaving the door ajar.

(iii) PW-2 for her part substantiated the evidence of PW-1 that the Appellant appeared to be in an inebriated condition. The Appellant grabbed PW-2 by her shoulder and put his hand on her chest to which she responded by hitting him with her elbow. He nevertheless repeated the act and did the same to PW-1. They accordingly informed one "*didi*", who lives near the house PW-1, who advised them to tell the mother of PW-1. On their narration of the incident to PW-3 and PW-4 the parents of PW-1, it was reported to the Police, subsequently by PW-3.

5. Having given meticulous consideration to the evidence on record, I see no reason to doubt the evidence of the minor witnesses, besides the sexual intent is explicit from the body parts of the two minor girls, including their chest that the Appellant groped. PW-1 is clear about the fact that the touch was a "bad touch". The evidence of both witnesses who faced the ordeal of a drunken adult groping them, supports each other and in my considered view there is no exacerbation of the events when they have narrated it to PW-3, PW-4 and PW-7. The minor discrepancies pointed out by Learned Counsel for the Appellant do not go to the root of the Prosecution case to render it unbelievable.

(i) In this context, it is worthwhile noticing that the Supreme Court in ***Kuriya and Another*** vs. ***State of Rajasthan***[1] has held that;

> **"30. This Court has repeatedly taken the view that the discrepancies or improvements which do not materially affect the case of the prosecution and are insignificant cannot be made the basis for doubting the case of the prosecution. The courts may not concentrate too much on such discrepancies or improvements. The purpose is to primarily and clearly sift the chaff from the grain and find out the truth from the testimony of the witnesses. Where it does not affect the core of the prosecution case, such discrepancy should not be attached undue significance**. The normal course of human conduct would be that while narrating a particular incident, there may occur minor discrepancies. Such discrepancies may even in law render credential to the depositions. The improvements or variations must essentially relate to the material particulars of the prosecution case. The alleged improvements and variations must be shown with respect to material particulars of the case and the occurrence. Every such improvement, not directly related to the occurrence, is not a ground to doubt the testimony of a witness. The credibility of a definite circumstance of the prosecution case cannot be weakened with reference to such minor or insignificant improvements. Reference in this regard can be made to the judgments of this Court in *Kathi Bharat Vajsur* v. *State of Gujarat* [(2012) 5 SCC 724 : (2012) 2 SCC (Cri) 740] , *Narayan Chetanram Chaudhary* v. *State of Maharashtra* [(2000) 8 SCC 457 : 2000 SCC (Cri) 1546], *Gura Singh* v. *State of Rajasthan* [(2001) 2 SCC 205 : 2001 SCC (Cri) 323] and *Sukhchain Singh* v. *State of Haryana* [(2002) 5 SCC 100 : 2002 SCC (Cri) 961]**."** **(emphasis supplied)**

(ii) That, having been taken into consideration, the evidence of DW-1 is indicative of the fact that although the Appellant and he were engaged together in constructing a water channel in a nearby site, nonetheless it was his admission that they were not consistently together while doing the chore. Admittedly, the Appellant is an alcoholic and drinks in the afternoon as well. The observation of the Learned Trial Court that the sole testimony of DW-1 cannot be believed as other two men who were reportedly working with them were never examined may be an erroneous ground for disregarding the evidence of DW-1, however it is also

[1] (2012) 10 SCC 433

true that the evidence of DW-1 fails to inspire the confidence of this Court, to rely on it wholly, for the reason that the witness was admittedly not aware of the whereabouts of the Appellant the whole time that they were working.

6. In light of the aforementioned grounds, I find no reason to differ with the findings of the Learned Trial Court in the impugned Judgment and consequently the Order on Sentence. Both are accordingly upheld.

7. Appeal is dismissed and disposed of accordingly.

8. No order as to costs.

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

(Meenakshi Madan Rai)
Judge
07-04-2025

Approved for reporting : **Yes**

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