

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

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Criminal Appeal No. 17 of 2018

Raju Prasad
S/o Shri Sambu Ram,
R/o Rangpo,
East Sikkim.

.... Appellant

versus

State of Sikkim

.... Respondent

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

Appearance:

Mr. U. P. Sharma, Legal Aid Counsel assisted by Mr. Mahendra Thapa and Mr. Kushan Limboo, Advocates for the Appellant.

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

J U D G M E N T (O R A L)
(04.03.2019)

Bhaskar Raj Pradhan, J

1. Heard. This is an appeal filed by the Appellant against his conviction under Section 9(m) of the Protection of Children from Sexual Offences Act, 2012 (the POCSO Act, 2012) and sentence under Section 10 thereof vide judgment dated 21.05.2018 and order on sentence dated 22.05.2017 (sic) signed on 22.05.2018. The Appellant has been sentenced to simple imprisonment for a period of 5

years and to pay a fine of Rs.1000/-. In default of payment of fine, the Appellant is required to undergo further simple imprisonment of one month. The period of imprisonment already undergone by the Appellant during investigation and trial is required to be set off against the sentence imposed.

2. Mr. U.P. Sharma, learned Legal Aid Counsel for the Appellant would urge three grounds in the present appeal. Firstly, that the learned Special Judge erred in passing the impugned judgment on the basis of a statement of the minor victim (P.W.1) recorded under Section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) (exhibit-6) and the preliminary examination (exhibit-7) of the minor victim as the contents of two are contradictory to her deposition in Court. Secondly, that the learned Special Judge failed to take into consideration the fact that prosecution withheld vital and independent witnesses like the driver, one Simon Rai of the Bolero vehicle from which the friends of the victim had seen the Appellant hugging the victim and another driver-Sudhir Tamang who helped the friends of minor victim rescue her from the Appellant and the juvenile in conflict with law. Finally, Mr. U.P. Sharma would also urge that the learned Special Judge had erred in convicting the Appellant under Section 9(m) of the POCSO Act, 2012 alone when he had been charged under Section 9(m) of the POCSO

Act read with Section 34 of the Indian Penal Code, 1860 (IPC, 1860).

3. This Court shall examine each of the three grounds raised by the learned Counsel for the Appellant. Before that however, certain uncontroverted facts must be stated.

4. The First Information Report (FIR) was lodged on 07.03.2017 by the uncle (P.W.2) of minor victim after being informed by her school friends about the alleged incident. The investigation pursuant to the (FIR) resulted in a charge-sheet being filed on 05.04.2017. On examination of the charge-sheet and hearing the learned Counsels four charges were framed by the learned Special Judge on 16.08.2017 under Section 9(m) of the POCSO Act, 2012 punishable under Section 10 thereof read with Section 34 of the IPC, 1860; under Section 354/34 of the IPC, 1860; under Section 363/34 of the IPC, 1860 and Section 342/34 of the IPC, 1860.

5. The indictment against the Appellant was that on 07.03.2017 at around 1630 hours the Appellant along with another, in furtherance of their common intention with sexual intent made physical contact with the minor victim, aged about 11 years and thereby committed the offence under Section 9(m) of the POCSO Act, 2012 punishable under Section 10 thereof.

6. In order to prove the charges the prosecution examined 24 witnesses. The defence did not lead any evidence. An opportunity to explain the circumstances appearing in the evidence against the Appellant was granted to the Appellant by the learned Special Judge on 07.05.2018. Ultimately, the learned Special Judge thought it fit to convict the Appellant under Section 9(m) of the POCSO Act, 2012 only. The prosecution has not assailed the acquittal of the Appellant on the other charges framed by the learned Special Judge. The prosecution having found the other person in the vehicle in which the assault was said to have taken place to be a juvenile filed the present charge sheet only against the present Appellant.

7. There is no argument regarding the minority of the victim. The learned Special Judge had satisfied herself about the same. Based on the birth certificate of the victim (exhibit-3), the evidence of Dr. Tsering Laden (P.W.16)-the Chief Medical Officer-cum-District Registrar of Birth & Death confirming the contents of the said birth certificate as well as the evidence of the Principal of the local English School (P.W.18) where the victim was studying during the period 2009 to 2013 from the records maintained in the school. The learned Special Judge has also confirmed the age of the minor victim at the time of the incident to be 11 years. There is no quarrel regarding this fact too.

8. The learned Special Judge while examining both oral as well as documentary evidence came to the conclusion that the prosecution has succeeded in establishing that the Appellant had committed aggravated sexual assault on the minor victim. The learned Special Judge also recorded that the juvenile in conflict with law was driving the Alto vehicle but could not find his active involvement in the incident. The learned Special Judge could not believe that the minor victim was forcibly pulled inside the vehicle but had no doubt that the Appellant had committed aggravated sexual assault on the minor victim.

9. The ground that the learned Special Judge has erred in passing the impugned judgment on the basis of the statement of the minor victim recorded under Section 164 Cr.P.C. (exhibit-6) and the preliminary examination of the minor victim (exhibit-7) as the contents of it are contradictory to her deposition in Court has no factual or legal basis. Primarily, exhibit-6 is the statement of a minor witness recorded under Section 164 Cr.P.C. and exhibit-7 is the preliminary examination of the said witness. They are not the statement and the questionnaire of the minor victim as submitted on behalf of the Appellant. A perusal of the statement recorded under Section 164 Cr.P.C. (exhibit-1) and the preliminary examination of the minor victim (exhibit-2) as well as her deposition reflects that the minor

victim has been firm on crucial facts that transpired on the relevant day. A perusal of the impugned judgment also does not reflect that the learned Special Judge has based her judgment solely on the statement of the minor victim recorded under Section 164 Cr.P.C and the questionnaire as sought to be urged both in the ground of appeal as well as during the oral submission before this Court.

10. The failure to examine the driver of the Bolero vehicle from where the friends of the victim had seen the Appellant hugging the minor victim or the failure to examine the other driver who helped the friends of the minor victim rescue her would also be of no consequence as the said friends have in fact been examined and they have all deposed what they saw. The examination of the two drivers would thus only be repetitive and it is settled that the prosecution has the flexibility to avoid repetitive witnesses. In any event the evidence of the minor victim on the crucial point of the Appellant having committed sexual assault on her stands firm and unimpeached.

11. The learned Special Judge has examined the provision of Section 7 of the POCSO Act, 2012 which defines “*sexual assault*”. She has come to the conclusion that sexual assault had been committed on the minor victim who was below the age of 12 years by the Appellant and thus he was guilty of having committed “*aggravated sexual assault*” as defined

under Section 9(m) of the POCSO Act, 2012. The Appellant has been found having himself committed sexual assault on the minor victim. The conviction of the Appellant under Section 9(m) of the POCSO Act, 2012 has been secured through direct evidence of the minor victim as well as other eye witnesses. The commission of the crime by the Appellant has been proved. Although the learned Special Judge had also charged the Appellant under Section 34 of the IPC, 1860 the Appellant has not been convicted under the said section as the learned Special Judge did not find active involvement of the juvenile in conflict with the law in the incident. However, the presence of the juvenile in conflict with the law along with the Appellant has been adequately and convincingly established. In the present case overt act has been attributed and proved against the Appellant and therefore merely because common intention with the juvenile in conflict with law is not proved it cannot be said that the Appellant could not have committed the offence under Section 9(m) of the POCSO Act, 2012.

12. The learned Special Judge has come to the conclusion about the facts as it transpired after examining the evidence of various witnesses, some of them direct witnesses. The minor victim has identified the Appellant. She has also deposed about the incident in fairly good detail. The minor victim has deposed about what transpired before and after

the incident. She has provided not only the names of the witnesses regarding the incident as well as the locations. The minor victim has categorically deposed that the Appellant forcibly kissed her in the second seat of the Alto vehicle. On this crucial aspect the defence, besides a bald denial, has not been able to extract anything to demolish the same in cross-examination. The narration of facts deposed by the minor victim has been corroborated by her school mates present at the time of the incident and some just before and after the incident.

13. The first informant (P.W.2) is the uncle of the victim who also identified the Appellant as the person who used to drive an Alto vehicle in the locality. He deposed that the Appellant and his friend were brought by the senior students in a vehicle. The first informant (P.W.2) lodged the FIR on the basis of the information received from the said students.

14. P.W.3 is a minor student witness who had witnessed the Appellant hugging the minor victim inside the Alto vehicle. She identified the Appellant as the person hugging the minor victim inside the Alto vehicle. P.W.3 is the minor victim's class mate and was in the Bolero vehicle driven by her brother who gave lift to her and four of her friends on the relevant day. While on the way they saw the Alto vehicle and got suspicious as the minor victim had already narrated about how the Appellant had given her a lift and sprayed

perfume on her the day before. While crossing the said Alto vehicle they saw the Appellant hugging the minor victim in the second seat. After her brother stopped the Bolero she and her friends decided to rescue the minor victim and requested the gentleman near a shop to accompany them to the Alto vehicle. As they approached the Alto vehicle the man smoking outside immediately got into the vehicle and started to drive it. He stopped the vehicle after being asked by them to do so. When they opened the door the minor victim came out crying. The Appellant was in the second seat. Thereafter, they took the minor victim to her house.

15. P.W.4-a minor student witness of the same school also identified the Appellant as she had seen him on the date of the incident. She was also in the Bolero vehicle driven by the brother of P.W.3. P.W.4 corroborated the statement of P.W.3 about boarding the Bolero vehicle driven by the brother of P.W.3 and seeing the Appellant hugging the minor victim in the back seat of the Alto vehicle. P.W.4 also corroborated P.W.3's deposition about how they rescued the minor victim from the Appellant and the other person.

16. P.W.10 another minor senior student witness of the same school was also in the Bolero vehicle and corroborated the depositions of P.W.3 and P.W.4. She identified the Appellant. When she was returning home from school that day one student told her that a vehicle went ahead in which

the minor victim was travelling with two persons. Thereafter she also boarded the Bolero vehicle in which other students were also riding. She saw the Appellant and the minor victim in the second seat of the car when she went with the other students to the parked vehicle. She noticed that the buttons of the house shirt of the minor victim were torn when she came out of the second seat of the said vehicle.

17. P.W.11-a minor student witness of the same school also identified the Appellant as the man who she had seen in the car on the day of the incident when she was returning home along with the minor victim and another student. She was also one of the students who boarded the Bolero vehicle. She saw the Appellant and the minor victim sitting in the second seat of the Alto vehicle and another boy smoking outside. P.W.11 also narrated the same story as deposed by P.W.3, P.W.4 and P.W.10. When she opened the door of the second seat of the Alto car she saw the Appellant hugging the minor victim.

18. The cross examination of these prosecution witness has not destroyed the substratum of the prosecution case. Minor contradictions on peripheral facts do not demolish the central narrative. The identification of the Appellant as the person involved in the crime is certain. The minor victim has categorically deposed that the Appellant forcibly kissed her in the back seat of the Alto car. P.W.3, P.W.4 and

P.W.11 have categorically deposed having seen the Appellant hugging the minor victim in the back seat of the Alto car.

19. The crucial question is whether forcibly kissing the minor victim a girl child of 11 years of age and hugging her amounts to “*aggravated sexual assault*” as defined in Section 9(m) of the POCSO Act, 2012. Whoever commits sexual assault on a child below 12 years is said to have committed aggravated sexual assault. “*Sexual assault*” is defined in Section 7 of the POCSO Act, 2012. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault. The act of forcibly kissing the minor victim, a child below 12 years of age and hugging her in the back seat of a car in the absence of her guardian by a 27 year old male cannot but be with sexual intent. The act of forcibly kissing and hugging involves physical contact although without penetration. Thus it is cogent that the said act amounts to sexual assault. As the sexual assault was committed on a child below 12 years of age it amounts to aggravated sexual assault as defined under Section 9(m) of the POCSO Act, 2012.

Crl. Appeal No.17 of 2018
Raju Prasad v. State of Sikkim

20. After having examined the impugned judgment as well as hearing the learned Counsels this Court is of the firm view that the impugned judgement of conviction is sound and brooks no interference. Section 10 of the POCSO Act, 2012 mandates a punishment of imprisonment for a term which shall not be less than 5 years but which may extend to 7 years. The learned Special Judge has exercised her discretion to impose the minimum sentence in the facts of the present case which is perfectly justified. The order on sentence dated 22.05.2017 (sic) signed on 22.05.2018 in the circumstances is adequate.

21. The appeal is dismissed. The Appellant is in custody. He shall continue there until the sentence is served.

(Bhaskar Raj Pradhan)
Judge

04.03.2019

to/

Approved for reporting: yes.
Internet: yes.