

(2019) 12 SIK CK 0009
In the Sikkim High Court
Case No : Criminal Appeal No. 19 Of 2018

Lok Prasad Limboo @ Lokay

APPELLANT

Vs

State Of Sikkim

RESPONDENT

Date of Decision : 09-12-2019

Acts Referred:

Protection Of Children From Sexual Offences Act, 2012 — Section 2(d), 7, 8, 9(I), 10
Indian Penal Code, 1860 — Section 354
Code Of Criminal Procedure, 1973 — Section 154, 161, 164, 207, 313
Evidence Act, 1872 — Section 145

Citation : (2019) 12 SIK CK 0009

Hon'ble Judges : Meenakshi Madan Rai, J

Bench : Single Bench

Advocate : N.B. Khatiwada, Gita Bista, Anusha Basnet, S.K. Chettri

Final Decision : Allowed

Judgement

Meenakshi Madan Rai, J

1. In Sessions Trial (POCSO) Case No.13 of 2017 the Appellant faced trial under Section 7 and Section 9(I) of the Protection of Children from Sexual

Offences Act, 2012 (hereinafter, POCSO Act) and Section 354 of the Indian Penal Code, 1860 (hereinafter, IPC). Vide the impugned Judgment

dated 31-05-2018, the Appellant was convicted on two counts for the offence under Section 7 of the POCSO Act, Section 9(I) of the POCSO Act

and on two counts for the offence under Section 354 of the IPC. Consequently, he was sentenced to suffer simple imprisonment of four years on each

count of the offence under Section 7 of the POCSO Act with fine of Rs.30,000/- (Rupees thirty thousand) only, each, with default clauses of

imprisonment. For the offence under Section 9(I) of the POCSO Act, he was sentenced to undergo simple imprisonment for a period of five years and

to pay a fine of Rs.40,000/- (Rupees forty thousand) only, also with a default clause of imprisonment. On each count of the offence under Section 354

of the IPC, simple imprisonment for a period of four years and fine of Rs. 40,000/- (Rupees forty thousand) only, each, default clauses of

imprisonment were prescribed. The periods of imprisonment were ordered to run concurrently.

2. Dissatisfied with the impugned Judgment and Order on Sentence the Appellant is before this Court contending that in the first instance no evidence

determines that the victim was a minor as her Birth Certificate was not seized. Secondly, the victim complained of sexual assault on two occasions

and deposed that when the earlier incident occurred her brother had also accompanied her to the shop of the Appellant for some errand. P.W.5, her

brother however did not shed any light on this aspect in his evidence. It was next contended that when the first alleged sexual assault took place the

victim did not disclose it to any person neither did she reveal it in her statement under Section 164 of the Code of Criminal Procedure, 1973 (for short,

Cr.P.C.) to the Learned Magistrate and came to light for the first time in her evidence before the Court, thereby reeking of falsity. That, the evidence

of the victim indicates a motive to falsely implicate the Appellant as she had stated that her uncle P.W.3 and the Appellant did not share cordial

relations. It was urged that prior to the alleged incident the victim frequented the shop of the Appellant but no such incident had ever been complained

of. That, in all likelihood she was tutored by her uncle and aunt to depose against the Appellant when she went to record her statement under Section

164 Cr.P.C. That, the victim's case is that she had gone to the shop of the Appellant at 7 p.m. when infact his shop closes down at 6 p.m.,

revealing the intent of P.W.3 and P.W.4 to falsely implicate the Appellant by sending her after his shop closed. The Appellant, for his part has clearly

denied the allegations made against him in his responses under Section 313 Cr.P.C. The medical evidence does not support the Prosecution case,

accordingly the case not having been proved beyond a reasonable doubt, the Appellant deserves an acquittal.

3. Learned Assistant Public Prosecutor refuting the contentions so advanced, argued that no doubt arises on the age of the victim, since Exhibit 9, the

Admission Register of the School in which she was admitted, was produced in evidence before the Learned Trial Court and proved. That, the

victim's name and date of birth is recorded therein and the Headmistress of the School, P.W.10, has vouched for the authenticity of the entries by

her evidence and issuance of a Certificate Exhibit 10. The incident took place on 27-06-2017, hence the victim was a minor in terms of the POCSO

Act her date of birth being 02-10-2000. The victim has categorically described the sexual assault perpetrated on her by the Appellant. That, in his

response to Question no.4 of the Section 313 Cr.P.C. statement, the Appellant admitted that the victim had indeed come to his shop to purchase

biscuits. That, this statement itself confirms the victim's presence at the place of occurrence. Hence, in view of the evidence furnished by the

Prosecution no requirement arises to interfere with the impugned Judgment and Order on Sentence.

4. The rival submissions of Learned Counsel have been heard at length and duly considered, all evidence and documents as also the impugned

Judgment have been duly perused and carefully considered.

5. The questions that fall for consideration before this Court is (i) whether the alleged incident indeed took place and (ii) whether the impugned

Judgment is sustainable in its entirety, the Appellant having been convicted on two counts of Section 7 of the POCSO Act and on two counts of

Section 354 of the IPC, sans FIR in the first incidents alleged.

6. In this regard, we may first look into the facts of the case. On 27-06-2017, P.W.3, the maternal uncle of the victim lodged an FIR, Exhibit 4, before

the Mangan Police Station, at around 2200 hours, informing therein that on the same date, at around 1900 hours, his niece the victim had gone to

purchase biscuits from the shop of the Appellant. She returned home crying and reported that the Appellant had sexually assaulted her by fondling her

breasts at his shop. P.W.3 and his wife along with their son went to confront the Appellant at his house, who attempted to compromise the matter by

offering them 'Khadas' (ceremonial silk scarf) and money. P.W.3 reported the matter to the local Panchayat and on being so advised by him, to

the Police. Based on the FIR, Mangan P.S. Case dated 27-06-2017, under Section 8 of the POCSO Act was registered against the Appellant. During

investigation it transpired that the victim was living with her aunt and uncle, the Appellant was their neighbour. In sum and substance investigation

revealed the sexual assault on the victim as complained in Exhibit 4. The victim

in her Section 164 Cr.P.C. statement stated that the Appellant had previously also fondled her breasts near his residence when she was studying in Class VII but she did not reveal the incident to anyone for fear of being disbelieved considering her young age. Charge-Sheet was submitted under Sections 8 and 10 of the POCSO Act against the Appellant. The Learned Trial Court framed Charge as reflected in the impugned Judgment. On his plea of "not guilty" the trial commenced, where the prosecution examined sixteen witnesses. On consideration of the evidence, the impugned Judgment and Order on Sentence came to be pronounced.

7. While addressing the first question formulated, I have examined the contents of Exhibit 9 the School Admission Register. The contents therein have been vouched for by P.W.10 Headmistress of the School. She identified Exhibit 9(a) as the entry pertaining to the victim. Exhibit 10 as the Certificate issued by her certifying therein that the date of birth of the victim as per Exhibit 9 was "02-10-2000". P.W.10 deposed that the minor victim had been admitted in their School in the pre-Primary Section on 21-02-2005 and left School in 2016. Considering the contents of the document no ambiguity whatsoever concerning the age of the victim exists. Consequently, it is found that the victim was a minor when the incident took place and a child as defined under Section 2(d) of the POCSO Act.

8. The victim before the Learned Trial Court had stated that when she was in the 7th standard her brother and herself had gone to the shop of the Appellant to reach some "bajri" and sand. When her brother went to drink water, the Appellant suddenly put his hands on her breasts. Her cross-examination elicited the fact that this incident went unreported by her, either to her family or any authority. Pausing here momentarily it may be remarked that an FIR was lodged in the matter consequently no investigation ensued. She then narrated the incident that took place on 27-06-2017.

She categorically stated that the Appellant fondled her breasts and on her resistance he left her upon which she ran home and reported the incident.

That, she and her family rejected the offer of compromise by the Appellant when she and P.W.3 and P.W.4 confronted him. The statements made by

the victim withstood the test of cross-examination. The evidence of P.W.3 would substantiate the Prosecution case pertaining to the lodging of the

FIR, he also corroborated the evidence of the victim which found further

corroboration in the deposition of P.W.4. P.W.5 was the brother of the victim who was present when they confronted the Appellant. His evidence corroborated the evidence of P.Ws 2, 3 and 4. P.W.6 was witness to the seizure of two Khadas and 10 number of Rs.500/-(Rupees five hundred) notes, from the Appellant at the Mangan Police Station. P.W.7 was a neighbour of the minor victim and went to the Appellant's house on hearing a commotion, he witnessed the Appellant offering Khadas to the minor victim and her family members on the relevant night in the Appellant's house. The Panchayat, P.W.13, vouched for the fact that P.Ws 2, 3 and 4 had come to his residence informing him about the said sexual assault upon which he instructed them to report the matter to the Police.

Although P.W.8 the Gynaecologist, who medically examined the victim stated that on examining the breasts of the victim she found no injury either there or on the person of the victim. No contradiction emanates in her statement and the Prosecution case as the victim has made no allegation of use of violence by the Appellant or of penetrative sexual assault. Her evidence is that he had fondled her breasts for which obviously unless violence was used there would be no signs of the assault. However, the statement of the victim with regard to the sexual assault on her on 27-06-2017 is consistent, cogent and reliable. As pointed out by Learned Assistant Public Prosecutor it is clear from the response to the question put to him under Section 313 Cr.P.C. statement the Appellant has admitted that the victim had come to his shop to purchase biscuits. Sexual assault includes touching of the private parts and the breasts of a child with sexual intent and involves physical contact without penetration. On the touchstone of this definition, it is obvious that since the Appellant touched the breasts of the victim no other conclusion can be drawn from the act except that it was with sexual intent. It is found from the evidence on record that the Prosecution has proved its case beyond a reasonable doubt based on the anvil of the statement of the victim and the supporting witnesses.

9. Dealing with the second question it may be recapitulated here that this Court in *Taraman Kami vs. State of Sikkim* and *State of Sikkim vs. Taraman*

Kami SLR (2017) Sikkim 781 had considered a similar question. The question that fell for consideration therein inter alia was (i) whether the Appellant

can be convicted and sentenced for an alleged offence against a Victim,

enumerated hereinabove. Thus, in the instant case, if the I.O. had during investigation stumbled upon an offence of like nature committed by the Appellant, against P.W.3, it was his bounden duty to record the facts stated by the person, treat it as a Complaint under Section 154 of the Cr.P.C., register a fresh Complaint and carry out investigation into the matter, the alleged offence against P.W.3 being independent of the offence perpetrated on P.W.4. Under no circumstances can he adopt a short cut route, foregoing legal provisions and file a Charge-Sheet on the basis of a Section 161 Cr.P.C. statement of a witness. At best, Section 161 Cr.P.C. statement of a witness can be used by either party for contradictions or omissions when the witness adduces evidence before a Court and is never to be considered as substantive evidence. In such a situation also, when the person makes contradictory statements either before different fora or at different stages of a matter, if his statement is sought to be contradicted his attention should be called to those parts which are to be used for contradicting him as provided in Section 145 of the Evidence Act, 1872. The provisions of law have to be comprehended by the I.O., who is then to proceed in terms perspicuously set out thereof. The accused for his part is entitled to know the contents of an FIR which connect him with the offence to enable him to protect his interest.

14. In Youth Bar Association of India vs. Union of India and Others MANU/SCOR/18594/2016 the Hon'ble Supreme Court while issuing directions to the States to upload each and every FIR registered in all the Police Stations within the territory of India in their official website, observed, inter alia, that;

â??12.

(a) An accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C.

(b) An accused who has reasons to suspect that he has been roped in a criminal case and his name may be finding place in a First Information Report

can submit an application through his representative/agent/ parokar for grant of a certified copy before the concerned police officer or to the

Superintendent of Police on payment of such fee which is payable for obtaining such a copy from the Court. On such application being made, the copy

shall be supplied within twenty-four hours.

(c) Once the First Information Report is forwarded by the police station to the concerned Magistrate or any Special Judge, on an application being filed for certified copy on behalf of the accused, the same shall be given by the Court concerned within two working days. The aforesaid direction has nothing to do with the statutory mandate inhered under Section 207 of the Cr.P.C.

.....

(h) In case a copy of the FIR is not provided on the ground of sensitive nature of the case, a person grieved by the said action, after disclosing his identity, can submit a representation to the Superintendent of Police or any person holding the equivalent post in the State. The Superintendent of Police shall constitute a committee of three officers which shall deal with the said grievance. As far as the Metropolitan cities are concerned, where Commissioner is there, if a representation is submitted to the Commissioner of Police who shall constitute a committee of three officers. The committee so constituted shall deal with the grievance within three days from the date of receipt of the representation and communicate it to the grieved person.

.....â??

The above ratio emphasises the importance of an FIR in a criminal offence, in the absence of which an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case. Thus, in view of the gamut of discussions which have taken place hereinabove, it concludes that the answer to the first question is in the negative.â??

Although the accused herein is the same person alleged to have committed the offence on an earlier occasion, when an offence was revealed in her

Section 161 Cr.P.C. statement the Investigating Officer was required to take steps as necessitated by law.

10. The Judgment supra of the Division Bench of this Court appears to have escaped the noticed of the Learned Trial Court.

11. Thus, sans FIR and investigation the Appellant cannot be convicted for the alleged previous offence.

12. Hence, the conviction of the Appellant on the first count for the offence under Section 7 of the POCSO Act and the first count under Section 354

of the IPC is set aside.

13. The conviction for the offence under Section 9(l) of the POCSO Act, i.e., for repeated sexual assault, is set aside and he is acquitted of the said offence.

14. The Appellant stands convicted on one count for the offence under Section 7 of the POCSO Act and one count for the offence under Section 354 of the IPC.

15. He is accordingly sentenced to undergo simple imprisonment of four years and to pay a fine of Rs.30,000/- (Rupees thirty thousand) only, under

Section 7 punishable under Section 8 of the POCSO Act. In default thereof further simple imprisonment of three months. He shall undergo simple

imprisonment for a period of four years and pay a fine of Rs.40,000/- (Rupees forty thousand) only, under Section 354 of the IPC. In default, further simple imprisonment of three months.

16. The Appeal is allowed to the extent above.

17. The order pertaining to compensation in terms of The Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016, warrants no interference.

18. No order as to costs.

19. Copy of this Judgment be forwarded to the Learned Trial Court for information.