

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 23rd November, 2022

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

Crl.A. No.12 of 2021

Appellant : Thutop Namgyal Bhutia @ Aku Namgyal

versus

Respondent : State of Sikkim

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

Appearance

Ms. Gita Bista, Advocate with Ms. Anusha Basnet and Pratikcha Gurung, Advocates for the Appellant.

Mr. S. K. Chettri, Additional Public Prosecutor with Mr. Shakil Raj Karki, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Appellant is aggrieved by the impugned Judgment which convicted him of the offence under Sections 376 and 354 of the Indian Penal Code, 1860 (for short "IPC"), in Sessions Trial (POCSO, Act) Case No.04 of 2021, dated 28-08-2021. He was sentenced to undergo imprisonment for a period of 10 (ten) years under Section 376 of the IPC, with fine of Rs.5,000/- (Rupees five thousand) only, and a default clause of imprisonment, vide Order on Sentence dated 31-08-2021. No sentence was imposed upon the convict under Section 354 of the IPC, in view of the provisions of Section 220(5) of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C.") read with Section 71 of IPC.

2(i). The Prosecution case is founded on Exhibit 9, the FIR dated 06-04-2021, lodged by P.W.9, the District Child Protection

Officer (DCPO) of the area concerned, informing therein that the victim P.W.10, Prosecutrix No.1 (hereinafter, "P.W.10") on 05-04-2021, during counselling, revealed that in the year 2019 at the time of her cousin's death, the Appellant committed aggravated penetrative sexual assault on her and her cousin P.W.1, Prosecutrix No.2 (hereinafter, "P.W.1") in his room, at their residence. Between the period January, 2021 up to 30th March, 2021, another person also sexually assaulted her by touching her private part, kissing her and threatening her with dire consequences if she reported the assault. FIR was registered against the Appellant and the second assailant, Pema Tshering Bhutia.

(ii) In the instant matter, we are dealing only with the allegation against the Appellant, the Appeal having been filed by him.

(iii) Investigation revealed a *prima facie* case against the Appellant under Section 376 of the IPC read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") for having committed the offences against the minor victims P.W.10 and P.W.1. Charge-Sheet came to be submitted accordingly. The Learned Trial Court framed Charge against the Appellant under Section 5(m) punishable under Section 6 of the POCSO Act and under Section 376 read with Section 354 of the IPC. The Prosecution examined 21 (twenty one) witnesses on the Appellant having entered a plea of "not guilty" to the offences that he was charged with. On closure of Prosecution evidence, the Appellant was examined under Section 313 of the Cr.P.C., in which he denied the occurrence of the alleged incidents and acts.

3. Learned Counsel for the Appellant argued that in the first instance the age of the victims have not been proved. The Learned Trial Court in the impugned Judgment has concluded that although Exhibit 3 the Birth Certificate of P.W.10 and Exhibit 4 the Birth Certificate of P.W.1 were furnished, the Prosecution failed to establish their age. That, this finding has not been assailed by the State-Respondent before this Court. That, the Section 164 of the Cr.P.C. statement of P.W.1 and P.W.10 being Exhibit 2 and Exhibit 14 respectively, vary from the statements made by them before the Court, which, exacerbates the alleged acts of the Appellant, rendering the alleged victims as unreliable witnesses. That, the Section 164 Cr.P.C. statement of the P.W.1 does not reveal any penetrative sexual assault contrary to her assertion of such act in her deposition before the Court. That, the evidence of P.W.10 before the Court is in contradiction to that of P.W.1, since, according to P.W.10, she had peeped into the room of the Appellant and seen P.W.1 being undressed by the Appellant after which he committed penetrative sexual assault on P.W.1. That, he then called P.W.10 to his room and in the presence of P.W.1 undressed her and also committed penetrative sexual assault on her. Conversely, P.W.1 deposed that she and P.W.10 were together called by the Appellant to his room where he kissed both of them and thereafter inserted his private part into her vagina and into the private part of P.W.10. That strangely, it is the allegation of P.W.1 that after commission of the offence the Appellant undressed both of them. That, there are anomalies with regard to the date of incident. As per P.W.1, it may have been in the year 2018/2019, while according to P.W.10, the incident took place

when her cousin passed away, but she gave no date or year of incident. That, assuming that the incident took place on the demise of their cousin, P.W.10 has specifically under cross-examination admitted that when the incident allegedly took place several persons were in the house performing 'Puja' in the Altar room. P.W.1 has substantiated this aspect by her evidence. That, in such circumstances, it would be inconceivable for the Appellant to commit the offences as alleged by P.W.1 and P.W.10 in his room which, according to P.W.1, is located in the ground floor, near the kitchen, where entry and exit of people would have been incessant, considering the bereavement in the house. That, it is also the evidence of P.W.1 that the Appellant did not bolt the door to his room when she was called by him, thereby making the entire Prosecution story unbelievable. The Prosecution has failed to explain the delay in the lodging of the FIR only on 06-04-2021, when the incident is alleged to be of 2019. It was next urged that, as per P.W.9, P.W.10 came to the Police Station on 05-04-2021, if that be so the question arises as to how the offence was one of 2019. In Exhibit 7, the Counselling Report of P.W.10, she does not reveal any threat held out to her by the Appellant and the statement regarding threat was added by P.W.10 only during her evidence in Court. The Prosecution story being rife with anomalies, the impugned Judgment of Conviction and Order on Sentence be set aside.

4. While contending that the Learned Trial Court had not erred in arriving at its finding of conviction, the Learned Public Prosecutor relied on the evidence of P.W.1 and P.W.10 which, according to him, unwaveringly indicated the acts of aggravated

sexual assault committed by the Appellant on the two minor victims. Admittedly, there was no appeal against the findings of the Learned Trial Court pertaining to the age of the victims, consequently it is not being questioned or contested herein. That, the evidence of P.W.9 is also supportive of the Prosecution case as she was the first person that the victims confided in after the incident. That, there is no reason to doubt the evidence of the victims which is supported by the medical report of the Doctor P.W.17 who at Exhibit 23 and the Doctor P.W.8 who at Exhibit 6, have found that the hymen of both the victims were ruptured although signs of fresh injuries on both the victims were absent. The investigation of P.W.21, the I.O., in tandem with the other witnesses clearly points to the guilt of the Appellant, hence the assailed Judgment and Order on Sentence may not be disturbed.

5. The rival contentions of Learned Counsel were heard *in extenso* and the evidence and documents scrutinised carefully.

6. The question that requires determination is; Whether the Learned Trial Court was correct in arriving at a finding that the Appellant had committed the offence under Section 375 punishable under Section 376 and Section 354 of the IPC?

7(i). A perusal of the evidence in its entirety from P.W.1 to P.W.21 reveals that only P.W.1 and P.W.10, the victims, are aware of the alleged incidents, the other witnesses are merely hearsay witnesses. P.W.1 in her evidence-in-chief before the Court *inter alia* stated that;

“.....

..... It was day time, I along with my friend was called by the accused Thutop Namgyal Bhutia in his room of the said house and kissed me and my friend. Thereafter, accused inserted his private part in my vagina and in the private part of

my friend (prosecutrix no.1) on the same day (objected to). Accused also undressed both of us after commission of said offence. My friend (prosecutrix no.1.) went to the house of foster mother (Nxxx Kxxx) and reported the above incident to her. However, I did not report the said incident to my aunt who was residing up stair of same house as I was scared. Later, I was also interrogated by one Madam who resides near District Hospital Mangan, North Sikkim and I narrated the said incident to her.

.....”

(ii) In Exhibit 2, the Section 164 Cr.P.C. statement of P.W.1, contrary to her allegation of penetrative sexual assault committed on her by the Appellant, she has merely stated *inter alia* as follows;

“.....

I do not know the exact date, month and year however, it was when the brother of Nxxxxx had passed away, When we had returned to Mangan and when Nxxxx and myself were mopping the floor after food, Aku Namgyal called me and started kissing me on my lips, my neck and molested my chest. Then, he also touched my private part. Thereafter, I went and told my mom about the incident.

.....”

(iii) A comparison of the above statements is a clear revelation of the fact that P.W.1 has embellished her narration with additional allegations in her deposition before the Court.

(iv) Along with her evidence, it is essential to examine the evidence of P.W.8 Dr. Pandim Lepcha. On examination of the genital of the victim on 07-04-2021 she found that the hymen of the Prosecutrix was not intact, margins were healed, vaginal orifice was around 1 cm. in diameter and no signs of fresh injury. The incident allegedly took place in 2019 as per the history given by the alleged minor victim to P.W.8. The medical examination having taken place on 07-04-2021, obviously, there would be no signs of injury on the genital of the victim.

(v) That having been said, it concludes that on account of the highly embellished statement of P.W.1 in Court as against what she has stated in her Section 164 Cr.P.C. statement her evidence concerning the penetrative sexual assault on her by the Appellant requires to be and is accordingly disregarded. However, it does not rule out an offence under Section 354 of the IPC.

8(i). Next, we examine the evidence of P.W.10 in the instant matter. Her deposition with regard to the incident is as follows;

“.....

I know accused Thutop Namgyal Bhutia produced before this Court through V.C. When the incident of this case took place I was staying with with (sic) my foster parents at Mxxxx Bxxxx, North Sikkim. Accused Thutop Namgyal Bhutia used to reside with Oxxxx Lxxxx, his mother & father below my residence at Mangan Bazar, North Sikkim. Oxxxx Lxxxx is my aunt. The incident of this case took place when there was demise of my cousin but I do not know the date, month and year. It was after our arrival from school, after changing clothes I was sweeping floor & prosecutrix no.2 was cleaning table of aunt Oxxxx's house. It was at the relevant time prosecutrix no.2 was called by accused's Thutop Namgyal Bhutia in his room and I peeped from back side of the accused room and saw prosecutrix no.2 undressed by accused Thutop Namgyal Bhutia and pressed her breast, kissed her cheeks & neck and committing penetrative sexual assault (inserting the penis of the accused into vagina of prosecutrix no.2). Thereafter, I was called by accused Thutop Namgyal Bhutia in his room. Prosecutrix no.2 was also present there in the said place when I went in the room of accused. Thereafter, accused Thutop Namgyal Bhutia started undressing me and started kissing me, touched on my breast. He also committed penetrative sexual assault on me (inserting the penis of the accused into my vagina). I was also made to suck penis of accused (Thutop Namgyal Bhutia).

.....”

(ii) In her Section 164 Cr.P.C. statement, Exhibit 14, she has *inter alia* stated as follows;

“.....

I do not know the exact date, month and time however, it was when in the year 2019 when my brother Sumzuk had passed away and it was just about two days when I was mopping the floor, Aku

Namgyal caught hold of me and started kissing me on my lips and my chest. He then also inserted his private part (talam) inside my vagina and he also asked me to suck his private part. He then threatened me not to speak about the same with anyone. I then went to my cousin mummy Nima Keepu Bhutia and narrated the incident but, in vain.

.....
”

(iii) In sum and substance, her evidence before the Court and under Section 164 of the Cr.P.C. corroborate and has been consistent, sans exacerbations.

(iv) This victim was medically examined by P.W.17 Dr. Komol Pradhan, who prepared Exhibit 23, the medical report of P.W.10. After examination of the victim, she observed as follows;

”.....

On my genital examination, pubic hair not developed, vulva no abnormality detected, labia majora & minora no abnormality detected. Vestibule no abnormality detected. Fourchette no abnormality detected, hymen torn (healed margins means old injuries sustained by minor prosecutrix on her hymen). Vagina permits one finger easily. Perineum no abnormality detected.

.....”

(v) Based on her observation and clinical examination, the Doctor opined that previous signs of sexual intercourse were present, however, at the time of examination there were no signs of semen, bodily fluids, edema, foreign material seen over the private part of the Prosecutrix. The hymen was ruptured with healed margins. She also found that the vagina permits one finger easily.

(vi) On consideration of the evidence of the victim before the Court, her Section 164 Cr.P.C. statement and the examination by the Doctor as reflected hereinabove, it is evident that penetrative sexual assault on her has been proved. Her unwavering statement is that the Appellant is the perpetrator of

the offence and he was responsible for the penetrative sexual assault.

(vii) The cross-examination of the witnesses failed to decimate the Prosecution case. The argument concerning the absence of proof of the minor age of the victims needs no discussions as the Prosecution does not assail the finding of the Learned Trial Court on the subject.

(viii) Thus, although the Learned Trial Court observed that the Appellant was responsible for penetrative sexual assault on both P.W.1 and P.W.10, on consideration of the evidence discussed above, we conclude that the Appellant committed penetrative sexual assault on P.W.10 and outraged the modesty of P.W.1. Consequently, there is no reason for this Court to interfere with the finding of the Learned Trial Court that the Appellant had committed the offence punishable under Section 376 of the IPC on P.W.10. However, we differ from the finding that the offence under Section 376 of the IPC had also been committed on P.W.1 in view of her vacillating evidence which is thus unreliable. Accordingly, we find that the Appellant committed the offence under Section 354 of the IPC on P.W.1. The offence of Section 376 of the IPC would obviously bring within its ambit the offence under Section 354 IPC when the act pertains to the same incident. Hence, we find no reason to convict the Appellant under Section 354 of the IPC, for his offence against P.W.10.

9(i). The next concern of this Court is with regard to the evidence of both P.W.8 and P.W.17 the Doctors and the method of their medical examination. P.W.8 after examining the P.W.1 deposed *inter alia* that “..... vaginal orifice was around 1 cm in

diameter” and P.W.17 after examining P.W.10 has *inter alia* observed that “..... *Vagina permits one finger easily.*”. On this facet, the Supreme Court in ***Lillu alias Rajesh and Another vs. State of Haryana***¹ while discussing medical evidence conducted by the Doctors held that;

“**7.** So far as the two-finger test is concerned, it requires a serious consideration by the court as there is a demand for sound standard of conducting and interpreting forensic examination of rape survivors.

.....

13. In view of the International Covenant on Economic, Social, and Cultural Rights, 1966 and the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, 1985, the rape survivors are entitled to legal recourse that does not re-traumatise them or violate their physical or mental integrity and dignity. They are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety and there should be no arbitrary or unlawful interference with their privacy.

14. Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot ipso facto, give rise to a presumption of consent.”

(ii) The Supreme Court has clearly enunciated that the two-finger test is violative of the rights of the victims/rape survivors and medical practitioners are therefore to desist from such examination which affects the dignity of the individual. The observation of the Hon’ble Supreme Court being the law of the land

¹ (2013) 14 SCC 643

in binding and hence, there should be no tests as described above to repeatedly traumatise the victim.

10. So far as the question of sentencing is concerned, the Learned Trial Court has sentenced the Appellant under Section 376 of the IPC for ten years and fine and, no sentence was imposed under Section 354 of the IPC. In view of our findings the sentence against the Appellant under Section 376 of the IPC is not disturbed. However, he is sentenced to undergo simple imprisonment of 2 (two) years under Section 354 of the IPC for the offence committed by him against P.W.1. Both the sentences shall run concurrently.

11. Appeal disposed of accordingly.

12. No order as to costs.

13. Copy of this Judgment be forwarded to the Learned Trial Court for information, along with its records.

(**Bhaskar Raj Pradhan**)
Judge
23-11-2022

(**Meenakshi Madan Rai**)
Judge
23-11-2022

Approved for reporting : **Yes**