

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

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 2023

Lendup Lepcha aged about 36 years,
Son of late Lhatam Lepcha,
R/o Upper Lingzay, Upper Dzongu, Sikkim.

Presently lodged at Rongyek Jail,
Gangtok, Sikkim.

..... Appellant

versus

State of Sikkim

..... Respondent

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

[Against the impugned judgment and order on sentence, both dated 19.04.2023,
passed by the Ld. Special Judge (POCSO), District Mangan, Sikkim,
in Sessions Trial (POCSO Act) Case No. 12 of 2022 in the matter of State vs. Lendup Lepcha]

Appearance:

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

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

Date of hearing : 10th June, 2024

Date of judgment : 17th June, 2024

J U D G M E N T

Bhaskar Raj Pradhan, J.

1. The appellant has been convicted having committed the offence of aggravated penetrative sexual assault on a child below twelve years under section 5(m) and repeatedly under section 5(l)

under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) and sentenced to twenty years rigorous imprisonment with fine of Rs.30,000/- (Rupees thirty thousand only) for each of the offences. He was also convicted under sections 376AB, 375(a) and 354B of the Indian Penal Code, 1860 (IPC). However, in view of section 42 of the POCSO Act, the appellant was not sentenced under sections 376AB and 375(a) IPC. The appellant was acquitted of the offence of criminal intimidation under section 506 IPC. The period of imprisonment was to run concurrently and the imprisonment already undergone was to be set off. The total amount of fine recovered was to be applied in payment of compensation to the minor survivor. Rs.5,00,000/- (Rupees five lakhs only) was also awarded to the minor victim out of the Victim Compensation Fund.

2. The appellant challenges the opinion of the learned Trial Court on the ground that the prosecution had failed to establish penetrative sexual assault. The minority of the victim successfully established by the prosecution during the trial is not questioned.

3. Mr. Jorgay Namka, learned Senior Advocate for the appellant, has taken this Court through the evidence led by the prosecution and submitted that the prosecution witnesses failed to establish that the appellant had committed aggravated sexual assault upon the victim. He pointed out to the contradictions in the statement of the victim recorded under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.) (victim's statement) and her deposition in Court. He also pointed out to the variance between the victim's deposition and the medical evidence. He fairly conceded

that the prosecution had been able to establish the minority of the victim.

4. Mr. Thinlay Dorjee Bhutia, learned Additional Public Prosecutor, submitted that the deposition of the victim is consistent with her statements. The deposition of the victim is truthful and cogent and the defence has not been able to demolish the same. The victim's mother (PW-11) was an eye witness to the last incident which has been proved by the prosecution. The seizure of the victim's underwear (M.O.-I) nearby the house by the Investigating Officer (PW-16) through seizure memo (exhibit-19) corroborates the deposition of the victim's mother (PW-11). The victim's deposition is also corroborated by the deposition of the complainant (PW-10) and the Childline Centre Co-ordinator (PW-13).

5. The first information report (FIR) (exhibit-13) was lodged by the Counsellor at the Childline of the district (PW-10) on 12.06.2022, stating that the victim had been sexually assaulted seven times by the appellant at different places, i.e, paternal aunt's house, paternal uncle's house, in a village (name redacted), their newly constructed building and their own residence. It was also stated that on 04.06.2022 at around 7:00 – 7:30 a.m. when the victim was being sexually assaulted at her residence, the victim's mother (PW-11) witnessed it and the appellant left home after a couple of days. After the case was registered, charge-sheet dated 29.08.2022 was filed. The learned Special Judge framed six charges against the appellant under section 5(l) and 5(m) of the POCSO Act, 376AB, 376(2)(n), 354B and 503 of the IPC on 24.11.2022. During

the trial, sixteen witnesses were examined by the prosecution including the Investigating Officer (PW-16). Dr. Archana Chettri, Clinical Psychologist (CW-1), was examined as a Court witness who examined the appellant and gave her opinion that he was found to have average normal intelligence. During the appellant's examination under section 313 Cr.P.C., he took a stand that he did not know anything. To a specific question regarding the incident of 04.06.2022 when the victim's mother (PW-11) had witnessed the sexual assault upon the victim, he took a stand that it was not true and that he had only pulled up his vest since it was hot. He also denied having committed similar acts earlier.

6. The victim's mother (PW-11) deposed that the victim was six years old and reading in Class I. She also identified her birth certificate (exhibit P-6) in which her date of birth is recorded as 28.10.2022. The victim's father (PW-12) deposed that at the time of the incident the victim was five years old. Additional Medical Superintendent-II-cum-Registrar of STNM Hospital (PW-2) proved the Live Birth Register (exhibit P-4) where her date of birth was recorded as 28.10.2016. The then Additional Medical Superintendent-II-cum-Registrar of STNM Hospital (PW-3) had issued the birth certificate of the victim (exhibit-6) after verifying it from the Live Birth Register of the year 2016. The ASHA Worker (PW-6) who assisted the victim's mother at the time of the delivery of the victim also deposed that the date of birth of the victim was 28.10.2016. The Technical Officer-cum-Medical Record Officer of STNM Hospital (PW-7) who gave information to the Registrar, Births

and Deaths, STNM Hospital regarding the birth of the victim and was also the informant in the Live Birth Register (exhibit P-5), collected the birth certificate of the victim and gave it to her parents. The teacher of the School where the victim was studying (PW-8) deposed that the victim was studying in Class I. The Counsellor at the Childline of the district (PW-10) witnessed the seizure of the birth certificate of the victim (exhibit P-6) from the victim's mother (PW-11). The Headmaster In-Charge of the School the victim was studying in (PW-14), proved the Admission Register (exhibit P-21) showing the birth date of the victim as 28.10.2016. The Co-villager (PW-15) who helped secure the first admission of the victim in her school and had signed in the Admission Register (exhibit P-22) as the guardian of the victim, identified his signature on it. These evidences clearly prove that at the time of commission of the alleged offences the victim was a minor of barely six years age.

7. The FIR was lodged on 12.06.2022 when the complainant (PW-10) who was a Counsellor at Child Line, received information regarding the incident. After receipt of the information, the complainant (PW-10), Child Line Centre Co-ordinator (PW-13) and others went to rescue the child. On confirming that the victim had been subjected to penetrative sexual assault from the parents, they brought the victim and her mother and kept them at the One Stop Centre. The next morning, the complainant (PW-10) had a counselling session with the victim where she revealed about the commission of the crime. This fact, as deposed by the complainant

(PW-10), has been adequately corroborated by the Child Line Centre Co-ordinator (PW-13) and the victim's mother (PW-11).

8. The victim's mother (PW-11) was an eye witness to the last incident. On 04.06.2022, she had sent the victim to the other room of their house to get her shirt but when she took a long time to return she went to check on the victim when she saw the appellant with his pants down and his penis out. The appellant left the house on seeing her. The victim was in the same room and was quiet. When asked, the victim did not say anything. The victim's mother (PW-11) checked the victim's panty and saw white discharge/semen on the panty. She gave the victim a bath, washed her panty and threw it. After a few days, the victim disclosed to her that the appellant had raped her on several occasions which she had not told her earlier. The victim's mother (PW-11) identified the victim's underwear (M.O-I) which was seized by the Investigating Officer (PW-16) on 13.06.2022 near the victim's house in the presence of two witnesses – the Counsellor (PW-10) and Child Line Centre Co-ordinator (PW-13). Investigating Officer (PW-16) and Child Line Centre Co-ordinator (PW-13) confirmed the seizure. The Investigating Officer (PW-16) deposed about sending a police team to locate the appellant and sending WT messages to all Station House Officers and In-Charge of Outpost to look out for the appellant. On 14.06.2022, a police team led by ASI Santa Bir Tamang located the appellant and apprehended him. On 15.06.2022, while they were returning the vehicle bearing registration no. SK 03 J 0122 met with an accident in which ASI

Santa Bir Tamang, VG Ugen Lepcha and VG Lyangsong Lepcha succumbed to their injuries while the rest of the occupants including the Driver were evacuated to the District Hospital and thereafter to the STNM Hospital. Mangan P.S. FIR Case No. 21(06)2022 dated 15.06.2022 was registered against the Driver of the vehicle and the case was investigated. An intimation dated 15.06.2022 (exhibit P-25) was sent by the Investigating Officer (PW-16) to the Special Judge (POCSO) Court, North Sikkim, about the incident. On 11.07.2022, the appellant was formally arrested after he was discharged from the hospital and taken into custody. These facts have been adequately proved by the Investigating Officer (PW-16).

9. The victim (PW-1) was six years old and studying in UKG when she deposed before the Court on 05.12.2022. She identified the appellant in Court as 'Aku Kancha'. In spite of her tender age, she described the act of aggravated sexual assault in absolute certainty. She stated that the appellant had done so in four different occasions - once at "Matim's" (aunt's) house, once in "Penam's" (uncle's) house and twice in her own house. She identified her underwear (MO-I) which she described as 'undu' that she was wearing. She also identified her statement and the questionnaire recorded under section 164 Cr.P.C. (exhibit P-1 and P-2 respectively). The cross-examination by the defence yielded no evidence to demolish the victim's deposition which satisfies the ingredients of aggravated penetrative sexual assault by the appellant. Her deposition is consistent to her statement recorded by the learned Magistrate on 21.06.2022 under section 164 Cr.P.C.

(victim's statement). Her deposition is also adequately corroborated by other prosecution witnesses.

10. The learned Senior Counsel submitted that there is a variance in the victim's statement and her deposition in Court. It was pointed out that in the victim's statement she had stated that the appellant had 'tried' inserting his penis inside the vagina whereas in her deposition in Court she had stated that he had 'put' his penis in her vagina. Dr. Komal Pradhan (PW-4) examined the victim on 12.06.2022 and recorded in her medical report (exhibit P-8) that the victim had given history of being repeatedly sexually assaulted by the appellant at different places and recently, a few days ago. She noticed that the victim's hymen was not intact and had been ruptured suggestive of forceful penetration/insertion in the past. She also recorded that there were no signs suggestive of struggle/injury at the time of her examination. During cross-examination, she admitted that hymen could tear due to many other reasons other than sexual intercourse and that if a minor of that age was sexually assaulted, the sensitive parts, i.e., labia majora and labia minora, may have injuries. This aspect was highlighted by the learned Senior Counsel to suggest that there was a variance between the deposition of the victim and the medical evidence. Dr. Komal Pradhan (PW-4), however, also volunteered to state that if the sexual assault was very recent than one could very easily see the injuries. That would explain the lack of injuries in the labia majora and labia minora of the victim who was examined after several days of the last incident. The victim's deposition is

adequately corroborated by the medical evidence. The minor discrepancy pointed out by the learned Senior Counsel between the victim's statement and her deposition can be attributed to her tender age. We notice that the victim was examined only on 12.6.2022 after several days of the last incident while the appellant was examined after a month on 11.07.2022. The records reveal that the victim's underwear (M.O.-I) had been washed by the victim's mother and thrown outside her house. The records also reveal that the vaginal swab and vaginal wash of the victim was collected after several days of the last incident after she had been bathed. Similarly, the appellant's penile swab, penile wash, pubic hair and nail clippings were collected after more than a month of the last incident. In such circumstances, the chances of Dr. Prem Kumar Sharma (PW-9) – the RFSL Expert, detecting blood, semen or any other fluid between 18.08.2022 and 17.09.2022 and reporting it in his RFSL Report (exhibit P-11) when he had occasion to examine the exhibits was almost negligible. We are of the view that this failure would not demolish the victim's deposition which is of sterling quality inspite of her tender age and the corroborative medical evidence.

11. This is a case in which the victim's statement is cogent and truthful. It is also corroborated by other prosecution evidence which leads us to believe that what she states is true. The medical evidence supports the victim's deposition of aggravated penetrative sexual assault by the appellant.

12. The conviction of the appellant by the learned Trial Court for the offences are upheld. However, we are of the considered view that the sentence under section 354B IPC cannot be upheld in view of section 71 IPC and it is accordingly set aside. The rest of the directions and the award of victim compensation are confirmed.

13. The appeal stands disposed of accordingly. Trial Court records be remitted forthwith.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

Approved for reporting : **Yes/No**
Internet : **Yes/No**
(bp)