

State of Sikkim Vs. Amit Darjee (Darnal)

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Court : Sikkim

Decided On : Sep-25-2015

Judge : The Honourable Chief Justice Mr. Sunil Kumar Sinha, & S.P. Wangdi

Appeal No. : Crl. A. No. 01 of 2015

Appellant : State of Sikkim

Respondent : Amit Darjee (Darnal)

Judgement :

Sunil Kumar Sinha, C.J.

1. This Appeal is directed against the Judgment of acquittal dated 30.09.2014 passed by the Special Judge under Protection of Children from Sexual Offences Act, 2012, East Sikkim at Gangtokin ST (POCSO) Case No. 02 of 2014 (Old ST Case No. 17 of 2013). By State of Sikkim vs. Amit Darjee (Darnal) the impugned Judgment, the respondent has been acquitted of the charges framed under Section 363 IPC and Section 3 (a) read with Section 4 of the POCSO Act, 2012.

2. The facts, briefly stated, are as under: -

2.1 The respondent and the victim (PW-2) were well known to each other. In the afternoon of 08.05.2013 the victim (PW-2), while returning to her house, met the respondent near Cooperative Stores at Sichey. The respondent suggested that

they go for a walk. Accordingly they went to Devi Dhara at Sichey, where they remained together till 05.00 PM. From there, they went to Sichey Housing Colony and walked on the street till 07.00 PM and then proceeded to Modern School, where they reached at about 08.00 PM. According to the victim (PW-2), they stayed outside the School for quite a long time and thereafter they went into a classroom. There they stayed for whole night. The victim (PW-2) made allegations that the respondent, there committed sexual intercourse against her. In the following morning, i.e. on 09.05.2013, the respondent then left the victim (PW-2) to the house of her (victim s) friend at Arithang, Gangtok, where she stayed for the said day, but on the following day her friend s brother took the victim to her house and handed over to her father. Her father gave beating. The victim (PW-2) narrated the entire incidents to her mother Rubina Rai (PW-1), who lodged the First Information Report (Exhibit-1) on 10.05.2013.

2.2 The victim (PW-2) was claimed to be aged about 16 years on the date of incident. She was sent for her medical examination and was examined by Dr. Ritu Nath Deokota (PW-10), who found a contusion over her right cheek measuring 3 x 2 inches. This was the only external State of Sikkim vs. Amit Darjee (Darnal) injury on her body. On internal examination, it was found that the victim (PW-2) was menstruating, her hymen was absent and the introitus admitted two fingers. There was fresh tear measuring 1 cm in the posterior commissure. The vaginal wash of the victim was sent to Pathology Department to detect the presence of spermatozoa. As per the Pathological Report there was no motile or non-motile spermatozoa detected in the specimen. The undergarments and blood samples were also sent for chemical examination to RFSL and the report was received. The victim was also sent for Ossification Test, in which Dr. Kharananda Sharma, Radiologist (PW-9) found her to be between 17 to 18 years of age.

2.3 During the course of investigation, a Photostat copy of the Birth Certificate (Exhibit-2) was seized from the possession of mother of the victim, in which her date of birth was mentioned as 06.03.1998.

2.4 Learned Special Judge recorded the finding that the victim (PW-2) was aged about 16 years, however, she did not rely on her testimony in light of the expert

evidence and held that it was not proved beyond all reasonable doubts that the victim (PW-2) was abducted and subjected to penetrative intercourse by the respondent making him liable for punishment either under Section 363 IPC or Section 3/4 of the POCSO Act, 2012. The respondent, therefore, was acquitted. Hence, this Appeal.

3. Mr. S.K. Chettri, learned Assistant Public Prosecutor appearing on behalf of the appellant-State, vehemently contended that the Special Court fell into error while appreciating evidence of the victim (PW-2) in light of the expert evidence and holding that on the basis of infirmities therein, the respondent was entitled to get benefit of doubt.

4. On the other hand, Ms. Chenga Doma Bhutia, learned counsel appearing on behalf of respondent, opposed these arguments and submitted that it was not proved that the victim (PW-2) was below 18 years of age and the conduct of the victim (PW- 2) on her own evidence would show that she willingly accompanied the respondent and became a party to the sexual intercourse in a school, where she stayed for whole of the night.

5. We have heard counsel for the parties.

6. Let us firstly examine the finding related to the age of the victim. Mrs. Rubina Rai (PW-1) is the mother of the victim (PW-2). She has deposed that the victim (PW-2) was aged about 16 years on the date of incident. In her entire evidence, she did not depose the date of birth of the victim (PW-2) or even the month or year of her birth. The other evidence regarding age of the victim (PW-2) was a Photostat copy of her Birth Certificate, shown to be issued by the Chief Registrar of Births and Deaths, Government of Sikkim in Form No. 9. Here the date of birth of the victim (PW-2) has been recorded as 06.03.1998. Another evidence regarding age was the report of Ossification Test conducted by the Radiologist (PW-9), who found her to be between 17 to 18 years of age.

7. Learned Special Judge simply relied on the contents of the Birth Certificate (Exhibit 2) and held that the victim was aged about 16 years as per the date of birth entered in the said Certificate.

8. Ms. Chenga Doma Bhutia has vehemently argued that the said Certificate was a Photostat copy, therefore, it was not admissible in evidence and the finding recorded on the contents of the said Certificate cannot be held to be conclusive and correct.

9. The Birth Certificate (Exhibit -2) on its face would show that it was neither original nor a certified copy. At one place, it has been mentioned in this Photostat copy that it was certified by the Registrar of Births. The Registrar has also been examined as PW-14. Though he deposed that he had certified the said Photostat copy of the Certificate after comparison with its original, but it does not appear in the document that on which date he certified it. The contents of his evidence would show that he did not compare the said Photostat copy either with the original copy retained in the office or with the entries made in the relevant register. It is clear from his evidence that he had not brought the Birth Register in Court while recording of his evidence. He admitted in the cross-examination that he did not tally the Certificate (Exhibit 2) with the Birth Register before certifying it. According to him, the original was produced before him and he tallied it with the original and certified it to be true. The mother of the victim, Rubina Rai (PW-1), has deposed in her evidence that the Photostat copy of the Certificate (Exhibit 2) was seized from her possession. In fact, the original was also with her, which was returned by the Investigating Officer to her and the certified true copy (Exhibit 2) was taken. Chezum Lepcha (PW-16) is the Investigating Officer. Her evidence would show that the family members of the victim (PW-2) had the original of the Photostat copy of the Birth Certificate and since they had Photostat copy, she opted to file a Photostat copy, which was certified to be a true copy.

10. If the evidence of PW-14 is appreciated in the light of the evidence of the Investigating Officer (PW-16), it would appear that PW-14 had simply attested the Photostat copy to be a true copy on the basis of a certified copy, which was allegedly in the possession of the family members of the victim (PW-2). Who took it for attestation, whether the Investigating Officer or the family members, on which date it was taken for attestation, why the original was not produced before the Court and many other circumstances like above are unexplained. Therefore, the fact remains that a simple Photostat copy, said to be attested by the Registrar of

Births and Deaths, was filed before the Court.

11. The prosecution, thus, utterly failed to produce a certified true copy of Exhibit 2 and Exhibit 2, attestation of which was doubtful, cannot be held as admissible for proof of contents thereof and no presumption can be drawn from such document under Section 79 of the Indian Evidence Act.

12. So far as Ossification Test Report is concerned, much reliance cannot be placed on it. In Modi s Jurisprudence (20th Edition), it is stated that too much reliance should not be placed on the table showing the age and years of the appearance and fusion of some of the epiphysis as observed by different authors as it merely indicates the average and is likely to vary in individual case even of the same province owing to the eccentricities of development. It is further stated that recent work has shown that the range of error may be up to 3 years on either side. In view of the above, when there is a possibility of error up to 3 years, it cannot be held that even by the said report, it was proved that the victim (PW-2) was aged about 16 years on the date of incident.

13. No other evidence relating to the age of the victim (PW-2) was produced by the prosecution. We are of the view that in the above facts and circumstances of the case, the prosecution utterly failed to establish that the victim (PW-2) was below 18 years of age on the date of incident.

14. So far as the conduct of the victim (PW-2) is concerned, it is clear from her evidence that she joined the company of the respondent, who was well known to her, in the afternoon of 08.05.2013 and visited many places with him till 08.00 PM and ultimately when they reached Modern School in the night, they silently entered in a classroom and stayed there for whole of the night, where the sexual intercourse was performed. The victim (PW-2) did not make any complaint to any one either in the way to the Modern School or even when she returned from the School in the morning to the house of her friend. The victim (PW-2) did not raise any alarm in the School premises. Thus, her conduct would show that she was never subjected to forceful sexual intercourse and whatever happened against her was on her own will, which she clearly admitted in her cross-examination.

15. After going through the entire evidence available on records, we do not find any compelling and substantial reason to interfere with the Judgment of acquittal.

16. The Appeal, therefore, is liable to be dismissed and is hereby dismissed.

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