

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 30th April, 2025

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

Crl. A. No.27 of 2024

Appellant : Sushan Darjee (Hingmang)

versus

Respondent : State of Sikkim

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

Appearance

Mr. Madan Kumar Sundas, Advocate (Legal Aid Counsel) for the
Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor with Ms. Pema
Bhutia, Assistant Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant was charged with the offences of impregnating a minor, PW-1, as a consequence of sexual assault, under Section 5(j)(ii) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"). Secondly, for repeatedly committing penetrative sexual assault on the child, under Section 5(l) of the POCSO Act, and for having committed aggravated penetrative sexual assault on the same child, knowing her to be pregnant, under Section 5(q) of the POCSO Act. All offences are punishable under Section 6 of the POCSO Act. He was also charged under Sections 376(2)(n), 376(2)(h) and 376(3) of the Indian Penal Code, 1860 (hereinafter, the "IPC"), for commission of the same offences (*supra*). The Court of the Learned Special Judge (POCSO Act, 2012), Gangtok, Sikkim, on appreciation of the evidence on record, concluded in Paragraph 28 of the impugned Judgment, dated 30-07-2024, in ST(POCSO) Case

No.24 of 2021 [*State of Sikkim vs. Sushan Darjee (Hingmang)*] that; the question whether the victim is a minor within the meaning of Section 2(d) of the POCSO Act, 2012, is answered in the negative. The Court also observed that on 13-05-2021 to 14-05-2021, when the Appellant and the victim were in his cousin's house at Sang, he could not be held guilty for rape as the victim was not a minor on those dates and the acts were consensual. The Learned Trial Court accordingly acquitted the Appellant from the above-mentioned charges of the POCSO Act and the IPC. However, invoking Section 222(2) of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."), the Appellant was convicted under Section 376(1) of the IPC for the offence of rape, committed by him, on the alleged victim on 12-04-2021. Vide the Order on Sentence, dated 31-07-2024, the Appellant was sentenced to undergo rigorous imprisonment, for a term of ten years, along with a fine of ₹5,000/- (Rupees five thousand) only, under Section 376(1) of the IPC with a default clause of imprisonment.

2. Aggrieved by the said conviction and sentence the Appellant has approached this Court. Learned Counsel for the Appellant urged that in fact the Appellant and the victim were in a romantic relationship. The Appellant was nineteen years at the time of the offence, while the age of the victim could not be ascertained from the Prosecution evidence furnished, although she claimed to be only thirteen years of age. That, the sexual acts between the Appellant and the alleged victim being consensual and the minority of the victim's age not being proved, the Appellant deserves an acquittal.

3. The Prosecution for their part conceded that, the age of the victim was not proved but that did not do away with the fact of the offence of rape, as it is the case of the victim that the sexual assault was perpetrated on her *sans* her consent, hence the Judgment and Order on Sentence requires no interference.

4. Having heard the rival contentions of Learned Counsel for the parties, it is essential to refer briefly to the facts of the case for clarity in the matter. On 14-05-2021, PW-2 the victim's father lodged the FIR Exbt P3/PW-2, complaining that his elder daughter, the victim, aged about fourteen years, was missing from their village since 10.00 a.m. of 12-05-2021. The jurisdictional Police station registered a case under Section 363 IPC against unknown persons and endorsed it to the Sub-Inspector PW-12 for investigation. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 363/376 of the IPC read with Section 4 of the POCSO Act. Charges under the POCSO Act and the IPC as detailed hereinabove were framed against the Appellant, to which he pleaded "not guilty" and sought to be tried. Twelve witnesses were examined by the Prosecution in a bid to establish their case beyond reasonable doubt. To enable the Appellant to explain the incriminating evidence appearing against him, he was examined under Section 313 of the Cr.P.C. and his responses recorded. The impugned Judgment and Order on Sentence were then pronounced.

(i) Investigation brought to light that the Appellant and the victim were students of the same school and in a romantic relationship for about three years. That, on 12-04-2021 they had sexual intercourse in an abandoned house near their school.

Suspecting, that she was pregnant, the victim conducted a self pregnancy test on 23-04-2021 which gave a positive result for pregnancy. Both panicked on account of the result and ran away from home on 12-05-2021 and stayed in the house of the Appellant's brother till 14-05-2021, in the same village. The victim's mother PW-3 called them back and they returned home on 15-05-2021. In the meanwhile, the victim's father had lodged the FIR Exbt P3/PW-2, dated 14-05-2021. The medical examination of the minor victim revealed that she was pregnant. On 19-05-2021 she was evacuated to a Shelter Home where she suffered a miscarriage.

(ii) While discussing the age of the victim, the Learned Trial Court took into consideration the evidence of PW-9, Additional Director-cum-Registrar of Births and Deaths Cell, Health and Family Welfare Department, Government of Sikkim, who stated that the date of birth of the victim was recorded as 10-07-2007 but her birth was registered only on 29-05-2017 in their office. PW-9 was not the concerned officer who had made the entries in the live birth register and the identity of the concerned official was not known. Reference was made to Section 13 of the Registration of Births and Deaths Act, 1969, by the Learned Trial Court and it was observed that since the registration of the victim's birth was delayed by ten years the provisions of the act prescribing the necessities for belated registration were not complied with. Exbt P-16/PW-9 the page of the live birth register, revealed that the birth was registered in May-June, 2017, without recording reasons in the remarks column. It was also observed that the victim under cross-examination mentioned that her parents had reduced her age while

recording her date of birth in the birth certificate and qualified it by stating that the Appellant had tutored her, her statement taken together with the above circumstances on belated registration did not inspire the confidence of the Court. It was held that the possibility of the victim's parents reducing her age, could not be ignored. That, PW-5 the School Principal was unsure about the correctness of the entry made in the school admission register where her date of birth was shown as 10-07-2007. It was observed that PW-5 at the time of the victim's admission was not working in the concerned school and the victim had previously studied in Kathmandu, Nepal, hence it would be fatal to rely on the school records also.

(iii) While making these observations reference was made to the decision of this Court in **State of Sikkim vs. Girjaman Rai @ Kami and Others**¹, wherein at Paragraph 15 it was held as follows;

"15. Date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim drags an accused to the rigours of the POCSO Act, 2012, which mandates a reverse burden of proof. Therefore, it is absolutely vital to prove the minority of the victim. The "*best evidence rule*" must be necessarily followed while proving the contents of a birth certificate."

(iv) Reliance was also placed by the Learned Trial Court on the decision of this Court in **Mangala Mishra @ Dawa Tamang @ Jack vs. State of Sikkim**², wherein it was held that if a person seeks to rely on a particular date of birth and thereby to press a document into service, he has to prove its authenticity, in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61 of the Indian Evidence Act, 1872, by examining the person having special means or knowledge, of date, time mentioned therein. The Learned Trial

¹ SLR (2019) SIKKIM 266

² 2018 SCC OnLine Sikk 215

Court on the above rationale concluded that, the victim was not a minor.

(v) We are inclined to accept the reasoning put forth by the Learned Trial Court with regard to the age of the victim and that the Prosecution has failed to prove that she was a child in terms of Section 2(d) of the POCSO Act. As pointed out by the Learned Trial Court, no reasons were advanced as mandated by law, for the rather belated registration of the birth certificate of the victim viz., ten years after her birth.

(vi) The issue regarding the age of the victim having been resolved, the question is whether the sexual acts between the Appellant and the victim were consensual. The Learned Trial Court, while relying on the evidence of the victim, observed *inter alia* at Paragraph 15 of the assailed Judgment that, it is palpable from the victim's statement in the first instance that, although she had voluntarily accompanied the Appellant to the said abandoned house, she had not consented to sexual intercourse. At Paragraph 16, it was observed that; the victim's unwillingness to have sexual intercourse with the Appellant could be ascertained from her deposition "*..... where he forced me to have sex with him. I refused as I told him as I was a minor and I was scared but he insisted and told me we were boyfriend and girlfriend nothing will happen as it was common amongst boyfriends and girlfriends*" The Learned Trial Court was of the view that this should have been sufficient for the Appellant to understand that the victim meant "no" and to force her by saying that it is common in a relationship was to go against her will. It thus tantamounts to rape within the ambit of the *first* and *second* descriptions of Section 375 of the

IPC. The Learned Trial Court while answering the connected question, as to whether the Appellant raped the victim repeatedly from 13-05-2021 to 14-05-2021 at his cousin's house at Sang, observed that, as the victim was not a minor, the allegation that the Appellant raped her repeatedly from 13-05-2021 to 14-05-2021 was in the negative, the acts being consensual.

5. Having thus examined the observation of the Learned Trial Court, pertaining to the rape committed by the Appellant on the alleged victim, we cannot bring ourselves to agree with the reasonings and therefore we revert to the evidence of PW-1. According to her, after the Appellant took her to an abandoned house near their school and forced her to have sex, she refused and told him that she was a minor and was scared but he insisted. After they had sex, she stopped menstruating. The fact that, she did not seek help from any person or tell her friend or parents, more especially her mother, about the incident, indicates that in all probability she had consented to the act. On testing positive for pregnancy she even agreed to the Appellant's suggestion to elope. The circumstances are therefore revelatory of the fact that the sexual acts were consensual. Consequently, we do not agree with the findings of the Learned Trial Court that the act of the Appellant, on 12-04-2021 was not consensual and the Appellant was guilty of rape. On this count the observation of the Learned Trial Court appears to be misconceived.

6. In view of the discussions that have emanated hereinabove, we find that the Appellant deserves to be and is accordingly acquitted of the offence under Section 375, punishable under Section 376(1) of the IPC.

- 7.** The Appeal stands disposed of on the above terms.
- 8.** The Appellant be set at liberty forthwith.
- 9.** The Jail Authorities shall however examine their records to verify whether he is involved in any other matter before such release.
- 10.** Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.
- 11.** Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.
- 12.** Copy of this Judgment be forwarded to the Jail Authority at the Central Prison, Rongyek, by e-mail for information and necessary steps. A soft copy of the Judgment be also made over to the Prisoner by the Jail Superintendent.

(Bhaskar Raj Pradhan)
Judge
30-04-2025

(Meenakshi Madan Rai)
Judge
30-04-2025

Approved for reporting : **Yes**