

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 9th June, 2025

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

Crl.A. No.07 of 2024

Appellant : Anil Chettri

versus

Respondent : State of Sikkim

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

Appearance

Mr. Sajal Sharma, Advocate for the Appellant.

Mr. S K. Chettri, Additional Public Prosecutor for the State-
Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant, a 31 year old married man, was alleged to have committed the offence of penetrative sexual assault and impregnated the female child, said to be 15 years at the time of the offence.
2. The Court of the Learned Special Judge (POCSO Act, 2012), Gangtok, Sikkim, vide the impugned Judgment, dated 21-12-2023, in ST (POCSO) Case No.07 of 2021, having examined the entire evidence furnished by the Prosecution, convicted the Appellant of the offence under Section 3 punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012 (for short, "POCSO Act, 2012"). Vide Order on Sentence, dated 22-12-2023, he was sentenced to undergo rigorous imprisonment for a term of twenty years and to pay fine of ₹ 2,000/- (Rupees two thousand) only, with a default stipulation.

3. Before delving into the merits of the matter, it is imperative to put forth a short summation of the Prosecution case. On 05-11-2020, PW-1 the victim's mother lodged Exbt P3/PW1, the FIR, informing the concerned Police Station that her daughter, aged about 15 years, was forced into a physical relation by and with the Appellant, about five to six months prior to the lodging of the FIR, resulting in her pregnancy of the same gestational period. Initially, her daughter, fearing ignominy did not inform anyone, but when PW-1 unexpectedly came to learn of the pregnancy and made enquiries from the victim, she narrated the incident of sexual assault. The FIR was duly registered under Section 6 of the POCSO Act, 2012, at the concerned Police Station, against the Appellant and investigated into by PW-11, the Investigating Officer (I.O.). On completion of the investigation, Charge-Sheet came to be filed before the Learned Trial Court against the Appellant under Section 6 of the POCSO Act, 2012, against the Appellant.

4. Charge was framed against the Appellant under Section 5(j)(ii) of the POCSO Act, 2012, punishable under Section 6 thereof and under Section 376(3) of the Indian Penal Code, 1860 (for short, "IPC"), to which he entered a plea of "not guilty" and sought trial. Eleven witnesses were examined by the Prosecution, on closure of which the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short, "Cr.P.C."). He denied knowledge of the incriminating evidence against him and claimed that he was innocent and had been falsely implicated. After hearing the final arguments of Learned Counsel for the parties, the Court, on consideration of all relevant materials pronounced the impugned

Judgment and the Order on Sentence. This Appeal has been filed assailing both.

5. Learned Counsel for the Appellant put forth the argument that the age of the victim was not proved and at the time of the lodging of the FIR the victim was already seven months pregnant, indicating a delay in the lodging of the FIR. The birth certificate of the victim was allegedly seized from PW-1, however PW-5 and PW-6, the witnesses to the seizure of the document, claimed ignorance of its contents or purport. PW-1, the mother of the victim failed to substantiate the Prosecution case with regard to the age of the victim as admittedly she was illiterate and could not state the exact year of the victim's birth. Under cross-examination she asserted that she knew her daughter's date of birth yet she failed to mention the date or year. PW-1 deposed that the victim turned 18 in the month of June, 2020, while PW-2 the victim, contrarily stated that she was 17 years old, hence the evidence of PW-1 and PW-2 do not corroborate on the aspect of the victim's age. The 'Anganwadi' Worker who was allegedly present when the date of birth of the victim was entered in the Birth Register was not produced as a witness for the Prosecution. The I.O., PW-11 stated that the victim was brought to the place of residence after her birth, from some other place, contrarily Exbt P1/PW1 the birth certificate, which was prepared fifteen days after her birth, indicates that she was born at the PHC of the village where she resided thereby making the Prosecution evidence unreliable with regard to the preparation of the birth certificate and thereby her age and place of birth. The Deoxyribonucleic Acid (DNA) report, pertaining to the child borne by the victim was not furnished by the Prosecution. The

victim deposed that the sample blood of the child was also drawn for the DNA test, contrarily the I.O. testified that since the child had already been given for adoption, it was impossible for him to obtain the blood sample of the new born. The paternity of the child born is therefore unknown. On the aforementioned grounds the Prosecution case not only appears suspicious but has also not been proved in terms of the law, hence the impugned judgment and Order on Sentence be set aside.

6. Learned Additional Public Prosecutor contesting the arguments advanced submitted that, the age of the victim was cogently proved by the victim and her mother, fortified by the entry in the birth certificate, duly furnished in evidence and the Live Birth Register, Exbt. P-10/PW-8. The baby born to the victim was that of the Appellant, in view of the gestational period as reported in the FIR and established by the time of the child's birth. The delay in the FIR was on account of the victim's reluctance to disclose the incident to PW-1. The incident has been narrated by the victim and no reason arises to disbelieve her version. That, the Prosecution having proved its case beyond reasonable doubt, the impugned Judgment requires no interference.

(i) The Prosecution narrative is that the Appellant had sexually assaulted the victim in an isolated place near a dumping ground, located somewhere in East Sikkim, after enticing her to go along with him at night for a drive. After a few months, on the victim's mother discovering that her child was pregnant, she lodged the FIR.

7. The Learned Trial Court after examining the evidence on record observed that, merely because the victim did not scream or

resist it did not mean that she voluntarily participated in the act as no direct evidence proved that. The Court concluded that, the Appellant had committed penetrative sexual assault on the victim in May-June, 2020. It was further observed that, it was uncertain as to whether the baby delivered by the victim was fathered by the Appellant since the I.O. stated that he did not collect the required blood samples of the baby for DNA analysis. The Court was of the view that in this context the evidence of the victim could also not be ignored as she had stated that, after the delivery, the Doctor had taken her blood sample and that of the baby for DNA analysis. The Learned Trial Court while considering the age of the victim observed that, her date of birth being 26-06-2005 was supported by her birth-certificate, Exbt P1/PW1 which was issued by the competent authority. The evidence of PW-8 revealed that, the entry of the victim's date of birth in the Birth Register matched with the entry in the Live Birth Register, accordingly the victim was found to be a minor and the Appellant guilty of penetrative sexual assault on her. He was convicted under Section 3 punishable under Section 4 of the POCSO Act, 2012 and sentenced accordingly.

8. Having given due consideration to the observations of the Learned Trial court, the opposing arguments advanced before us and having carefully perused the documents and the evidence on record, this Court is to determine, whether the Appellant was the perpetrator of the sexual offence or whether the sexual act was consensual. The second question which requires determination is, whether the baby delivered by the victim was that of the Appellant and thirdly, whether the victim was a child as per the POCSO Act, 2012.

9. While determining the first question, i.e., whether the Appellant was the perpetrator of the sexual offence or whether the sexual act was consensual, it has to be noticed that there is no eye-witness to the incident. Only the minor victim is privy to the alleged sexual assault. In this context, it is essential to examine whether the victim's testimony can be considered to be clear, consistent and credible, thereby rendering her a "sterling witness", upon which the Court can convict the Appellant. In *Rai Sandeep alias Deepu vs. State (NCT of Delhi)*¹ the Supreme Court observed as follows;

"22. In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. **What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused.** There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have co-relation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. **It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held that such a witness can be called as a "sterling witness"** whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant

¹ (2012) 8 SCC 21

materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged.” [emphasis supplied]

10. On the anvil of the foregoing pronouncement, we may examine the evidence of the victim. She claims to be seventeen years on 20-03-2023 when her evidence was recorded before the Court, contrary to her age as stated by her mother, PW-1 who specifically stated that the victim had turned eighteen years in the month of June, 2022. The victim identified Exbt P-5/PW-2, as her statement recorded under Section 164 of the Cr.P.C. bearing her thumb impression. In Court, the witness stated that, the portion containing the information that, she had made Manoj her brother, when she was in Class IV is incorrect, but the remaining statements are correct. In her Section 164 Cr.P.C. statement, she had categorically stated that she had made Manoj her brother when she was in Class IV. Manoj had a brother named Ramesh, through whom she happened to befriend a person named Anil Chettri (the Appellant), in the month of February, 2020, who worked at the Jio Tower. Records reveal that the said Manoj is not a witness in the instant case. However, Ramesh named by her, is a Prosecution Witness PW-3. According to him, he worked along with the Appellant at the Jio Tower and he knew the victim, who used to be his girlfriend. This statement was not decimated in cross-examination. The victim however failed to disclose her relationship with Ramesh PW-3. In fact, under cross-examination she stated that she did not have any other boyfriend. It is also noted that in her Section 164 Cr.P.C. statement, she had stated that she called the Appellant to ask him for diesel to clean her house floor. He

came at around 9 p.m. and after seeking her mother's permission she went up till the road to get the diesel, but the Appellant asked her to go with him for a ride in his vehicle. On reaching the spot where the incident took place, where there were no people, he molested her. Before the Court however, she made no statement regarding the Appellant coming at night, nor did she state that she took permission from her mother to meet him. In her evidence in Court she testified that in an isolated place at the dumping area, the Appellant gave her some beer to drink. After drinking the beer when she was drunk, the Appellant forcibly raped her. She could not resist because of the beer that she had consumed. The Appellant then drove her back home. The narration of drinking beer is nowhere seen in her Section 164 Cr.P.C. statement which was recorded in the first instance by the Magistrate on 21-11-2020 after the FIR was lodged on 05-11-2020. There are inherent contradictions in her various statements as revealed hereinabove. Before the Court she has made every effort to improve upon her statements vis-à-vis, the statement given by her before the Magistrate under Section 164 Cr.P.C. In such circumstances, her evidence fails to qualify as that of a sterling witness. Consequently, in view of her vacillating evidence, we are constrained to observe that reliance on it for convicting the Appellant would be a travesty of justice. We are aware of the limitations set on the Court by the provisions of Section 29 of the POCSO Act, 2012, but that in no manner eradicates the role of the Court in assessing the veracity and truthfulness of the victim's statement.

11. The second question as to whether the baby delivered by the victim was that of the Appellant or not has to be answered in the

negative. The Prosecution failed to enlighten the Court as to whether the Appellant was the father of the new born baby as no evidence whatsoever appears in this context. As per PW-2, the Doctor took her blood samples and also that of her new born baby for the purpose of DNA profiling, whereas the I.O. specifically stated that he made a requisition to the Judicial Magistrate seeking permission to obtain blood samples of the victim, her child and the Appellant, however he only collected the blood samples of the Appellant and the victim as the baby had already been given in adoption by the time he went to collect the baby's blood sample after a lapse of two/three weeks. It is worth mentioning that this Court cannot pick and choose evidence suitable to the Prosecution in order to bring the Appellant to book. The evidence furnished by the Prosecution must be consistent and cogent and must establish the guilt of the Appellant beyond reasonable doubt which is sadly lacking as can be culled out from the Prosecution evidence. The contradictory evidence of PW-1 and PW-11 regarding the drawing of the blood samples leads this Court to draw an adverse inference against the Prosecution on this facet. That apart, PW-3 claims that the victim used to be his girlfriend, this statement stood undecimated in cross-examination, but the Prosecution failed to investigate into this aspect to examine his complicity or otherwise in the victim's pregnancy. The argument regarding the delayed FIR is irrelevant as PW-1 has explained the circumstances for the delay. The place of residence and anomalies thereof pertaining to the victim also do not merit consideration as it has no relevance to the issue of sexual assault.

12. Now, while considering whether the victim is a child as per the POCSO Act, 2012, although the mother of the victim appeared to be confused about the exact date of birth of the victim or her specific age and the oral evidence of PW-1 and PW-2 differ with regard to the victim's age, however, PW-1 identified Exbt P1/PW-1 as the birth certificate seized by the concerned Police from her. Under cross-examination, the fact of such seizure and identification of the birth certificate was not demolished. The date of birth mentioned in Exbt P1/PW-1 is 26-06-2005. PW-8 the Dental Surgeon posted at the relevant PHC testified that, on the requisition of PW-11 she issued an authentication certificate certifying that the birth certificate of the victim was correct and genuine, apart from which the Live Birth Register maintained in the concerned PHC was also produced before the Court to establish the veracity of the victim's date of birth. The alleged offence is supposed to be taken place 5/6 months prior to 05-11-2020, when the FIR Exbt P3/PW1 was lodged. The victim appears to be around fifteen years at the time of the offence and is therefore covered by the ambit of the definition of child under Section 2(d) of the POCSO Act, 2012.

13. In conclusion although the victim is found to be a minor, we are disinclined to take into consideration her evidence pertaining to the sexual assault for the detailed reasons discussed and the fact that the paternity of the child borne of the alleged sexual assault has not been proved beyond reasonable doubt. The Appeal is consequently allowed.

14. The conviction and sentence imposed on the Appellant, vide the impugned Judgment and Order on Sentence of the Trial Court are set aside.

15. The Appellant is acquitted of the offence under Section 3 punishable under Section 4 of the POCSO Act, 2012.

16. He be set at liberty forthwith, if not required to be detained in any other case.

17. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

18. No order as to costs.

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

20. A copy of this Judgment be made over to the Appellant/convict through the Jail Superintendent, Central Prison, Rongyek and to the Jail Authority for information.

(Bhaskar Raj Pradhan)
Judge
09-06-2025

(Meenakshi Madan Rai)
Judge
09-06-2025

Approved for reporting : **Yes**

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