

**THE HIGH COURT OF SIKKIM : GANGTOK**  
(Criminal Appeal Jurisdiction)

Dated : 16<sup>th</sup> April, 2025

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**DIVISION BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**  
**THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE**  
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Crl.A. No.04 of 2024

**Appellant** : Shanu Rai @ Netra Kumar Rai  
**versus**

**Respondent** : State of Sikkim

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

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**Appearance**  
Mr. Safal Sharma, Advocate (Legal Aid Counsel) for the Appellant.  
Mr. Yadav Sharma, Additional Public Prosecutor with Mr. Sujan  
Sunwar, Assistant Public Prosecutor for the State-Respondent.  
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**JUDGMENT**

Meenakshi Madan Rai, J.

**1.** This Appeal assails the conviction of the Appellant under Section 5(g), punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act, 2012") and under Section 366 of the Indian Penal Code, 1860 (hereinafter, "IPC"), vide the impugned Judgment, dated 20-12-2023, in S.T. (POCSO) Case No.19 of 2020, of the Court of the Learned Special Judge, POCSO Act, 2012.

**(a)** The Order on Sentence, dated 21-12-2023, directed the Appellant to undergo rigorous imprisonment for a term of twenty years and to pay a fine of ₹ 2,000/- (Rupees two thousand) only, for the offence of sexual assault and to undergo simple imprisonment for a term of five years and fine of ₹ 2,000/- (Rupees two thousand) only, for the offence of abduction, with default stipulations. This order is also impugned.

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**2.** The facts of the Prosecution case briefly summarised is that, on 21-03-2020, PW-1, the victim lodged an FIR, Exbt P-1/PW-1 informing that, on the relevant night when she was asleep along with her younger brother and sister at her home, she woke up to some knocking on the door and opened it. Two unknown persons closed her mouth, took her to a nearby jungle and pushed her to the ground. She recognised the Appellant, a co-worker of her parents, who disrobed and sexually assaulted her. Investigation was endorsed to PW-12, the Investigating Officer (I.O.), who on completion thereof, submitted Charge-Sheet under Section 6 of the POCSO Act, 2012, against the Appellant. The Learned Trial Court proceeded to frame Charge against the Appellant under Sections 366/34, 376D, 376DA of the IPC and Section 5(g) of the POCSO Act, punishable under Section 6 of the same Act, read with Section 34 of the IPC. The Charge having been read over to the Appellant, he entered a plea of "not guilty", pursuant to which trial commenced and the Prosecution examined twelve witnesses. On closure of the Prosecution evidence, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") to enable him to explain the incriminating evidence against him and his responses recorded. He sought to and examined himself as DW-1 and his mother as DW-2.

**3.** Learned Counsel for the Appellant canvassed that the Learned Trial Court was in error in convicting the Appellant under the provisions of the POCSO Act, 2012 (*supra*), as the age of the victim was not proved beyond reasonable doubt. The Birth Certificate of the victim was not furnished to fortify the Prosecution case. The victim's father gave her date of birth as 19-04-2007

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during her school admission, while PW-1 the victim and her mother PW-2 stated that, it was 19-04-2009, which are contradictory to each other. The entry of the date of birth in the School Admission Register was made in the year 2016, when the victim was admitted in Class III, no other document, such as, admission to her previous school or Birth Register was furnished to augment the assertion of the Prosecution regarding the correct date of birth of the victim. That apart, the victim has made several improvements in the Prosecution case as seen from her deposition in the Court as against her statement made under Section 164 Cr.P.C. Besides, the forensic report filed by the Prosecution fails to support the Prosecution case in any manner. That, there was no witness to establish that the Appellant had actually visited the house of the victim along with other persons, on the night of the incident nor was any medical evidence of the Appellant furnished to establish that he was capable of sexually assaulting the victim. Hence, the Appeal, on this ground alone, besides the other grounds urged, ought to be dismissed and the Appellant acquitted of all charges.

**4.** *Per contra*, Learned Additional Public Prosecutor contended that the evidence of PWs 1 and 2 pertaining to the age of the victim was correctly considered by the Learned Trial Court, as it was undecimated in cross-examination. Exbt 2, the Section 164 Cr.P.C. statement of the victim, reveals that, the Magistrate recording it, concluded that, the victim was aged thirteen years, hence there is no reason to disbelieve such finding. Relying on the decision of **xxxxx vs. State of Sikkim**<sup>1</sup> it was urged that this Court held therein that the Trial Court itself can make an assessment of the age of the victim, that, in light of such pronouncement, the age

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<sup>1</sup> 2024 SCC OnLine Sikk 89

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of the victim as assessed by the Magistrate cannot be faulted. The conviction was rightly handed out to the Appellant as the victim's evidence regarding the sexual assault was consistent and duly supported by the evidence of PW-4, the Doctor who examined her and found her clothes covered with mud, grass and dry leaves. There were signs of recent vaginal penetration and minor swelling around the vaginal orifice of the victim. Hence, the impugned Judgment and Order on Sentence require no interference and the Appeal deserves a dismissal.

**5.** We have heard the rival contentions raised by Learned Counsel for the parties. The evidence has been perused as also all other documents on records including the impugned Judgment and Order on Sentence.

**6.** Was the Appellant guilty of the offence and was the victim below eighteen years as found by the Learned Trial Court are the questions for determination before us.

**7.** Addressing the argument pertaining to the age of the victim, relevantly we may notice that the Learned Trial Court in Paragraphs 22 and 23 of the impugned Judgment observed as follows;

**"22.** To prove the victim's age, the prosecution has produced the school admission details (Exhibit-P8/PW-8) which shows that her date of birth is recorded in the school record as 19.04.2007. The concerned Headmaster (PW-8) has confirmed the record but under cross-examination, he would state that the victim's date of birth was recorded as 19.04.2007 based on the verbal mention of her father.

**23.** The victim and her mother on the other hand would state that her date of birth is 19.4.2009. It is apparent that here is a difference of two years between the school record and the version of the victim's mother. Apart from the school record, the parents of the victim does not have any other document to show the victim's actual year of birth. Under such circumstances, it would not be correct to fully rely on the school records as about the actual date of birth of the victim. **Nevertheless, the evidence of the victim's**

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**mother of her daughter's age also cannot be disregarded. As a matter of caution, even if five years is added on the year of birth mentioned by the victim's mother, the victim would be between 15-16 years old as on the date of offence."**

[emphasis supplied]

**(i)** Having perused that, we pause here momentarily, as we are unable to comprehend how the Learned Trial Court can by adding five years to the age of the victim, based on the evidence of PW-2, conclude that the victim would be 15-16 years old. This rationale of the Learned Trial Court is not fortified by any statutory provision, precedential law or even one under Article 141 of the Constitution of India and is therefore alien to the legal system. We are thus not inclined to consider such presumptions and disregard it as it deserves to be, in totality.

**(ii)** That having been said, we notice that PW-1 in her Section 164 Cr.P.C. statement recorded on 04-05-2020, claimed to be thirteen years of age and that her date of birth is 19-04-2009, which her mother PW-2 supported. In her evidence before the Court recorded in July, 2022, she stated that she was fourteen years old. This is proof of the fact that she appears to be unaware of her age as after two years of the recording of her Section 164 Cr.P.C. (in May, 2020) statement, she claims to be only a year older in July, 2022. There is no Register of Births furnished before the Learned Trial Court by the Prosecution, much less a Birth Certificate to bolster this submission. This is being flagged for the reason that the Prosecution had relied on the evidence of PW-8 the Headmaster of the Government Primary School, where the victim was studying, who stated that as per the School Admission Register, her date of birth is 19-04-2007. That, he had recorded so, based on the verbal version of her father, sans documentary evidence. On the face of the contradictory evidence of PW-8, PW-1 and PW-2 pertaining to

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the age of the victim, the Court appears to have been foisted with the unenviable task of selecting a year of date of birth of the victim, which obviously is not an option as the Prosecution case is to be proved beyond reasonable doubt and not by a preponderance of probabilities or the whim of the Court. Besides, we also notice that PW-1 in her deposition before the Court has stated that she had studied up to the eighth standard and discontinued her studies. The Prosecution made no effort to explain this sentence in the context of the year she dropped out of school. This would have been relevant for the purpose of assessing the victim's age. PW-10 claimed to be a Member of the Childline and PW-11 an Outreach Worker, both working under the District Child Protection Unit. However, from their evidence, it can be culled out that, they made no effort to check or verify the age of the victim and agreed with what the Police stated on this aspect, although relevant to the allegation of sexual assault PW-11 noticed that the victim at that time was not in a normal mental state and appeared traumatised. The argument that the Magistrate who recorded the Section 164 Cr.P.C. statement of the victim "assessed" her to be thirteen years is an erroneous submission. The age given by the Magistrate was based on the statement of the victim herself and has not been recorded as an independent assessment of the official. Considering the vacillating evidence discussed above with regard to the age of the victim and the lack of documentary evidence to substantiate it, we are of the considered view that the Prosecution has failed to prove the age of the victim beyond reasonable doubt. Hence, we are in absolute disagreement with the conclusion of the Learned Trial Court that PW-1 was a minor.

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**8.** Now, coming to the Prosecution case regarding the sexual assault committed on the victim by the Appellant, we find that the evidence of PW-1 in this context has been consistent. It is her case that when she and her younger siblings had gone to bed that fateful evening, she heard a knocking on the door. This happened thrice and on the third occasion, when she opened the door, someone suddenly caught hold of her, covered her mouth with a cloth and pulled her outside forcibly. She saw three people then, of whom she was able to recognise the Appellant only. She was taken to the nearby jungle where she was disrobed and the Appellant forcibly committed penetrative sexual assault on her. When her mother arrived the Appellant and others fled from the spot. She informed her mother of the incident who took her to the Police Station, where her elder sister prepared the complaint, Exbt P-1/PW-1, on which she signed. She was then forwarded for medical examination. It was the specific assertion of PW-1 that, she recognised the Appellant as he is her father's friend and often visited their house, and she saw him when he switched on the mobile phone light whilst he was fleeing.

**(i)** The victim's mother PW-2 supported the version of PW-1. She added that when she reached the place she saw the victim tied to a tree, stark naked and gagged with a handkerchief. Relevantly no arguments were advanced by the defence with regard to the above testimony of PW-2, as PW-1 made no mention of such a circumstance. Be that as it may, PW-2 further elucidated that the Appellant works with herself and her husband as a manual labourer at a construction site. On the relevant day, he came to work totally intoxicated and her husband advised him not to come to work in

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such a condition. That evening, both she and her husband were informed by the site contractor that their son had met with an accident at another construction site and taken to the hospital by the owner. They rushed to the hospital and found him in a critical condition. Around 10.30 p.m., she returned home, where she had left the victim with two of her younger siblings. *En route* she went to the home of her elder daughter PW-3, from where her son-in-law PW-6 accompanied her till her house. When they reached her home, they found the door open and the lights switched off and the victim missing. Both of them went out to the nearby jungle calling out the victim’s name. They saw a person scrambling and running into the jungle and found the victim tied to a tree. PW-3 and PW-6 later took the victim to the PS to lodge a complaint.

**(ii)** PW-3, the victim’s sister while stating that they were six siblings in all, the victim being her second sister, deposed that her mother, PW-2, had found the victim in the jungle and as per PW-1 there were three persons who took her to the jungle at night. Later, she took her victim sister to the PS to lodge the complaint. PW-6 supported the evidence of PWs 1, 2 and 3.

**(iii)** PW-4 the Doctor, who examined the victim identified Exbt P-3/PW-4 as the medical report she prepared after examining the victim. She recorded *inter alia* that, the victim gave a history of sexual assault after being taken by three people from her home to her nearby jungle. That, the sexual assault was perpetrated by one person only. The details are as follows;

" .....				
O/E	-> conscious,	Vitals	- B/P-130/74	<u>Imp</u> ① There was only minor swelling around vaginal orifice present, Rest Normal.
	oriented to time, place, person.	mm hg		
Clothing	- dirty, mud over	OR-90/m	SPO <sub>2</sub> -	
all		99% RA		



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clothes ⊕ and feet	S/E-CUS-SN2 (+)	② There is sign of recent vaginal penetration seen.
few grass-green and dried leaves pieces seen ⊕ at her clothes.	P/A – soft, tenderness over epigastrium + umbilical region	③ There is no injury in the perineum.
L/E – There is no cut injury near vagina		.....
<div><div>Labia minora Labia majora</div><div>- intact</div></div>	* No strangulation marks by hands or any other items noted	
No injury to clitoris /urinal opening.	- around-neck or mouth/ arms/legs-noted.	
Vaginal opening or orifice -> <u>1 finger</u>		
No fourchette tear	* No signs of any struggles at back-dorsum region of the body noted.	
There was minor swelling around vaginal orifice ⊕ present.	No laceration/ abrasion ⊖	
There was blood smudged in perineum.		
Fresh Blood was coming out of vagina.	* No bite marks around breasts.	
light clots present.	No scratches seen	
Buttocks side -> Redness (light) noted.	No cut/ no lacerations.	
however, no lacerations, no cut injury or skin blue discoloration seen.	No discolorations.	
No signs of anal penetration seen.		.....”
No redness ⊖/no swelling ⊖		

Her evidence therefore supports the evidence of the victim that there was penetrative sexual assault committed on her by the Appellant.

**(iv)** The argument that the forensic report was negative has no legs to stand in the face of the uncontroverted and consistent evidence of the victim.

**9.** In view of the foregoing discussions, we have reached the finding that there is no reason to differ with the finding of the Learned Trial Court so far as the question of sexual assault and abduction is concerned.

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**10.(a)** However, as the victim's minority remained unproved, he is acquitted of the offence under Section 5(g) of the POCSO Act, 2012. In lieu thereof, he stands convicted of the offence under Section 376D of the IPC.

**(b)** In view of the offence under Section 5(g) of the POCSO Act punishable under 6 of the same Act and Section 376D of the IPC, being the exact same offence and the penalty to be imposed also being the same, we are of the considered view that no prejudice is caused to the Appellant if he is sentenced to undergo rigorous imprisonment for twenty years under Section 376D of the IPC, as the charge under Section 5(g) punishable under Section 6 of the POCSO Act was clearly explained to him and understood by him.

**(c)** His conviction under Section 366 of the IPC and the sentence meted out to him thereunder stands undisturbed.

**(d)** He is acquitted of the offence under Section 376DA of the IPC.

**11.** Appeal disposed of on the above terms.

**12.** No order as to costs.

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

**14.** 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**  
16-04-2025

**( Meenakshi Madan Rai )**  
**Judge**  
16-04-2025

Approved for reporting : **Yes**