

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 23rd 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.06 of 2023

Appellant : State of Sikkim

versus

Respondent : Lakpa Sherpa

Application under Sections 378(1)(b) of the
Code of Criminal Procedure, 1973

Appearance

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

Mr. Rajendra Upreti, Advocate (Legal Aid Counsel) for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The State-Appellant is aggrieved by the acquittal of the Respondent of the offences under which he was charged, viz; Section 3(a) punishable under Section 4(2) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"), Sections 361 and 375, punishable under Sections 363 and 376 of the Indian Penal Code, 1860 (hereinafter, the "IPC") respectively, vide the impugned Judgment dated 29-03-2022, in Sessions Trial (POCSO) Case No.10 of 2021 (*State of Sikkim vs. Lakpa Sherpa*), by the Court of the Learned Special Judge (POCSO Act), Mangan, North Sikkim.

2. We may briefly advert to the facts for clarity. FIR Exhibit 1, was lodged on 20-10-2021, before the jurisdictional P.S., where the alleged victim PW-3, informed that, on 17-10-2021 she returned home to "S", a town in East Sikkim, where she resided with her mother and step-father, after having spent a week with

her father and step-mother, in a village in North Sikkim. She returned to town "S", to her mother and step-father, but on being reprimanded by them, she left the house and spent the night in her cousin's house, from where she planned to return to her father's house the next day. Her cousin, however advised her to return back to her mother, as her school would be re-opening, to that end, he stopped a truck and requested the driver, the Accused/Respondent, to reach her to place, "Z", from where she would disembark and proceed home. The driver assured her cousin that, he would do so as he was going to Siliguri and town "S" *en route*, where he would drop her instead of "Z". On reaching "S", when she requested him to stop the vehicle, he told her that the Police would not permit him to halt and if she accompanied him to Siliguri, on their return he would stop the vehicle at "S". After completing his errands at Siliguri, they returned, but when she requested him to stop at "S", he did not do so but took her to his room in an unknown place in North Sikkim, by which time it was around 02.00 a.m. Of the two beds in the room she occupied one. After the lights were switched off, the Respondent came to her bed and committed penetrative sexual assault on her. The next day she reserved a vehicle and went to the place, "Z", where she was helped by one person to board a vehicle to the town "S" and she reached home at 10.00 p.m. On 20-10-2021 she along with PW-18, her mother, went to the concerned Police Station in North Sikkim from where they were directed to the jurisdictional Police Station and the FIR was lodged.

(i) On the basis of the said FIR, the Police Station registered Case No.03/2021, dated 20-10-2021 under Section 4 of

the POCSO Act against the Respondent. The matter having been investigated into by PW-22, Charge-Sheet was submitted against the Respondent, under Section 363 of the IPC, read with Section 4 of the POCSO Act. The Respondent was then tried by the Learned Trial Court for the offences under Section 3(a) punishable under Section 4(2) of the POCSO Act, Section 361 punishable under Section 363 and Section 375 punishable under Section 376 of the IPC, the Charges having been read over and explained to him and a plea of "not guilty" entered by him. The Prosecution examined twenty-two witnesses to prove its case against the Respondent. The Respondent was then examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C.") and his responses recorded. Thereafter, on hearing the final arguments, the Learned Trial Court pronounced the impugned Judgment of acquittal.

3. The question that falls for determination by this Court is whether the Learned Trial Court was in error in acquitting the Respondent of the offences he was charged with.

4. The State-Appellant in the first instance conceded that, the Prosecution was unable to prove that the Prosecutrix was a minor at the time of the offence. Secondly, that on the inability of the Prosecution to prove the victim's age, the sexual offences committed by the Respondent consequently fell under Section 375 of the IPC and not under the provisions of the POCSO Act, 2012. That, the fact of sexual assault is proved, as, even though the victim consented to be taken by the Respondent to Siliguri in his truck, on their return he forcibly drove her to his room, located near a monastery and sexually assaulted her without her consent

as apparent from the victim's evidence. That, in such circumstances the Judgment of acquittal be set aside and the Respondent be convicted of the offences under Sections 375/376 of the IPC.

5. Learned Counsel for the Respondent contended that there was no error in the finding of the Learned Trial Court and the Prosecution not only failed to prove the age of minority but also of non-consensual sexual assault. The allegation that the victim did not consent to the sexual act is belied by the fact that there were six sheds at the place where the Respondent took the victim, the alleged offence took place in one of the sheds. The sheds being adjacent to each other the cries of the victim would have been heard by the occupants of the other five sheds. Besides, had she been raped, she would not have relaxed in the room of the Respondent till late in the morning, where she was seen to be sleeping till 11.00 a.m. Hence, the impugned Judgment of acquittal ought not to be disturbed.

6. Having heard Learned Counsel for the parties, we find that there is substance in the submissions of Learned Counsel for the Respondent. It was fairly conceded by Learned Additional Public Prosecutor that the Prosecution failed to furnish proof of age of the victim. On this aspect, the Learned Trial Court took into consideration the evidence of PW-13, PW-14, PW-17 and PW-18. While considering the evidence of the said witnesses, it was observed by the Learned Trial Court that PW-13 the Doctor posted at the concerned PHC, claimed that, the Prosecutrix's date of birth was 27-05-2007 but under cross-examination deposed that he did not know the name of the informant and she did not sign in his

presence. That, PW-14, the Aganwadi Worker, furnished information about the date of birth of the Prosecutrix but under cross-examination admitted that when she put her signature at Column No.14 of Exhibit 15 the Live Birth Register, the particulars of the Prosecutrix was already filled up and the witness was not present when the Prosecutrix was born. PW-17, the School Principal, on verification from the school admission register found the date of birth of the Prosecutrix to be 27-05-2007, but admitted that she could not say which document was submitted at the time of the victim's admission to school. The mother of the Prosecutrix deposed that she did not know the contents of the Birth Certificate, Exhibit 6. At Paragraph 20 of the impugned Judgment it was accordingly observed as follows;

"20. In view of the above facts, date of birth of prosecutrix given in her birth certificate (Exhibit-6) and School Admission Register (Exhibit-22) cannot be relied on by this Court to prove that prosecutrix was below the age of eighteen years at the time of incident. Accordingly, the point no.(i) is decided against the prosecution."

This finding of the Learned Trial Court with regard to the victim's age was not assailed by the Prosecution by way of an Appeal.

(i) Apart from the above witnesses, we also notice that the father of the Prosecutrix was examined as PW-6. He stated that he did not remember the exact date of birth of his daughter and could not say whether his daughter was fourteen years as he did not know her date of birth. That, he had given his statement to the Police but the same was not read over and explained to him. PW-21 was the Doctor posted at the PHC who on a requisition sent by the I.O. of the case verified from the Live Birth Register, Exhibit 15, of the Prosecutrix's date of birth, where it was shown to be 27-

05-2007, but admittedly she had no personal knowledge of Exhibit 15 nor was the entries made in her presence and she did not know anything about the date of birth of the Prosecutrix in the case. The victim, examined as PW-3, asserted that her date of birth was 27-05-2007. The parents of the victim have admitted that they are unaware of her date of birth in such a circumstance the victim's evidence cannot be countenanced. PW-11, a driver in the Monastery, claimed to be the person in whose presence Exhibit 6 the Birth Certificate of the victim was seized, but he admitted that he did not know its contents. From the evidence of the witnesses considered by the Learned Trial Court and that of the witnesses discussed hereinabove by this Court, it is evident that the Prosecution has failed to prove the age of the victim. Hence, the conclusion of the Learned Trial Court on this facet cannot be faulted.

7. So far as the offence of rape is concerned, it is seen that the victim left her house on 17-10-2021. She travelled to Siliguri in the Respondent's truck on 18-10-2021 and returned in the vehicle the same evening, but by the time they reach the living quarters of the Respondent, somewhere in North Sikkim, it was around 02.00 a.m. of 19-10-2021. Her evidence reveals that, her statement to the Police was an offshoot of the "missing person" case lodged by her mother PW-18, when the victim failed to return home. After the alleged offence when she returned from the house of the Respondent, she encountered Police *en route* at various places as was her admission, but she did not report any incident of sexual assault to them, despite having been alone when she saw the Police. She reached her home at "S" only at 10.00 p.m. that

night (19-10-2021). PW-2 the Counsellor working with the District Child Protection Unit deposed that, the victim narrated to her the fact of sexual assault. She is not an eye witness. PW-4, a monk of the monastery, who resided in a shed near the Respondent, along with a friend of his PW-7 travelled in the Respondent's truck up to Siliguri, on 18-10-2021 returned the same evening and reached home, in the morning wee hours of 19-10-2021. The witness deposed that the victim sought a lift and boarded the vehicle and both the victim and the Respondent started talking to each other. The Respondent requested the victim to accompany him up to Siliguri which she agreed to. After completing their respective errands at Siliguri, all who were in the truck, returned to their place of stay in North Sikkim, where PW-4 and his friend left the victim and the driver in the vehicle. His cross-examination would extract the fact that the victim during the travel in the said vehicle was comfortable and did not request the Respondent to drop her anywhere either while going or returning. She also did not complain about the Respondent on the to and fro journey. That, there are six to seven rooms outside the said monastery, of which one is occupied by the Respondent. PW-5 was the uncle of the victim who had stopped the truck for her to return home. As the victim did not reach home, PW-5 made efforts to trace her by telephonically communicating with her relatives despite which she could not be located. He also called the Respondent several times on his phone but his calls were rejected. The conduct of the Respondent raised his suspicions, accordingly he directed the mother of the Prosecutrix to lodge a missing report at the concerned Police Station. Following the report, the

Respondent was summoned to and apprehended at the Police station. PW-7 the friend of PW-4 was in the same truck and his evidence regarding the travel and return corroborated that of PW-4. PW-9 stated that he saw a girl sleeping inside the room of the Respondent at 11.00 a.m., as his room is located next to the room of the Respondent. That, he was present there in his room the previous night but he did not hear any cries for help from the girl in the Respondent's room. The victim claimed to have reserved a vehicle and reached "Z", however the evidence of PW-10 reveals that the vehicle reservation was done by the Respondent. PW-10 had sent a private vehicle to pick her up and he was told that a girl was taken from the monastery to the place "Z". PW-15 the doctor, who examined the victim deposed *inter alia* as follows;

"..... On her per vaginal examination:-
Vulva within normal limits, no swelling, no tenderness.
Vagina within normal limits, no discharge noted.
Hymen ruptured (healed). There was no external injuries, no struggle marks noted at the time of examination."

The Prosecutrix/victim had given a history of sexual assault by the driver "Lakpa Sherpa" on 19-10-2021. The examination of the Respondent by PW-16, another doctor revealed that the Respondent admitted to having sexual intercourse with the Prosecutrix on 19-10-2021 at around morning time. PW-18 the mother of the victim stated that during dusherra she had sent the Prosecutrix to her father's house but she was informed that her child was sent home in the truck. As she did not reach home, she verbally lodged a report before the "S" town Police Station. Later that evening her daughter reached home around 10.10 p.m. Although she enquired as to where the victim had resided the

previous night, the victim did not disclose anything to her. PW-19 fortified the evidence of PW-10 that he reserved a taxi vehicle and dropped a girl from the monastery to place "Z". PW-22 conducted the investigation.

8. The Learned Trial Court after appreciating the evidence on record opined that the Prosecutrix on reaching the monastery went to the room of the Respondent and slept in a separate bed but later the Respondent and she slept in one bed and indulged voluntarily in sexual intercourse. On her return home although she came across Police personnel, she failed to raise an alarm revealing that the act was consensual.

9. Having meticulously perused the evidence of the victim, we find no reason to differ from the evidence of the Learned Trial Court as the victim travelled and traversed long distances in the vehicle of the Respondent, without raising any alarm whatsoever nor did she complain of the misconduct of the Respondent to PW-4 and PW-7 her co-passengers. She not only spent the night in the room of the Respondent where she did not raise any alarm for help but she continued to remain there till 11.00 a.m. and returned home in the taxi reserved by the Respondent for her. Evidently, it was only her mother who was aggrieved with the disappearance of the victim which led to the FIR.

10. In light of the foregoing discussions, we find no error in the conclusion arrived at by the Learned Trial Court.

11. The impugned Judgment is upheld.

12. Appeal is dismissed and disposed of.

13. No order as to costs.

14. Copy of this Judgment be transmitted forthwith to the Learned Trial Court for information along with its records.

(Bhaskar Raj Pradhan)
Judge
23-04-2025

(Meenakshi Madan Rai)
Judge
23-04-2025

Approved for reporting : **Yes**