THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

Dated : 10th September, 2025

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

Crl. A. No.08 of 2023

Appellant : Tashi Pintso Lepcha

versus

Respondent : State of Sikkim

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

Appearance

Mr. Thupden Youngda, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Shakil Raj Karki, Additional Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. In this Appeal, which assails the Judgment dated 29-11-2018, of the Court of the Special Judge (POCSO), West Sikkim, at Gyalshing, in Sessions Trial (POSCO) Case No.08 of 2018 (*State of Sikkim vs. Tashi Pintso Lepcha*) and the Order on Sentence of the same date, three specific points of challenge have been raised by Learned Counsel for the Appellant i.e., (i) The Prosecution has failed to prove the age of minority of the victim; (ii) There is no proof of penetrative sexual assault; and (iii) There are inconsistencies in the previous statement of the victim with her evidence as deposed in Court.

2. Before examining the merits of the Appeal, the Prosecution case is narrated briefly. On 09-03-2018, PW-2 the victim's father lodged Exbt-3 the FIR, alleging therein that his thirteen year old daughter PW-1, had been sexually assaulted by the Appellant, near her school compound, between 01.05 p.m. to

01.45 p.m. The matter came to be registered before the jurisdictional police station as FIR GPS Case No.11/2018, dated 09-03-2018, under Sections 341, 376 of the Indian Penal Code, 1860 (hereinafter, the "IPC") read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"). Investigation was endorsed to PW-17, the Investigating Officer (IO), on completion of which, Charge-sheet was submitted against the Appellant under Sections 376/341/506 of the IPC, read with Section 4 of the POCSO Act.

(i) The Trial Court framed charged against the Appellant under Sections 376(2)(f), 376(2)(i) and 354 of the IPC along with Section 5(n) punishable under Section 6 of the POCSO Act. The Appellant entered a plea of "not guilty" and claimed trial. On such plea the Prosecution took to furnishing and examining seventeen witnesses before the Trial Court. The Trial Court did not frame any specific question for determination but in the impugned Judgment discussed amongst other issues, the non-production of the victim's birth certificate by the Prosecution. After taking into consideration the evidence of PWs 1, 2, 10 and 17 and also relying on the Judgment of the Supreme Court in ***Pradeep Kumar*** vs. ***State of U.P.***[1], the Court concluded that the victim was a minor, aged thirteen years, at the time of the lodging of Exbt-3. The Trial Court then embarked on assessing the evidence of the victim and whether she was able to establish that the offence was committed against her. In such exercise, the statement of the victim PW-1, her father PW-2, PWs 3, 4, 5, 6, 8, 9, 10, 13, 14 and 17 were considered and on appreciating the evidence, it was concluded that the incident of aggravated penetrative sexual assault was committed by the

[1] 1995 Supp (4) SCC 419

Appellant upon the victim and duly proved. It was also proved by the evidence of the victim and her father PW-2 that, the Appellant is a relative of the victim being the victim's elder aunt's husband. Thus, on analysing the entire Prosecution evidence, the Court came to a finding that the Prosecution had established the offence under Section 5(n) punishable under Section 6 of the POCSO Act against the Appellant. He was consequently sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹ 10,000/- (Rupees ten thousand) only, under Section 5(n) punishable under Section 6 of the POCSO Act, with a default stipulation. It was also observed that as the ingredients of Sections 376(2)(f)/376(2)(i) of the IPC are ingrained in Section 5(n) of the POCSO Act, a separate discussion and decision under the said sections were not required neither was a separate conviction required, the offences being the same as made out under Section 5(n) of the POCSO Act. In this context, the Court bolstered its reasoning by invoking Section 42 of the POCSO Act, which provides for alternative punishment.

3. Learned Counsel for the Appellant, impugning the said findings submitted that, the Prosecution failed to furnish any documentary evidence to establish the victim's age. The only document furnished by the Prosecution was her Immunization Card, Exbt-23, said to be signed by a health worker, who however was not produced as a Prosecution witness. Thus, in such circumstances, this document cannot be relied on for proof of age. Apart from this document, the Prosecution relied on Exbt-10, a certificate issued by PW-10, the headmaster of the school where the victim was studying but the school admission register was not

furnished in its original, nor was PW-10 able to give reasons for its non-production. Under cross-examination he admitted that Exbt-10 was issued by him but it was not on the basis of the victim's date of birth. PW-17 the IO, also did not seize the school admission register, therefore the evidence of PW-10 to the effect that the victim's date of birth was recorded as 22-02-2005 in the school admission register is of no assistance to the Prosecution case in the absence of the school admission register. No birth certificate of the victim was furnished nor was any document furnished from the Registrar of Births and Deaths. The victim's age therefore went unproved. The Appellant in his Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."), asserted that the victim was eighteen years of age. In such circumstances, it was urged that, it is now settled law that when contradictory evidence emerges, the evidence in favour of the accused ought to be taken into consideration by the Court.

(i) In the second leg of his arguments, relying on the medical report of the victim it was contended that PW-14 the Doctor, had conducted the medical examination of the victim. Her evidence is specific that there were no visible fresh or old injuries on the body of the victim and her hymen intact, ruling out penetrative sexual assault.

(ii) Although the third ground raised by Learned Counsel related to inconsistencies in the statement of the victim in Court with her evidence under Section 164 of the Cr.P.C., this argument was abandoned on the realisation by the Learned Counsel that the victim had not been confronted with her Section 164 Cr.P.C. statement when her evidence was being recorded in Court. In light

of the above circumstances it was urged that, the Appellant would only be liable for the offence, if at all, for sexual assault and not penetrative sexual assault as alleged. Hence, the sections of conviction and consequently the sentence imposed on the Appellant be reduced.

4. Learned Additional Public Prosecutor in the first leg of his arguments advanced the contention that the Appellant was the victim's uncle, being the husband of her mother's elder sister. He had specifically sent PW-3, an eight year old boy to call the victim after which he took her to the forest and then raped her as can be culled out from the evidence of the victim PW-1 and her friends PWs 4, 6 and 8, who deposed that, the victim had told them that she had been raped by the Appellant and he had given her ₹ 10/- after that. PW-3 has specified that he had been sent by the Appellant to call the victim to the canteen. PW-5 another friend of the victim has also deposed that her friends had said that '*there was some secret thing*', as they saw the victim and the Appellant going towards the jungle. They also went towards the place where the victim and the Appellant had gone. When they met the victim they saw that her school uniform was dirty and they enquired from her as to what had happened. She disclosed reluctantly, that, she had been sexually assaulted by the Appellant. PWs 4, 5, 6 and 8 had deposed that they then informed PW-7, their teacher, about the above facts. PW-7 corroborated the aforestated evidence. PW-9, another teacher of the same school along with PW-7 deposed that, the victim and the friends, the PWs (*supra*) had told her and PW-7 of the penetrative sexual assault committed on the victim by the Appellant. They accordingly went and informed PW-10. PW-10

has corroborated the said fact and the narration of the sexual assault by PWs 7 and 9 to him. The fact of penetrative sexual assault has been proved by the foregoing evidence of the witnesses, substantiated by the evidence of PW-14, the doctor who examined the victim and pointed out the redness over the "posterior commissure" which was bright red in colour and could only be the result of penetrative sexual assault. The age of the victim has been proved by PW-10 as Exbt-10 the certificate issued by him established that the victim was born on 22-02-2005 as recorded in the school admission register. Exbt-23 the Immunization Card of the victim, an official document, duly signed by the health worker supported by Exbt-10. In such circumstances, there is no reason to interfere with the findings and conclusions of the Trial Court which has correctly convicted.

5. We have given due consideration to the rival contentions advanced before us and examined all the evidence, documents on record and perused the impugned Judgment and Order on Sentence.

6. The question that falls for determination by this Court is; Whether the findings of the Trial Court is guided by the settled principles of law and the conviction and sentence handed out correctly.

7. Dealing first with the age of the victim, we are inclined to agree with the submissions of Learned Counsel for the Appellant that the victim being a minor has not been established by the Prosecution. The Immunization Card Exbt-23 has been filed in the original. It purports to be under the signature of a health worker who however was not examined as a Prosecution witness. Exbt-

23, which under normal circumstances, ought to have been with the victim's parents and known to them was not exhibited by the victim's father who was examined as PW-2. The document does not bear the official stamp of the signatory, his name, or the official stamp of the concerned hospital and was exhibited by the IO PW-17, who would have no personal knowledge about it. According to PW-17, Exbt-23 was seized vide Seizure Memo Exbt-5 and the date of seizure is reflected as 09-03-2018 at Gyalshing P.S., from the victim. The victim did not depose about such seizure to lend assurance to the statement of the IO. The two witnesses to the seizure, i.e., Nirmala Gurung PW-9 and Bandana Lepcha PW-7 were examined. PW-9, only deposed about the seizure of ₹ 10/- currency note from the victim and not about the seizure of the Exbt-23. PW-7 did not depose about any seizure. The aforesaid circumstances compel us to ignore Exbt-23, the contents having remained unproved.

(i) PW-10 is the headmaster, who is said to have issued the certificate pertaining to the date of birth of the victim. As per this witness the school admission register recorded the victim's date of birth as 22-02-2005. It was his admission that the said register was not furnished in original in the Court and the certificate Exbt-10 was issued by him but it was not on the basis of the victim's birth certificate. Even if it is presumed that the relevant entry was there in the school admission register, which was not produced in Court, a question would arise as to how that entry was recorded. The failure of the Prosecution to produce the School Admission Register leaves the question open for conjectures and surmises which in a criminal case is impermissible.

(ii) The Prosecution produced an Aadhar Card Exbt-24 claiming it to be that of the victim. Neither the victim nor the victim's father spoke about it or exhibited it. The Aadhar Card was exhibited by the PW-17 IO who would have no personal knowledge about it. The IO deposed that it was collected and seized under proper Seizure Memo Exbt-5, in the presence of witnesses. The Seizure Memo Exbt-5 records that it was seized from the victim but she gave no evidence about the seizure. The two witnesses to the seizure were again said to be PW-9 and PW-7 but they did not mention the seizure of the Aadhar Card in their depositions and Exbt-24 does not even bear the correct first name of the victim. There is no explanation by the Prosecution in this regard. The entries in the Aadhar Card Exbt-24 are thereby of no relevance.

(iii) That, leaves this Court with the oral deposition of the victim and her father stating that the victim was 13 years old. The evidence of the victim is in the circumstances, only hearsay, as the parents have not procured or made her birth certificate. The victim's father only stated that **"**……My victim daughter is 13 years old.……**"**. He did not give any further detail, not even her date of birth. However, during cross-examination, he admitted that **"**……. It is true that the Birth Certificate of my victim daughter is not procured by us till date…..**"**.

(iv) The oral evidence of the father and the victim that she was 13 years old may be true but in a criminal prosecution it may be difficult for this Court to hold that the Prosecution has been able to prove the minority of the victim as the standard required to prove the Prosecution case is 'beyond reasonable doubt'. In light of

the evidence furnished by the Prosecution we are in disagreement with the Trial Court on the aspect of the victim's age.

(v) Now, while dealing with the proof of penetrative sexual assault it appears that PW-14 in her evidence observed as follows;

> **"**……
> On examination : the patient was conscious, cooperative, well oriented with time, place and person. Vitals were stable. Chest and CVS – NAD, P/A soft, NAD. Breast was well developed. No visible injuries. No visible fresh or old injuries over the body. She attained her menarche at 12 years (4-5 month ago). Gait was normal. Urine not passed.
> On local examination : Painless ulcers over the left labia majora. Foul smelling discharge present. Hymen was intact. Redness present over the posterior commissure which was bright red in colour.
> Three vaginal swabs and undergarment were handed over to the police.
> Findings: Urine pregnancy test was negative. Redness present over the posterior commissure.
> Exhibit – 15 is the medical report of the victim prepared by me, wherein Exhibit – 15(a) is my signature.
> ……**"**

(vi) It was the admission of the doctor PW-14 under cross-examination that she did not find any seminal stains in the private parts of the victim. She had not given any opinion about the painless ulcers over the labia majora and redness over the posterior commisure of the victim. The doctor admitted that painless ulcers over the labia majora and redness over the posterior commissure are not a sure indication of any kind of sexual assault. That, such circumstance can also occur due to factors other than sexual assault. This evidence of the doctor is being considered along with the evidence of PW-1. According to PW-1 **"**……..*Thereafter, we started walking towards the jungle. After sometime my brother was sent back to school and my 'Thumba' took me towards the jungle. I resisted and told my Thumba that I will go back to school but he did not let me. He took me towards cave in jungle where he touched my*

*breast and all over my body. Thereafter, the accused removed my clothes, laid me down and raped me. After he raped me he gave me ₹ 10/- and ran away from that place ……..***"**

(vii) PW-17 the IO in his evidence stated that, the undergarment in respect of the victim and vaginal swabs and two bottles of penile swabs and undergarment in respect of the accused Tashi Pintso Lepcha were forwarded to RFSL for comparison and lab analysis. The reports were negative for saliva or semen.

(viii) Now, the evidence of these three witnesses PW-1, PW-14 and PW-17 are to be taken into perspective. The alleged incident as per Exbt-3 is said to have taken place between 01.05 p.m. to 01.45 p.m. The FIR was lodged at 1700 hours the same day. The victim was examined at 08.00 p.m. by PW-14 the same evening. It is not the Prosecution case that the victim had changed her undergarment after the incident or before her medical examination by PW-14 which is indicative of the fact that she wore the same garments as she had worn during the alleged sexual assault. The victim has given no details or elucidated what she meant by rape. In ***Guidelines for medico-legal care for victims of sexual violence © World Health Organization 2003***, at Page 12, the physical consequences of rape are detailed as below;

> **"**…….
> ***2.5.1 Physical consequences***
> …….
> Genital injuries in women are most likely to be seen in the posterior fourchette, the labia minora, the hymen and/or the fossa navicularis. The most common types of genital injuries include:
> — tears;
> — ecchymosis (i.e. bruising);
> — abrasions;
> — redness and swelling.
> …….**"**

(ix) We have noticed that the evidence of these three witnesses are inconclusive for the offence of penetrative sexual assault. The undergarment and vaginal swabs of the victim did not indicate the presence of spermatozoa or other foreign body fluids although the apparels were unchanged after the alleged rape. The concerned scientist, who carried out the forensic analysis, of the said articles was not examined leading to an adverse inference on this facet. There is no description of the offence by the victim and what according to her constituted the offence of rape. In the absence of any seminal stains or other incriminating evidence even on the genital of the victim and considering that the doctor was unable to give an opinion for the 'painless ulcers' over the left labia majora, or the reason for the redness over the posterior commissure, we are inclined to observe that the foul smelling discharge from her genital as noted by PW-14 and the redness in the posterior commissure in all likelihood indicated some infection in her private part as there is no evidence of penetrative sexual assault on medical examination. In ***Guidelines for medico-legal care for victims of sexual violence © World Health Organization 2003***, at Page 48, Genito-anal injuries related to penetration are detailed as follows;

> **"**…….
> ***4.5.3 Genito-anal injuries related to penetration***
> …….
> The posterior fourchette, the labia minora and majora, the hymen and the perianal folds are the most likely sites for injury, and abrasions, bruises and lacerations are the most common forms of injury (see Figs. 3–5).
> …….**"**

There is no mention of redness in the posterior commissure in offences of penetrative sexual assault.

(x) While examining the evidence of her friends PWs 4, 5, 6 and 8 it is clear that, the victim also did not give them any details about the incident, in fact she was reluctant to disclose the incident to them and it was only after much coaxing that she told them that she was raped by the Appellant *sans* details of what constituted the act of rape.

(xi) In the wake of the evidence furnished by the Prosecution and the details that emanate therefrom, we are of the considered view that the Prosecution has failed to prove penetrative sexual assault on the victim by the Appellant. It appears from the evidence that some form of sexual assault took place but there is no conclusive finding of penetrative sexual assault.

8. Hence, based on the evidence on record, we conclude that the Prosecution has proved its case beyond reasonable doubt against the Appellant under Section 354A(1)(i) of the IPC which reads as follows;

> **"354A. Sexual harassment and punishment for sexual harassment**.—(1) A man committing any of the following acts—
>
> (i) physical contact and advances involving unwelcome and explicit sexual overtures; or**"**

(i) Consequently, he is sentenced to undergo rigorous imprisonment of three years and to pay fine of ₹ 10,000/- (Rupees ten thousand) only, under the Section (*supra*), in default thereof to undergo simple imprisonment for two months.

9. In such circumstances, the impugned Judgment and Order on Sentence of the Trial Court is set aside and the question framed for determination by this Court is answered accordingly.

10. The Appeal stands disposed of accordingly.

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

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

13. Pending applications, if any, also stand disposed of.

(Bhaskar Raj Pradhan)
Judge
10-09-2025

(Meenakshi Madan Rai)
Judge
10-09-2025

Approved for reporting : **Yes**

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