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.18 of 2024

Appellant : Edward Bara

versus

Respondent : State of Sikkim

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

Appearance

Mr. Umesh Ranpal, Advocate (Legal Aid Counsel) with Ms. Rubusha Gurung, Advocate for the Appellant.

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

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant was tried for and found guilty of having committed the offence of aggravated sexual assault and aggravated penetrative sexual assault, on a child, below twelve years and convicted and penalised accordingly. This Court is to determine, whether the Judgment of conviction and Order on Sentence was correctly handed out to the Appellant, by the Learned Trial Court.

2. Before delving into the merits of the matter, the Prosecution narrative is summarised. On 15-09-2022, PW-1 the mother of the minor victim, lodged an FIR Exbt P-2/PW-1, before the concerned Police Station, informing that, on 14-09-2022, at around 10.30 p.m., her child PW-2, aged about four years, told her that the Appellant had called her to his room, directed her to close the door, undress herself and he touched her private parts, inserted

his private part in her mouth and attempted to insert his private part into hers.

3. PW-13 the Investigating Officer (I.O.) of the case, on being endorsed with the investigation and on completion thereof, submitted Charge-Sheet against the Appellant, under Section 376 of the Indian Penal Code, 1860 (hereinafter, "IPC"), read with Sections 4/7 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act, 2012") and Sections 3(a)(c)(d)/5(m)/6 and 8 of the same Act.

(i) The Learned Trial Court framed Charge against the Appellant under Section 376AB of the IPC, Section 6 and Section 10 of the POCSO Act, 2012. The Charges having been read over and explained to the Appellant, he entered a plea of "not guilty" and sought to be tried. The Prosecution examined thirteen 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."), where he reiterated his innocence and asserted that a false case had been registered against him. He desired to and examined himself as his witness.

(ii) The Learned Court of the Special Judge (POCSO Act, 2012), Gangtok, on appreciation of the evidence furnished, pronounced the impugned Judgment on conviction on 26-03-2024, in S.T. (POCSO) Case No.28 of 2022. Vide the impugned Order on Sentence, dated 27-03-2024, the Appellant was sentenced to twenty years of rigorous imprisonment and a fine of ₹ 5,000/- (Rupees five thousand) only, for the offence under Section 5(m) punishable under Section 6 of the POCSO Act, 2012, while under Section 9(m) punishable under Section 10 of the POCSO Act, 2012,

he was ordered to undergo rigorous imprisonment of five years and to pay a fine of ₹ 5,000/- (Rupees five thousand) only. Both sentences of fine bore default stipulations.

4. Learned Counsel for the Appellant while pointing out the perceived flaws in the Prosecution case, contended that, PW-10 the Doctor, who examined the victim, was not able to establish that the injury/redness on the vagina of the child was due to sexual assault. She also could not identify the victim in the Court room. The evidence of the victim, being rife with inconsistencies, are indicative of tutoring. No person witnessed the victim entering the house of the Appellant and the victim's mother admitted that, they did not visit the Appellant's house. It is the Prosecution case that, the grandparents were the victim's caregivers when her parents were out for work, but their non-examination as Prosecution witnesses leads to an adverse inference against the Prosecution. The FIR alleges that the incident took place at around 10.30 p.m. when no child of four years would possibly be out of her house. The Appellant was working as a Section Officer in the Spices Board, Regional Office and would attend office from 09.30 a.m. to late in the evenings and the question of him thereby committing the offence does not arise. The evidence of PW-5, the victim's uncle, who lived with the victim and her family does not inspire confidence, as he is unaware of what transpired between the Appellant and the victim. That, in fact the animosity between PW-5 and the Appellant led to the institution of a false case against him. The anomalies in his evidence, with that of PW-1, cannot be ignored as he stated that, he went to the restaurant to inform PWs 1 and 3 the victim's parents, whereas PW-1 stated that she had received a phone call

from him about the alleged incident. The evidence of PW-3 does not establish the commission of the offence while that of PW-1 is not only vacillating but as she is not an eye-witness deserves no consideration. Contesting the age of the victim, it was urged that her age was not proved as the birth certificate relied on by the Prosecution remained unproved. Hence, the impugned Judgment and Order on Sentence be set aside and the Appellant be acquitted of all charges.

5. Learned Additional Public Prosecutor, on the other hand, contended that, the age of the child has been duly proved and the fact that she was a mere child of four years could easily be visually assessed. That, the various reasons given by the Learned Trial Court, while convicting the Appellant of the offences of sexual assault are sound and hence, requires no interference.

6. The arguments were heard *in extenso* and all documents examined, including the entire evidence on record. The impugned Judgment was carefully perused.

7. On the doubts raised regarding the age of the victim, we cannot bring ourselves to agree with the arguments advanced by the Counsel for the Appellant. It is seen from the unwavering evidence of the Prosecution witnesses on record, that, the victim is a mere child of four years, a pre-schooler. PW-2, the victim in her evidence in Court on 22-06-2023, deposed that she was four years old. No cross-examination contradicted this statement.

(i) As per PW-3 the victim's father, the victim was four years old, having been born in September, 2018, at "CRH Manipal". All that could be extracted from him during his cross-examination

was the assertion and thereby a confirmation that his daughter was indeed born in September, 2018.

(ii) PW-5 identified the victim as his niece and claimed that she is four years old, this statement stood the test of cross-examination, although he did not know the details of Exbt P-1/PW-1, the birth certificate.

(iii) PW-6 was the Registrar, Births and Deaths of the concerned Municipal Corporation. On receiving a written requisition from the I.O., regarding the victim's age, he checked and verified the details in the Live Birth Register and found that the birth certificate issued in her favour was genuine and correct, her date of birth being 27-09-2018. However, he admitted that at the time of the entry of such details he was not the Registrar of Births and Deaths.

(iv) PW-7 claimed to have counselled the child victim, aged about "four years", being a Childline Counsellor. The age of the victim, as stated by this witness, was not tested under cross-examination.

(v) According to PW-9, the School Principal, the victim was presently studying in LKG and she issued a Certificate, Exbt P-11/PW-9, along with a certified copy of the school admission register, confirming that the victim's date of birth was recorded as 27-09-2018. She admittedly did not check the original birth certificate of the child and the entry in the school admission register was based on a photocopy of the birth certificate.

(vi) PW-11, the Officer-in-Charge of the concerned Police Station in September, 2022, received the FIR, Exbt P-2/PW-1,

informing that the victim aged about "four years" has been sexually assaulted.

(vii) PW-12 was the witness to the seizure of the birth certificate Exbt P-1/PW-1, from the victim's mother by the police, but was unaware of the contents of the document.

(viii) The I.O., PW-13 has relied on the documentary evidence, i.e., the Register of Birth Certificate, to establish the age of the victim.

(ix) The Appellant examined himself as DW-1 and categorically deposed that "*It is true that the age of the victim of this case was about 4 years old at the relevant time.*".

(x) As pointed out by the Learned Counsel for the Appellant the original birth certificate of the victim was never furnished before the Court neither were the contents of Exbt P-1/PW-1, the alleged birth certificate of the victim proved. We are indeed conscious, aware and alive to the fact that the age of the victim must be established beyond reasonable doubt by the Prosecution. We have held so in nth number of Judgments, pronounced to this effect. However, the facts and circumstances in this case are to be distinguished from those cases, where the victims are adolescents, which thereby disables the Courts from visually gauging whether the victims are fourteen or eighteen years of age. If such method was adopted by the Courts and the age of the "adolescent victim" discerned from their appearance, or based entirely upon the age given by the victim or her parents, sans unimpeachable documentary evidence, it would undoubtedly culminate in travesty of justice. In the instant case, the victim is, as already said, a pre-

schooler, aged about four years. This Court in ***xxxxx*** vs. ***State of Sikkim***[1] has held that;

> **"**33. When a victim who is said to be a minor child is brought before the Court by the prosecution to establish a case of alleged rape, the Special Court under the POCSO Act jurisdiction is mandated to determine two vital facts. Firstly, the fact that the victim is a child and secondly, whether the offence as defined under the POCSO Act as alleged had been committed upon the victim. When the victim is said to be a minor child of the age of 5 years the determination of the age of the victim cannot be a difficult task. The minor victim is brought before the learned Special Judge during the course of trial as a prosecution witness. The learned Special Judge has numerous occasions to examine her physical appearance and interact with the victim. If, therefore, at the end of the trial, if the learned Special Judge concludes that the age of such a victim, who is but a child of 5 years old, has not been established by the prosecution during the trial, it is certain that the trial conducted by the learned Special Judge has failed the victim for whom the POCSO Act has established the Special Court and appointed the Special Judge.
>
> ……
>
> 37. We noticed that P.W.1, who was related to the victim and had interacted with her after the incident, examined her, accompanied her to the District Hospital and thereafter lodged the FIR (exhibit-1), deposed that the age of the victim was five years at the time of the incident. The defence made no effort to contradict this fact during her cross-examination.
>
> 38. P.W.3 - the grandfather of the victim, stated that the victim was five years old. During his cross-examination, the defence secured an admission that the victim did not have a birth certificate and that he had stated about her age on presumption. We are of the view that failure of the parents to procure a birth certificate does not disprove that the victim was a minor.
>
> 39. P.W.4, who was also related to the victim and an important prosecution witness, also deposed that the victim was five years old. She had overheard the victim disclose to her friend about the sexual assault on her by her father. The defence made no attempt to disprove this assertion about the victim's age. In fact, as per the cross-examination, the victim was reading at Integrated Child Development Services (ICDS) School indicating that the defence did not contest that the victim was a minor.
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> 40. The victim (P.W.2), who according to the learned Special Judge, was not prevented from understanding the question put to her and gave rational answers in spite of her tender age, stated that she was studying in LKG although she did not know her

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> age. The defence made no attempt to contest the fact that the victim was studying in LKG.
>
> ……
>
> 45. P.W.12 - the Medical Officer examined the victim and made her medical report (exhibit-17). The medical report (exhibit-17) records the age of the victim as five years at the time of the examination. The suggestion of the defence during the cross-examination of P.W.12 that the victim was not forwarded to a paediatrician for her medical examination is also suggestive of the admission that the victim was in fact a minor.
>
> 46. P.W.16 posted at the District Child Protection Unit as Counsellor examined and counselled the victim after the assault by the appellant. P.W.16 also confirmed that the age of the victim was five years. During her cross-examination, it was suggested by the defence that she had mentioned about the age of the victim in her counselling report (exhibit-26) as per the information given by her guardian - P.W.4. There is no suggestion by the defence that the victim was not a minor.
>
> ……**"**

This Court also noticed in the matter (*supra*) that the immunization records of the victim was exhibited by PW-10, the In-Charge of the ICDS without any objection and the Live Birth Register of the STNM Hospital was produced in original by the Additional Medical Superintendent, PW-11, the contents of which was not contested. Thus, on examination of the evidence led by the Prosecution and the cross-examination of the relevant witnesses, this Court opined that there cannot be any doubt that the victim was a minor child. This conclusion was lent succour by the statements made by the assailant, (the father of the victim), who when examined under Section 313 Cr.P.C., confirmed that his daughter was five years old.

(xi) On the edifice of the foregoing discussions and decision, while examining the evidence already extracted hereinabove of the said witnesses, namely, PWs 2, 3, 5, 7, 11, 12 and 13, we find that nothing debars us from observing and thereby concluding that the child is four years old. At the same time, we disregard the evidence of PW-6 and PW-9 as they fail to fulfil the legal parameters, the

contents of the documents not having been proved for one and based on entries made in photocopy for another. The conclusion reached by this Court regarding the age of the victim, being four years, we hasten to add, does not tantamount to this Court condoning the act of the Prosecution on its failure to have adopted the correct steps for proof of age as laid down in Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, nor is it to be considered a legal precedent for all such matters. We are aware that the said provision is for the purposes of assessing the age of a "child in conflict with law" or a "child in need of care and protection" as per the statute, nonetheless, the principles set out therein have consistently been adopted by Courts for determination of the age of any child.

8. The matter regarding the age of the victim having been settled as above, the only question that remains is, whether the sexual offence was committed by the Appellant on the innocent victim. To examine this aspect, it is imperative to reproduce her evidence in totality hereinbelow;

> **"**……..
>
> *OATH ADMINISTERED*
>
> I know the accused whose picture is shown to me. He is uncle who lives next to our house. I used to go to his house. He touched my private part (points on the front side i.e., her vagina) and has also inserted is *"issh garne"* (penis) inside my mouth. I can identify the photograph which shows our room which is marked AB. The photograph marked AA shows the room of the uncle whose picture was shown to me on the screen. The photograph marked B is the room of the said uncle. I do not remember my birthday. MOI shown to me is my half-pant.
>
> **CROSS-EXAMINATION ON BEHALF OF THE ACCUSED**
>
> *(through the Court)*
>
> I do not know the name of the said uncle whose picture was shown to me on the screen. **It is not true that my parents tutored me to depose against the accused. It is not true that I used to go to the room of**

> **the accused on my own. I do not know whether I had told my mother about the alleged incident.** I do not know whether I had mentioned about the alleged incident to Pxxxxx Txxxxx. **It is not true that the accused did not touch my private (sic) and did not insert his *"issh garne"* (penis) inside my mouth.** On being asked when the incident occurred, she says *"asti"* (last time). It is not true that my parents did not allow me to go to the room of the accused. It is not true that I am deposing falsely.
>
> *(Proceedings held in camera)*
>
> *Questions were put to the minor victim by the Ld. Counsel(s) through the Court.*
>
> ……..**"** **[emphasis supplied]**

(i) The victim's evidence in spite of her age is unwavering, consistent and cogent. Her testimony has stood the test of cross-examination. The fact of sexual assault has been deposed consistently. On this point, we are not inclined to accept the arguments of Learned Counsel for the Appellant that her evidence is rife with inconsistencies. The fact of sexual assault has been reiterated in her cross-examination lending further credence to the Prosecution case.

(ii) The fact of sexual assault was narrated by the victim to PW-5 who stated *inter alia* that, when he was about to go to bed, he checked the victim's clothes and found that the victim was not wearing her underwear. On enquiry from her, he was told by the victim that the Appellant had told her to open her underwear. His cross-examination revealed that the case was registered on the basis of what the victim had told him. PW-1 the victim's mother after being informed by PW-5 of the incident went and enquired from her daughter PW-2 about the matter. PW-2 narrated to her the facts already extracted hereinabove. The statements withstood cross-examination.

(iii) PW-3 was merely told of the incident by PW-2 and hence his evidence holds no relevance as it is his admission under cross-

examination that his daughter did not tell him directly about the alleged incident.

(iv) PW-4 resided in the same locality in the adjoining building to that of the victim and her parents. Her evidence also fortifies the occurrence of the incident, as she deposed that, she was called by PW-1 outside her house, where she witnessed the Appellant standing in front of the door to his room. PW-1 started physically assaulting him in her presence. This evidence remained undecimated and gains importance for the fact that there is no evidence on record, even of the Appellant, who examined himself as DW-1, that, after such assault by PW-1, the Appellant lodged any complaint against her being without basis. His conduct lends credence to the fact of sexual assault.

(v) PW-7 was the Childline Counsellor. The victim disclosed to her that the Appellant who was her neighbour used to call her to his room after which he used to make her bolt the door from inside, undress her and touch her private parts. That, the Appellant used to make her perform oral sex.

(vi) The Doctor who examined the Appellant medically was PW-8. On such examination, he arrived at the finding that the patient was capable of performing sexual intercourse.

(vii) PW-10, the Doctor who examined the victim, on 15-09-2022, at around 12.32 a.m., found on local examination, as follows;

> **"**……..
>
> On local examination, there was redness and swelling present in the clitoris and labia, no redness swelling or sign of inflammation, present on anal region. Impression – minor victim has redness and swelling over the private part (perenium), there was no obvious sign of sexual intercourse, however vaginal wash sample had been handed over to the accompanying police.
>
> …….**"**

(viii) From the entire evidence as extracted hereinabove, it is evident that the victim has unwaveringly confirmed the fact of sexual assault committed on her by the Appellant. The evidence of PW-10 the Doctor who examined the victim supported the Prosecution case. The last nail in the coffin was put by the Appellant himself who as DW-1 has given contradictory evidence, regarding the visits of the victim to his house. He vacillates between stating that she used to visit his residence occasionally then, never came to his residence and that she never came to his residence at any point of time. He went on to state that he did not have any connection with the victim or her parents. In the next breath, he admitted that he was aware that the parents of the victim used to run a restaurant till late at night, leaving the victim at home. The arguments advanced by the Learned Counsel for the Appellant that the victim could not be identified by the Doctor is a preposterous argument, lacking legal fortification nor is it a principle of criminal jurisprudence. The victim is not in the dock, the Appellant is. The Appellant used to attend office at 09.30 a.m. and return home late as canvassed by his Counsel but it is not his case that he returned anytime after 10.30 p.m. or regularly did so, and hence this argument is untenable. The allegations of animosity between the Appellant and PW-5 went unproved.

9. Hence, we find no reason to disagree with the finding of the Learned Trial Court, which thereby warrants no interference.

10. Both the impugned Judgment and Order on Sentence are accordingly upheld.

11. Appeal dismissed and disposed of accordingly.

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
23-04-2025

(Meenakshi Madan Rai)
Judge
23-04-2025

Approved for reporting : **Yes**

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