

THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

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

Crl.A. No.20 of 2024

Appellant : Krishna Chettri

versus

Respondent : State of Sikkim

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

Appearance

Ms. K. D. Bhutia, Advocate (Legal Aid Counsel).

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

Date of hearing : 06-04-2026

Judgment reserved : 06-04-2026

Judgment pronounced & uploaded : 21-04-2026

JUDGMENT

Meenakshi Madan Rai, J.

1. An FIR was received from the Complainant PW-2 on 05-09-2020, at 1000 hours, at the concerned Police Station, with the information that his niece (brother's daughter), aged five years, was sexually molested by the Appellant, on the previous day, at around 1600 hours, near her house. A case was accordingly registered as FIR No.39/2020, dated 05-09-2020, and endorsed to PW-14, the Sub-Inspector at the Police Station, for investigation. On completion of investigation, having *prima facie* found that, the Appellant, aged about sixty years, had committed an offence of aggravated penetrative sexual assault, on the minor victim, the Charge-Sheet under Sections 6/10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act) was submitted against him.

2. The Learned Court of the Special Judge (POCSO Act), Namchi, Sikkim, framed Charge against the Appellant under Section

3(b) punishable under Section 4 of the POCSO Act, for committing penetrative sexual assault on the minor victim and under Section 5(m) punishable under Section 6 of the POCSO Act for sexual assault on a child below twelve years. Charge was also framed under Section 376(1) of the Indian Penal Code, 1860 (IPC), for the offence of rape and Section 376(3) of the IPC for committing rape on a woman under sixteen years of age.

3. The Appellant entered a plea of "not guilty" to the Charges and the Prosecution thereupon examined fourteen witnesses to prove its case beyond a reasonable doubt. On closure of the Prosecution evidence, the Appellant was examined under Section 313 of the Criminal Procedure Code, 1973 (Cr.P.C.), pursuant to which, the Learned Trial Court on consideration of the entire evidence on record, vide the impugned Judgment, dated 21-06-2023, in Sessions Trial (POCSO) Case No.28 of 2020 (*State of Sikkim vs. Krishna Chettri*), convicted the Appellant under Section 3(b) punishable under Section 4 of the POCSO Act and Section 5(m) punishable under Section 6 of the POCSO Act. It was observed in the impugned Judgment that, the Appellant was also convicted under Sections 376(1) and 376(3) of the IPC respectively, however in view of Section 42 of the POCSO Act, the Appellant having been penalized under Section 6 of the POCSO Act, no penalty under Sections 376(1) and 376(3) of the IPC were required. The Appellant was sentenced to undergo twenty years imprisonment vide the Order on Sentence dated 22-06-2023. Aggrieved with the conviction and order on sentence, the Appellant assails both.

4. It was contended by Learned Counsel for the Appellant that the fact of sexual assault is not being contested herein nor is

the age of the victim in contest. The only point with which the Appellant is aggrieved is that there was no penetrative sexual assault committed by the Appellant on the victim, and the medical report also does not support such allegations of the Prosecution. That, the Appellant ought to have been convicted and sentenced only for the offences of sexual assault and not penetrative sexual assault, hence the penalty be reduced to one under Section 8 of the POCSO Act which mandates a penalty of three years imprisonment instead of the twenty years handed out by the Learned Trial Court.

5. Learned Additional Public Prosecutor submits that the Prosecution has duly proved its case beyond all reasonable doubt and the impugned Judgment requires no intervention.

6. Having heard Learned Counsel for the parties, perused the records and given due consideration to both, we find, in the first instance, that, the victim PW-1 was aged about five years, when the sexual assault took place and the Appellant aged about sixty years age. While analysing the evidence of the victim, we are mindful of the age of the victim, her articulation skills are therefore considered with the sensitivity it deserves. The victim has stated that;

“

One day, *bajey (accused)* carried me and took me to the road and put his hand inside my clothes and inserted his finger in my '*susu garney*' (*vagina*) which hurt me (*The witness gestured by pointing at her vagina with her finger*). After that, he also pinned my legs and smelled my '*susu garney*' (*vagina*).

.....”

(i) Despite her tender years, we notice that she has given cogent evidence and has not dithered during her cross examination from the facts stated above by her, which establish not only sexual assault but penetrative sexual assault on her by the Appellant whom she identified in the Court room.

(ii) Pausing here for a moment, we notice that the Appellant was visible to the victim with no barriers in place. We direct the Court to ensure that in all POCSO proceedings the Accused is placed behind a one way mirror to avoid traumatising the victim during trial.

(iii) The evidence of PW-2 indicates that he was told by PW-3, his younger brother, that the wife of PW-3, i.e., PW-4, had witnessed the Appellant sexually assaulting the victim. PW-2 and PW-3 did not witness the incident. The evidence of PW-2 however establishes that he had lodged the FIR Exbt 2 pertaining to the incident on being told of it by PW-3. PW-3 corroborates the evidence of PW-2 to the extent that he had told PW-2 of the incident as PW-4, his wife (wife of PW-3) had witnessed it when the incident occurred. The evidence of both PW-2 and PW-3 stood unrelinquished during cross-examination.

(iv) According to PW-4 the eye-witness, when she was returning home from a shop, on reaching the house of the minor victim, she saw the victim running alone, near a landslide area, situated near her house. She also saw that the Appellant present there. As she neared the minor victim, she saw the Appellant carry her and when she reached the place where the Appellant was, she saw the Appellant lifting the minor victim upside down and fondling her vagina with his fingers and sniffing it as well. She witnessed the discomfort of the victim due to the acts of the Appellant. Thereafter, he put her down. She also witnessed the Appellant pulling the minor's head towards his private part (penis). She pulled the minor victim away from the Appellant, reprimanded him, took hold of the hand of the victim and tried to take her home. The

Appellant again caught hold of the minor’s hand and pulled her towards him. She reprimanded the Appellant for a second time and took the minor victim home. She saw that the Appellant was following them. She took the minor victim into the minor’s house and remained there until she heard the voice of the brother of the minor victim and thereafter allowed her to go inside. The cross-examination did not decimate her examination-in-chief.

(v) PW-5 the victim’s father was told of the incident by PW-4 who is his sister-in-law.

(vi) According to PW-6, he received a call from one *KR alias SMR* stating that the Appellant had committed rape, later the Police came and took the Appellant. The “Police personnel” who took the Appellant was PW-7, a Village Guard working in the area. PW-9 was the Officer who registered the case against the Appellant on receiving the FIR.

(vii) PW-10 was the Doctor who examined the victim. According to him, the victim was brought by a Head Constable, on 05-09-2020, at 1100 hours. He stated *inter alia* that;

“

5. On examination, the patient was conscious, oriented to time, place and person. Her vital signs were within normal limits. **Upon local examination of the external genitalia, perineum (area between the external genitalia and anus) and anus, reddish abrasion was present on the right side upper aspect of inner wall of labia minora and reddish tear was present at 6 o’ clock position in the anal orifice.** Two vaginal wash specimen was collected, one was handed over to the police and the other one was forwarded to STNM Pathology Department for its psychological (sic)/pathological examination.

6. Impression: **On the basis of external examination, fresh injury was present in the vagina and anus.** Sexual violence cannot be ruled out. Final opinion after RFSL report is received.

.....” [emphasis supplied]

(viii) PW-10 advised primary treatment for the victim with psycho social counseling. Exbt 7 was identified by PW-8 as the requisition for medical examination of the victim, received by him, from the Officer-in-Charge of the Police Station and Exbt 8 as the medical report of the victim, prepared by him. On that day, he also examined the Appellant and he took the nail clippings of the hand of the Appellant. Although a prolix cross-examination appears to have taken place with regard to the medical examination of the victim, the injuries found by him on the victim, as per the medical report, could not be demolished.

7. From the evidence that has been discussed hereinabove, it appears that the Appellant had digitally sexually assaulted the victim. The victim has stated as much in her evidence duly corroborated by the evidence of PW-4. The medical evidence of the victim prepared in Exbt 8 reveals that, the local examination of the genitalia of the victim indicated a reddish abrasion on the right side in upper aspect of inner wall of labia minora and reddish tear was present at 6 o' clock position in the anal orifice. PW-4 had witnessed the Appellant using his finger to fondle the private part of the minor victim. PW-1 with clarity stated that the Appellant had inserted his finger into her vagina which hurt her. Section 3(b) of the POCSO Act provides as follows;

"3. Penetrative sexual assault—A person is said to commit "penetrative sexual assault" if—

.....

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

....."

(i) From the evidence of PW-1 duly corroborated by PW-4 both of which are consistent and unwavering further supported by the evidence of PW-10, we are of the considered view that no error was committed by the Learned Trial Court in the impugned Judgment for convicting the Appellant of the offence of penetrative sexual assault under Section 3(b) punishable under Section 4 of the POCSO Act.

(ii) Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and clause (m) lays down penetrative sexual assault on a child below twelve years. The relevant provision is extracted hereinbelow;

"5. Aggravated penetrative sexual assault—.....

.....
 (m) whoever commits penetrative sexual assault on a child below twelve years; or
"

(iii) In the context of the above provision of law, the age of the child is not disputed, hence the Prosecution evidence that she was five years old at the time of the assault meets with no hindrance. As the inner portion of the genital of the victim has been injured it is evident that penetrative sexual assault, as already discussed hereinabove, had been committed on her. It may, on pain of repetition, be recapitulated here that, penetrative sexual assault means that, the insertion of any object or part of the body, ought to be to any extent into the vagina, urethra or anus of the child. It is not necessary that there has to be full penetration.

8. In light of the foregoing discussions it stands to reason that the Learned Trial Court was correct in having convicted and sentenced the Appellant also under Section 5(m) of the POCSO Act.

9. The Appellant was further convicted under Sections 376(1) and 376(3) of the IPC. The Learned Trial Court in terms of Section 42 of the POCSO Act did not pronounce penalty under these two Sections. It may be mentioned here that Section 42 of the POCSO Act provides for alternate punishment which reads as follows;

"42. Alternate punishment.—Where an act or omission constitutes an offence punishable under this Act and also under sections 166A, 354A, 354B, 354C, 354D, 370, 370A, 375, 376, 376A, 376AB, 376B, 376C, 376D, 376DA, 376DB, 376E, section 509 of the Indian Penal Code (45 of 1860) or section 67B of the Information Technology Act, 2000 (21 of 2000)], then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under this Act or under the Indian Penal Code as provides for punishment which is greater in degree.

....."

10. No error emanates in the order of the Learned Trial Court pertaining to the absence of penalty under under Sections 376(1) and 376(3) of the IPC in view of the law laid down in Section 42 of the POCSO Act.

11. Relevantly, we notice that the impugned Judgment, dated 21-06-2023, concludes with the conviction of the Appellant under Sections 3(b) and 5(m) of the POCSO Act and under Sections 376(1) and 376(2) of the IPC. However, in the impugned Order on Sentence, dated 22-06-2023, the Learned Trial Court has, in Paragraph 7, recorded only, as follows;

"7. Considering the above facts and circumstances, the convict is sentenced to undergo Simple Imprisonment for a period of twenty (20) years."

12. It is a legal imperative that under Section 354 of the Cr.P.C. the Learned Trial Court should mention the Section under which the imprisonment is imposed and whether the sentences run concurrently, the Learned Trial Court has been remiss on this

aspect. However, as the Learned Trial Court has specified in the impugned Judgment that the Appellant has been convicted under the aforementioned Sections of law we conclude that the sentence of imprisonment is for the offences under Section 3(b) punishable under Section 4 of the POCSO Act and Section 5(m) punishable under Section 6 of the POCSO Act. The imprisonment prescribed for both the offences (*supra*) is for a period of not less than twenty years each.

13. Consequently, the sentence imposed under Section 3(b) and Section 5(m) of the POCSO Act with penalty prescribed under Section 4 and Section 6 of the POCSO Act respectively, is upheld and ordered to run concurrently. The sentence is modified to the above extent.

14. The Compensation of ₹ 6,00,000/- (Rupees six lakhs) only, granted by the Learned Trial Court is also upheld.

15. Appeal disposed of accordingly.

16. Copy of this Judgment along with original records be remitted forthwith to the Learned Trial Court for information.

17. 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
21-04-2026

(Meenakshi Madan Rai)
Judge
21-04-2026

Approved for reporting : **Yes**