THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate 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.22 of 2024

Appellant : Sanjay Darjee

versus

Respondent : State of Sikkim

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

Appearance

Mr. Umesh Ranpal, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Thinlay Dorjee Bhutia, Public Prosecutor, Mr. Yadev Sharma, Additional Public Prosecutor and Mr. Sujan Sunwar, Assistant Public Prosecutor for the Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant was convicted of the offences under Section 3(a), punishable under Section 4 and Section 5, punishable under Section 6, of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, the "POCSO Act"), vide the impugned Judgment dated 24-04-2024, in ST (POCSO) Case No.12 of 2022, in the Court of the Special Judge (POCSO Act, 2012), Gangtok, Sikkim. On 29-04-2024, he was sentenced to undergo rigorous imprisonment for a period of twenty years and fined ₹ 2,000/- (Rupees two thousand) only, for the offence under Section 5(m), punishable under Section 6 of the POCSO Act with a default stipulation. While sentencing the Appellant under Section 5(m)/6 of the POCSO Act, the Court reasoned that, as the victim was below twelve years of age, the convict was sentenced under Section 6 of the POCSO Act, for aggravated penetrative sexual assault. He was therefore not required to be sentenced for the

same offence under Section 4 of the POCSO Act as the penalty prescribed under Section 6 of the POCSO was greater in degree.

(i) Aggrieved by the Judgment and Sentence, the Appellant is before this Court, impugning both.

2. The Prosecution narrative is that, on 02-03-2022 the FIR, Exbt P-11/PW-9 was received from PW-9, informing that, her step-sister PW-1, aged about twelve years was missing from their residence around 05.00 p.m., on 24-02-2022. She was last seen with the Appellant, a driver, who was not responding to calls on his cell phone. The FIR was duly registered that same day under Section 363 of the Indian Penal Code, 1860 (hereinafter, the "IPC") against the Appellant. Investigation was endorsed to PW-11 the Investigating Officer (IO), whereupon it was revealed that the Appellant was known to the victim's family since the past two years. During her father's treatment at Siliguri, and after his demise the Appellant helped them with their household rations. On 24-02-2022, the Appellant went to the victim's house and asked her to accompany him to Gangtok. She left without her mother's consent and spent the night with him at a hotel in Gangtok. The victim claimed that night she was not sexually assaulted by the Appellant. On 25-02-2022, they went to Pelling, West Sikkim, with tourists in the Appellant's vehicle and booked into one hotel room. On 26-02-2022, on account of mechanical defects in the Appellant's vehicle they could not return home, and continued to stay in the same hotel till 27-02-2022, where the Appellant allegedly sexually assaulted PW-1 several times. On 28-02-2022, after the vehicle was repaired, they returned together to Gangtok and spent another night together. On 01-03-2022, the Appellant

took some tourists to North Sikkim and PW-1 accompanied them where they again shared a hotel room. On 03-03-2022, they were intercepted by the jurisdictional police personnel and handed over to PW-11. He submitted Chargesheet, against the Appellant under Section 363 of the IPC, read with Section 4 of the POCSO Act.

(i) The Trial Court framed Charge against the Appellant under Section 3(a) punishable under Section 4, Section 5 punishable under Section 6 of the POCSO Act. The Appellant having entered a plea of "not guilty", the Prosecution examined twelve witnesses in support of its case, on closure of which, the Appellant was examined under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter, the "Cr.P.C."). He claimed innocence and asserted that the allegations levelled against him were false and fabricated. The Trial Court on appreciation of the entirety of the evidence, pronounced the impugned Judgment and Order on Sentence.

3. Learned Counsel for the Appellant while assailing both, submitted that the date of birth of the victim was not proved as the Prosecution failed to prove seizure of the birth certificate and also failed to examine the author of the document as he was never arrayed as a witness. It was canvassed that regardless of the evidence of PWs 1, 2, 7 and 8 about the age of minority of the victim, the fact that PW-1 herself has stated that she had told PW-2 her mother that she had married the Appellant, indicates that she was not fourteen years old but much older. The Trial Court based its evidence on the sole testimony of the victim, but there were no witnesses to prove that the Appellant and the victim spent several nights together in various hotels. The evidence does not

establish sexual assault by the Appellant on the victim nor does the medical report of the victim substantiate the Prosecution case. There is no proof whatsoever of penetrative sexual assault and the chain of circumstances do not favour the Prosecution case. The undergarment of the victim as well as her vaginal wash and swab were forwarded to the RFSL Saramsa, but the results were negative for presence of semen, thereby ruling out the allegation of penetrative sexual assault. The medical report of the victim, Exbt P-14/PW-11, found no injuries or abnormalities either on her person or in her genital. The cross-examination of the doctor revealed that during the victim's medical examination, he did not find a history of sexual assault on her. In such circumstances, the Judgment of conviction and consequent Order on Sentence of the Trial Court deserves to be set aside and the Appellant acquitted of all charges.

4. *Per contra,* Learned Public Prosecutor argued that the victim as per the birth certificate has been shown to be twelve years old. PW-7 the Registrar of Births and Deaths authenticated the documents and found the entries therein to be correct. PW-8 the Headmistress of the school attended by the victim lends support to the evidence of PW-7, who on verification of the school admission register, which was furnished in Court, confirmed that, the victim's date of birth was recorded therein as 19-03-2010. In the face of such categorical evidence, the victim being a minor cannot be denied. Minor discrepancies such as the victim stating that she was fourteen years old and her mother stating that she was thirteen years old does not demolish the Prosecution case. The victim has clearly deposed that the Appellant touched her

inappropriately which she described as 'bad touch' at the hotel in Pelling and that he had sex with her on the second day. The medical evidence proves that she was sexually assaulted as the examining doctor found her to be sexually active. In such circumstances, the Judgment and Order on Sentence warrants no disturbance.

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 Trial Court framed the following points for determination; Whether the accused committed penetrative sexual assault on the victim in a hotel room at Pelling between 25th to 27th February, 2022 and at Lachen between 1st to 2nd March, 2022? If so, whether she is a minor within the meaning of Section 2(d) of the POCSO Act, 2012?

(i) The Trial Court in Paragraph 14 of the impugned Judgment observed that, the accused was known to the victim for a long time as he is related to her through her father. In March, 2022, she had gone with the accused to Pelling along with tourists. During their two days stay in a hotel at Pelling, the accused did 'bad touch' to her i.e., touched her breasts and stomach and also had sex with her. From Pelling they came to Gangtok and then left for Lachung (sic. Lachen), the following day. There the accused again repeated the 'bad touch', on her. The police intercepted them and took them to the police station. The Court further observed that the victim's testimony that the accused had sexual intercourse with her at Pelling and Lachen cannot be disbelieved

simply because there was no injuries on the vaginal region. Oral evidence of the victim, which is credible has to be given precedence over the medical evidence. Her statement recorded under Section 164 of the Cr.P.C. (Exbt P-1/PW-1) also supports her oral evidence given before the Court. Although her cross-examination indicated that she had gone with the accused to various locations and had sexual intercourse with him of her own free will, but in a case under the POCSO Act, the child's consent becomes inconsequential. Hence, the question whether the accused committed penetrative sexual assault on the victim in a hotel room at Pelling between 25-02-2022 to 27-02-2022 and at Lachen between 01-03-2022 and 02-03-2022 was answered in the affirmative. The Court then went on to discuss the age of the victim and on consideration of the evidence of PW-1 the victim, PW-2 the mother of the victim, PWs 3 and 4, witness to the seizure of the victim's birth certificate Exbt P-2/PW2 from PW-9 (victim's sister) where her date of birth is recorded as 19-03-2010, PW-7, the Registrar of Births and Deaths who found the victim's birth certificate to be genuine, after verification with the live birth register, PW-8 who deposed that the victim's date of birth too was recorded in the school admission register as 19-03-2010, concluded that the victim was barely twelve years old at the time of the incident. The impugned Judgment was accordingly pronounced, followed by the impugned Order on Sentence.

7. This Court is now to determine whether the findings of the Trial Court with regard to the age of the victim and the allegations of penetrative sexual assault and sexual assault against the Appellant stand fortified by the evidence on record.

(i) While examining the evidence of the victim, we find that she deposed *inter alia* as follows;

> **"**.....
>
> I do not remember the exact date but in March this year (2022), I had gone with Sanjay dada to Pelling. We stayed in a hotel for about two days. Sanjay dada is a driver and had taken some tourists, so I also went along with them. *Witness says, "mo ghumnu gayo" (I went for a visit)*. While at Pelling Sanjay dada and I stayed in the same room in the hotel. During our stay he did "bad touch" to me.
>
> Question by the Court:-
>
> Q. Can you tell us what you mean by "bad touch"?
>
> Ans: He touched me "here" (*victim points to her breasts and stomach*).
>
> Q. Did he do anything else to you?
>
> Ans: He did *naramro cheej* to me.
>
> Q. Can you tell us what you mean by "*naramro cheej*
>
> Ans: He had sex with me on the second day. I screamed but no one came to my rescue.
>
> However, I remained with him as I had no one else to go with. From Pelling, we came to Gangtok and halted for a night in a hotel at M.G. Marg. The next day we left for Lachung. I did not go home when I came to Gangtok. At Lachung also we stayed in a hotel and shared a room. There also he did "bad touch". We did not have sex. While at Lachung the police came and caught us and took us to the thana.
>
> ....."

Her cross examination revealed *inter alia* as follows;

> **"**.....
>
> It is not a fact that I was not aware that accused was touching me in a bad way. It is not a fact that on the second day in Pelling, the accused did not have sex with me. It is true I did not resist when the accused had sex with me. It is true I consented to having sex with the accused. It is true that I did not complain to anyone in the hotel about the accused either in Pelling or in Lachung. It is not a fact that accused did not do "bad touch" to me in Pelling and Lachung.
>
> ....."

(ii) Before proceeding further, at this juncture, it would be relevant for us to point out that the Trial Court has erroneously placed reliance on the Section 164 Cr.P.C. statement of the victim while opining at Paragraph 15 of the impugned Judgment as follows;

> **"15.** The victim's evidence makes it certain that the accused had taken her to Pelling and Lachen (referred

as Lachung by the victim) during the said period. Therefore, the contention of defence that accused person's name does not match with the name in the F.I.R (Sanjay Rai) is inconsequential. The identity of the accused, being the person who had taken the victim from her house stands proved. The victim's testimony that the accused had sexual intercourse with her at Pelling and Lachen cannot be disbelieved simply because there was no injury on her vaginal region (as per the medical report marked Exhibit P-14/PW11). Oral evidence of the victim, which is credible has to be given precedence over the medical evidence. Her statement recorded prior in time under Section 164 of the Code of Criminal Procedure, 1973 (Exhibit-P1/PW-1) also supports her oral evidence given before this Court.**"**

(iii) This Court in ***Ganesh Dhakal*** vs. ***State of Sikkim***[1] has detailed the parameters for consideration of a statement under Section 164 of the Cr.P.C. as follows;

> **"7.** .....
> ix. That, the contents of a statement under Section 164 Cr.P.C. is not substantive evidence is now no more *res integra* and should the Court contemplate considering its contents, then the author of the contents ought to be confronted with it and the provisions of Section 145 of the Evidence Act, 1872, complied with. The object of statement of witnesses, recorded under Section 164 Cr.P.C. is concerned the object is twofold. The first is to deter the witness from altering his stand by denying the contents of his previously recorded statement. Secondly, it is to tide over immunity from Prosecution by the witness under Section 164 Cr.P.C. The proposition that if a statement of a witness is recorded under Section 164 Cr.P.C., his evidence in Court should be discarded is not at all warranted. Section 157 of the Evidence Act makes it clear that a statement recorded under Section 164 Cr.P.C. cannot be relied upon and is only for the purpose of corroborating statements made by the witnesses in the committal Court or even to contradict it, for the reason that the Defence has had no opportunity of cross-examining the witnesses whose statements were recorded under Section 164 Cr.P.C. [See ***R. Shaji*** vs. ***State of Kerala*** (2013) 14 SCC 266)]. It is also settled law that the formalities prescribed by Section 145 of the Evidence Act are to be complied with, even for statements recorded under Section 164 Cr.P.C. Every circumstance intended to be used as contradiction or corroboration has to be put to the witness point by point and the whole statement read out to him. The admission or denial thereof has to be extracted

[1] 2025 SCC OnLine Sikk 25

> from the witness, before the Court can consider such contradiction or corroboration. In the instant matter, it is seen that all that the witness has stated with regard to Section 164 Cr.P.C. statement, in her testimony before the Court is that, during the course of investigation she was taken to Court and her statement recorded, which she identified as Exbt-4, on which she had affixed her right thumb impression. In her cross-examination she denied having improvised her statement at the time when her Section 164 Cr.P.C. statement was recorded. Clearly she was not confronted point by point, fact by fact or paragraph by paragraph on each circumstance that was intended to be contradicted or corroborated, and hence the arguments advanced by Learned Counsel for the Appellant on this aspect is untenable.**"**

(iv) More recently in ***State of Sikkim*** vs. ***Rup Narayan Rai (Chamling) and Others***[2] it has been held as follows;

> ***"7.*** With regard to the evidence of PW-1, the victim, her statement under Section 164 of the Cr.P.C. Ext-1 was recorded on 19-08-2020. Under cross-examination she asserted that Ext-1 in two pages was her statement recorded by the Judge. Before proceeding further on this facet, it may be clarified that the statement made under Section 164 of the Cr.P.C. may be used to corroborate or contradict a statement made in the Court in the manner provided by Sections 145 and 157 of the Evidence Act but under no circumstance can it be treated as substantive evidence.
>
> ***(i)*** Section 145 of Evidence Act reads as follows;
>
> > **"145.Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.**"**
>
> Section 145 of the Evidence Act gives the accused the right to cross-examine the witness, on previous statements made by him and reduced into writing, when the previous statements are relevant to the matters in issue. The object of the provision is to afford reasonable opportunity to the witness to explain his previous statement, after his attention has been drawn to the specific portions of his previous statement, which are sought to be contradicted or corroborated, in a fair and reasonable manner and not for the purpose of mere form. When the witness is questioned about every material passage in his previous statement, point by point, there is

[2] Decided by the Division Bench of this High Court, in Crl. A. No.28 of 2024, on 13-08-2025.

substantial compliance with the requirement of Section 145 of Evidence Act. As far back as in 1952 in ***Bhagwan Singh*** vs. ***The State of Punjab***[3] the Supreme Court while elaborating on the second limb of Section 145 of the Evidence Act extracted hereinabove, held that, if it is intended to contradict the witness, his attention must be called to those parts which are to be used for the purpose of contradicting him. It was further held that, if the witness denies having made any statement which is inconsistent with his testimony in Court, the latter testimony would not be vitiated, until the cross-examiner proceeds to comply with the procedure prescribed, in the second limb of Section 145 of the Evidence Act. The credit of a witness can be impeached by proof of any statement which is inconsistent with any part of his evidence in Court. At the same time, reading out the entire Section 164 Cr.P.C. statement to the witness and asking what he had to say with regard to the entire statement is not in compliance with the provision of Section 145 of the Evidence Act.

(ii) In ***V. K. Mishra and Another*** vs. ***State of Uttarakhand and Another***[4], a three Judge Bench of the Supreme Court observed as follows;

> **"19.** Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the Evidence Act that is, by drawing attention to the parts intended for contradiction.**"**

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[3] AIR 1952 SC 214
[4] (2015) 9 SCC 588

(iii) Section 157 of the Evidence Act reads as follows;

> **"157. Former statements of witness may be proved to corroborate later testimony as to same fact.**—In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.**"**

This Section is based on the principle that if there is consistency between the previous statement and present statement of a witness it may be considered a ground for believing him. The two things which are essential for Section 157 of the Evidence Act to apply are; The witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time, when the fact took place or before any authority legally competent to investigate the fact. Section 157 of the Evidence Act makes it clear that, a statement recorded under Section 164 Cr.P.C. cannot be relied upon and is only for the purpose of corroborating or contradicting it, the reason being that the Defence has had no opportunity of cross-examining the witnesses whose statements were recorded under Section 164 Cr.P.C. [See ***R. Shaji*** vs. ***State of Kerala*** (2013) 14 SCC 266].

(iv) On careful perusal of the evidence of the victim it is seen that the second limb of Section 145 of the Evidence Act has not been complied with either by Prosecution to indicate corroborative evidence as urged in the arguments of Learned Additional Public Prosecutor or to prove contradictions as per the contentions of Learned Senior Counsel for the Respondents. The Trial Court was therefore in error in considering Ext-1, while discussing the evidence of PW-1. Hence, there is no requirement to consider this facet of the arguments advanced by both Learned Court. It is reiterated here that, evidence under Section 164 of the Cr.P.C is not substantive evidence.

> ....."

Hence in view of the fact that the victim has not been questioned in terms of the law laid down as discussed at length (*supra*), her statement under Section 164 of the Cr.P.C. is rendered totally irrelevant for the present purposes. Apart from which, it needs no reiteration that a statement under Section 164 of the Cr.P.C. is not substantive evidence and is utilised only for the purposes of corroboration and contradiction.

(v) So far as the age of the victim is concerned, we find that the deposition of PW-1 and PW-2 are fortified by contents of

the birth certificate which has been proved by PW-7 and PW-8 as detailed in the impugned Judgment, which has been discussed hereinabove. We see no reason to disagree with the finding of the Trial Court on the age of the victim, as her date of birth is 19-03-2010 and the offence was reported on 02-03-2022, making her a few days short of twelve years of age.

(vi) Having thus meticulously perused the statement of the victim, it is evident that the Appellant touched her inappropriately on her breasts and stomach, which she has described as 'bad touch'. Her categorical statement is that on the second day the Appellant had sex with her. Her cross-examination reveals that she did not resist when the Appellant had sex with her and that it was consensual. The evidence of PW-12, the doctor, which the Trial Court has failed to consider, establishes that, although upon genital examination no abrasion or injuries were found in and around the vagina, however he found the patient i.e., the victim to be sexually active. In such circumstances, it is established that penetrative sexual assault on the victim was perpetrated by the Appellant. As correctly pointed out by the Trial Court, even if there was consensual sex between the victim and the Appellant, it needs no reiteration that consent of a minor is of no relevance and the Appellant being an adult man, aged around thirty-two years would still be considered the perpetrator of the offence of penetrative sexual assault.

8. In light of the foregoing discussions, the impugned Judgment and the impugned Order on Sentence of the Trial Court are accordingly upheld and the question framed for consideration by this Court (*supra*) is consequently given a quietus.

9. The Appeal is dismissed and disposed of.

10. Copy of this Judgment be forwarded forthwith to the Trial Court along with its records.

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

(Bhaskar Raj Pradhan)
Judge
10-09-2025

(Meenakshi Madan Rai)
Judge
10-09-2025

Approved for reporting : **Yes**

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