THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 19th June, 2025

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

Crl.A. No.21 of 2024

Appellant : Arjun Kumar Prasad

versus

Respondent : State of Sikkim

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

Appearance

Ms. Neha Gupta, Advocate for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor for the State-Respondent.

JUDGMENT

Meenakshi Madan Rai, J.

1. The Appellant was charged with the offence under Section 5(j)(ii), punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter, "POCSO Act") and Section 376(1) of the Indian Penal Code, 1860 (hereinafter, "IPC"). He was convicted for the POCSO offence (*supra*) and sentenced to undergo rigorous imprisonment for a term of twenty years and to pay fine of ₹ 2,000/- (Rupees two thousand) only, with a default stipulation, vide the impugned Judgment, dated 03-04-2024, in ST (POCSO) Case No.08 of 2022, of the Court of the Special Judge (POCSO Act, 2012). For the offence under Section 376(1) of the IPC, the Court ordered that, he need not be convicted for the same offence twice.

2. The genesis of the Prosecution case is the FIR Exbt P-2/PW-2, lodged by PW-2 the victim's sister, on 01-02-2022, before

the jurisdictional Police Station, informing that her sister, aged about sixteen years, was taken to the District Hospital after she complained of stomach pain. The Doctor informed PW-2 that, the victim had miscarried, but the placenta remained inside. The victim revealed to PW-2, on her enquiry that, she was involved in a sexual relationship with the Appellant, in a hotel room, in the month of November, 2021. Although she informed him of the pregnancy, he paid no heed to her. A case was registered against the Appellant under Section 5(j)(ii)/6 of the POCSO Act and investigation was endorsed to PW-7, the Sub-Inspector at the PS.

(i) Upon completing her investigation, finding *prima facie* materials against the Appellant, Charge-Sheet was submitted in the Court. Charge was framed against the Appellant under Section 5(j)(ii) of the POCSO Act, punishable under Section 6 of the POCSO (Amendment) Act, 2019 and under Section 376(1) of the IPC, to which the Appellant claimed trial, having pled "not guilty". The Prosecution examined eight witnesses, upon closure of which, the Appellant was afforded an opportunity under Section 313 of the Code of Criminal Procedure, 1973, to explain the incriminating evidence against him. He claimed innocence and asserted that he had been falsely implicated in the case. Final arguments of the parties were heard. On appreciating the entire evidence on record, the impugned Judgment of conviction and sentence were pronounced by the Trial Court.

3. The Prosecution narrative is that, on 31-01-2022, the victim was brought to the District Hospital, in the evening, with a history of abdominal pain and bleeding since 28-01-2022. A urine test indicated pregnancy. A specimen of the placenta was collected

and handed over for DNA analysis. It also emerged that the Appellant and the victim had met through social media platform (Facebook) in the month of March, 2021. The victim had sexual intercourse with the Appellant in November, 2021. After the incident, she missed two consecutive menstrual cycles which she brought it to the notice of the Appellant, but was ignored. Thereafter, the above circumstances unfolded.

4. Learned Counsel for the Appellant submitted that it is the Prosecution case that on 31-01-2022 medical examination of the victim was conducted. According to the Doctor, PW-4, her examination per abdomen, revealed **"***22 weeks uterus PV Grade II perineal tear, boggymass felt introitus …… and no fetus was present***"**. If such be the circumstance, since the victim claims to have had sexual intercourse with the Appellant in the month of November, 2021, the gestation of the pregnancy would have been about eight weeks. This is in direct contradiction to the finding of PW-4, who opined that the uterus indicated twenty-two weeks pregnancy. Thus, the victim's evidence is not of sterling quality. To buttress this submission, Counsel placed reliance on the decision of the Division Bench of this Court in ***Cho Mingur Lepcha*** vs. ***State of Sikkim***[1], wherein this Court was of the view that, the victim appeared to be concealing the actual circumstances of her pregnancy as she gave birth in May, 2020, after making claims of being raped by the Appellant in December, 2019/January 2020. Her evidence was rejected as being unreliable. Contending that the circumstances appear to be similar in the instant case the victim's evidence it was urged deserves to be rejected.

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[1] 2021 SCC OnLine Sikk 174

(i) It was next put forth that, the age of the victim was not proved in terms of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, resultant, the Prosecution failed to establish that she was a minor, in such circumstances, the offence under Section 376(1) of the IPC cannot be held against the Appellant as the act between them was admittedly consensual. The Prosecution having failed to prove its case beyond reasonable doubt, the impugned Judgment and Order on Sentence be set aside.

5. *Per contra*, the contention of the Learned Additional Public Prosecutor was that the date of birth of the victim has been proved to be 28-05-2005, while the date of offence was some time in the month of November, 2021. It is therefore apparent that she was about fifteen years when the offence took place. PW-2 and PW-3, both the sisters of the victim, have with their evidence fortified the Prosecution case regarding the victim's age. The fact of sexual assault having been proved and as the law mandates that consent of a minor is of no consent, the impugned Judgment warrants no interference.

6. We have heard the parties at length, given due consideration to the evidence, all documentary evidence on record and also perused the impugned Judgment and Order on Sentence.

7. The Trial Court considered the following points for determination — Whether in November 2021, the accused committed penetrative sexual assault on the victim in a hotel and thereby impregnated her? If so, whether she is a minor within the meaning of Section 2(d) of the POCSO Act.

(i) The Court observed that, the Investigating Officer (I.O.) PW-7, did not seize the victim's birth certificate. Nevertheless, the

victim's date of birth being 28-05-2005 was corroborated by her school record Exbt P-7/PW-5. The Court also observed that though there is some confusion about the victim's father's first name in the school record, her mother's name is correct. The evidence of the victim considered along with that of PW-2 and PW-3 establishes that she was born on 28-05-2005. Hence, she was found to be about sixteen years old at the time of the incident.

(ii) The Court was also of the view that the medical evidence of PW-4 confirms that, the victim had miscarried and only the placenta was present at the time of her medical examination. The Court agreed that, the forensic examination report Exbt P-21/PW-7, did not support the Prosecution case, but opined that such evidence did not tantamount to the innocence of the Appellant. The Court found that genetic profiling was not possible as the exhibit forwarded to the laboratory on the assumption that it was the placenta, was in fact only, a 'biological' sample of the victim. The Appellant however cannot take advantage of the negligence of the hospital authorities and the investigating agency on this aspect, when it is clear from the evidence discussed that the Appellant had sexual intercourse with the victim resulting in her pregnancy. The Court concluded that the Appellant had committed penetrative sexual assault on the victim and impregnated her.

8. The question that requires determination by this Court is, whether on the foundation of the evidence furnished by the Prosecution, the Trial Court was correct in arriving at the aforestated conclusions.

9. Dealing first with the age of the victim, she was examined before the Court in the month of May, 2023 and stated

that her date of birth is 28-05-2005. No documentary evidence was furnished to fortify this submission made by her. PW-2 who is the victim's sister stated that the victim was born on 28-05-2005. This witness also did not exhibit the birth certificate of the victim, although she asserted in her cross-examination that, she was aware of her sister's date of birth. PW-3, the other sister of the victim, stated that, the victim was born on 28-05-2005 and at the relevant time she was studying in Class VIII. No document was furnished to substantiate this assertion. The I.O. did not seize the birth certificate of the victim. No parent of the victim was examined to lend credence to the Prosecution version that her date of birth was 28-05-2005. It is now no more *res integra* that the best proof of age of a child is her parent's evidence buttressed by unimpeachable documentary evidence.

(i) In ***Vishnu alias Undrya*** vs. ***State of Maharashtra***[2] the Supreme Court observed as follows;

> **"22.** In the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the present case, the father and the mother, PW 1 and PW 13 categorically stated that PW 4 the prosecutrix was born on 29-11-1964, which is supported by unimpeachable documents, as referred to above in all material particulars. These are the statements of facts. If the statements of facts are pitted against the so-called expert opinion of the doctor with regard to the determination of age based on ossification test scientifically conducted, the evidence of facts of the former will prevail over the expert opinion based on the basis of ossification test. Even as per the doctor's opinion in the ossification test for determination of age, the age varies. In the present case, therefore, the ossification test cannot form the basis for determination of the age of the prosecutrix on the face of witness of facts tendered by PW 1 and PW 13, supported by unimpeachable documents. Normally, the age recorded in the school certificate is considered to be the correct determination of age, provided the parents furnish the correct age of the ward at the time of admission and it is authenticated. ……**"**

[2] (2006) 1 SCC 283

(ii) In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[3] the Supreme Court held as follows;

> **"20.** So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.
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> **21.** For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school egister is to be discarded. ……
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> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. ……**"**

(iii) According to PW-5 the School Principal, the victim's date of birth was recorded as 28-05-2005 in the school admission register Exbt P-7/PW-5 furnished by her. The Prosecution failed to explain as to why the name of the father recorded in the register Exbt P-7/PW-5 differed from his name in the FIR Exbt P-2/PW-2. During cross-examination the Principal admitted that the School Admission Register records the name of the father of the victim as Bxx Bxxxxxx Bxxxxx and the name of the mother as xxxxxx xxxxxx. The Principal could not say on what basis the entries were made as she was not posted there at the relevant time. The I.O. admitted the aforestated anomaly which however remained unresolved by the

[3] (2010) 9 SCC 209

Prosecution. PW-3 also deposed that the victim was her younger sister born on 28-05-2005. At the same time of the deposition of PW-3 on 02-08-2023, she was twenty-two years of age which would make her just about four years of age at the time when the victim was born. PW-3 also did not specify the name of her parents in the deposition, although the name of her father is recorded as Sxxxx Bxxxxx, which is neither the name given in the FIR nor in the School Admission Register, Exbt P-7/PW-5. As such, both PW-2 and PW-3 would not have any personal knowledge about the date of birth of the victim. The victim's deposition also does not provide any details about any of the parents of the victim. The Prosecution has failed to produce relevant evidence on this aspect. In the absence of documentary evidence and PW-2 and PW-3 being the siblings of the victim, it stands to reason that they would not be the best persons to have knowledge of the victim's exact date of birth or age. It would do well to recall here that, the Prosecution is required to prove its case beyond all reasonable doubt. When the age of the victim has not been established by documentary evidence, the mere verbal evidence does not inspire the confidence of this Court.

10. That having been said, as pointed out by Learned Counsel for the Appellant, the allegation that the Appellant was responsible for impregnating the victim does not add up from the evidence furnished. PW-4, who examined the victim, unequivocally stated, as follows;

> "…… on 31.01.2022, at around 5.50 pm, the victim of this case was brought to the Emergency ward with a complaint of abdominal pain since few hours with active vaginal bleeding. Accordingly, I examined her at around 6.45 pm in the presence of nurse on duty and Dr. Sonam Yangden Sherpa. On my examination per abdomen 22 weeks

> uterus PV Grade II perineal tear, boggymass felt introitus. Manual removal of boggymass felt confirmed as a retained placenta. Discharge was foul and no fetus was present. Placenta was weight around 350 gram infected with puss cover and the patient was diagnosed as a case of G1P0+0 with retained placenta and perineal tear Grade II (midline) with severe anaemia with sepsis with UTP positive. She was managed accordingly in hospital. I had given order to store placenta in normal saline for further needful. After managing conservatively she was discharge on 08.02.2022. ……"

His cross-examination led to a voluntary statement that the length of the placenta was not taken, but in such cases the placenta is weighed, which had accordingly been done. The evidence of PW-7 reveals that Exbt P-9/PW-9 is the blood sample authentication form of the Appellant and PW-20/PW-7 is the blood sample authentication form of the victim. No conclusive evidence regarding the blood samples was given by the IO nor was any expert examined in this context to bolster the Prosecution case. The placenta removed from the victim was also evidently not sent for expert opinion to the CFSL.

11. We find weight in the argument of Learned Counsel for the Appellant that if the victim alleges that the sexual intercourse took place in the month of November and she suffered bleeding due to termination of pregnancy, in the month of December/January, the size of the placenta would have indicated around eight weeks' pregnancy. In contradiction thereto, PW-4 after medically examining the victim has categorically opined that the size of the placenta indicated pregnancy of twenty-two weeks. In the face of such categorical medical evidence, we cannot conclude that the Appellant caused the pregnancy.

12. In conclusion, on both counts, viz., the age of the victim and the Appellant being the perpetrator of the offence, we have to

disagree with the findings of the Trial Court. We do not find the evidence of the victim to be of a "sterling quality" and the medical evidence furnished lends credence to this opinion.

13. Accordingly, the conviction and sentence imposed on the Appellant, vide the impugned Judgment and Order on Sentence of the Trial Court are set aside.

14. The Appeal is consequently allowed.

15. The Appellant is acquitted of the offence under Section 5(j)(ii) punishable under Section 6 of the POCSO Act and Section 376(1) of the IPC.

16. He be set at liberty forthwith, if not required to be detained in any other case.

17. Fine, if any, deposited by the Appellant in terms of the impugned Order on Sentence, be reimbursed to him.

18. No order as to costs.

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

20. 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
19-06-2025

(Meenakshi Madan Rai)
Judge
19-06-2025

Approved for reporting : **Yes**

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