

**(2023) 10 SIK CK 0008**

**Sikkim High Court**

**Case No:** Criminal Appeal No. 02 Of 2023

Santa Kumar Rai

APPELLANT

Vs

State Of Sikkim

RESPONDENT

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**Date of Decision:** Oct. 4, 2023

**Acts Referred:**

- Protection Of Children From Sexual Offences Act, 2012 - Section 2(d), 5(l), 5(n), 6
- Indian Penal Code, 1860 - Section 376(2)(f), 376(2)(n), 506 Evidence Act, 1872 - Section 32(5), 35, 50, 51, 59, 60, 61, 67, 74, 101, 102
- Code Of Criminal Procedure, 1973 - Section 12, 17, 164
- Juvenile Justice (Care And Protection Of Children) Act, 2015, - Section 94
- Registration Of Births And Deaths Act, 1969 - Section 8, 10, 12, 17

**Hon'ble Judges:** Meenakshi Madan Rai, J; Bhaskar Raj Pradhan, J

**Bench:** Division Bench

**Advocate:** Sudhir Prasad, Yadav Kumar Sharma, Sujan Sunwar

**Final Decision:** Disposed Of

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**Judgement**

Meenakshi Madan Rai, J

1. The Appellant is assailing the Judgment of conviction dated 28-10-2022, in Sessions Trial (POCSO) Case No.05 of 2020, of the Court of the

Learned Special Judge, Protection of Children from Sexual Offences Act, 2012, at Namchi and the Order on Sentence dated 31-10-2022.

2. The Appellant was charged with the offence under Sections 5(l) and 5(n) of the Protection of Children from Sexual Offences Act, 2012

(hereinafter, the "POCSO Act"), read with Sections 376(2)(f), 376(2)(n) and 506 of the Indian Penal Code, 1860 (hereinafter, the "IPC").

(i) He was convicted of the offence under Section 5(n) of the POCSO Act, punishable under Section 6 of the same Act and under Section 376(2)(f)

of the IPC. He stood acquitted of the offences under Section 5(l) of the POCSO Act and Sections 376(2)(n) and 506 of the IPC.

(ii) He was sentenced to undergo rigorous imprisonment for a period of twenty years under Section 5(n) of the POCSO Act and to pay a fine of ₹

5,000/- (Rupees five thousand) only. He was sentenced to undergo rigorous imprisonment for a period of ten years under Section 376(2)(f) of the IPC

and to pay a fine of ₹5,000/- (Rupees five thousand) only. The sentences of imprisonment were ordered to run concurrently while the sentences of

fine bore default clauses of imprisonment.

3. The primary ground advanced by Learned Legal Aid Counsel for the Appellant to assail the conviction is that the age of the victim went un-

established by the Prosecution as the contents of Exhibit 7, the Birth Certificate of the victim, furnished by the Prosecution were not proved. The

document was allegedly then in the possession of P.W.8, the victim's sister, who failed to depose of its contents. P.W.7, the Doctor and in-charge

of the Birth Records Register at the concerned Primary Health Centre (PHC), merely stated that on 03-02-2020 she received a requisition for

authentication of the Birth Certificate of the minor from details maintained in the Birth Record Register, of Melli PHC. Accordingly, she verified the

date of birth of the victim but she had no personal knowledge of the entries made in the Register. The evidence of P.W.3, the Vice-Principal of the

School shed no light on the age of the victim, the witness being unaware of the entries in Exhibit 5, the School Admission Register. He traced the

victim's date of birth in the School Admission Register and found it recorded as 12-06-2002, but had no inkling of who had made the

entries. That, this Court in Sanjay Manger vs. State of Sikkim CrI. A. No.07 of 2021, High Court of Sikkim, decided on 14-11-2022., has held that;

“6. It is merely because the document is admissible it does not waive the requirement of proof of its contents. Admittedly the contents of Exhibit

(iv) 4 thereof have not been proved in as much as the person who scribed the document or the signatory of the document were not summoned or

examined as Prosecution witnesses to comply with the requirements of Section 67 of the Evidence Act.

[illegible]

That accordingly, the Prosecution case that the victim was a minor is not proved.

(i) In the next prong of his arguments, Learned Counsel contended that the Medical Certificate, Exhibit 9 relied on by the Prosecution does not reveal

the commission of the alleged offence of sexual assault on the victim as there were no signs of recent penetration. An old hymen tear was seen. No

injuries were detected on her person, thereby the evidence fell short of the requirement of establishing the alleged offence. That, in her statement

under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter, "Cr.P.C.") she made no allegations of sexual assault but by improving

her statement subsequently she has alleged sexual assault in her deposition in Court. Her evidence being contradictory, are therefore unreliable.

Accordingly, in the absence of proof of age of the victim and of sexual assault perpetrated on her, the Judgment of conviction and the Order on

Sentence be set aside.

4. Resisting the contentions firstly on the question of the victim's age, according to the Learned Additional Public Prosecutor the age of the victim

has been proved by the School Admission Register, Exhibit 5 and by the evidence of P.W.3 the Vice-Principal of the school which the victim

attended. P.W.7, who had proved the entries regarding the victimâ€™s date of birth made in the Births Register. That, P.W.7 also identified Exhibit

12 as the requisition filed by P.W.9, the Investigating Officer (I.O.), seeking authentication of the Birth Certificate of the minor victim, which she duly

authenticated vide Exhibit 13. The victim herself has stated that she was eighteen years at the time of her evidence, making her seventeen years at

the time of offence. The victim being a minor at the time of the offence thus cannot be doubted. In the context of the offence committed on her,

Learned Additional Public Prosecutor contended that, the victim's statement of sexual assault has been duly corroborated by P.W.5, the person to

whom she confided much after the incident took place, being ashamed to do so earlier, her being father the perpetrator. That, merely because there

were no injuries on the person of the victim, it is not conclusive of the fact that the offence was not committed. The minor victim has categorically explained in her evidence that, after her mother went for work to Delhi, she was sexually assaulted by her father several times. To buttress this submission, reliance was placed on State of Maharashtra vs. Prakash and Another 1993 Supp (1) SCC 653, wherein it was observed that the use of force is not a sine qua non to establish the offence of rape. It was next urged that, the contradictions allegedly made by the victim in her statement under Section 164 Cr.P.C. and her deposition in Court are inconsequential as the victim has admitted that, she did not disclose the incident of sexual assault before the Judge recording her Section 164 Cr.P.C. statement as she was ashamed of the incidents. This fact went un-demolished under cross-examination. That, in light of the evidence on record, the Prosecution has proved its case beyond a reasonable doubt and the impugned Judgment and Sentence suffer from no infirmity.

5. The submissions having been duly considered and the evidence on record perused as also the impugned Judgment and Order on Sentence. We proceed to examine whether the Learned Trial Court was correct in its appreciation of the Prosecution evidence which led to the Appellant's conviction as detailed supra.

6. Dealing first with the issue of the victim's age, the evidence of P.W.1 is as follows; "I am eighteen years old." The victim has not qualified her statement further by stating her actual date of birth. She identifies Exhibit 1 as the statement made by her and recorded by one Judge Madam at Soreng Court. In Exhibit 1, so far as the age of the victim is concerned the Learned Judicial Magistrate has recorded as follows; "The Victim/Witness is of 17 years of age and in order to satisfy myself that the Victim/Witness can understand the nature of the proceedings, I asked her a few questions, as follow". The Learned Judicial Magistrate has therefore unilaterally reached a finding that the victim/witness is seventeen years of age, as nowhere is it stated by the Magistrate that the victim herself gave her age as seventeen years old nor was there any documentary evidence for the official to fall back on which vouched for the age of the victim. Although no question in

cross-examination was put to P.W.1 to contradict her evidence that she was eighteen years of age during the trial, in our considered opinion the onus is cast on the Prosecution to prove its case beyond a reasonable doubt and the lack of cross-examination does not do away with the statutory requirement placed on the Prosecution by Sections 101 and 102 of the Indian Evidence Act, 1872.

(i) Documentary evidence to establish the victim's age was imperative for the reason that the victim was evidently shocked by the acts perpetrated on her by her biological father. Her evidence with regard to her age, in the absence of the foregoing details and documentary evidence, fails to vouchsafe for her minority.

(ii) Next, we delve into the contents of Exhibit 5, the certified copy of the page of the School Admission Register, pertaining to the entries of the victim's date of birth. P.W.3 the Vice-Principal of the school which the victim was attending, deposed that, he found that the victim's date of birth was recorded on 27-02-2007, at serial no.29 as "12-06-2002" in the School Admission Register. Exhibit 5 was identified by the witness. He had also brought along with him the original School Admission Register for the year 2007, containing the date of birth of the victim. Admittedly P.W.3 had not made the entries in Exhibit 5 and was oblivious of the details of the entry. Perusal of Exhibit 5 indicates that details of the victim's age was based on the details furnished by her father, the offender and hence the evidence of P.W.3 on this aspect is of little use to the Prosecution case as he has failed to prove the contents of the Exhibit 5. The custody of the Birth Certificate, Exhibit 7, was with P.W.8, the elder sister of the victim, as can be seen from the evidence of P.W.4, P.W.6 and P.W.8 herself. Exhibit 7 was not in the custody of either of the victim's parents and no reasons have been assigned by the Prosecution as to why her sister P.W.8 would be in possession of the document. It was handed over to the Police, vide Exhibit 6, the Handing-Taking Memo, prepared by the Police on which P.W.4 and P.W.6 also affixed their signatures as witnesses to such exchange. P.W.8 also vouched for the truth of the evidence of P.Ws 4 and 6 but she gave no evidence of the contents of Exhibit 7.

(iii) P.W.7 issued the certificate Exhibit 13, certifying that from the counterfoil bearing no.22490 of the Birth records Register of Melli PHC, the date of birth of the victim was recorded as 12-06-2002, while the date of registration was 30-06-2002. Her evidence reveals that she was posted at the Melli PHC and was the Registrar of Births and Deaths but her evidence does not establish that she was the Registrar of the Births and Deaths at Melli PHC in the year 2002, when the entries supra were made or that she had made the entry pertaining to the victim's date of birth in the Register. She was unaware of how Exhibit 7 was issued. The original Birth Certificate Register was not produced before the Learned Trial Court during her evidence, no reasons were put forth for such non-production. P.W.7 identified the signature on Exhibit 14, (the counterfoil bearing No.22490 based on which she verified the victim's date of birth), as that of one Dr. Mukta Mukhia, the Registrar of Births and Deaths at Melli PHC. The said Doctor was not produced as a witness by the Prosecution. Exhibit 7 may have been prepared by a public servant in the discharge of official duties but it still requires corroboration by the person on whose information the entry was made. The evidence of the parents of the minor is the best evidence, if supported by unimpeachable evidence as propounded in Madan Mohan Singh and Others vs. Rajni Kant and Another [(2010) 9 SCC 209]. The Prosecution has failed to conduct the necessary investigation and the Learned Trial Court has been remiss in failing to take into consideration the provisions of Section 94 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

(iv) This Court in a plethora of cases has prescribed the parameters for proof of date of birth which we reiterate hereinbelow. In State of Sikkim vs.

Girjaman Rai @ Kami and Others SLR (2019) SIKKIM 266, while discussing this aspect it was observed thus;

“15. Date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim drags an accused to the rigours of the POCSO Act, 2012 which mandates a reverse burden of proof. Therefore, it is absolutely vital to prove the minority of the victim. The “best evidence rule” must be necessarily followed while proving the contents of

a birth certificate.

17. This Court in re: Mangala Mishra @ Dawa Tamang @ Jack v. State of Sikkim [2018 SCC OnLine Sikk 215] examined whether the

birth certificate and held that it had not been established in terms of the required legal parameters. Section 35 of the Indian Evidence Act, 1872 was

essential to show that a document was prepared by the public servant in discharge of his official duty. This Court also examined Section 74

various pronouncements of the Supreme Court and culled out the parameters for consideration as follows:

examined in the facts and circumstances of a particular case.

discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been

criminal cases.

votersâ€™ list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the

(iv) 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.

(v) 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 register is to be discarded.

(vi) 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 Section 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining a person having special means of knowledge, authenticity of date, time, etc. mentioned therein.

18. In re: Mangala Misra (supra) it was seen that the evidence produced by the prosecution was contradictory and no register of the Chief Registrar of Births and Deaths was furnished to substantiate the entries made in the birth certificate. It was also noticed that no witness was examined to prove the entries therein. Hence, this Court concluded that the prosecution had failed to establish that the victim was a child and rejected the purported birth certificate as proof of age.

19. In re: Sancha Hang Limboo (SLR (2018) Sikkim 1) this Court clarified that the birth certificate may be admissible under Section 35 of the Indian Evidence Act, 1872, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. This Court held that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. This Court also held that a birth certificate is a public document falling under Section 74 of the Indian Evidence Act, 1872. It was noticed that objection as to the admissibility and mode of proof of



document was not taken at the trial before it was received in evidence and marked as exhibit. Thus it was held that the birth certificate cannot be questioned at the appellate stage.

20. In re: Lakhi Ram Takbi v. State of Sikkim [SLR (2019) SIKKIM 45] this Court held that the seizure of the birth certificate had been established and that it fulfilled the requirements of both Section 35 and Section 74 of the Indian Evidence Act, 1872. It was held that since no doubt was raised about the authenticity of the original birth certificate by way of examination of witnesses before the learned Trial Court this question could not be brought up before the Appellate Court since it was admitted without formal proof. In the said case the Headmaster of the School attended by the victim was examined as a prosecution witness who produced the original register maintained and exhibited the certified copy thereof. This Court noticed that the defence had failed to cross-examine regarding proof of entries therein and therefore, it was held that the certificate issued by the Headmaster which indicated the date of birth of the victim also was not demolished. Considering the evidences produced including the birth certificate, copy of the entries contained in the school register and the evidence of the Headmaster of the school this Court held that the prosecution had proved the victim's minority.

21. In re: Murugan [(2011) 6 SCC 111] the Supreme Court examined various documents i.e. the FIR, certificate of birth issued under Section 17 of the Registration of Births and Deaths Act, 1969 (the 1969 Act), the date of birth certificate issued by the Headmaster of the school as well as the evidence of the Radiologist and the test report opining that the victim's age was about 18 years. The Supreme Court also examined the oral evidences of various witnesses including the mother who had deposed about the date of birth being 14 years of age and the Headmistress of the school proving the certificate issued by the school. It was noticed that the birth certificate issued by the Municipality did not contain the name of the child. It was in this background that the Supreme Court held that documents made ante litem motam can be relied upon safely, when such documents are admissible under Section 35 of the Indian Evidence Act, 1872. It was noticed that although the registration was made one month after the birth the

names of the parents and address were correctly mentioned and thus there was no reason to doubt the veracity of the said certificate. The Supreme

Court also noticed that the school certificate had been issued by the Headmaster on the basis of the entry made in the school register which

corroborates the contents of the certificate of birth issued by the Municipality. It was noticed that both those entries in the school register as

well as in the Municipality had come much before the criminal prosecution started and those entries stood fully supported and

corroborated by the evidence of the mother of the victim who had been cross-examined at length.

22. The common determinative factor which runs in the judgments examined supra is the consideration of the evidence produced to

determine the age of the victim. The aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all

other facts in issue the determination of the age of the victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO

Act, 2012 does not diminish or dilute the Indian Evidence Act, 1872.

23. The birth certificate is a certificate issued under the 1969 Act. The Registrar of Births & Deaths appointed under the 1969 Act is

required to enter information of the birth given to him either orally or otherwise in the register maintained. The informant who gives

the information of the birth of a child is required to be provided free of charge an extract of the prescribed particulars under his hand

from the register relating to such birth. The name of the informant is also to be recorded in the register maintained under the 1969

Act. Proved by its signatory i.e. the maker, the birth certificate would stand proved. The maker of the birth certificate would be able to

depose about the contents of the birth certificate based on the information recorded in the register maintained under the 1969 Act. If the register is

therefore, produced and proved it would prove the authenticity of what is recorded in the birth certificate. This would prove that the contents of the

birth certificate are the extract of the contents of the register maintained under the 1969 Act. The contents of the register, however, are entered from

the information provided by the informant as required under the 1969 Act. The truth about the contents of the information recorded in the register

however, is yet another matter. Usually the informant would be the parents or either of them. Section 8 of the 1969 Act provides for the duty of the

persons specified therein to give or cause to be given, either orally or in writing, according to the best of their knowledge and belief, information to the

Registrar of the several particulars required to be entered in the forms prescribed in respect of births. Section 10 of the 1969 Act imposes a duty upon

certain persons to notify births. The person specified therein would have special knowledge about the birth of the child. The birth certificate issued

under the 1969 Act is therefore an extract of the entries made in the register issued under Section 12 or 17 of the 1969 Act.â€

(emphasis supplied)

(v) On the anvil of the principles elucidated hereinabove, it is essential to notice that the Prosecution has failed to toe the line of legal requisites.

Consequently, the Prosecution has failed to prove the age of the victim.

(vi) The second facet that needs determination is whether the Appellant committed the alleged offence. P.W.1 is the victim, she has detailed in her

evidence the sordid incident pertaining to the sexual assault, perpetrated on her by her biological father. According to her, a month after her mother

left for work in Delhi leaving behind her and her ten year old brother with their father, when she was asleep with her brother in her room, suddenly

she woke up and found that the Appellant had opened all his clothes including his trousers and was naked waist down and was committing penetrative

sexual assault on her. When she raised a hue and cry he threatened to kill her if she disclosed the incident to anyone. She was shocked and nervous

and did not narrate the incident to anyone. Thereafter, the penetrative sexual assault on her by him followed several other times. She disclosed these

facts to P.W.5 her relative in the month of December, 2019, when P.W.5 came to her home to collect some seedlings. P.W.5 took the victim to Melli

Police Station, where she lodged the First Information Report (FIR), Exhibit 2. P.W.1 admitted that when she went to the Soreng Court to have her

statement recorded by the Learned Judge, she was too ashamed to disclose the entire incident. Her evidence in chief pertaining to the fact of sexual

assault by the Appellant on her could not be demolished despite prolix cross-examination. Considering the evidence of the victim, who had to bear the brunt of the depravity of her biological father, we are of the considered view that there would be no reason for the victim to fabricate such an obnoxious tale. We find her evidence to be cogent as regards the sexual assault. No contradictory statements have been made by the victim concerning the incidents of sexual assault and she has explained why she did not mention the fact of sexual assault in her Section 164 Cr.P.C. statement which remained undecimated.

â€œThe girl gives h/o sexual assault since April, 2019 last sexual intercourse on Dec 10/2019.

Relationship of assailant with victim: Father.

Pt gives h/o threatening her if she complained.

No use of condom/other contraceptives except natural methods

[illegible]

Exhibit 9 also reveals that the last sexual assault occurred on December 10, 2019 whereas the victim was examined on 21-12-2019, consequently, it

stands to reason that there would be no signs of physical violence on the person of the victim.

7. In conclusion, in view of the detailed discussions above, on account of the failure of the Prosecution to establish the age of the victim as a minor the

conviction of the Appellant under Section 5(n) punishable under Section 6 of the POCSO Act is set aside. He is acquitted of the offence and the

Sentence imposed thereof is also dispensed with.

8. However, the conviction of the Appellant under Section 376(2)(f) of the IPC is upheld. The period of imprisonment handed out to the Appellant

under the said provision suffers from no infirmity.

9. Appeal allowed to the extent above.

10. Copy of this Judgment be transmitted to the Learned Trial Court for information along with its records.

11. The victim would obviously be in need of psychological intervention and assistance. The Child Care Institution (CCI) where she is lodged shall

take all necessary steps in this context and facilitate psychological intervention for the victim.

12. Appeal disposed of accordingly.