

**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. 30 of 2024**

Sandeep Gajmer @ Sandeep Gazmer,  
Aged about 32 years,  
S/o Shri Kharka Bahadur Gajmer,  
Resident of 7<sup>th</sup> Mile, Near Gas Godown,  
P.O. Sandur and P.S. Ranipool,  
Gangtok, Sikkim.

At present: Rongyek Jail, Gangtok, .... Appellant

**versus**

State of Sikkim .... Respondent

**Appeal under Section 415(2) of the Bharatiya Nagarik Suraksha  
Sanhita 2023 (BNSS)**

[against the impugned judgment dated 21.08.2024 & order on sentence dated 22.08.2024  
passed by the learned Special Judge (POCSO Act, 2012) at Gangtok, in S.T. (POCSO) Case No.  
14 of 2022 – State of Sikkim vs. Sandeep Gajmer @ Sandeep Gazmer ]

**Appearance:**

Mr. N. Rai, Senior Advocate with Mr. Yozan Rai and Ms Tara Devi Chettri, Advocates for the Appellant.

Mr. Yadev Sharma, Additional Public Prosecutor with Mr. Sujan Sunwar, Assistant Public Prosecutor for the State Respondent.

**J U D G M E N T**

Date of Hearing : 20<sup>th</sup> April, 2026  
Date of Judgment : 29<sup>th</sup> May, 2026  
Date on which uploaded: 29<sup>th</sup> May, 2026

**Bhaskar Raj Pradhan, J.**

The appellant stands convicted and sentenced for rape under Section 376(1) of the Indian Penal Code, 1860 (IPC). He has been sentenced for ten years rigorous imprisonment with a fine of Rs.5000/-. The victim has been

recommended for award of compensation to a sum of Rs.1,00,000/- under the Sikkim Compensation to Victims (or their Dependents) Scheme, 2021.

**2.** The appellant assails the impugned judgment dated 21.08.2024 and the order on sentence dated 22.08.2024 passed by the learned Special Judge, POCSO Act, Gangtok, Sikkim in S.T. (POCSO) Case No.14 of 2022.

**3.** Heard Mr. N. Rai, learned Senior Advocate for the appellant and Mr. Yadev Sharma, learned Additional Public Prosecutor for the State.

**The arguments**

**4.** The learned Senior Counsel for the appellant submits that the defence demolished the medical evidence of the prosecution during the trial. According to him, the medical and forensic reports do not suggest sexual assault; that even if the prosecution has been able to establish rape upon the victim, the appellant's guilt was not proved; that the victim's age was not proved during trial; that although test identification parade was conducted by the prosecution, they suppressed the test identification report clearly raising a presumption against them under Section 114(g) of the Indian Evidence Act, 1872. The learned Senior Counsel

relied upon two judgments of the Supreme Court and two of this Court in support of his contentions.

**5.** In *Rajesh Patel vs. State of Jharkhand*<sup>1</sup>, the Supreme Court was examining a case of alleged rape upon the prosecutrix. Before the Supreme Court, it was argued that the sole testimony of the prosecutrix could not have been used against the appellant therein to hold him guilty of offence under Section 376 IPC; that the prosecution had not examined either the doctor who conducted the medical examination of the prosecutrix or the investigating officer. Therefore, the finding of fact holding the appellant guilty of the offence was erroneous in law and liable to be set aside. It was also contended that there were serious contradictions in the version of the prosecutrix and her mother. Further, the appellant contended that the explanation of the prosecution that the prosecutrix could not raise alarm since the appellant threatened her with a knife was improbable. The Supreme Court on examination of the evidence of the case concluded that the prosecution story as narrated by the prosecutrix was most improbable and unnatural. The Supreme Court also found that there was inordinate delay in lodging the FIR, which was not tenably explained. As the

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<sup>1</sup> (2013) 3 SCC 791

doctor had not been examined, the Supreme Court had opined that the non-examination of the doctor as well as the investigating officer has prejudiced the case of the appellant therein, for the reason that if the doctor would have been examined he could have elicited evidence about any injury sustained by the prosecutrix on her private part or any other part of her body and also the nature of hymen layer, etc. so as to corroborate the story of the prosecution that the prosecutrix suffered unbearable pain while the appellant committed rape on her.

**6.** In *Subhash vs. State of Haryana*<sup>2</sup>, the Supreme Court found that dying declaration was not believable as there were contradictions, inconsistencies, exaggerations and embellishments in the deposition of the victim without any explanation.

**7.** In *Shaktiman Rai vs. State of Sikkim*<sup>3</sup>, we were once again called upon to determine the guilt of the accused person who had been convicted solely on the dying declaration of the deceased. We held that the prosecution must stand on its own legs and cannot garner strength from the weaknesses of the defence. We also held that the cardinal principal of criminal jurisprudence is that the case

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<sup>2</sup> (2011) 2 SCC 715

<sup>3</sup> 2024:SHC:39

can only be proved beyond a reasonable doubt when there is explicit evidence against the accused and the conviction cannot be a moral one. On examination of the facts of the case, we were of the view that the prosecution had not been able to prove its case beyond a reasonable doubt and failed to establish the identity of the appellant as the assailant. We also held that in the light of vacillating evidence, the dying declaration had not been proved by the prosecution.

**8.** In *Sandeep Tamang vs. State of Sikkim*<sup>4</sup>, one of us (*Meenakshi Madan Rai, J.*) sitting singly, held that the prosecution had failed to establish that the victim was either 18 years or 16 years of age at the time of the offence on the facts of that case. It was also held that the evidence of the prosecution witness did not inspire confidence and the evidence of other witnesses was contradictory.

**9.** The learned Additional Public Prosecutor submitted that the factum of rape has not been demolished. It was submitted that the prosecution has been able to establish that the appellant raped the victim and there is no denial that he was with her that day.

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<sup>4</sup> 2016:SHC:84

**The relevant facts**

**10.** The brief facts relevant for the purpose of disposal of the present appeal are required to be stated herein. On 22.3.2022, the victim's father (PW-2) lodged a missing report stating that the victim, aged 16 years did not return home after her tuition got over at 5:30 p.m. The Station House Officer (SHO) (PW-10) registered Sadar P.S. Case (FIR) No.41/2022 dated 22.3.2023 under Section 363 IPC against unknown persons. According to the Investigating Officer (PW-20), after receipt of the missing report and registration of the case, WT messages were circulated to all police stations and police outposts. Subsequently, she was traced and admitted to the hospital. During her medical examination by Dr. D.P. Sharma (PW-14), she revealed to him that she was sexually assaulted. On 6.6.2022, the Investigating Officer (PW-20) filed a charge-sheet alleging that the appellant had committed rape against the minor victim and was liable to be punished under Section 376 of the IPC read with Section 4 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). On 19.9.2022, the learned Special Judge framed two charges against the appellant for having committed an offence defined under Section 3(a) of the POCSO Act punishable under Section 4(2) thereof in the evening of 22.3.2022 at an isolated place on

the minor victim who was below the age of 16 years. The appellant was also charged of the same offence under Section 376 (3) of the IPC.

**11.** Twenty witnesses including the Investigating Officer (PW-20) were examined by the prosecution during the trial. The learned Sessions Judge framed two questions to be examined by him. The first was whether the appellant committed penetrative sexual assault on the victim at an isolated location inside a bus bearing number SK-03-B-0104 on the evening of 22.3.2022 and whether the victim was a minor within the meaning of Section 2(d) of the POCSO Act.

**The impugned judgment**

**12.** While the learned Special Judge was convinced that the accused had committed rape upon the victim, it was held that the prosecution had failed to establish that the victim was a minor and a child within the meaning of Section 2(d) of the POCSO Act.

**The challenge**

**13.** The appellant assailing his conviction under Section 376(1) of the IPC has filed the present appeal. The finding of the learned Special Judge that the prosecution failed to establish the victim's minority has not been assailed by the State. Thus, the only question which is to be

examined by us is whether the appellant's conviction under Section 376(1) of the IPC was correct.

**14.** The learned Sessions Judge relied upon the statements of the owner of the bus (PW-19) to confirm that he had engaged the appellant as the driver of the bus, which was seized by the prosecution in the present case. PW-17 who was employed with the company also confirmed that the appellant was the driver of the bus. Two employees of the same company (PW-6 and PW-18) had seen a girl travelling with the appellant in his bus during the relevant time. The learned Special Judge was reassured that it was in fact the victim who had travelled with the appellant in the bus during the relevant period through the admission of the defence. The learned Special Judge believed the victim who deposed that it was the appellant who had raped her. It was held that although the victim was cross-examined at length the core of the evidence could not be demolished. The learned Special Judge also relied upon the evidence of lady police personnel (PW-4) to confirm that she along with her colleague had taken the victim from the "hawa ghar" (kiosk/waiting shed) to the hospital for medical aid since she was lying unconscious. The learned Special Judge also relied upon the deposition of another lady police personnel

(PW-11) according to whom the victim had disclosed to the doctor (PW-14) that she had been roaming with the appellant in his bus. The deposition of Dr. D.P. Sharma (PW-14) to the effect that before conducting medical examination he inquired from the victim and she revealed that she had been sexually assaulted by a person the previous night reassured the learned Special Judge what the victim had deposed in Court was true. The medical report prepared by the Doctor (PW-14) and the medical file of the victim of the hospital corroborated the victim's injury.

**Consideration**

**15.** Central to this present prosecution, like in every case of sexual offence, is the victim's version. The victim had informed the learned Magistrate in her statement recorded on 29.3.2022 under Section 164 Cr.P.C. that on 21.03.2022 she had an argument with her father. After attending tuition, she did not wish to return home so she stayed at "hawa ghar" (kiosk/waiting shed). While she was there, one person came in a bus and asked her if she wanted to accompany him. She did not trust his intention and refused. She spent the night at the "hawa ghar" (kiosk/waiting shed). Early next morning, he came back again in a different vehicle and once again asked her if she wanted to

accompany him. By then she was hungry and cold and so she accompanied him. He first drove her to the petrol pump and after that they boarded the bus that was driven by him. He had to drop off the employees of the company and while doing so he fed her food at a particular place. He asked her to spend a day with him and they travelled in the bus the entire day while he was picking up and dropping off the employees. She remembered the registration number of the bus. That night, inside the bus, he forced himself on her and raped her despite her protest. Later on, he apologised to her for raping her. After that they drove to the petrol pump and he asked her to stay inside a vehicle. He boarded the bus and went to Gangtok. After he returned he asked her to leave and she went to the same “hawa ghar” (kiosk/waiting shed). It was raining then. She may have lost consciousness after that.

**16.** The victim deposed on 20.10.2022 and stated that she was 17 years old and studying in class IX. She identified the appellant shown to her on the screen as the uncle who came and took her in the bus and raped her. The identification of the appellant in Court by the victim was not objected to by the defence. The defence has also not suggested that it was not the appellant who was with the

victim on the day of the incident. Infact, the suggestion made to the victim during cross-examination reflects his admission that they were together on the day of the incident. The victim has deposed all that she stated in her statement recorded under Section 164 Cr.P.C. with exaggerations and embellishments. She recollected the incident when in the summer of 2021 (*sic* '2022'), she had quarrelled with her father and left home. The narration of facts are descriptive and in detail. She alleged that she was raped by the appellant in the bus and remembered the registration number as 104 as she had alleged in her statement recorded under Section 164 Cr.P.C as well. The cross-examination of the victim was exhaustive and certain discrepancies and exaggerations have been brought out which cautions us to scrutinise the evidence properly. However, we notice that the core of the victim's deposition in Court and her statement to the learned Magistrate that the appellant had raped her inside a bus bearing no.104 remained intact as held by the learned Special Judge.

**17.** According to the prosecution, the victim was raped by the appellant inside the bus on 22.03.2022 in an isolated place in the cover of darkness. The victim deposed that she had travelled in the bus driven by the appellant

throughout the day, i.e., 22.03.2022, when he picked up various employees of the company and dropped them off. Two employees of the company (PW-6 and PW-18) identified the appellant as the driver of the bus belonging to the company. They also recollected that some time last year they had boarded the bus driven by the appellant when they saw one girl boarding it. The victim also deposed about being driven to a petrol pump after she was raped. An employee of the petrol pump (PW-13) also identified the appellant as the driver of the bus and that some time last year he had come to the petrol pump, parked his bus and asked him to give some water to one girl who was in the bus. Although, none of these witnesses identified the victim as the girl who was with the appellant at the relevant time, their identification of the appellant cannot be doubted. The owner of the bus (PW-19) confirmed that the appellant was the driver of his bus bearing registration no. SK-03-B-0104. The registration certificate of the bus (exhibit P-23/PW-19) confirms this. The authorization letter issued by PW-19 in favour of the appellant (exhibit-24/PW-19) also confirms that the appellant was in fact the driver of the bus.

**18.** The first prosecution witness who saw the victim was lady police personnel (PW-4), who on receipt of

information, evacuated the victim lying unconscious from the waiting shed to the hospital. Another lady police personnel (PW-11) visited the hospital on 22.3.2022 after receiving a call from the General Duty Officer of the Police Station and found the victim admitted there who was being attended to by Dr. D.P. Sharma (PW-14). According to her, when Dr. D.P. Sharma (PW-14) inquired from the victim, she disclosed that she was roaming along with a bus driver of a company in a bus bearing no. SK-03-B-0104. She also deposed that another doctor came and medically examined the victim's private parts and found signs of recent sexual intercourse. The executive in the operation department of the hospital (PW-8) proved the medical report of the victim which reflects that the victim had infact been admitted in the hospital on 23.03.2022 as per the prosecution case.

**19.** Dr. D.P. Sharma (PW-14) examined the victim after she was brought to the hospital. He deposed that the victim was brought by one personnel from the police station in the emergency ward in a semi-conscious state on 23.03.2022 with the alleged history of having found lying near Oxxx Vxxx confirming the deposition of the lady police personnel (PW-4). He inquired from the victim regarding the matter. She revealed that she was sexually assaulted by a

person the previous night corroborating the deposition of the other lady police personnel (PW-11). On local examination, he found 5x4cm reddish blue coloured bruise over left supraclavicular region. On genital examination, he found her hymen torn at 6'0 clock position with presence of reddish erythematous swelling with discharge present. Dr. D.P. Sharma (PW-14) opined that there was presence of forceful penetration. He, therefore, prepared his medical report (exhibit P-16/PW-14). He also prepared a wound certificate (exhibit P-18/PW-14) in which he had mentioned that the injury sustained was simple in nature and the fact that the genital examination of the victim had been conducted by Dr. Shrabanti and Dr. Karma Mingyur in his presence.

**20.** As both Dr. Shrabanti and Dr. Karma Mingyur, who admittedly conducted the genital examination of the victim, were not examined by the prosecution, the learned Senior Counsel submitted that the wound certificate (exhibit P-18/PW-14) should be discarded as it was not proved by them. The wound certificate (exhibit P-18/PW-14) has been prepared by Dr. D.P. Sharma (PW-14) and therefore, we are of the view that failure to examine Dr. Shrabanti and Dr. Karma Mingyur who conducted the genital examination of

the victim would not be fatal since Dr. D.P. Sharma (PW-14) had witnessed the genital examination and had prepared the wound certificate himself.

**21.** During cross-examination, Dr. D.P. Sharma (PW-14) admitted that there was no fresh injury over the genital region of the victim. He also admitted that there was no fresh bleeding from the torn hymen at 6'O clock position which proves that it was an old injury. He admitted that he had found no injury over the body of the victim. He admitted that the reddish erythamous swelling could be caused due to non-maintenance of hygiene and not changing of undergarments for two-three days.

**22.** Dr. D.P Sharma's (PW-14) admission during cross-examination that he had found no injury over the body of the victim is not borne from the medical report prepared by him which reflects that he had, as deposed in his examination in chief, noted that there was 5x4cm reddish blue colour bruise over left supraclavicular region. Although, he also admitted that the reddish erythamous swelling could be caused due to non-maintenance of hygiene and not changing of under garments for two three days we are of the view that the finding of reddish erythamous swelling along with the torn hymen and the reddish blue

bruise is suggestive of sexual assault which corroborates the victim's version of rape committed on her.

**23.** Although, the forensic evidence did not yield positive result, we are of the view that this fact alone cannot undo the evidence of the victim corroborated by the medical evidence and other prosecution witnesses. It is settled that a positive result of forensic examination would constitute clinching evidence against an accused if, however, the result of the forensic test is in the negative, i.e., favouring the accused, the weight of the other material on evidence on record still have to be considered (see ***Sunil vs. State of Madhya Pradesh***<sup>5</sup>). We are of the considered view that failure of the prosecution to further clinch the case with the forensic evidence result does not negate the deposition of the victim as well as the medical evidence proved by them and other prosecution witnesses as discussed above.

**24.** During the cross-examination of the Investigating Officer (PW-20), he confirmed that during investigation test identification parade was conducted by him but the report of the test identification parade was not enclosed in the charge-sheet. The victim during her cross-examination admitted that she had gone to the jail for a test identification

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<sup>5</sup> (2017) 4 SCC 393

parade and she could not identify the appellant from the line up. Identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by witnesses in Court. It is quite evident that when the test identification parade was conducted by the prosecution, the victim did not identify the appellant at that time. However, we notice that the appellant's identification by the victim in Court has not even been questioned by the appellant during cross-examination. In fact, the appellant through the suggested questions during cross-examination of the victim has admitted that he was with the victim in the bus on the relevant day. The appellant also admitted this fact voluntarily while explaining the circumstances against him in the proceedings under Section 313 Cr.P.C. Thus, even the presumption under Section 114(g) of the Indian Evidence Act, 1872 against the prosecution that the result of the test identification parade, which could have been produced but was not produced would, if produced, be unfavourable to the prosecution who withheld it would be to the extent the victim herself admitted during her cross-examination. This presumption under Section 114(g) of the

Indian Evidence Act, 1872 being a rebuttable presumption we notice that the evidence led by the prosecution, i.e., the deposition of the victim and the other prosecution witnesses rebuts this presumption.

**25.** We hold that the medical evidence read with the victim's deposition clearly suggests that the victim was raped by the appellant inside the bus bearing no. SK-03-B-0104 on the evening of 22.3.2022. We are of the view that it would not have been anyone else beside the appellant who was responsible for the heinous act.

**26.** We are, therefore, of the opinion that the conviction of the appellant under Section 376 of the IPC and consequent sentence by the learned Special Judge calls for no interference. The appeal is rejected.

**27.** Copy of this judgment be sent to the learned Special Judge, Gangtok, for information along with the records.

**(Bhaskar Raj Pradhan)**  
**Judge**

**(Meenakshi Madan Rai)**  
**Judge**

Approved for reporting: **Yes/No**  
Internet: **Yes/No**

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