

THE HIGH COURT OF SIKKIM: GANGTOK
(Criminal Appeal Jurisdiction)

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

CRL. A. No. 25 of 2024

Jeet Hang Subba,
Aged about 27 years,
S/o Shri Buddha Bir Subba,
Permanent Resident of Thangling, Soreng District,

*At present lodged at Rongyek Jail,
Gangtok, Sikkim*

.... Appellant

versus

State of Sikkim

.... Respondent

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

*[against the impugned judgment & order on sentence dated 31.07.2024 passed by the
learned Special Judge (POCSO Act, 2012) Soreng, Sikkim in S.T. (POCSO) Case No. 01 of 2024
State of Sikkim vs. Jeet Hang Subba.]*

Appearance:

Mr. Jorgay Namka, Senior Advocate (Legal Aid Counsel) and Ms.
Mingma Lhamu Sherpa, Advocate (Legal Aid Counsel) for the
Appellant.

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

J U D G M E N T

Date of Hearing : 29.04.2026
Date of Judgment : 29.05.2026
Date on which uploaded: 29.05.2026

Bhaskar Raj Pradhan, J.

1. The present appeal assailing the impugned judgment of
conviction and order on sentence dated 31.07.2024 is

limited to the extent of the conviction under section 3(a) of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). It is contended that the prosecution had failed to prove that the victim was a child as defined under section 2(d) of the POCSO Act.

2. The investigation started with the lodging of the First Information Report (FIR) (exhibit-P7) on 10.08.2022 before the police station by Dr. Sharad Hang Subba (P.W.7) the Medical Officer at the Public Health Center stating that the victim came to the outpatient department with complaints of vaginal bleeding, pain in the abdomen and generalised weakness since seven days. He also reported that on examination and investigation, her Urine Pregnancy Test came positive and that she had been given an over-the-counter drug by the appellant who was her boyfriend on 02.08.2022. The victim had also given history of having sexual intercourse with the appellant on 13.06.2022 to the first informant.

3. The investigation led to the filing of the charge sheet alleging that it revealed that the appellant who was a married person with a child had a love affair with the victim and indulged in sexual intercourse consensually. Subsequently, a supplementary charge sheet was also submitted after receipt of the report from the Central

Forensic Science Laboratory (CFSL). Three charges were framed against the appellant under section 5(j) (ii) of the POCSO Act, section 376 (1) and section 315 of the Indian Penal Code, 1860 (IPC).

4. Sixteen witnesses were examined by the prosecution in support of their case. After the trial the appellant was examined under section 313 of the Code of Criminal Procedure, 1973 (Cr.P.C.) where he pleaded that he was not aware of any of the circumstances against him and that he had been falsely implicated.

5. The learned Special Judge was of the considered view that the prosecution had failed to prove the charge under section 315 of the IPC. However, the learned Special Judge was of the opinion that the prosecution had proved that the victim was a minor on the date of the incident i.e. 13.06.2022 and that he had committed penetrative sexual assault upon her notwithstanding her consent. Therefore, the appellant was also found guilty of the offence under section 376(1) of the IPC.

6. Mr. Jorgay Namka, learned Senior Counsel for the appellant submitted that the birth certificate (exhibit-P3) which was issued after many years is doubtful considering the deposition of the victim and her mother (P.W.2) regarding her age. That this would suggest that the entry

made in the birth certificate (exhibit-P3) was false. If therefore the prosecution failed to establish that the victim was a child at the time of the consensual sexual intercourse then the conviction under section 376(1) of the IPC is also liable to be set aside.

7. The learned Additional Public Prosecutor on the other hand submitted that the prosecution had been able to establish that the victim was a child when the offence took place.

8. The persons who would be aware of the victim's age examined by the prosecution are the victim herself, the victim's mother (P.W.2), the victim's father (P.W.3) and the victim's sisters (P.W.4, P.W.5 and P.W.6.).

9. The victim who deposed on 01.11.2022 stated that she was presently eighteen years old and that her actual date of birth is 05.01.2004 however, her parents had reduced her age and recorded it as 05.01.2005.

10. The victim's mother (P.W.2) stated that the victim was born in December, 2004 and that her birth certificate (exhibit-P3) was obtained from the Primay Health Centre (PHC). She identified both the birth certificate (exhibit-P3) which records her date of birth as 05.01.2005 and her immunization card (exhibit-P4).

11. The prosecution did not cross examine either the victim or the victim's mother (P.W.2) although their depositions were against the prosecution case with regard to the victim's age.

12. The victim's father (P.W.3) deposed that the victim was born on 05.01.2005 at home and he had obtained the birth certificate (exhibit-P3) from the PHC. He also identified the birth certificate (exhibit-P3) obtained by him. When the victim's father (P.W.3) was cross examined by the appellant's counsel he deposed that he could not say whether the birth certificate (exhibit-P3) was of the victim. He also did not know when he had obtained the birth certificate (exhibit-P3) from the PHC. He admitted that he did not know the exact age of the victim but denied the assertion that her date of birth was not 05.01.2005.

13. The victim's sister (P.W.4) stated that she was seventeen years old when she deposed on 14.12.2022. During her cross examination by the appellant she conceded that she was seventeen years old and the victim was seven months older than her. She also admitted that her birthday was 08.07.2005.

14. The victim's sister (P.W.5) did not depose anything about the victim's age. The victim's sister (P.W.6) during her cross examination by the appellant admitted that the victim

was presently eighteen years old when she deposed on 14.12.2022.

15. The other set of prosecution witnesses produced for establishing the age of the victim are the retired nurse (P.W.8), the Head Master of Government Primary School (P.W.9), P.W.10 and P.W.11 the seizure witnesses of the birth certificate, P.W.12 the seizure witness for the immunization card of the victim, P.W.13 the seizure witness of the polio card of the victim and the Registrar, Births & Deaths of the PHC (P.W.14).

16. P.W.10 and P.W.11 proved the seizure of the birth certificate (exhibit-P3) from the victim's house by the police.

17. The retired nurse (P.W.8) working at the relevant time at the PHC as an auxiliary nurse and midwife (ANM) proved the immunization card of the victim and her mother. She deposed that those entries including the date of birth as 05.01.2005 were made by her.

18. P.W.12 proved the seizure of the immunization card (exhibit-P4) and P.W.13 proved the seizure of the polio card of the victim from her house.

19. The Head Master of Government Primary School (P.W.9) examined the School admission register and deposed that the date of birth of the victim was recorded as 05.01.2005 as furnished by her mother (P.W.2).

20. The Registrar, Births and Deaths (P.W.14) proved that the birth certificate (exhibit-P3) was issued by him after verification and that the original Births and Deaths Register (exhibit-P15) contained an entry of the date of birth of the victim as 05.01.2005 but was registered only on 05.04.2022. He also stated that the informant regarding the date of birth of the victim was the father (P.W.3).

21. Under normal circumstances, the birth certificate which is a public document may have drawn a presumption that the entry made therein is correct. However, we notice that the birth certificate of the victim (exhibit P3) which records her date of birth as 05.01.2005 was issued on 05.04.2022 only. Obviously the Registrar, Births and Deaths (P.W.14) would have no personal knowledge about it and had recorded it as informed by the victim's father (P.W.3). The victim's father (P.W.3) however, conceded in cross examination that he could not say the exact age of the victim and when he obtained the birth certificate (exhibit-P3). The victim's mother (P.W.2) who would be the best person to know the date of birth of the victim deposed that the victim was born in December, 2004 in her examination-in-chief itself. The victim went a step further and deposed that her actual date of birth was 05.01.2004 but her parents had reduced her age and recorded it as 05.01.2005. These

assertions regarding the falsity of the entries made in the birth certificate, and the register of birth and deaths made by the prosecution witnesses remains uncontroverted. Therefore, the entries made in the birth certificate (exhibit-P3) are questionable. When the prosecution sets out to establish their case it is incumbent upon them to do so with cogent evidence. When conflicting evidence is put forth by the prosecution it is settled law that the one favouring the accused person should be accepted.

22. Further, we notice that section 13 of the Registration of Births and Deaths Act, 1969 deals with delayed registration of births and deaths. Section 13 (3) of the Registration of Births and Deaths Act, 1969 provides that any birth or death which has not been registered within one year of its occurrence shall be registered only on an order made by a Magistrate of a First Class after verifying the correctness of the birth or death and on payment of prescribed fee. There is no evidence placed by the prosecution to suggest compliance of this provision before the Registration of Births and Deaths in the Register (exhibit-P15). Consequently, the presumption of correctness of the public document i.e. the birth certificate (exhibit-P3) cannot be made in its favour.

23. We are thus of the view that the prosecution had unfortunately faltered in proving that the victim was in fact

a child as defined under section 2(d) of the POCSO Act. Consequently, the conviction and sentence of the appellant under section 3(a) of the POCSO Act is set aside.

24. The learned Special Judge was of the view that the deposition of the victim that she had sexual intercourse with the appellant on 13.06.2022 had not been demolished nor denied by the appellant. As such the learned Special Judge considered the evidence of the victim to convict and sentence the appellant for the offence under section 376(1) of the IPC. In such situation the victim must satisfy the test of a sterling witness.

25. The victim deposed that on 13.06.2022 at around 10.30 pm she had gone to meet the appellant, her boyfriend, a little further away from her house as they had decided to meet there. It was during this meeting in the evening that they had sexual intercourse after that they returned to their respective homes. She also deposed that as a result of sexual intercourse she did not have her period for two months which led her to get a pregnancy done which showed positive result. She further deposed that when she informed the appellant about the pregnancy he got her medicine for abortion through a compounder after consuming which she started bleeding from her private part and had a bad stomach ache. As she was not getting better

she asked her sister to take her to the PHC from where she had been referred to District hospital, Namchi and thereafter, to the District Hospital, Gangtok.

26. On a suggestion of the defence the victim admitted that the accused had not forced her to have sexual intercourse with him and that the sexual intercourse was consensual although she was aware that he was married. She also admitted that about a year before the incident she was sexually abused by the elder brother of her brother-in-law.

27. The victim's mother (P.W.2), the victim's father (P.W.3), the victim's sisters (P.W.4, P.W.5 and P.W.6) confirmed about the victim's pregnancy. All of them identified the appellant in Court. The victim's sisters (P.W.5 and P.W.6) confirmed that they had taken the victim to the PHC after learning about her pregnancy and being informed that it was the appellant who was responsible for it.

28. Dr. Sharad Hang Subba (P.W.7) the Medical Officer posted at the PHC deposed that the victim had come to him with complaint of vaginal bleeding, pain in the abdomen and generalised weakness since seven days on 10.08.2022. He deposed that on examination and investigation the victim tested positive for pregnancy.

29. Dr. Chimi P. Theeng (P.W.15) the Obstetrician and Gynaecologist at the STNM Hospital who examined the

victim on 12.08.2022 deposed that ultrasonography of the victim showed moderate product of conception, which was removed. She proved the medical report of the victim (exhibit-P17) which also records the said fact.

30. The investigating officer (P.W.16) deposed that on 10.08.2022 he received a call information from the Medical Officer (P.W.7) of the PHC about the victim and her disclosure that she had sexual intercourse with the appellant on 13.06.2023 due to which she had become pregnant. The investigating officer (P.W.16) deposed that thereafter, he arrested the appellant.

31. We are of the view that the victim's deposition that she had sexual intercourse with the appellant on 13.06.2022 is corroborated by the deposition of Dr. Chimi P. Theeng (P.W.15) who examined her on 12.08.2022 and found her pregnant showing moderate product of conception. We also notice that the suggestion made by the defence that the victim had been sexually abused by the elder brother of her brother-in-law a year prior to the incident of 13.06.2022 is of no relevance as she would have already delivered a child prior to 13.06.2022 if she had conceived through that suggested intercourse.

32. Therefore, we are of the view that although the prosecution could not establish that the fetal substance

extracted from the pregnant victim was that of the appellant, the victim's deposition about the sexual intercourse with the appellant on 13.06.2022 is unblemished. However, as the sexual intercourse between them was consensual and the prosecution could not establish that the victim was a child we are unable to confirm the conviction and sentence of the appellant under section 376(1) of the IPC.

33. Consequently, the impugned judgment is set aside and the appellant is acquitted of all charges, he shall be set free if not required in any other cases.

34. Copy of this judgment be sent to the learned Special Judge, Soreng along with the records for information.

35. Copy of this judgment shall also be forwarded to the Jail Superintendent, Rongyek, Gangtok.

(Bhaskar Raj Pradhan)
Judge

(Meenakshi Madan Rai)
Judge

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

to