

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

SINGLE BENCH: THE HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Criminal Appeal No. 24 of 2025

Limbu Manger @ Raju Thapa,
S/o Late xxxxx xxxxxx,
Age xxxxx,
Resident xxxxxx,
Pxxxxxx Sxxxx.

**At present: Sikkim State Jail, Rongyek,
Gangtok.**

..... Appellant

Versus

State of Sikkim.

.....Respondent

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

Appearance:

Mr. D. K. Siwakoti, Advocate (Legal Aid Counsel) for the
Appellant.

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

Date of Hearing	:	10.09.2026
Date of Judgment	:	10.09.2026
Date on which uploaded	:	12.09.2026

J U D G M E N T (O R A L)

Bhaskar Raj Pradhan, J.

1. The appellant has been convicted for commission of "aggravated sexual assault" upon the survivor. This is a criminal appeal against the impugned judgment dated 10.06.2025 and order on sentence dated 16.06.2025 passed by the learned Special Judge (POCSO) Act, 2012 in S.T. (POCSO) Case No.06 of 2024

wherein the learned Special Judge has found the appellant guilty of the offence under section 9(l) punishable under section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act). Accordingly, he has been sentenced to undergo rigorous imprisonment for a term of five years and fine of Rs.2000/- for the said offence. The learned Special Judge has also directed that the period of imprisonment already undergone by the appellant during investigation and trial shall be set off against the sentence. A sum of Rs.15,000/- has also been recommended to be paid to the survivor as compensation under the Sikkim Compensation to Victims (or their Dependents) Scheme, 2021.

Appellant's Submissions

2. Mr. D.K. Siwakoti, learned counsel for the appellant raises four submissions. Firstly, it is submitted that during the examination of the survivor's father (P.W.3) who had lodged the First Information Report (FIR) (exhibit P-4/P.W.3) he deposed that he had been informed by his wife (P.W.2) about the incident stating that the appellant had come to their house and had sexually assaulted their daughter-survivor (P.W.1). The mother (P.W.2) while describing the alleged offence to her husband had stated "*jew ma hath lagaya cha*" which translated would read as "*touched her body*". The learned counsel submits that however in the depositions of the survivor (P.W.1) as well as the mother (P.W.2) the allegation is of touching the survivor's breasts. It is therefore, submitted that this is a discrepancy which ought to have been noted by the learned Special Court.

3. The second submission is on whether the offence would amount to "*aggravated sexual assault*" or "*sexual assault*" as in the FIR (exhibit P-4/P.W.3) lodged by the survivor's father (P.W.3), it was stated that the appellant had touched her breasts but there was no mention of having done so repeatedly. To strengthen this argument the learned counsel also takes me to the deposition of the survivor's mother (P.W.2) where she has deposed that the survivor had informed her that the appellant had fondled her breasts in their kitchen but had not mentioned the fact that it was done repeatedly. He also draws my attention to the examination of Dr. Sidhant Basnett, the Medical Officer (P.W.10) who also deposed that on local examination the survivor had revealed that the appellant had forcefully touched/fondled with her breasts.

4. The third submission raised by the learned counsel is that there is discrepancy in the exact time of the alleged incident in as much as the survivor deposed that it happened at 04.00 p.m., the mother (P.W.2) deposed that it was 03.00 p.m. and the father (P.W.3) deposed that it was 04.00 p.m.

5. Finally, he submits that the seizure of the birth certificate (exhibit P-2/P.W.1) has not been proved by the prosecution.

Prosecutor's submissions

6. Per contra, the learned Additional Public Prosecutor submits that the prosecution has been able to establish beyond reasonable doubt that the appellant had committed "*aggravated sexual assault*" upon the survivor and therefore, the learned Special Judge

had correctly convicted and sentenced him under the said provisions of law.

Consideration

7. The essence of the POCSO Act is to provide a comprehensive, gender neutral and child friendly legal framework for protecting children below 18 years of age from sexual assault, sexual harassment and sexual exploitation, while ensuring timely reporting, investigation, speedy trial and appropriate punishment of the offenders.

8. The conviction of the appellant is for the offence of "aggravates sexual assault" as defined in section 9 (I) and punishable under section 10 of the POCSO Act.

Ingredients of Sexual Assault

9. Section 7 of the POCSO Act defines "sexual assault". Whoever, with sexual intent touches the vagina, penis, anus or breasts of the child or makes the child touched the vagina, penis, anus or breasts of such person or any other person, or does any act with "sexual intent" which involves physical contact without penetration is said to commit "sexual assault".

10. Therefore, the crucial ingredient of the offence of "sexual assault" is the "touch" coupled with "sexual intent".

11. The survivor deposed that on 14.12.2023 while she was eating her food the appellant came from behind asking her to be careful of the stove/heater wire and thereafter, touched her breasts from behind and pressed it. The survivor was initially

shocked but when she talked in a louder voice he stepped back a little. However, when she continued eating, he came and pressed her breasts with his hands.

12. The narration of the incident by the accused is not cryptic but contains a fair amount of detail in her deposition recorded on 12.04.2024 which has a ring of truth. Prior to that, on 27.12.2023 the survivor had narrated and given the same account of the incident before the learned Judicial Magistrate when she was examined under section 164 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

Sexual Intent

13. The repeated act of the appellant of touching the survivor's breasts after a gap between the first incident and the second reflects his "sexual intent". "Sexual intent" may be gathered from the actions of the accused during the time of the incident. The repeated act of the appellant of touching the survivor's breasts when on the first occasion she had expressed her displeasure to him clearly establishes that it was done "intentionally". Unfortunately, some male gaze still suffers from mental aberrations and fantasizes a girl's breasts as a sexual object. Therefore, the POCSO Act makes the "touch" of a child's breasts with "sexual intent", an offence. The appellant clearly suffered from it as well. According to the survivor the appellant thereafter offered the survivor Rs.100/-. This also reflects his intent.

Aggravated Sexual Assault

14. When a person commits "sexual assault" on a child more than once or repeatedly it amounts to "aggravated sexual assault." The two separate acts of touching the survivor's breasts by the appellant during the same occurrence establish the ingredients of section 9(l) of the POCSO Act which the prosecution has been able to prove by the evidence of the survivor herself. The testimony of the survivor of repeated sexual assault by the appellant on her establishes the commission of "aggravated sexual assault."

Presumption under Section 30 of the POCSO Act

15. The foundational facts having been cogently proved by the prosecution through the testimony of the survivor, the presumption under section 30 of the POCSO Act i.e. the existence of his mental state would also apply against the appellant who had no evidence to *"prove the fact that he had no such mental state with respect to the act charged."* The appellant did not lead any evidence to prove that the mental state did not exist and his act was innocent.

The Corroborative Evidence

16. According to the prosecution's case, the incident took place in the house of the survivor when both her parents were not at home on 14.12.2023. When the survivor's mother (P.W.2) returned home later, the survivor informed her about it. The survivor's mother (P.W.2) thereafter informed the survivor's father (P.W.3) who was also away. Subsequently, on the next date, the father (P.W.3) lodged the FIR (exhibit P-4/P.W.3).

17. The disclosure was immediate and corroborated by the testimony of the persons to whom the disclosure was made. The survivor's deposition was cogent and the defence could not destroy it. The defence did not question the victim on any other aspect, which would create a doubt in the mind of the learned Special Judge to discard her testimony. The survivor's testimony before the Court withstood detailed cross-examination by the defence could not be doubted.

18. On 15.12.2022 the survivor was medically examined by Dr. Sidhant Basnett (P.W.10) who also deposed that she had been brought for medical examination with a history of sexual assault by the appellant. Although Dr. Sidhant Basnett (P.W.10) did not notice any external injuries on the survivor's body, the fact that the survivor had also disclosed to him that she was sexually assaulted by the appellant further corroborates the survivor's deposition.

19. Sun Tshering Lepcha (P.W.11) posted at the police station as officer in charge was the one who received the written report from the survivor's father (P.W.3) and registered the case against the appellant. These facts have been proved by the prosecution by leading reliable evidence. These facts also corroborate the story of the survivor, which assures this Court that her deposition was truthful.

The Challenges for the Prosecution and the Court

20. The POCSO Act was enacted to protect children from offences of sexual assault, sexual harassment and pornography. The learned Special Judge therefore must ensure that the children are

protected. When the allegation is of offence of "sexual assault" it is always a formidable task for the prosecution to establish it with clinching evidence beyond the oral statement of the material witnesses, primary amongst them the deposition of the survivor. The Court is therefore always faced with this task and sometimes it becomes difficult for it to take a call either ways.

The Prosecution must establish their case with cogent evidence

21. In such cases it would be obvious and also appropriate for the prosecution to establish their case from the child's testimony which is substantive evidence. If the learned Special Court finds the testimony reliable, consistent and trustworthy, a conviction can potentially rest on it even without medical corroboration. The child's earlier statement made to a parent, a teacher, a police officer, a Magistrate or anyone who would be natural witness available close to her would be relevant. Circumstantial or corroborative evidence by those present when the incident occurred or what happened immediately afterwards would be required to be examined to further strengthen the testimony of the child. The Court examining a case of alleged "sexual assault" or "aggravated sexual assault" must seek to answer the questions as to whether the touching actually occurred, was it intentional and was it accompanied by "sexual intent". The child's testimony should be treated with appropriate respect and still tested judicially.

Establishing a case through the evidence of a sterling witness

22. The Supreme Court has laid down a golden principle of establishing a case through the evidence of a "sterling witness".

23. In **Rai Sandeep vs. State (NCT of Delhi)**¹ the Supreme Court held:

"22 In our considered opinion, the "sterling witness" should be of a very high quality and calibre whose version should, therefore, be unassailable. The court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as the sequence of it. Such a version should have correlation with each and every one of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other such similar tests to be applied, can it be held

¹ (2012) 8 SCC 21

that such a witness can be called as a "sterling witness" whose version can be accepted by the court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."

24. In the present case the survivor's deposition was tested before the learned Special Judge which stood firm, cogent and consistent. The narration of the account of the incident was internally consistent. There was no material improvement or contradiction. The account was consistent with contemporaneous conduct and surrounding circumstances. The minor discrepancies highlighted by the learned counsel for the appellant were merely natural variations and did not dampen the core prosecution charge.

Minor discrepancies

25. The FIR (exhibit P-4/P.W.3) dated 15.12.2023 was lodged by the father (P.W.3) of the survivor who was a mason and who also did not know the contents of the FIR (exhibit P-4/P.W.3) which according to him was prepared by the police and narrated to him.

26. The FIR lodged by the father (P.W.3) propelled the investigation and during the course of the investigation the survivor was examined by the learned Judicial Magistrate under section 164 Cr.P.C. wherein she informed about the incident that transpired on 14.12.2023. On 12.03.2024 before the learned Special Judge the survivor deposed exactly what she had stated to

the learned Judicial Magistrate in her 164 Cr.P.C. statement which she identified in Court as her statement. The deposition of the survivor is therefore, consistent.

27. I have perused the cross-examinations of the survivor as well as her father (P.W.3) and her mother (P.W.2). The discrepancies pointed out by the learned counsel for the appellant, in the first place, were not put to any of the prosecution witnesses let alone the survivor or her parents. Save a denial, there is no effective cross-examination. It has been consistently held by the Supreme Court as well as this Court that FIR is not an encyclopaedia. If the complaint makes out a cognizable offence, the police are duty bound to register the FIR and investigate the case.

28. The father (P.W.3) of the survivor has reported about the incident as informed to him by the mother (P.W.2) who was also informed by the survivor. As both of them were not available at the time of the incident due to their own circumstances, certain amount of minor discrepancies would be natural.

29. While examining the evidence of witnesses what is essential is whether the prosecution has been able to establish the ingredients of the offence alleged. Variance in versions of the witnesses which completely destroy prosecution's case must be taken cognizance of. However, minor discrepancies which are attributable to various factors, if it does not affect the core of the prosecution's case, can be ignored, lest truth gets submerged in these trifles. Moreso, when the prosecution has established the

sequence of events, which led to the filing of the FIR (exhibit P-4/P.W.3) the very next day of the incident.

Proving birth certificate

30. The birth certificate issued by a competent authority is a public document and it may be proved in the manner public documents are proved in Courts.

31. The original birth certificate (exhibit P-2/P.W.1) of the survivor has been brought on record and placed for examination before the learned Special Judge. The birth certificate (exhibit P-2/P.W.1) is under the signature of the Registrar of Births and Deaths (P.W.4). It records her date of birth as 20.01.2008 and the date of registration is the very next day i.e. 21.01.2008. It was issued on 14.03.2008.

32. The birth certificate (exhibit P-2/P.W.1) was identified by the survivor and both the parents. According to the survivor's father (P.W.3) the police had seized it from his possession during the investigation. P.W.6 and P.W.7 are the seizure witnesses.

33. P.W.6 deposed that he had stood as a witness to the seizure of birth certificate (exhibit P-2/P.W.1) of the child and affixed his signature on the seizure memo (exhibit P-9/P.W.6) as well as the birth certificate (exhibit P-2/P.W.1). During cross-examination he admitted that he had not personally gone through the contents of the birth certificate; he did not know the name of the person in whose name the birth certificate was issued; he did not see the date of birth of the person concerned; and he had not gone through the contents of the seizure memo prepared by police. He

admitted that the police prepared the seizure memo in which he had accordingly signed.

34. P.W.7 also identified the seizure memo (exhibit P-9/P.W.6) in which he had affixed his signature, after the birth certificate (exhibit P-2/P.W.1) of the survivor was seized by the police in his presence. In cross-examination he admitted that he did not personally go through the contents of the birth certificate; that the contents of the seizure memo (exhibit P-9/P.W.6) was not read over to him, and he didn't know why it was filled and when he had signed on it. He also admitted that he did not see when the father (P.W.3) of the child handed over the birth certificate (exhibit P-2/P.W.1) to the police and it was through the police he learned that the birth certificate (exhibit P-2/P.W.1) was of the survivor.

35. The seizure was made under the provision of Section 102 of the Cr.P.C. which does not require the seizure to be done in the presence of a witness. It's merely done as a matter of caution.

36. The Investigating Officer (P.W.12) has clearly deposed that the original birth certificate (exhibit P-2/P.W.1) of the survivor was seized from the possession of the father (P.W.3) of the survivor in the presence of the independent witnesses.

37. The Investigating Officer (P.W.12) has also identified the seizure memo and signatures of the two witnesses as well as his official seal and signature. He further deposes that he had verified the contents of the birth certificate (exhibit P-2/P.W.1) from the issuing authority and in fact the date of birth was 20.01.2008. Except for a bald denial, there is no cross examination on what the

Investigating Officer (P.W.12) has categorically stated about the seizure of the birth certificate (exhibit P-2/P.W.1).

38. The contents of the birth certificate (exhibit P-2/P.W.1) has also been corroborated by the oral evidence of the survivor as well as her parents. The survivor has deposed that she was 16 years old at the time of her deposition and that she was born on 20.01.2008. The survivor's parents also deposed on the same date and confirmed that the survivor was born on 20.01.2008 and she was currently 16 years of age.

39. I am satisfied that the birth certificate (exhibit P-2/P.W.1) was of the survivor and since it is a public document it carries a presumption of correctness unless rebutted. The parents of the survivor who are the best witnesses regarding the birth of the survivor have correctly deposed the date of birth and identified the birth certificate (exhibit P-2/P.W.1).

40. Therefore, there is no reason for this Court to doubt that the survivor was in fact a child when the incident occurred on 14.12.2023 which has been proved by the prosecution.

41. Besides the evidence of the parents as well as the survivor, the deposition of the Registrar of Births and Deaths, STNM Hospital, (P.W.4); the Head Master of the Government Secondary School (P.W.5) where the survivor was a student earlier; Dr. Chintamani Sharma, Additional Medical Superintendent-II-cum-Registrar of Births and Deaths (P.W.9); along with the school admission register (exhibit P-11/P.W.8); relevant portion of the school admission register (exhibit P-8/P.W.5); the relevant page of

Live Birth Register (exhibit P-6/P.W.4) and the certified copy of the cover of the Live Birth Register (exhibit P-7/P.W.4) also confirms the correctness of the date of birth of the survivor in the records maintained by the school as well as the Registrar of Births and Deaths (P.W.4).

Confirmation of the identity of the appellant

42. The appellant was known to the survivor as well as her parents. They identified him in Court. There is no doubt about his identity as he was a co-villager and known to them as well as other co-villager who were prosecution witnesses.

Appropriate sentencing

43. The learned Special Court must ensure that a convict is appropriately sentenced for the crime committed. The learned Special Judge has found the appellant guilty of having committed "aggravated sexual assault" as defined in section 9(I) of the POCSO Act. I do not find any reason to disagree with the conviction and confirm it. Section 10 of the POCSO Act, 2012 provides for punishment of a term which shall not be less than five years but which may extend to seven years for the offence of "aggravated sexual assault". The mandate of section 10 therefore does not permit the learned Special Court to sentence the appellant for a term less than the minimum prescribed i.e. five years. It is noticed that the learned Special Court has sentenced the appellant to the minimum as prescribed by the law. Therefore, I am unable to heed to the request made by the learned counsel for the appellant to reduce his sentence considering other factors which were in any

case not brought on record before the Court including an assertion that he has a child who is fifteen years old and a student of Class IX and therefore, the appellant's absence may cause difficulty to his family.

44. The appeal is therefore, dismissed. The impugned judgement dated 10.06.2025 and order on sentence dated 16.06.2025 are upheld. The compensation recommended to the survivor in terms of the Schedule-I to the Sikkim Compensation to Victims (or their Dependents) Scheme, 2021 is confirmed. The Trial Court Records be remitted to the Court of the learned Special Judge, Pakyong.

(Bhaskar Raj Pradhan)
Judge

Approved for reporting : **Yes**

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