Sikkim High Court
Mikal Bhujel Alias Ruben vs State Of Sikkim on 17 April, 2021
Bench: Hon'Ble The Justice

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

Crl. A. No. 31 of 2018

Mikal Bhujel alias Rubeen,
Son of Jeewan Bhujel alias Joh,
Permanent Resident of 'CG', 'R',
East Sikkim.
... Appellant

Versus

State of Sikkim.
... Respondent

BEFORE
HON'BLE MR. JUSTICE JITENDRA KUMAR MAHESHWARI, CJ.

For the Appellant	:	Mr. B. Sharma, Sr. Advocate Mr. B.N. Sharma, Advocate Mr. Safal Sharma, Advocate
For the Respondent	:	Ms. Pema Bhutia, Asst. Public Prosecutor.
Date of hearing	:	03.04.2021 & 05.04.2021
Date of judgment	:	17.04.2021

JUDGMENT

This appeal has been filed under Section 374 of the Code of Criminal Procedure, 1973, hereinafter referred to as "Cr. P.C.", by the accused/appellant Mikal Bhujel @ Rubeen, challenging the judgment dated 21.08.2018 and the findings of conviction recorded in S.T. (POCSO) Case No.14 of 2016 by the learned Special Judge, Protection of Children from Sexual Offences Act, 2012, hereinafter referred to as "POCSO Act". The sentence awarded on 22.08.2018 directing the accused to undergo 7 years Rigorous Imprisonment has also been assailed with fine of Rs.5,000/-, in default, three months Rigorous Imprisonment.

Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim

2. The case of the prosecution, in brief, is that on 25.05.2016 at 13.30 hrs., a written complaint was submitted by the mother of the minor victim to Rhenock Police Station. It is alleged that on complaining stomach ache by the victim, she consulted the Doctor and found that her minor daughter is pregnant. On enquiring with the victim, she revealed that one Jeewan Bhujel @ John of the same locality had sexually assaulted her on so many occasions since the year 2014. On receiving the complaint of mother of victim, Rhenock Police Station registered FIR No. 04/2016 on the same date, i.e. 25.05.2016, against Jeewan Bhujel @ John under Section 376 of the Indian Penal Code, 1860, hereinafter referred to as "IPC" read with Section 6 of the POCSO Act. Thereafter, it was endorsed for investigation to Sub-Inspector Jigme W. Bhutia. On recording the statement of the victim under Section 161 of the Cr. P.C., it transpired that the son of the accused Jeewan Bhujel, namely, Mikal Bhujel @ Rubeen (appellant), had also sexually assaulted her on 3 to 4 occasions, therefore, the appellant was also made accused. Accused persons and the victim were sent for medical examination to Rhenock PHC, wherefrom she was referred to STNM Hospital, Gangtok for further examination. The Investigating Officer seized the birth certificate of the victim from her stepfather in the presence of two independent witnesses. Both the accused persons were arrested, thereafter sketch-map was prepared. The victim was found pregnant as per the report of the Doctor of STNM Hospital. The radiological report as well the forensic report regarding pregnancy has also been obtained. The statement of the victim was recorded under Section 164 of the Cr. P.C. by the Judicial Magistrate, East Sikkim. The seized articles were sent to the Forensic Science Laboratory, Tripura. Intimation has also been given to the Member Secretary, Sikkim Commission for Protection of Child Rights. With the aforesaid prima facie material the Investigating Officer closed the investigation and filed Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim charge-sheet against both the accused persons Jeewan Bhujel @ John and Mikal Bhujel @ Rubeen (appellant) under Section 376 of the IPC read with Section 6 of the POCSO Act. The victim gave birth to a boy child on 07.01.2017. Thereafter, the blood samples of the suspects were collected along with the blood samples of the victim as well as the newly born child and sent for DNA test. The DNA report has been received on 03.05.2017. As per the said report it was found that the accused no.1 Jeewan Bhujel @ John is the biological father and the victim is the biological mother of the newly born baby (boy). However, supplementary challan has been filed after further investigation.

3. On completion of the investigation, charge-sheet was submitted before the competent Court, wherefrom it was transmitted to the Court of Sessions having jurisdiction for trial, where charges were framed against the appellant and the co-accused under Section 5 (j) (ii) and (l) of the POCSO Act. The accused persons have abjured their guilt and demanded trial. During trial, the accused Jeewan Bhujel @ John has admitted his guilt of alleged sexual assault taking defence that it was with consent, while the accused/appellant Mikal Bhujel @ Rubeen has taken a defence of his false implication.

4. The prosecution has examined as many as 14 witnesses to prove the charges levelled. In defence, the appellant examined himself and his wife as a defence witness.

5. Learned Trial Court after considering the evidence, recorded the finding that the allegation of commission of rape to prove the charge under Section 5 of the POCSO Act, i.e. aggravated penetrative sexual assault has been proved against Jeewan Bhujel @ John accused no.1 who was

convicted and sentenced under Section 6 of the POCSO Act, while the Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim accused/appellant Mikal Bhujel @ Rubeen was found guilty of charge of penetrative sexual assault under Section 3 of the POCSO Act, accordingly, convicted and sentenced under Section 4 of the POCSO Act, as described hereinabove. It is relevant to state that the accused Jeewan Bhujel @ John has not filed any appeal against the judgment of his conviction and sentence and the present appeal has been filed by the appellant Mikal Bhujel @ Rubeen only questioning the impugned judgment.

6. Mr. B. Sharma, learned Senior Counsel appearing on behalf of the appellant, has contended that in the FIR lodged by the mother of the victim on enquiring her, the name of the appellant has not been mentioned. Therefore, initially, the offence was registered only against Jeewan Bhujel @ John. The victim, in her statement under Section 161 Cr. P.C. implicated the appellant which is based on afterthought. It is urged in the statement of the victim under Sections 161 and 164 Cr. P.C. the allegation of rape/sexual assault has not been alleged but, in the Court statement, only the allegation of sexual assault indicating the incident has been alleged. The testimony of prosecutrix, PW-1 and the case of prosecution cannot be relied upon in particular when the said allegation has not been supported by medical and forensic evidence collected against the appellant. It is also urged that if we see the statement of the prosecutrix under Sections 161 and 164 Cr. P.C., she said "chara garyo" to her while, in the Court statement, it is stated that she was sexually assaulted and it would not cause a commission of offence as per the judgment of this Court in the case of State of Sikkim vs. Sashidhar Sharma reported in SLR (2019) SIKKIM 717. It is also contended that as per DNA report, the victim is the biological mother of the newly born baby boy, and the co-accused Jiwan Bhujel @ John is the biological father. Thus, the allegation of rape as alleged did not find support from the DNA Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim report. It is urged that if this Court is of the opinion that the testimony of the victim is worthy to rely in such a case looking to her testimony, the finding and conviction under Section 3 of the POCSO Act and the sentence under Section 4 of the POCSO Act are not tenable, hardly it may be a case of Section 7 of the POCSO Act and punishment under Section 8 of the POCSO Act is specified. Therefore, considering the alternative argument, the finding and conviction may be set aside and the sentence may be reduced as per Section 8 of the POCSO Act.

7. Per contra, Ms. Pema Bhutia, learned Assistant Public Prosecutor, contends that as per the allegation alleged by the prosecutrix, the Trial Court has considered the testimony of the prosecutrix which remain withstand to the allegation and there is no cross-examination of those allegation, therefore, the testimony of the victim has been rightly relied upon. The story of commission of rape as alleged by the prosecutrix has been proved and the appellant as well as co-accused, both have been convicted though for separate charges, believing the story of the prosecution, relying the testimony of the prosecutrix. Therefore, such findings do not warrant any interference. On the alternative contention, it is urged that looking to the testimony of the prosecutrix, the Trial Court has rightly convicted the appellant under Section 3, i.e. penetrative sexual assault, although the charge was under Section 5, i.e. aggravated penetrative sexual assault. The said finding of fact is just, to which interference in this appeal either on conviction or on sentence is not warranted.

8. After hearing learned counsel for the parties and in the facts of the case while adverting the arguments so advanced, the following two questions are posed for answer:

> Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim
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> (i) Whether the Trial Court committed an error in convicting the appellant relying upon the testimony of the prosecutrix warranting interference in this appeal?
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> (ii) Whether the alternative argument of appellant-counsel is having some force, in the facts and circumstances of the case?

9. The said question can be answered on consideration of the allegation and the evidence brought to prove such allegation and the charges. As per the prosecution narration, about 3-4 days after committing the rape by John Bhujel, the appellant Rubeen Bhujel called the mother of the victim to send tobacco and surf buying from the shop asking the victim. It is further alleged that the appellant committed sexual assault 2-3 times. As per the testimony of the prosecutrix, the mother told her that the appellant Rubeen Bhujel requested to ask her for buying some tobacco and surf from nearby shop and send to his residence. On instruction of the mother, she bought tobacco and surf and reached to the residence of the appellant. He was alone at home and his family members had gone to the church. The appellant called her inside the room where he was watching Television. She had asked to sit down on the bed and the accused bolted the door. After forcibly pushing her on his bed, the accused removed her apparels. The victim tried to free from the clutches of the accused but the accused prevented though she had screamed and cried for help. Thereafter, the accused removed his clothes which he was wearing and committed sexual assault. On the basis of the said testimony, it is clear that slight deviation from allegation was there in the Court statement with respect to committing sexual assault 2-3 times but, the allegation of sexual assault is re-stated by the said testimony and the said allegation remain withstand and there is no cross-examine of it. Therefore, the victim withstands to the allegation by her in ocular version.

Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim The counsel for the appellant contended that the name of his client has not been mentioned in the FIR lodged by the mother of the victim and later in her statement, the allegation of commission of rape has been brought against him because the appellant refused to marry the victim, those possibilities of false implication may be ruled out because her statement was recorded by the Investigating Officer on the same day as of lodging the FIR, in which name of appellant with the allegation has come on record.

10. In this regard the judgment of the Hon'ble Apex Court in the case of Kirender Sarkar & Ors. vs. State of Assam reported in AIR 2009 SC 2513 is relevant. By which it is clear that FIR is not supposed to be an encyclopedia on the entire evidence and cannot contain the minutest details of the events. The plea of impleading the person afterthought must be judged having regard to the entire factual scenario in each case. In this context on lodging FIR on 25.05.2016, the statement of the prosecutrix was recorded on the same day in the presence of the mother and father of the victim in which she levelled allegation of commission of rape against the appellant also. The SHO applied to the Magistrate for recording her statement under Section 164 Cr. P.C. on 26.05.2016, however,

the Magistrate gave the date for recording such statement on 14.06.2016. In the said statement, allegation of "chara garyo" has been alleged and in the Court statement, as narrated hereinabove, the allegation of sexual assault has remained withstand, therefore, in the opinion of this Court, if the mother of the victim has not specified the name of the accused/appellant in FIR, it does not give any benefit because, at the earliest occasion, when the statement of the victim was recorded by police on the same day, the allegation against the appellant has been brought by her. In view of the above, the testimony of the victim remains in ocular so Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim far as the sexual assault made by the appellant. Therefore, the allegation of sexual assault by the appellant has been proved by the prosecution beyond reasonable doubt.

11. It is not out of place to observe that in the present case, there are two accused persons, Accused No.1, Jeewan Bhujel, father of the appellant has sexually abused the victim first. As per DNA report, the baby boy born on 07.01.2017, the child is the biological son of the victim and Jeewan Bhujel @ John. Jeewan Bhujel @ John has not filed any appeal challenging the finding of conviction. Thus, it can safely be said that the testimony of the victim cannot be doubted proving the allegation of prosecution with respect to rape. The sole testimony of the victim proving allegation of commission of rape is sufficient so far as it relates against the appellant is concerned. Therefore, the finding of guilt recorded by the Trial Court does not warrant interference.

12. Now, reverting to the alternative argument of the appellant that as per the testimony of the prosecutrix, conviction under Section 3 of the POCSO Act is not in accordance with law, required to be adverted to. In the present case, charge has been framed against the appellant under Section 5 of the POCSO Act alleging aggravated penetrative sexual assault. The Trial Court had not convicted the appellant for the said charge but altered it to the lesser punishment under Section 3 (a) and 4 of the POCSO Act for penetrative sexual assault. In terms of the testimony of the prosecutrix if accepted on its face, the arguments advanced is that such testimony may fall within the purview of the sexual assault as specified under Section 7, to which punishment thereto under Section 8 of the POCSO Act is prescribed.

Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim

13. The charge against the appellant was under Section 5 (j) and (l), therefore, the relevant provision as required to be reproduced, which reads as under:

> "5. Aggravated penetrative sexual assault.- (a) xxxxxxx x x x
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> (j) whoever commits penetrative sexual assault on a child, which-
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> (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (b) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently;

(ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;

(iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or Infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;

(iv) causes death of the child; or

x x x

(l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or"

14. Section 3 of the POCSO Act deals with penetrative sexual assault, which is reproduced as thus:

"3. Penetrative sexual assault.- A person is said to commit "penetrative sexual assault" if -

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

The punishment for penetrative sexual assault has been prescribed under Section 4 of the POCSO Act.

15. Section 7 of the POCSO Act deals with sexual assault, which is also relevant, therefore, reproduced as thus:

"7. Sexual assault.- Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any Crl. A. No. 31 of 2018 Mikal Bhujel @

> Rubeen vs. State of Sikkim other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."

The punishment for Section 7 has been prescribed under Section 8 of the POCSO Act.

16. On perusal of the aforesaid provisions, it is clear that Section 5 applies for aggravated penetrative sexual assault but the said charge has not been found prove as per allegation and the testimony of the victim against the appellant. The Trial Court convicted for lesser charge of Section 3 and punished under Section 4 of the POCSO Act. On perusal thereto it is clear that in case a person commits a penetrative sexual assault by penetrating his penis, to any extent, into vagina, mouth, urethra or anus of a child or makes the child to do so vice-a-versa with him or any other person, therefore, by the evidence, the element of penetration of penis to any extent into the vagina, mouth, urethra or anus is necessary. As per the testimony of the victim so far as it relates to the appellant is concerned, it is said that when she entered into the room where the appellant was watching Television, she was asked to sit on bed and he bolted the door. After pushing her forcibly, he removed her apparels. Thereafter, the accused removed his clothes that he was then wearing and committed sexual assault. As per the testimony of the Doctor or in the scientific report, no evidence has been brought by the prosecution corroborating the said allegation against the appellant. Therefore, looking to the said testimony, the penetration of penis into vagina has not been proved except to alleging the sexual assault. In the said context, if we see the aforesaid provision of Section 7 of the POCSO Act then it is clear that when a person with sexual intent does any other act which involves physical contact without penetration is said to commit sexual assault. Therefore, to analyze the said testimony it is to be seen that what is the meaning of penetration of the penis.

Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim

17. In the above context, the judgment of the Hon'ble Supreme Court in the case of Aman Kumar & Another vs. State of Haryana reported in (2004) 4 SCC 379 is relevant. The Apex Court in the said case in paragraph 7 held as thus:

> "7. Penetration is the sine qua non for an offence of rape. In order to constitute penetration, there must be evidence clear and cogent to prove that some part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little (see Joseph Lines, IC&K
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> 893). It is well known in the medical world that the examination of smegma loses all importance after twenty-four hours of the performance of the sexual intercourse. [See S.P. Kohli (Dr) v. High Court of Punjab and Haryana [(1979) 1 SCC 212 : 1979 SCC (Cri) 252] .] In rape cases, if the gland of the male organ is covered by smegma, it negatives the possibility of recent complete penetration. If the accused is not circumcised, the existence of smegma around the corona gland is proof against penetration, since it is rubbed off during the act. The smegma accumulates if no bath is taken within twenty-four hours. The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to

> constitute the offence of rape and rupture of the hymen is not necessary. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz. labia majora, are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the female for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC."

18. The said judgment is based upon the judgment of State of U.P. vs. Babul Nath reported in (1994) 6 SCC 29, wherein the difference of sexual assault or indecent assault has been clarified observing that complete penetration is not essential even partial or slightest penetration Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim with or without emission of semen and rupture of hymen or even an attempt to penetration is sufficient, as per medical jurisprudence.

19. The Apex Court in the case of Tarkeshwar Sahu vs. State of Bihar (now Jharkhand) reported in (2006) 8 SCC 560 has observed and relevant portion of the judgment is reproduced as thus:

> "10. ..... The important ingredient of the offence under Section 375 punishable under Section 376 IPC is penetration which is altogether missing in the instant case. No offence under Section 376 IPC can be made out unless there was penetration to some extent. In the absence of penetration to any extent, it would not bring the offence of the appellant within the four corners of Section 375 of the Penal Code. Therefore, the basic ingredients for proving a charge of rape are the accomplishment of the act with force. The other important ingredient is penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of

semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Section 375 and 376 IPC. ....."

x x x

13. In order to constitute rape, what Section 375 IPC requires medical evidence of penetration, and this may occur and the hymen remain intact. In view of the Explanation to Section 375, mere penetratio

of penis in vagina is an offence of rape. Slightest penetration is sufficient for conviction under Section 376 IPC.

x x x

21. In view of the catena of judgments of the Indian and English Courts, it is abundantly clear that slight degree of penetration of the penis in the vagina is sufficient to hold the accused guilty for the offence under Section 375 IPC punishable under Section 376 IPC."

20. On perusal of the aforesaid, it is clear that the basic ingredient to prove the charge of rape is the accomplishment of the act with force. The other ingredient is penetration of the male organ within the labia majora or the vulva or pudendum with or without any emission of semen or even an attempt at penetration into the private part of the victim completely, partially or slightly would be enough for the purpose of Sections 375 and 376 IPC.

21. It is not out of place to observe here that all the aforesaid judgments are interpreting the provisions of Sections 375 and 376 of the IPC. The ingredients as specified for commission of rape under Section 375 (a) to (d) IPC is similar to Section 3 (a) to (d) of the POCSO Act. If Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim those act has been committed in any of the seven descriptions as specified in the definition of rape in Section 375 IPC with the aid of Explanation one, it would amounting to committing of rape to which punishment has been prescribed in Section 376, 376 (2) (a) (i) to (iii), 376 (2) (b), 376 (2) (c), 376 (2) (d) and 376 (2) (e). It is to observe here that in Explanation of Section 375 IPC, it is clarified that "vagina" shall also include "labia majora". But in the POCSO Act, no such explanation has been given with respect to "vagina" what it includes or not. In the said context, the evidence of the victim has to be seen by which the offence of Section 3 would be made out or Section 7 of the POCSO Act.

22. But prior to see the said discussion, the explanation of certain words describing male or female organs and its parts is essential. 'Penetration' means as used in the rule that penetration only is necessary to be proved on a trial for rape, is a limitation upon and qualification of the meaning of the term 'carnal knowledge'. In limiting the 'carnal knowledge' mentioned in the definition of 'rape' to 'penetration' only, the Legislature intended to eliminate the question of 'emission' in such cases. The word 'penetrate' would mean to access into or through, pass through [Tarakeshwar Sahu (supra)]. The 'penetration' is the sine qua non for an offence of rape as observed in Aman Kumar

(supra). The 'penetrative sexual assault' may be in a situation as prescribed in Section 3 (a) to 3 (d) of POCSO Act. The 'sexual assault' includes rape and other forms of physical assault of a sexual nature including sodomy. Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration, is said to commit sexual assault, as specified in Section 7 of the POCSO Act. The word 'Virile', means having male qualities; pertaining Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim to the male sex; able to procreate. With respect to female organ, 'pudendum', means the external genital organs of a woman. 'Labia' are part of the female genitalia, they are the major externally visible portions of the 'vulva'. Two parts of 'labia' are (i) 'labia majora (the outer labia)' are larger and fattier, (ii) 'labia minora (folds of skin between the out labia'. 'Vulva', means the external parts of the female genital organs. The 'Vagina' means any structure resembling a sheath. Specifically, a passage directed downwards and forwards from the external os uteri to open at the vulva (vaginal orifice) immediately posterior to the external urethral orifice. Its anterior wall [paries anterior (NA)] is related to the bladder and the uterus; its posterior wall [paries posterior (NA)] to the lower part of the rectum and the anal canal. It accommodates the penis during sexual intercourse.

23. In the above said definitions of the male organs and female organs and to prove the allegation of penetrative sexual assault in terms of the provision of POCSO Act, the penetration of penis into vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person is necessary. Although the explanation to the meaning of vagina has not been given in the POCSO Act as given in Section 375 of the IPC, but looking to the legislative intent of the POCSO Act the same explanation may be acceptable while dealing the cases of the POCSO Act. Therefore, it is concluded that for the penetrative sexual assault for the purpose of Section 3 of the POCSO Act also the penetration of penis into vagina would include all the above specified parts of the female organ and if such evidence has been brought in the testimony of the victim, the charge of Section 3 would prove otherwise it would come within the purview of Section 7 of the POCSO Act.

Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim

24. In the above discussion and as per the testimony of the victim referred above, it is clear that except of removing of wearing apparels of the victim and the removing of the apparels of the accused, the allegation of sexual assault has come. The aforesaid testimony does not testify the requirement of Section 3 of the POCSO Act in the light of the above discussions. Therefore, in the opinion of this Court the conviction of the appellant relying upon the sole testimony of the victim for the charge under Section 3 of the POCSO Act and the sentence so awarded stands set aside.

25. As per the testimony of the victim, the sexual assault has been committed by the accused/appellant with her and to such extend her testimony is in ocular and withstand to those allegations. Therefore, the testimony of the victim cannot be disbelieved to such extent. Simultaneously, it cannot be ignored that in her testimony the allegation of penetration of virile to the pudendum has not come. However, it is only said that the appellant has sexually assaulted her. In absence of having the ingredient in the Court testimony of the victim regarding penetrative sexual assault, finding of conviction for the charge under Section 3 of the POCSO Act as recorded by the

Trial Court is not justified. Hence, looking to the testimony of the victim and its contents the charge of Section 7, sexual assault can be found proved. Therefore, the alternative argument as advanced by the counsel for the appellant is acceptable and the findings proving the charge of Section 3 of the Trial Court cannot be countenanced. With the said discussions, both the questions are answered.

26. Accordingly, this appeal is hereby allowed in part. The conviction of the appellant for the charge under Section 3 and the sentence so awarded by the impugned judgment is hereby set aside. As per the discussion Crl. A. No. 31 of 2018 Mikal Bhujel @ Rubeen vs. State of Sikkim made hereinabove, the appellant is held guilty for the charge under Section 7 of the POCSO Act and he is directed to undergo the sentence of three years Rigorous Imprisonment with fine of Rs.5000/-, in default, one month Rigorous Imprisonment. The judgment of the Trial Court stands modified in above terms.

27. The appellant is on bail, therefore, he shall surrender to the custody within a period of one month from the date of pronouncement of the judgment and shall undergo the sentence as directed hereinabove. On failure to surrender by the appellant, the Trial Court shall take appropriate step to take him into custody for serving the sentence. It is needless to observe that the period of sentence already undergone by him during trial shall be set off from the sentence directed hereinabove, as per Section 428 of the Cr. P.C.

28. The record of the Trial Court be sent back forthwith.

(J.K. MAHESHWARI) CHIEF JUSTICE jk/