THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 19th February, 2018

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

Crl.A. No. 11 of 2017

Appellant : Sancha Hang Limboo,
Aged about 24 years,
Son of Aita Man Limboo,
R/o Alubari,
Upper Gerethang,
West Sikkim.
[Presently State Central Jail,
Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

Appeal under Section 374(2) of the
Code of Criminal Procedure, 1973

Appearance

Ms. Navtara Sarda, Advocate (Legal Aid Counsel) for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mrs. Pollin Rai, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. Calling in question the impugned Judgment dated 21-03-2017, of the Court of the Learned Special Judge (POCSO) West Sikkim, at Gyalshing, in Sessions Trial (POCSO) Case No.04 of 2016 convicting the Appellant and the Order on Sentence, dated

23-03-2017, the Appellant is now before this Court. He stood convicted under Section 5(l), 5(m) and 5(n) of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act") and sentenced to undergo rigorous imprisonment for a period of 15 years and to pay a fine of Rs.20,000/- (Rupees twenty thousand) only, with a default stipulation, duly setting off the period of imprisonment already undergone by him.

2. The grounds raised herein by the Appellant are that, although the alleged incident was said to have occurred on 15-02-2016, Exhibit 8 the First Information Report (for short "FIR''), was lodged only on 19-02-2016, with no explanation afforded for the delay, raising doubts about the veracity of the Prosecution case. That, the Learned Trial Court wrongly placed reliance on Section 35 of the Indian Evidence Act, 1872 (in short "Evidence Act") in admitting Exhibit 2, the Birth Certificate of the victim, without examining the author of the document or testing the contents, therefore, the document as also the age of the victim have remained unproved. That, the statement of the victim under Section 164 Code of Criminal Procedure, 1973 (for short "Cr.P.C.") was considered by the learned Trial Court without examining the concerned Magistrate. That, the Learned Court failed to examine that a heinous offence cannot be committed over an extended period of time without there being a hue and cry in the village. That, the Medical Report and the evidence of the Doctor reveal that the victim's hymen was intact, the *fourchette* was normal and no discharge or bleeding was seen, thereby belying the Prosecution

case since it is unimaginable that penetrative sexual assault would leave the hymen intact. That, redness on the genital can easily be sustained on account of allergies or infection which are normal in a girl child or due to gynaecological problems as opined by the examining Doctor. The victim's clothes worn during the alleged offence were not produced. Her continued attendance in School coupled with absence of narration of the alleged incident to her friends or parents casts a doubt on the case, duly supported by lack of injuries on her person. The Learned Trial Court, it is contended, failed to consider that the Appellant had cordial relations with the victim's mother, leading to the false allegation by the victim's father in a bid to settle scores, as evident from the examination of the Appellant under Section 313 Cr.P.C. Assuming but not admitting the correctness of the Prosecution version, the offence would at best fall under Section 7 of the POCSO Act, and thus, in the alternative deserve a lower sentence.

3. Refuting the arguments of the Appellant, Learned Additional Public Prosecutor while placing reliance on ***State of Madhya Pradesh*** vs. ***Anoop Singh***[1] urged that the Birth Certificate furnished by the Prosecution is sufficient proof that the child's date of birth is "03-03-2008", ancillary thereto of proof that the offence was committed on a minor, the incident having occurred on 15-02-2016. Garnering strength from the decision in ***Radhu*** vs. ***State of Madhya Pradesh***[2] it was next contended that the fact of the incident having occurred was established by the uncontroverted evidence of the

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[1] (2015) 7 SCC 773
[2] (2007) 12 SCC 57

minor victim's cogent and consistent evidence. Learned Additional Public Prosecutor would contend that the child was examined by the Learned Trial Court in terms of Section 33 of the POCSO Act and Section 118 of the Evidence Act to gauge her competence to testify and was satisfied thereof, towards which reliance was placed on ***Virendra alias Buddhu and Another*** vs. ***State of Uttar Pradesh***[3]. That, the evidence of the victim is clear proof that the Appellant had perpetrated the offence, therefore, the conviction and sentence be upheld.

4. We have heard at length and considered the opposing arguments of Learned Counsel for the parties. Careful examination has been made of the evidence and documents on record and the citations made at the Bar.

5. The Complaint, Exhibit 8, was lodged by P.W.7 the victim's father, on 19-02-2016 when P.W.1 the victim, complained of stomach-ache and painful thighs, alleging sexual assault on her by the Appellant. Exhibit 8 was registered by the Gyalshing Police Station as FIR No.09/2016, dated 19-02-2016, under Section 376 of the Indian Penal Code (for short "IPC") and Section 4 of the POCSO Act, 2012, upon which investigation commenced. During investigation it transpired that, the Appellant aged about 23 years had subjected the victim, aged about 8 years, to sexual assault on about six occasions at various locations at Upper Gerethang, West Sikkim, between the months of August, 2015 to February, 2016. Both the victim and the Appellant were medically examined. The

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[3] (2008) 16 SCC 582

Medical Report of the victim revealed that her hymen was intact, the *fourchette* lacked injuries, but there was redness over the *labia minora* suggesting blunt injury due to blunt force but absence of spermatozoa. The Appellant's Medical Report suggested that he was not incapable of performing the sexual act. The victim's statement under Section 164 of the Cr.P.C. was recorded, her Birth Certificate seized. M.O.II the undergarment of the victim, M.O.III, a Jute Sack, on which the Appellant had allegedly sexually assaulted the victim on one occasion were also seized. On completion of investigation, Charge-sheet was submitted against the Appellant under Sections 376/506 of the IPC and Section 4 of the POCSO Act, 2012.

6. Charge was framed against the Appellant under Section 5(l), 5 (m) and 5(n) of the POCSO Act punishable under Section 6 of the same Act and under Section 506 of the IPC. The Appellant having pleaded "not guilty" to the Charges, trial commenced during which 9 (nine) Prosecution Witnesses were examined including the Investigating Officer. On closure of evidence, the Appellant was examined under Section 313 of the Cr.P.C. and his responses duly recorded. The Learned Trial Court considered the evidence furnished and pronounced the impugned Judgment and Order on Sentence.

7. The questions that fall for consideration before us are;

1. Whether the delay in lodging the FIR has been adequately explained?
2. Whether the question of authenticity of the Birth Certificate can be raised at the appellate stage the

same having not been made an issue before the Learned Trial Court?

3. Whether absence of injuries on the victim negates commission of the offence?

4. Whether the Learned Trial Court erroneously convicted the Appellant?

8. Addressing the first question that there was a delay in the lodging of the FIR, the records would reveal that Exhibit 8 was lodged by the victim's father on 19-02-2016, informing therein that a few days prior to the lodging of the FIR and twenty to twenty-five days earlier on, the Appellant, in the absence of P.W.7 and P.W.8 had been sexually assaulting the victim P.W.1, their 8 year old daughter. It would be apposite to notice that the victim in her evidence has stated that she had not revealed any of the incidents of sexual assault committed by the Appellant on her to either P.W.7 or P.W.8. It was only on the 6th occasion, evidently on 15-02-2016, when the Appellant sent her to the bathroom where he followed and sexually assaulted her that she complained of stomach-ache after a few days, i.e., on 19-02-2016. On inquiry by P.W.8, she narrated the incident to her which led to the lodging of Exhibit 8. The sexual assaults perpetrated on her on various occasions by the Appellant were also detailed in her evidence, although she was unable to specify the time or date. Therefore, if the victim has failed to inform her parents of the previous incident(s) for one reason or another upon which we do not propose to speculate, obviously in their ignorance they would not have been in a position to lodge the FIR for those incidents. The last incident also came to light only on

account of the pain in the victim's stomach and thighs. Besides, it would not be out of place to mention that parents tend to be more circumspect about reporting such incidents bearing in mind all that is at stake for the victim as well as the family. In this context, we may refer to the decision of the Hon'ble Supreme Court in ***Deepak*** vs. ***State of Haryana***[4] wherein it was held that;

> **"15.** The courts cannot overlook the fact that in sexual offences and, in particular, the offence of rape and that too on a young illiterate girl, the delay in lodging the FIR can occur due to various reasons. One of the reasons is the reluctance of the prosecutrix or her family members to go to the police station and to make a complaint about the incident, which concerns the reputation of the prosecutrix and the honour of the entire family. In such cases, after giving very cool thought and considering all pros and cons arising out of an unfortunate incident, a complaint of sexual offence is generally lodged either by victim or by any member of her family. Indeed, this has been the consistent view of this Court as has been held in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384)]**."**

In the afore stated circumstances, this Court is of the opinion that the delay in the lodging of Exhibit 8 has been sufficiently explained.

9. To examine Question No.2 *supra*, we may beneficially turn to Exhibit 2, the Birth Certificate. The date of birth mentioned therein is 03-03-2008. Exhibit 2 and Exhibit 8 considered together would reveal that, the victim's age was a few days short of 8 years when the incidents occurred. It was contended by the Appellant that the Learned Trial Court erroneously relied on Exhibit 2 by drawing strength from the provisions of Section 35 of the Evidence

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[4] (2015) 4 SCC 762

Act. To consider this argument, let us turn to the provisions of Section 35 of the Evidence Act, which reads as follows;

> **"35. Relevancy of entry in public record or an electronic record made in performance of duty**.—An entry in any public or other official book, register or record or any electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact.**"**

10. The requirements for admissibility of a document under Section 35 of the Evidence Act can be summarized as follows;

(i) The document must be in the nature of an entry in any public or other official book, register or record;

(ii) It must state a fact in issue or a relevant fact; and

(iii) The entry must be made by a public servant in the discharge of his official duties or in the performance of his duties especially enjoined by the law of the country in which the relevant entry is kept.

[***State of Bihar*** vs. ***Radha Krishna Singh and Others***[5]]

11. In ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[6] the Hon'ble Supreme Court while distinguishing between admissibility of a document and its probative value observed as follows;

> **"18.** Therefore, a document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case. The

[5] (1983) 3 SCC 118
[6] (2010) 9 SCC 209

aforesaid legal proposition stands fortified by the judgments of this Court in *Ram Prasad Sharma* v. *State of Bihar* [(1969) 2 SCC 359 : AIR 1970 SC 326] , *Ram Murti* v. *State of Haryana*[(1970) 3 SCC 21 : 1970 SCC (Cri) 371 : AIR 1970 SC 1029], *Dayaram* v. *Dawalatshah* [(1971) 1 SCC 358 : AIR 1971 SC 681], *Harpal Singh* v. *State of H.P.*[(1981) 1 SCC 560 : 1981 SCC (Cri) 208 : AIR 1981 SC 361], *Ravinder Singh Gorkhi* v. *State of U.P.* [(2006) 5 SCC 584 : (2006) 2 SCC (Cri) 632], *Babloo Pasi* v. *State of Jharkhand* [(2008) 13 SCC 133 : (2009) 3 SCC (Cri) 266], *Desh Raj* v. *Bodh Raj* [(2008) 2 SCC 186 : AIR 2008 SC 632] and *Ram Suresh Singh* v. *Prabhat Singh* [(2009) 6 SCC 681 : (2010) 2 SCC (Cri) 1194]. In these cases, it has been held that even if the entry was made in an official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to whether the entry so made has been exhibited and proved. The standard of proof required herein is the same as in other civil and criminal cases.

19. Such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act as held in *Mohd. Ikram Hussain* v. *State of U.P.* [AIR 1964 SC 1625 : (1964) 2 Cri LJ 590] and *Santenu Mitra* v. *State of W.B.* [(1998) 5 SCC 697 : 1998 SCC (Cri) 1381 : AIR 1999 SC 1587].

20. So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, **they may be admissible under Section 35 of the Evidence Act but the court has a right to examine their probative value**. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/school leaving certificate require to be proved in accordance with law and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

21. For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, government hospital/nursing home, etc., the entry in the school register is to be discarded. (Vide *Brij Mohan Singh* v. *Priya Brat Narain Sinha* [AIR 1965 SC 282], *Birad Mal Singhvi*v. *Anand Purohit* [1988 Supp SCC 604 : AIR 1988 SC 1796], *Vishnu* v. *State of Maharashtra* [(2006) 1 SCC 283 : (2006) 1 SCC (Cri) 217] and *Satpal Singh* v. *State of Haryana* [(2010) 8 SCC 714 : JT (2010) 7 SC 500].

> **22.** If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Sections 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining the person having special means of knowledge, authenticity of date, time, etc. mentioned therein. (Vide *Updesh Kumar* v. *Prithvi Singh* [(2001) 2 SCC 524 : 2001 SCC (Cri) 1300 : 2001 SCC (L&S) 1063] and *State of Punjab* v. *Mohinder Singh* [(2005) 3 SCC 702 : AIR 2005 SC 1868].)**"** **[emphasis supplied]**

A careful reading of the extracts *supra* would clarify that the document may be admissible under Section 35 of the Evidence Act, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. It needs no reiteration that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. Infact, the ratio *supra* emphasises that the entries in School Register/School Leaving Certificate require to be proved in accordance with law, demanding the same standard of proof as in any other criminal case.

12. In ***Birad Mal Singhvi vs. Anand Purohit***[7], the Hon'ble Supreme Court while discussing Exhibits 8, 9, 10 and 11 which were entries in the scholar's register, counterfoil of Secondary Education Certificate of one Hukmi Chand Bhandari, copy of tabulation record of the Secondary School Examination 1974 and copy of tabulation of record of Secondary School Examination of 1977 respectively, observed as follows;

> **"14.** ..... Neither the admission form nor the examination form on the basis of which the aforesaid entries relating to the date of birth of Hukmi Chand and Suraj Prakash Joshi were recorded was produced before the High Court. No doubt, Exs. 8,

[7] AIR 1988 SC 1796

9, 10, 11 and 12 are relevant and admissible but these documents have no evidentiary value for purpose of proof of date of birth of Hukmi Chand and Suraj Prakash Joshi as the vital piece of evidence is missing, because no evidence was placed before the Court to show on whose information the date of birth of Hukmi Chand and the date of birth of Suraj Prakash Joshi were recorded in the aforesaid document. As already stated neither of the parents of the two candidates nor any other person having special knowledge about their date of birth was examined by the respondent to prove the date of birth as mentioned in the aforesaid documents. Parents or near relations having special knowledge are the best person to depose about the date of birth of a person. If entry regarding date of birth in the scholars register is made on the information given by parents or someone having special knowledge of the fact, the same would have probative value. The testimony of Anantram Sharma and Kailash Chandra Taparia merely prove the documents but the contents of those documents were not proved.

The date of birth mentioned in the scholar's register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. The entry contained in the admission form or in the scholar register must be shown to be made on the basis of information given by the parents or a person having special knowledge about the date of birth of the person concerned. If the entry in the scholar's register regarding date of birth is made on the basis of information given by parents, the entry would have evidentiary value but if it is given by a stranger or by someone else who had no special means of knowledge of the date of birth, such an entry will have no evidentiary value.

Merely because the documents Exs. 8, 9, 10, 11 and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exs. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmichand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouch safe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the

> aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.
>
> ....." **[emphasis supplied]**

The observations are self explanatory, succinctly differentiating between admissibility of the documents and its probative value.

13. On the heels of Section 35 of the Evidence Act, we may consider the provisions of Section 74 of the Evidence Act, which defines "public documents" and reads as follows;

> ***"74. Public documents.****—The following documents are public documents:-*
>
> *(1) Documents forming the acts, or records of the acts—*
>
> *(i) of the sovereign authority,*
>
> *(ii) of official bodies and tribunals, and*
>
> *(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;*
>
> *(2) Public records kept in any State of private documents."*

The aforesaid stated provisions thus point to the fact that Exhibit 2 is covered by both the provisions.

14. The seizure of Exhibit 2, the victim's birth certificate vide Exhibit 1 Seizure Memo, is proved by P.W.4 and P.W.8. The cross-examination of P.W.4 and P.W.8 with regard to Exhibit 2 clearly reveal that no questions were put to the witness with regard to the contents of Exhibit 2 or its authenticity, neither were the contents tested for impeachability, admissibility or the mode of proof before the Learned Trial Court. Apart from the above, attention is also

drawn to the judgment in ***Mahadeo s/o Kerba Maske*** vs. ***State of Maharashtra and Another***[8] wherein it was held that the age of the juvenile has to be gauged by the following methods;

> **"12.** ……
>
> **12. (3)** In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining—
>
> (*a*)(*i*) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (*ii*) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (*iii*) the birth certificate given by a corporation or a municipal authority or a Panchayat;
>
> Under Rule 12(3)(*b*), it is specifically provided that only in the absence of alternative methods described under Rules 12(3)(*a*)(*i*) to (*iii*), the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well.**"**
>
> **[emphasis supplied]**

The above prescribed method for gauging the age of a juvenile can be applied to that of the victim but was not followed either by the Prosecution nor sought for by the Learned Trial Court.

15. Therefore, can the authenticity of the contents of Exhibit 2 be raised now? The answer would have to be in the negative. In this context, we may beneficially turn to the ratio in ***Sham Lal alias Kuldip*** vs. ***Sanjeev Kumar and Others***[9] where the Hon'ble Supreme

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[8] (2013) 14 SCC 637

[9] (2009) 12 SCC 454

Court while considering whether there was a validly executed Will in favour of the Defendants No.1 and 2, discussed as follows;

> **"21.** One of the documents relied upon by the learned District Judge in coming to the conclusion that the plaintiff is the son of the deceased Balak Ram is Ext. P-2, the school leaving certificate. The learned District Judge, while dealing with this document has observed:
>
> > "On the other hand, there is a public document in the shape of school leaving certificate, Ext. P-2 issued by Head Master, Government Primary School, Jabal Jamrot recording Kuldip Chand alias Sham Lal to be the son of Shri Balak Ram. In the said public document as such Kuldip Chand alias Sham Lal was recorded as son of Shri Balak Ram."
>
> ***The findings of the learned District Judge holding Ext. P-2 to be a public document and admitting the same without formal proof cannot be questioned by the defendants in the present appeal since no objection was raised by them when such document was tendered and received in evidence.***
>
> **22.** It has been held in *Dasondha Singh* v. *Zalam Singh* [(1997) 1 PLR 735 (P&H)] that an objection as to the admissibility and mode of proof of a document must be taken at the trial before it is received in evidence and marked as an exhibit.**"**
>
> **[emphasis supplied]**

This ratiocination would aptly apply to the present circumstances and hence the Appellant cannot now bring to question the contents of Exhibit 2 before this Court, the issue having not been raised before the Learned Trial Court.

16. That having been settled, this Court consequently proceeds on the premise that in terms of Exhibit 2 the victim was a few days short of 8 years on the date that the matter was reported and the incident had been perpetrated on her.

17. Now to address Question No.3, the argument that the victim did not suffer injuries on her body thereby negating sexual

assault also holds no water. The Doctor, P.W.6, on examining the victim noted as follows;

> **"**.....
>
> No discharge, bleeding seen. Fourchette - normal. Hymen – intact. Redness present over the left labia minora about 1.5 cm x 0.1 mm.
>
> Three vaginal swabs taken and handed over to the police.
>
> Opinion reserved till reports are available.
>
> Opinion — Local examination is suggestive of blunt injury due to the blunt force. However, lab report shows absence of spermatozoa.
>
> .....**"**

Although the hymen was not ruptured, redness was found on the *labia minora* and it was opined that it could be due to application of blunt force.

18. Modi's Medical Jurisprudence and Toxicology, 24th Edition, in Chapter 31 – *Sexual Offences* at Page 668, explains the result of penetrative sexual assault as extracted hereunder;

> **"**(4) .....
>
> The fourchette and posterior commissure are not usually injured in cases of rape, but they may be torn if the violence used is very great. The extent of injury to the hymen and the genital canal depends upon the degree of disproportion between the genital organs of both the parties and the violence used on the female.
>
> In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of the fourchette and the perineum.
>
> .....**"** **[emphasis supplied]**

19. Besides, the opinion of the medical expert is just that, an opinion and not evidence. We may refer to ***Radhu v. State of Madhya Pradesh*** (*supra*)*,* where the Hon'ble Supreme Court held that;

> **"6.** ..... Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. ....."

20. This observation is buttressed with the observation in ***Madan Gopal Kakkad v. Naval Dubey and Anr.***[10], it was held as hereinbelow;

> **"34.** A medical witness called in as an expert to assist the Court is not a witness of fact and the evidence given by the medical officer is really of an advisory character given on the basis of symptoms found on examination. The expert witness is expected to put before the Court all materials inclusive of the data which induced him to come to the conclusion and enlighten the Court on the technical aspect of the case by explaining the terms of science so that the Court although, not an expert may form its own judgment on those materials after giving due regard to the expert's opinion because once the experts opinion is accepted, it is not the opinion of the medical officer but of the Court."

The above pronouncements set at rest the role and value of a medical expert who is called as a witness.

21. In ***Krishan*** vs. ***State of Haryana***[11] it was ruled that it is not expected that every rape victim should have injuries on her body to prove her case. In ***State of Rajasthan*** vs. ***N. K. the Accused***[12], it held in Paragraph 18 as follows;

> **"18.** …….. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of

[10] (1992) 2 SCR 921
[11] (2014) 13 SCC 574
[12] (2000) 5 SCC 30

> commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In *Sk. Zakir* [*Sk. Zakir* v. *State of Bihar*, (1983) 4 SCC 10 : 1983 SCC (Cri) 76 : 1983 Cri LJ 1285] absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In *Balwant Singh* [*Balwant Singh* v. *State of Punjab*, (1987) 2 SCC 27 : 1987 SCC (Cri) 249 : 1987 Cri LJ 971] this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In *Karnel Singh* [*Karnel Singh* v. *State of M.P.*, (1995) 5 SCC 518 : 1995 SCC (Cri) 977] the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply a common-sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.**"** **[emphasis supplied]**

In ***Ranjit Hazarika v. State of Assam***[13], the Hon'ble Supreme Court of India held that non-rupture of hymen or absence of injury on victim's private part does not belie her testimony. The Court further held that the opinion of the doctor that no rape was committed cannot throw out an otherwise cogent and trustworthy evidence of the prosecutrix.

The rationale in the above decisions have to be borne in mind and are undoubtedly relevant to the matter in hand.

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[13] (1998) 8 SCC 635

22. That apart, it would be trite to once again walk through the provisions of Section 29 of the POCSO Act, 2012, which lays down as follows;

> **"29. Presumption as to certain offences.—** Where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court *shall presume*, that such person has committed or abetted or attempted to commit the offence, as the case may be, unless the contrary is proved.**"**

Nothing to the contrary has been proved beyond a reasonable doubt by the Appellant as envisaged by the above provision and Section 30 of the POCSO Act.

23. So far as the statement of the victim under Section 164 of the Cr.P.C. is concerned, it can only be used for corroboration and in any event is not substantive evidence while the non-examination of the Magistrate has no adverse repercussions on the Prosecution case which stands fortified by the evidence of the victim before the Court. In ***Mohd. Imran Khan*** vs. ***State Government (NCT of Delhi)***[14] the Hon'ble Supreme Court opined as follows;

> **"22.** It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the

[14] (2011) 10 SCC 192

> prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence.**"**

24. From the entire facts and circumstances discussed hereinabove, it can safely be concluded that the finding and conviction handed out to the Appellant by the Learned Trial Court was neither erroneous nor brooks any interference.

25. However, it may be pointed out that while convicting the Appellant in the impugned Judgment, the learned Trial Court ordered as follows;

> "37. ,.....I, therefore hereby find the accused guilty as charged for having repeatedly committed aggravated penetrative sexual assault (section 5 (l) POCSO Act 2012) on a child below 12 years (section 5(M) of POCSO Act 2012) who is related to him, being his niece (section 5(n) POCSO Act 2012) and thus convict him to be sentenced accordingly under section 6 of POCSO 2012."

26. While meting out Sentence to the Appellant, the learned Trial Court ordered as herein below;

> "**5.** Hence considering the gravity of the offence, I am of the view that the ends of justice would be well served if the convict is sentenced under Section 6 of the POCSO Act, 2012 to undergo rigorous imprisonment for a term of 15 years and to pay of (*sic*) fine of Rs.20,000/-. The fine amount shall be deposited in the fund for the Sikkim Compensation to Victims Scheme. In the event of default on payment of fine, convict shall undergo rigorous imprisonment for a term of 2 years."

As is apparent one consolidated Sentence of rigorous imprisonment of 15 years was handed out for the three different offences without application of mind, in as much as the sentencing ought to have been distinct for every offence, as each offence committed by the Appellant is a separate and distinct offence. The learned Court could have finally ordered that the Sentences shall run concurrently. The imposition of fine also suffers from the same defect.

27. In a similar situation, this Court in ***Robin Gurung vs. State of Sikkim***[15] relying on the decision of the Hon'ble Allahabad High Court in ***Murlidhar Dalmia vs. State***[16] held at Paragraph 29 as follows;

> **"*29.*** ..... conclusion thereof would be that *the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done*. Thus, much was held by the Hon'ble Allahabad High Court in ***Murlidhar Dalmia*** vs. ***State*** [AIR 1953 All 245] and is ostensibly applicable herein. It was further held therein that "*We, therefore, hold that the single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, ...*". Needless to say we garner support from this observation.**"**

Of course, for the purposes of the instant matter, we once again revert to and draw succour from the above observation.

28. In light of the above circumstances, the learned Trial Courts are advised to be more circumspect while handing out sentence and to abide by the provisions of Section 354 of the Cr.P.C., which are reproduced for reference and understanding;

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[15] Crl. A. No.33 of 2016 dated 22-09-2017
[16] AIR 1953 All 245

> **"354. Language and contents of judgment.**—(1) Except as otherwise expressly provided by this Code, every judgment referred to in section 353,—
>
> (a) shall be written in the language of the Court;
>
> (b) shall contain the point or points for the reasons for the decision;
>
> **(c) shall specify the offence (if any) of which, and the section of the Indian Penal Code (45 of 1860) or other law under which, the accused is convicted and the punishment to which he is sentenced;**
>
> (d) if it be a judgment of acquittal, shall state the offence of which the accused is acquitted and direct that he be set at liberty.
>
> (2) When the conviction is under the Indian Penal Code (45 of 1860) and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same, and pass judgment in the alternative.
>
> (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.
>
> (4) .....
>
> (6) .....
>
> (7) ....."

29. It is further noticed that the learned Trial Court has failed to make any order for payment of compensation to the victim as is wont. We thus invoke the provisions of the Sikkim Compensation to Victims or his Dependents Schemes, 2011, as amended in 2016. In terms of the said Scheme, a sum of Rs.3,00,000/- (Rupees three lakhs) only, is awarded as

compensation to the minor victim and shall be made over by the Sikkim State Legal Services Authority.

30. It is also noticed that the learned Trial Court has ordered that the fine amount be deposited in the fund of Sikkim Compensation to Victims Scheme. In this context, it would be necessary to refer to the provisions of Section 357 of the Code of Criminal Procedure, 1973 for clarity, which lays down as follows;

> "**357. Order to pay compensation**. (1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied-
>
> (a) in defraying the expenses properly incurred in the prosecution;
>
> (b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;
>
> (c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;
>
> (d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.
>
> (2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has

> elapsed, or, if an appeal be presented, before the decision of the appeal.
>
> (3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment, order the accused person to pay, by way of compensation, such amount as may be specified in the order to the person who has suffered any loss or injury by reason of the act for which the accused person has been so sentenced.
>
> (4) An order under this section may also be made by an Appellate Court or by the High Court or Court of Session when exercising its powers of revision.
>
> (5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section.

In ***Hari Singh v. Sukhbir Singh***[17], while discussing the provisions of Section 357 of the Code of Criminal Procedure, 1973 it was, *inter alia*, held that;

> "**10.** ..... In addition to conviction, the Court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of Courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way."

The purpose of Section 357 of the Code of Criminal Procedure, 1973 has thus been clearly elucidated. A bare perusal of the provision reveal that it does not envisage payment of the fine amount to any fund. It is either to be paid to the prosecution for

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[17] AIR 1988 SC 2127

defraying the expenses incurred by it or to any person as compensation for loss or injury caused by the offence and recoverable in a Civil Court or the Court may order that the accused pay such compensation to the person who has suffered loss or injury by the act of the accused. Consequently, the Order requiring the fine amount of Rs.20,000/- (Rupees twenty thousand) only, to be deposited in the fund for the Sikkim Compensation to Victims is set aside and it is hereby ordered that the said amount be made over to the victim.

31. Consequently, a sum of Rs.2,00,000/- (Rupees two lakhs) only, from the compensation of Rs.3,00,000/- (Rupees three lakhs) only, and a sum of Rs.20,000/- (Rupees twenty thousand) only, granted to the victim as hereinabove, shall be deposited in a fixed deposit with a Nationalised Bank in the name of the minor till she attains majority, while a sum of Rs.1,00,000/- (Rupees one lakh) only, shall be utilised as deemed necessary for the rehabilitation/treatment of the child.

32. No order as to costs.

33. Copy of this Judgment be transmitted to the Court of the Learned Special Judges (POCSO) of all the Districts for information and compliance.

34. Copy be made over to the Member Secretary, Sikkim State Legal Services Authority, for information and compliance.

35. Records be remitted forthwith to the Court of the Learned Special Judge (POCSO), West Sikkim, at Gyalshing.

Sd/-
(Bhaskar Raj Pradhan)
Judge
19-02-2018

Sd/-
(Meenakshi Madan Rai)
Judge
19-02-2018

Approved for reporting : **Yes**

Internet : **Yes**

ds/bp