

IN THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

Heard on : 17.08.2017
Pronounced on : 28.08.2017

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

Crl. A. No. 18 of 2016

Shri Rabin Burman,
Son of Adar Burman,
Resident of Jalpaiguri,
Village Nathua, West Bengal

.... Appellant.

Versus

State of Sikkim

... Respondent.

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

Appearance:

Mr. Sonam Palden Bhutia, Advocate for the Appellant.

Mr. Karma Thinlay Namgyal, Senior Advocate and Additional
Public Prosecutor with Ms. Pollin Rai, Asstt. Public Prosecutor for
the Respondent.

J U D G M E N T
(28.08.2017)

Bhaskar Raj Pradhan, J

- 1.** Conviction of the Appellant, who had been given shelter by his employer, the unfortunate father of the hapless child, at his own residence, is under Appeal in the present case having been convicted by the Court of the Special Judge, East District at Gangtok under the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012) for having committed the offence of sexual

assault on a girl child, the victim herein, as well as under Section 354 A and 323 of the Indian Penal Code, 1860 (IPC) in the very same house in which he was given shelter.

- 2.** Mr. Sonam Palden, learned Counsel appearing for the convict, now the Appellant, fairly submits, at the very outset, that he does not wish to challenge the conviction considering the nature of evidence available. The Learned Special Judge has found that from the testimony of the child (P.W.1) and her father (P.W.2) which is supported by the medical evidence (exhibit-8) it is clear that the Appellant had tried to disrobe the child and had physically and sexually assaulted her on the night of 01.07.2015 at her house. The Learned Special Judge has also found that the victim was a child within the meaning of Section 2 (d) of the POCSO Act, 2012. The conviction of the Appellant by the learned Special Judge under the aforesaid provisions of law thus stands confirmed.
- 3.** However, the Appellant is aggrieved by the order on sentence, dated 23.05.2016 imposing the maximum punishment of imprisonment prescribed under each of the offences for which he stands convicted as well as the direction that the sentences should run consecutively.
- 4.** Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor, would also fairly concede that the sentence imposed under Section 354 A, IPC is not maintainable in view of Section 42 of the POCSO Act. Section 42 of POCSO Act, 2012 provides where an act or omission constitute an offence punishable under POCSO Act, 2012 and also under Section 354 A, IPC, amongst others, then, notwithstanding anything contained in any law for the time being in

force, the offender found guilty of such offence shall be liable to punishment under POCSO Act, 2012 or under the IPC as provides for punishment which is greater in decree. The impugned order dated 23.05.2016 sentences the Appellant to undergo rigorous imprisonment for five years and pay a fine of Rs. 1,000/- under Section 8 of POCSO Act, 2012 and in default of payment of fine to undergo further imprisonment for six months. For the offence under Section 354 A, IPC, the Appellant has been sentenced to undergo rigorous imprisonment for three years and fine of Rs. 1,000/- and in default of the payment of fine he shall undergo further imprisonment for six months. In view of Section 42 of POCSO Act, 2012, the Appellant shall be liable to punishment under Section 8 of POCSO Act, 2012 as it provides for punishment which is greater in decree. Consequently, the sentence for conviction under Section 354 A, IPC is set aside.

- 5.** On hearing the submissions of Mr. Sonam Palden and Mr. Karma Thinlay Namgyal it seems quite clear that judicial determination in the present case is narrowed down to the rationale of the judicial discretion exercised by the learned Special Judge in imposing the maximum sentences for each of the offences charged and convicted, sans Section 354 A, IPC and whether in the given facts, the sentences ought to have been directed to run 'concurrently' instead.

Sentences

- 6.** Under Section 8 of the POCSO Act, 2012 whoever commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but

which may extend to five years, and shall also be liable to fine. The learned Special Judge has sentenced the Appellant to undergo rigorous imprisonment for five years and pay a fine of Rs. 1,000/- under Section 8 of the POCSO Act, 2012 and in default of the payment of fine to undergo further imprisonment for 6 months.

7. Under Section 323, IPC whoever except in the case provided for by Section 334, voluntarily causes hurt, shall be punished with imprisonment of either description for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both. The learned Special Judge has sentenced the Appellant to undergo rigorous imprisonment for one year under Section 323, IPC.

8. The word 'heinous' is defined in the Black's Law Dictionary, tenth edition as "*shockingly atrocious or odious.*" The offence of sexual assault committed by the Appellant on a girl child under Section 8 of the POCSO Act, 2012 is a 'heinous' offence. The preamble to the POCSO Act, 2012 which supplies a key to the interpretation of the Sections therein also says so.

9. In re: ***Ms. Eera Through Dr. Manjula Krippendorf v. State (Govt. of NCT of Delhi) & Anr.***¹ the Apex Court has held:-

"18..... There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act."

¹ 2017 SCC online SC 787

10. The crime depicts depravity and lacks in morality. The criminality is against the Society. In **State of Karnataka v. Puttaraja**² the Apex Court held:-

" 12. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime e.g. where it relates to offences against women like the case in hand, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude moral delinquency which have great impact and serious repercussions on social order and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meagre sentences or taking too sympathetic a view merely on account of lapse of time or considerations personal to the accused only in respect of such offences will be result wise counterproductive in the long run and against societal interest which needs to be cared for and strengthened by the required string of deterrence in built in the sentencing system."

11. Sexual offences on children constitute a crime, so different even compared to other heinous crimes. When committed by full grown adults it is almost certain that it is a result of perversity or a depraved mind.

12. Mr. Sonam Palden would submit that the fact that the Appellant had no previous criminal record; that he has aged parents and is 35 year old is mitigating circumstances to reduce the sentence. In re: **Purushottam Dashrath Borate & Anr. v. State of Maharashtra**³, the Apex Court has held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be mitigating circumstances. Mr. Sonam Palden would also submit that the Court must also be alive to the reformatory theory of punishment and thus, if the first time convicted Appellant was to be kept with hardened criminals in the State Jail for the long period of sentences imposed, the Appellant may perhaps never reform. It is trite that while imposing the quantum of sentence the Court must examine both mitigating as well as aggravating circumstances. The aggravating

² (2004) 1 SCC 475

³ (2015) 6 SCC 652 : (2015) 3 SCC (Cri) 326

circumstances pointed out by Mr. Karma Thinlay Namgyal is the conduct of the Appellant of acting innocent after having committed the crime by first jumping out of the window, then coming to the main door from outside and pretending to enquire what had happened. More aggravating, is the fact that a 35 year old man, in full consciousness, perhaps emboldened by a little drink just before the crime, taking advantage of his proximity to the child and the father and of the shelter so humanely granted by the father of the child to him and of the position of power he held over the child, in the cover of the night, seeking to gratify his lust and committing sexual assault and voluntarily causing hurt on a hapless child.

13. *"Do you question the young children in the sorrow why their tears are falling so?"* These words by Elizabeth Barrett Browning (1806-1861), British Poet, although while lamenting about the plight of the children's condition of employment in mines and factories, but apt on the pain and anguish, perhaps also needs to be kept in mind while sentencing a convict found guilty of sexual assault on the victim, a girl child, barely in her teens. The aggravating circumstances far outweigh the mitigating circumstances projected by Mr. Sonam Palden, learned Counsel for the Appellant.

14. The conviction of the Appellant being for a 'heinous crime' the deterrence theory as a rationale for punishing the offender becomes relevant and in such cases the role of mercy, forgiveness and compassion become secondary as held by the Apex Court in numerous cases. In such cases while determining the quantum of sentence the Court has to govern itself by reason and fair play and discretion and is not to be exercised according to whim and caprice.

It is the duty of the Court to impose adequate sentence, for one of the purposes of imposing requisite sentence is protection of society and a legitimate response to the collective conscience.

15. The learned Special Judge has exercised his judicial discretion. The said exercise of judicial discretion is neither perverse nor erroneous. The maximum sentences awarded for each of the two offences has been awarded keeping in mind the aggravating circumstances as reflected in the impugned order on sentence. This Court has no cogent reason to reduce the sentences so awarded for the offence under Section 8 of the POCSO Act, 2012 and Section 323, IPC.

Consecutively or Concurrently

16. In paragraph 23 of the impugned judgment dated 18.05.2016 it has been held :-

"It is palpable from the evidence discussed above that the accused had gagged the victim's mouth, throttled her neck, attempted to remove her clothes and touched her body with sexual intent....."

17. In the impugned order on sentence dated 23.05.2016 it has been held:-

"4. The seriousness of the offence could be gathered from the evidence of the victim (PW 2) who has stated thus: ".....He placed his hand on my mouth and told me that it was time for me to die that night. He kept on pressing his hands on my mouth and nose, and also squeezed my throat because of which, i could not scream. I lost consciousness. When I woke up, the accused was on top of me from behind. He tried to open my clothes and laid his hand all over my body with sexual intent....."

5. The nature of injury sustained by the victim could be seen from the testimony of the victim's father, who has deposed that: ".....My victim daughter had also sustained injury on her eyes and facial region because the accused had gagged her mouth and squeezed her neck while attempting to sexually assault her in the course of attempting rape, the accused had inflicted injury on my daughter during the struggle that ensued between them. It has been about one and half months since my victim daughter has started wearing glasses because of injury on her eyes during the incident....."

18. The findings recorded by the learned Special Judge both in the impugned judgment dated 18.05.2016 and order on sentence dated 23.05.2016 makes it evident that the commission of voluntarily causing hurt was in pursuit of the Appellant's sexual intent to commit sexual assault upon the hapless child. It is thus clear that the occurrence is the same in the present case.

19. Section 31 of the Code of Criminal Procedure, 1973 (Cr.P.C.) provides:-

"31. Sentence in cases of conviction of several offences at one trial. - (1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-

(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."

20. The Apex Court in re: **O.M. Cherian v. State of Kerala**⁴ would hold that when the prosecution is based on a single transaction where it constitutes two or more offences, sentences are to run concurrently and further imposing separate sentences, when the acts constituting different offences form part of the single

⁴(2015) 2 SCC 501

transaction is not justified. The Apex court in re: **Kuldeep Singh v. State of Haryana & ors.**⁵ held:-

" 5. Since the occurrences is the same, and the punishment is under different provisions of IPC, for the same incident, we are satisfied that the sentence awarded under the different provisions of the IPC ought to have been ordered to run concurrently, specially keeping in mind the facts and circumstances of the present case. Ordered accordingly."

21. Mr. Karma Thinlay Namgyal fairly concedes that in view of the judgment of this Court in **Kaziman Gurung v. State of Sikkim**⁶ on this issue following the dicta of Section 31 of Cr.P.C as well as the judgments of the Apex Court in re: **O.M Cherian**⁴ (*supra*) & **Kuldeep Singh**⁵ (*supra*), the issue stands settled.

22. This Court is therefore of the view that the sentences imposed by the learned Special Judge for the offences under Section 8 of the POCSO Act, 2012 and 323, IPC is to run 'concurrently' and not 'consecutively' as held by the learned Special Judge.

23. While addressing this Court on the quantum of sentence, Mr. Sonam Palden would also rely upon Section 71, IPC. The same reads as follows:-

"71. Limit of punishment of offence made up of several offences.— Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such of his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence, the offender shall not be punished with a more severe punishment than the court which tries him could award for any one of such offences."

⁵Manu/SC/1546/2016

⁶2017 SCC OnLine Sikk 117

24. In re: **State represented by Inspector of Police, Pudukottai, T.N v. A. Parthiban**⁷, held as under:-

"7. The crucial question is whether the alleged act is an offence and if the answer is in the affirmative, whether it is capable of being construed as offence under one or more provisions. That is the essence of Section 71 IPC, in the backdrop of Section 220 CrPC."

25. In the light of the law enunciated from reading Section 71 of the Cr.P.C. and the judgment of the Apex Court in re: **State represented by Inspector of Police, Pudukottai, T.N v. A. Parthiban**⁷ (*supra*) it is clear that this is not a case which falls under the parameters of Section 71, IPC. The essence of Section 8 of POCSO Act, 2012 is the touch and the sexual intent. Whereas the ingredient of Section 323, IPC is the voluntarily causing of hurt.

26. In conclusion :-

1. The sentence of conviction of the Appellant under Section 354 A, IPC is set aside.
2. The sentences for the offence under Section 8 of the POCSO Act, 2012 and Section 323, IPC awarded to the Appellant is upheld.
3. The sentences for the offences under Section 8 of the POCSO Act, 2012 and 323, IPC is directed to run 'concurrently' and not 'consecutively'.
4. The direction of the learned Special Judge that the fines imposed vide the order on sentence, if recovered shall be made over to the child as compensation and that the child is also entitled to compensation of Rs. 50,000/- under the Sikkim Compensation to Victims or his Dependants Scheme, 2011 for the physical and mental trauma that the child had to endure because of the incident is maintained.

⁷(2006) 11 SCC 473

27. In view of the aforesaid the Appeal against conviction is dismissed as not pressed. The Appeal against the sentence is partly allowed in the above terms.

Few Concerns

28. Before parting, few concerns of this Court must be voiced. The records reveal that during the recording of the statement of the child under Section 25 of the POCSO Act, 2012 by the Magistrate the identity of the child has been disclosed. It is seen that the judicial record has documents with the identity of the child and photograph of the child collected during investigation. The FIR (exhibit-2) records the identity of the child. The birth certificate of the child (exhibit-4) records the identity of the child. The letter to the Medical Officers (exhibit-5 and 7) forwarding the child for medical examination records the identity of the child. The communication from the Chief Medical Officer to the Investigating Officer dated 09.09.2015 (exhibit-9) records the identity of the child. The property seizure memo (exhibit-10) records the identity of the child. The application of the Investigating Officer to the Chief Judicial Magistrate dated 02.07.2015 (exhibit-11) with the prayer for recording the statement of the child under Section 164 Cr.P.C. records the identity of the child. The preliminary examination of the child conducted on 14.07.2015 by the Learned Chief Judicial Magistrate (exhibit-12) discloses the identity of the child. The records further reveals that the Investigating Officer has filed a report under Section 173 Cr.P.C disclosing the identity of the child. While recording the depositions of the child (P.W.1) and her father (P.W.2) in Court, the Learned Special Judge, although, has ensured

that the name of the child is not disclosed but in the body of the depositions the identity of the child through the name of the school and neighbourhood has been disclosed. The examination of the accused under Section 313 Cr.P.C. also records the identity of the child's School.

29. The Constitutional Bench of the Apex Court in re: **Justice K.S. Puttaswamy (retd.) and Anr. v. Union of India & Ors**⁸ has held:

"3 (A) Life and personal liberty are inalienable rights. These are rights which are inseparable from a dignified human existence. The dignity of the individual, equality between human beings and the quest for liberty are the foundational pillars of the Indian Constitution;

(B) Life and personal liberty are not creations of the Constitution. These rights are recognised by the Constitution as inhering in each individual as an intrinsic and inseparable part of the human element which dwells within;

(C) Privacy is a constitutionally protected right which emerges primarily from the guarantee of life and personal liberty in Article 21 of the Constitution. Elements of privacy also arise in varying contexts from the other facets of freedom and dignity recognised and guaranteed by the fundamental rights contained in Part III;

(D) Judicial recognition of the existence of a constitutional right of privacy is not an exercise in the nature of amending the Constitution nor is the Court embarking on a constitutional function of that nature which is entrusted to Parliament;

(E) Privacy is the constitutional core of human dignity. Privacy has both a normative and descriptive function. At a normative level privacy sub-serves those eternal values upon which the guarantees of life, liberty and freedom are founded. At a descriptive level, privacy postulates a bundle of entitlements and interests which lie at the foundation of ordered liberty;

(F) Privacy includes at its core the preservation of personal intimacies, the sanctity of family life, marriage, procreation, the home and sexual orientation. Privacy also connotes a right to be left alone. Privacy safeguards individual autonomy and recognises the ability of the individual to control vital aspects of his or her life. Personal choices governing a way of life are intrinsic to privacy. Privacy protects heterogeneity and recognises the plurality and diversity of our culture. While the legitimate expectation of privacy may vary from the intimate zone to the private zone and from the private to the public arenas, it is important to underscore that privacy is not lost or surrendered merely because the individual is in a public place. Privacy attaches to the person since it is an essential facet of the dignity of the human being;

(G) This Court has not embarked upon an exhaustive enumeration or a catalogue of entitlements or interests comprised in the right to privacy. The Constitution must evolve with the felt necessities of time to meet the challenges thrown up in a democratic order governed by the rule of law. The meaning of the Constitution cannot be frozen on the perspectives present when it was adopted. Technological change has given rise to concerns which

⁸ Writ Petition (Civil) No. 494 of 2012 dated 24.08.2017.

were not present seven decades ago and the rapid growth of technology may render obsolescent many notions of the present. Hence the interpretation of the Constitution must be resilient and flexible to allow future generations to adapt its content bearing in mind its basic or essential features;

(H) Like other rights which form part of the fundamental freedoms protected by Part III, including the right to life and personal liberty under Article 21, privacy is not an absolute right. A law which encroaches upon privacy will have to withstand the touchstone of permissible restrictions on fundamental rights. In the context of Article 21 an invasion of privacy must be justified on the basis of a law which stipulates a procedure which is fair, just and reasonable. The law must also be valid with reference to the encroachment on life and personal liberty under Article 21. An invasion of life or personal liberty must meet the three -fold requirement of (i) legality, which postulates the existence of law; (ii) need, defined in terms of a legitimate state aim; and (iii) proportionality which ensures a rational nexus between the objects and the means adopted to achieve them; and (I) Privacy has both positive and negative content. The negative content restrains the state from committing an intrusion upon the life and personal liberty of a citizen. Its positive content imposes an obligation on the state to take all necessary measures to protect the privacy of the individual.

4 Decisions rendered by this Court subsequent to *Kharak Singh*, upholding the right to privacy would be read subject to the above principles.

5 Informational privacy is a facet of the right to privacy. The dangers to privacy in an age of information can originate not only from the state but from non -state actors as well. We commend to the Union Government the need to examine and put into place a robust regime for data protection. The creation of such a regime requires a careful and sensitive balance between individual interests and legitimate concerns of the state. The legitimate aims of the state would include for instance protecting national security, preventing and investigating crime, encouraging innovation and the spread of knowledge, and preventing the dissipation of social welfare benefits. These are matters of policy to be considered by the Union government while designing a carefully structured regime for the protection of the data. Since the Union government has informed the Court that it has constituted a Committee chaired by Hon'ble Shri Justice B N Sri Krishna, former Judge of this Court, for that purpose, the matter shall be dealt with appropriately by the Union government having due regard to what has been set out in this judgment...."

30. Article 39 of the Constitution of India, *inter alia*, provides that the State shall in particular direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to developed in a healthy manner and in conditions of freedom and dignity.

31. The statement of objects and reasons of the POCSO Act, 2012, *inter alia*, provides that "the interests of the child, both as a victim as well as a witness need to be protected."

32. The statement of objects and reasons of the POCSO Act, 2012 further provides at paragraph 4 thereof :-

"4. It is, therefore, proposed to enact a self contained comprehensive legislation inter alia to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial offences and provision for establishment of speedy courts for speedy trial of such offences."(Emphasis supplied)

33. The preamble to the POCSO Act, 2012, *inter alia*, provides:-

"And whereas it is necessary for the proper development of the child that his or her right to privacy and confidentiality be protected and respected by every person by all means and through all stages of a judicial process involving the child;

And whereas it is imperative that the law operates in a manner that the best interest and well being of the child are regarded as being of paramount importance at every stage, to ensure the healthy physical, emotional, intellectual and social development of the child." (Emphasis supplied)

34. In re: **Ms. Eera Through Dr. Manjula Krippendorf v. State**

(Govt. of NCT of Delhi) & Anr.¹ (supra) the Apex Court held:-

"18. The purpose of referring to the Statement of Objects and Reasons and the Preamble of the POCSO Act is to appreciate that the very purpose of bringing a legislation of the present nature is to protect the children from the sexual assault, harassment and exploitation, and to secure the best interest of the child. On an avid and diligent discernment of the preamble, it is manifest that it recognizes the necessity of the right to privacy and confidentiality of a child to be protected and respected by every person by all means and through all stages of a judicial process involving the child. Best interest and well being are regarded as being of paramount importance at every stage to ensure the healthy physical, emotional, intellectual and social development of the child. There is also a stipulation that sexual exploitation and sexual abuse are heinous offences and need to be effectively addressed. The statement of objects and reasons provides regard being had to the constitutional mandate, to direct its policy towards securing that the tender age of children is not abused and their childhood is protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. There is also a mention which is quite significant that interest of the child, both as a victim as well as a witness, needs to be protected. The stress is on providing child-friendly procedure. Dignity of the child has been laid immense emphasis in the scheme of legislation. Protection and interest occupy the seminal place in the text of the POCSO Act."

35. The Apex Court whilst holding that the accused persons are entitled to have a copy of the FIR at a stage prior to that prescribed under Section 207 Cr.P.C. and directing the State Governments to upload the FIRs on the Police websites or the State websites within

24 hours of its registration carved out an exception to the said directions in its judgment in re: **Youth Bar Association of India v. Union of India**⁹, in the following words:-

"11.4. The copies of the FIRs, unless the offence is sensitive in nature, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under the Pocso Act and such other offences, should be uploaded on the police website, and if there is no such website, on the official website of the State Government, within twenty-four hours of the registration of the first information report so that the accused or any person connected with the same can download the FIR and file appropriate application before the court as per law for redressal of his grievances. It may be clarified here that in case there is connectivity problems due to geographical location or there is some other unavoidable difficulty, the time can be extended up to forty-eight hours. The said 48 hours can be extended maximum up to 72 hours and it is only relatable to connectivity problems due to geographical location.

11.6. The word "sensitive" apart from the other aspects which may be thought of being sensitive by the competent authority as stated hereinbefore would also include concept of privacy, regard being had to the nature of the FIR. The examples given with regard to the sensitive cases are absolutely illustrative and are not exhaustive."

36. Section 23 of POCSO Act, 2012 provides:-

"23. Procedure for media: (1) No person shall make any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering his reputation or infringing upon his privacy.

(2) No reports in any media shall disclose, the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child:

Provided that for reasons to be recorded in writing, the Special Court, competent to try the case under the Act, may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

(3) The publisher or owner of the media or studio or photographic facilities shall be jointly and severally liable for the acts and omissions of his employee.

(4) Any person who contravenes the provisions of sub-section (1) or sub-section (2) shall be liable to be punished with imprisonment of either description for a period which shall not be less than six months but which may extend to one year or with fine or with both.

37. Section 24 of POCSO Act, 2012 provides:-

"24. Recording of statement of a child: (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.

(2) The police officer while recording the statement of the child shall not be in uniform.

⁹ (2016) 9 SCC 473

- (3) *The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.*
- (4) *No child shall be detained in the police station in the night for any reason.*
- (5) *The police officer shall ensure that the identity of the child is protected from the public media, unless otherwise directed by the Special Court in the interest of the child."*

38. The Police Officer while recording the statement of the child is required to ensure that the identity of a child is protected from the public media unless otherwise directed by the Special Court in the interest of the child. The protection of the identity of a child is bestowed upon the Police Officer recording the statement and unless directed otherwise by the Special Court who shall do so only in the interest of child, the said Police Officer must zealously protect the same.

39. Section 33 (7) of POCSO Act, 2012 provides:-

"33.....

(7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial: Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.

Explanation.— For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.

.....
....."

40. Section 37 of POCSO Act, 2012 provides:-

"37. Trials to be conducted in camera: The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the court, it shall proceed to issue a commission in accordance with the provisions of section 284 of the Code of Criminal Procedure, 1973 (2 of 1974)".

41. A purposeful reading of Section 23, 24, 33 and 37 of the POCSO Act, reflects that the scheme of the POCSO Act, 2012 provides vital safeguards to ensure protection of the Child's reputation and privacy and that the identity of the child is not

disclosed during investigation or trial. This is paramount. The role of the Special Court specially constituted under the POCSO Act, 2012 is not only defined but made special for its effective implementation. The Investigating authorities, the media houses and the Courts have a statutory duty to protect this with all their might. The identity of the child not being disclosed is the interest of the child, both as a victim as well as a witness which is sought to be protected by the POCSO Act, 2012. This cannot be compromised.

42. Under Section 33 (7) of the said Act the special Court has been given the statutory duty to ensure that the identity of the child is not disclosed at any time during the course of investigation or trial. Under Section 19 (6) of the said Act the Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of 24 hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of a child for care and protection and step taken in this regard. The Special Court, therefore, under the Scheme of the POCSO Act, 2012 is kept abreast of the development in the Investigation right from the stage of filing of the First Information Report. Under Section 33 (7) read with Section 19 (6) of the POCSO Act, 2012 the Special Court is enjoined to ensure that at no stage of investigation or trial thereof, the identity of child is disclosed. The proviso thereto is an exception for the Special Court to permit such disclosure but only in the "interest of the child." This permission must be only after judicial consideration and coming to a definite conclusion that the disclosure is in the interest of the Child.

43. The Special Court must keep in mind that the identity of the child, as clarified in the explanation to Section 33 (7) of the POCSO Act, 2012 does not mean only the name but includes the identity of the family, school, relatives, neighbourhood or any other information by which his/her identity may stand exposed. The mandate is unequivocal.

44. All statutory Authorities including the Investigating Agencies and the Courts involved during investigation or trial would have to bear the legislative command against disclosure of identity of the child who are victims of sexual offences in mind and ensure strict compliance thereof.

45. The Special Judge, manning the Special Court must keep conscious of Section 33(9) of the POCSO Act, 2012 which starts within the words "subject to the provision of this Act" and provides:-

"33 (9) Subject to the provisions of this Act, a Special Court shall, for the purpose of the trial of any offence under this Act, have all the powers of a Court of Session and shall try such offence as if it were a Court of Session, and as far as may be, in accordance with the procedure specified in the Code of Criminal Procedure, 1973 (2 of 1974) for trial before a Court of Session."

46. The Special Court must also be mindful of Section 42A of the POCSO Act, 2012 which provides:-

*"42A. **Act not in derogation of any other law.**- The provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force and, in case of any inconsistency, the provisions of this Act shall have overriding effect on the provisions of any such law to the extent of the inconsistency."*

47. The Special Judges manning the Special Courts must keep in mind that the nomenclature 'Special Court' has been advisedly used to distinguish it from other Courts by some quality peculiar or out of the ordinary. Similarly, the 'Special Public' Prosecutor' appointed

under Section 32 of the POCSO Act, 2012 must also be conscious of the fact that they have been specially appointed as 'Special Public Prosecutors' under the POCSO Act, 2012. The word 'special' has to be understood in contradiction to the word 'general' or 'ordinary'. It signifies specialisation. The 'Special Court' constituted under the POCSO Act, 2012 must necessarily be specialised in the understanding, appreciation and effective implementation of the POCSO Act, 2012. Similarly the 'Special Public Prosecutor' must also have adequate specialization in the understanding, appreciation and effective implementation of the POCSO Act, 2012. That is the only way in which the mandate of the POCSO Act, 2012 can be successfully fulfilled.

48. The trauma of a child who has undergone sexual abuse so heinous in nature must be in the mind of all concerned in the process of administration of justice. Children are National assets and must have a special place in life. Children due to their age and innocence are vulnerable. A child who has already undergone sexual abuse and traumatised must be insulated completely from secondary victimization. Investigation of such offences must be entrusted and conducted by Police Officers competent as per the POCSO Act, 2012 and sensitized to the unique role each Police Officer is required to play during the investigation. The POCSO Act, 2012 provides a criminal justice system which is not only child friendly but also in the best interest of child. A child's right to confidentiality must be respected and protected even by the lawyers who are involved in the case. The process of administration of Criminal Justice in such cases must also necessarily be steps for resurrecting the dignity, self esteem, honour, faith and self

confidence of the child. The Police Officers, the Special Public Prosecutors, the lawyers, the Judges and all other persons involved in the investigation or trial of such offences must be sensitive to the special role they are required to perform during the process.

49. In the age of super speed internet, whatsApp and other messenger applications and social media, information travels as quick as human thoughts. The statutory authorities under the POCSO Act, 2012 must be guarded that the information of the identity of child with them, if leaked, transmitted or shared against the mandate of the POCSO Act, 2012 may cause irreparable damage to the child's fundamental right as guaranteed by the Constitution as well as his statutory rights to privacy under the POCSO Act, 2012 and the IPC. The statutory authorities must remember that the duty to protect the identity of a child who is not capable of safeguarding her/his rights is higher on them.

50. Whereas the recording of a statement of child by the Magistrate under Section 25 of the POCSO Act, 2012 read with the additional provisions as provided in Section 26 of the POCSO Act, 2012 provides adequate protection for the child. The mandate of Section 33 (7) of the POCSO Act, 2012 cannot be lost sight of. Complete protection of identity of the child, which is paramount, must be ensured while recording such statement by the Magistrate even under the provision of Section 164 Cr.P.C. or Section 164 A Cr.P.C. If identity of the child is disclosed while recording the statement of the child before a Magistrate in terms of Section 25 and 26 of the POCSO Act, 2012 the interest of the child and the

protection of the child's identity is compromised it will run counter to the scheme of the POCSO Act, 2012.

51. This Court in re: ***Budha Singh Tamang v. State of Sikkim***¹⁰ in a judgment rendered on 19.04.2016, noticing that the Learned Trial Court had not taken protective measures as required by law and had disclosed the name of the child without recording reasons for such disclosure, directed that the learned Trial Courts dealing with cases under the POCSO Act, 2012 and offences under section 354 A to 354 D, 370, 370 A, 372, 373, 375, 376 or section 509 of the IPC, shall abide strictly by the mandate of the law as provided in section 33 (7) of the POCSO Act, 2012. However, it is seen, with a great deal of pain and anguish that the identity of the child continues to be compromised, without adequate reasons.

Directions

- 52.** In view of the aforesaid the following directions are issued:-
1. All statutory authorities involved in the investigation or trial of the offences under the POCSO Act, 2012 shall bear in mind that the identity of a child is not only the name of a child but includes the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of a child may be revealed.
 2. The Police Officer recording an FIR relating to an alleged offence on a child under POCSO Act, 2012 shall ensure that the said FIR is not made public or uploaded on Police websites or State Government websites in compliance with

¹⁰ 2016 SCC OnLine Sikk 48

the direction of the Apex Court in re: ***Youth Bar Association of India v. Union of India***⁹ (*Supra*) or any other website.

3. The Investigating Officer conducting the investigation of an alleged offence on a child under POCSO Act, 2012 shall ensure that the materials collected during investigation is guarded against disclosure of the identity of a child. Any document or photographs obtained during investigation of the case which would contain the identity of a child shall not be disclosed to the public media or to any person who is not involved in the administration of Criminal Justice under the POCSO Act, 2012. While issuing copies or certified copies of such documents or photographs as per law to the limited stakeholders under the POCSO Act, 2012 necessary masking of the identity of a child shall be ensured before its issuance.
4. The mandate of Section 23 of the POCSO Act, 2012 shall be strictly followed. Any person who contravenes the provisions of sub-section (1) by making any report or present comments on any child from any form of media or studio or photographic facilities without having complete and authentic information, which may have the effect of lowering the child's reputation or infringing upon his privacy shall be prosecuted for contravention thereof under Section 23 (4) of the POCSO Act, 2012. Similarly, if any report in any media discloses the identity of a child including his name, address, photograph, family details, school, neighbourhood or any other particulars which may lead to disclosure of identity of the child, all such persons involved in making such report

and disclosure shall be prosecuted for contravention thereof under Section 23 (4) of the POCSO Act, 2012.

5. While recording the statement of a child as provided under Section 24 of the POCSO Act, 2012 the Police Officer shall ensure that the identity of a child is protected from the public media, unless otherwise directed by the Special Court in the interest of a child.
6. While recording such statement of a child under Section 24 of the POCSO Act, 2012 the Police Officer shall ensure that the identity of a child is not disclosed and for the said purpose may use pseudonyms or any other appropriate way in accordance with law to protect the identity of a child.
7. While recording a statement of a child by the Magistrate under Section 25 of the POCSO Act, 2012 and in any judicial record thereof the Magistrate shall ensure that the identity of the child is not disclosed and necessary precaution is taken to protect the same. Pseudonyms or any other appropriate way in accordance with law shall be adopted to protect the identity of a child.
8. The Special Court shall ensure that the identity of a child is not disclosed at any time during the course of investigation or trial as mandate under section 33(7) of the POCSO Act, 2012 unless for reasons to be recorded in writing the Special Court is of the opinion such disclosure is in the interest of a child.
9. The Special Court is required to ensure that the identity of the child shall not be disclosed anywhere on judicial records

and that names shall be referred by pseudonyms or in any other appropriate way in accordance with law.

10. For the protection of the child's identity as mandated under the POCSO Act, 2012 the Special Court and the Investigating Officer shall restrict the disclosure of information to limited stakeholders and ensure there is controlled access of non-essential persons during investigation or trial. The Special Court must ensure the best interest of the child and act as *parens patriae* for the child.
11. To ensure that the identity of the child is not disclosed during the course of investigation or trial, the local Police or the Special Juvenile Police Unit recording the report under section 19, the Police Officer recording the statement of the child under Section 24, the Investigating Officers investigating the offences under the POCSO Act, 2012, the Magistrates recording the statement of the child under Section 25, the Special Court conducting the trial of the offences under the POCSO Act, 2012 shall keep in mind the provisions of Section 40 of the POCSO Act, 2012 which provides:

"subject to the proviso to Section 301 of the Code of Criminal Procedure, 1973 (2 of 1974) the family or the guardian of the child shall be entitled to the assistance of a legal counsel of their choice for any offence under this Act:

Provided that if the family or the guardian of the child are unable to afford a legal counsel, the Legal Services Authority shall provide a lawyer to them."

12. Such lawyers providing assistance of legal counsel to the child shall keep in mind the mandate of the law under the POCSO Act, 2012 which insulates the child's privacy and

confidentiality by all means and through all stages of judicial process involving the child.

13. The Special Public Prosecutors who have been appointed by the State Government by Notification in the Official Gazette for every Special Court for conducting cases only under the provision of the POCSO Act, 2012 shall also keep in mind the mandate of the law under the POCSO Act, 2012 which insulates the child's privacy and confidentiality by all means and through all stages of judicial process involving the child.
14. For the proper and effective implementation of the POCSO Act, 2012 the State Government, if not already done, shall prepare guidelines for use of non Governmental organisations, professionals and experts or persons having knowledge of psychology, social work, physical health, mental health and child development to be associated with the pre trial and trial stage to assist the child as mandated vide Section 39 of the POCSO Act, 2012.
15. The State Government shall take effective measures to ensure that the concerned persons (including the Police Officers) are imparted periodic training on the matters relating to the implementation of the provisions of the POCSO Act, 2012.
16. As provided for in Rule 4 (2) (f) of the Protection of Children from Sexual Offences Rules, 2012 (POCSO Rules, 2012) the Special Juvenile Police Unit or the local police receiving information under sub-section (1) of section 19 of

the POCSO Act, 2012 from any person including the child shall inform the child and his parent or guardian or other person in whom the child has trust and confidence as to right of the child to legal advice and counsel and the right to be represented by a lawyer, in accordance with section 40 of the POCSO Act, 2012. The lawyer so appointed must have sound knowledge of the POCSO Act, 2012 and sensitivity towards the best interest of a child to ensure that the child's identity is not disclosed amongst other mandates of the POCSO Act, 2012.

17. As per the mandate of rule 4 (8) of the POCSO Rules, 2012 the 'support person' who are assigned by Child Welfare Committee, in accordance with sub-rule (8) of the rule 4, of the POCSO Rules, 2012 to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of any offence under the POCSO Act, 2012 shall at all times maintain the confidentiality of all information pertaining to the child to whom he has access.

53. Finally, it is hoped that the prison authorities on whom the custody of the Appellant shall remain during conviction shall keep in mind that it is a depraved mind that indulges in such crimes against a girl child. To battle such evil it is this mind that must also be effectively tackled. The State in such cases must rise to the occasion and also ensure counselling and psychotherapy treatment of the offender while under detention.

54. This Court records its deep appreciation of the assistance of the Learned Counsels appearing for the parties especially on the aspect of the protection of the identity of the child. The erudite Judgments of the Division Bench of the Delhi High Court in re: **Gaya Prasad Pal @ Mukesh v. State**¹¹ and the Single Bench of the High Court of Calcutta in re: **Bijoy @ Guddu v. The State of West Bengal**¹² cited at the bar by the Learned Counsels has also guided this Court while penning this judgment to voice its concerns as above.

55. The Registrar General of this Court is directed to transmit copies of this judgment to all the Special Courts to ensure full and complete compliance to the mandate of section 33 (7) of the POCSO Act, 2012; the District & Sessions Judges of all the four Districts to ensure that the Magistrates are made aware of the directions issued; the Director General of Police (DGP) to ensure compliance by the Special Juvenile Police Unit (SJPU) and the Police Officers involved in the investigation and trial of offences under the POCSO Act, 2012 and for guidance to the Special Public Prosecutors; the State Government for compliance, the Sikkim Legal Services Authority, Bar Association of Sikkim the Namchi Bar Association for information and guidance to the lawyers and the Press Club of Sikkim for information and guidance to the reporters.

(Bhaskar Raj Pradhan)
Judge
28.08.2017

/avi Approved for reporting: yes.
Internet: yes.

¹¹ (2016) SCC OnLine Del 6214; (2016) 235 DLT 264 (DB)

¹² (2017) SCC OnLine Cal 417