THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 16th JUNE, 2017

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

Crl.A. No.21 of 2016

Appellant : Sanjok Rai,
Aged about 26 years,
Son of Late Parsu Ram Rai,
R/o Upper Tongsong Tea Garden,
Darjeeling, West Bengal.
[Presently in Central Prison,
Rongyek, East Sikkim]

versus

Respondent : State of Sikkim

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

Appearance

Mr. N. B. Khatiwada, Senior Advocate with Ms. Gita Bista, Advocate (Legal Aid Counsel), for the Appellant.

Mr. Karma Thinlay Namgyal, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The challenge in this Appeal is to the Judgment dated 30-09-2014 of the Learned Special Judge (Protection of Children from Sexual Offences Act, 2012), South Sikkim, at Namchi, in Sessions Trial (POCSO) Case No.08 of 2013, convicting the Appellant under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), read with Section

376(2) of the Indian Penal Code, 1860 (for short "IPC"). The Appellant was sentenced as follows;

> ***"**……. for having committed offences punishable under Section 6 of the POCSO Act, 2012 read with Section 376(2) of the IPC, 1860 (which provide for like punishments):-*
>
> - *to undergo Rigorous Imprisonment for a period of ten years and to pay a fine of ₹ 50,000/- (Rupees fifty thousand) only. In default to pay the said amount of fine he shall undergo Simple Imprisonment for a further period of six months.**"***

The imprisonment already undergone was set off.

2. In the first limb of the argument pressed before this Court by Learned Senior Counsel for the Appellant, it was canvassed that P.W.11, the Investigating Officer (for short "I.O.") seized Exhibit 2, the Birth Certificate, of the victim P.W.9, according to which, her date of birth is reflected as 07-07-1997. Raising a doubt about the authenticity of the date in Exhibit 2, it was submitted that her father, P.W.10, has admitted under cross-examination that Exhibit 2 had been made after she started School, meaning thereby that it was not prepared at her birth. Thus, the victim could well be above 18 years at the time of the alleged offence. Support on this count was drawn from the decision in ***Alamelu and Another*** vs. ***State, Represented by Inspector of Police***[1]. The accused therein was tried for an offence under Sections 366 and 376 of the IPC. He disputed the age of the victim, allegedly a minor. The Supreme Court, *inter alia*, held that the Transfer Certificate issued by the Government

1. AIR 2011 SC 715

School, duly signed by the Headmaster would be admissible in evidence under Section 35 of the Indian Evidence Act, 1872 (for short "Evidence Act"). However, the date of birth mentioned in the Transfer Certificate would have no evidentiary value unless the person who made the entry or who gave the date of birth is examined. Likening the instant case to the above situation, it was contended that as no witnesses were examined in proof of Exhibit 2, the document remained unproved and the victim's age unestablished. The second limb of the argument was that the delay in the lodging of the FIR, Exhibit 7 is unexplained and its contents remain suspicious as P.W.10 who allegedly lodged Exhibit 7 has testified that he is unaware of its contents. The victim was allegedly missing from 13-08-2013, but the Exhibit 7 was lodged only on 19-08-2017, almost seven days' after the incident, thereby leading to a reasonable doubt that the parents were aware of the relationship between the victim and the Appellant. The victim for her part has admitted to receiving calls from and giving missed calls to the Appellant. That, the contention of the Prosecution that the victim did not disclose this to her family and that her parents were unaware of such calls, is unbelievable to a prudent man. That, no signs of struggle or protest were detected by the I.O. when the victim was with the Appellant. All the said facts lead to the inevitable conclusion that the Appellant and the victim were in a relationship and she was above sixteen years at the relevant time. That, the Supreme Court in ***Shyam and Another*** vs. ***State of Maharashtra***[2] observed in a similar case that when the Prosecutrix

2. AIR 1995 SC 2169

did not put up a struggle or raise an alarm when being taken away by the accused, she appeared to be a willing party, thus the culpability of the accused was not established and he was acquitted. The Learned Trial Court thus erred in convicting the Appellant, hence, the impugned Judgment and Order on Sentence be set aside.

3. Rebutting the arguments, Learned Additional Public Prosecutor urged that there was no reason to doubt the veracity of the Birth Certificate, Exhibit 2, which had been admitted and exhibited before the Learned Trial Court, without any objection from the Appellant. To fortify this submission, reliance was placed on ***Murugan alias Settu*** vs. ***State of Tamil Nadu***[3], where the victim was found to be a minor, reliance having been placed on the Birth Certificate given by the Municipality and the Supreme Court having concluded that the date of birth, date of registration, names of parents and their addresses had been correctly mentioned, there was thus no reason to doubt the veracity of the said Certificate. Moreover, the School Certificate had been issued by the Headmaster on the basis of the entry made in the School Register, which corroborates the contents of the Certificate of Birth issued by the Municipality. That, in the instant case, Exhibit 2, the Birth Certificate of the victim was issued by the Registrar, Births and Deaths, Health and Family Welfare Department, Namchi, South Sikkim, under Sections 12/17 of the Registration of Birth and Death Act, 1969, which, therefore, was sufficient proof of its authenticity. Relying on ***Sham Lal alias Kuldip*** vs. ***Sanjeev Kumar and Others***[4], it was further

3. (2011) 6 SCC 111
4. (2009) 12 SCC 454

argued that in the said case one of the documents relied on by the Learned District Judge in coming to the conclusion that the plaintiff was the son of the deceased Balak Ram was Exhibit 2, the School Leaving Certificate. The Apex Court observed that the findings of the Learned District Judge cannot be questioned as no objection was raised by the Appellants when such document was tendered and received in evidence. That, such a document is admissible under Section 35 of the Evidence Act, being a public document as defined under Section 74 of the Evidence Act thereby requiring no formal proof. Gathering support from ***Madamanchi Ramappa and Another*** vs. ***Muthaluru Bojjappa***[5] it was further contended that the Hon'ble Supreme Court held that when the document in question was a certified copy of a public document, it need not be proved by calling a witness. Pausing here, it would be appropriate to point out that this case would not be relevant to the present facts and circumstances as we are dealing with an original document and not a certified copy of a public document.

4. Both Learned Counsel were heard *in extenso* and their submissions given careful consideration. I have also perused the impugned Judgment and Order on Sentence as well as the entire records of the case.

5. The facts briefly narrated would be that, P.W.10 the victim's father, on 19-08-2013 lodged the FIR Exhibit 7, informing therein that his daughter, the victim P.W.9, was missing since 13-08-2013. On enquiry, he had learnt that she had been kidnapped

5. AIR 1963 SC 1633

by the Appellant enroute to School. Based on Exhibit 7, Jorethang Police Station Case No.55/2013, dated 19-08-2013, u/Ss 363/365 of the IPC, 1860, was registered against the Appellant and taken up for investigation, during the course of which Birth Certificate of the victim Exhibit 2, was seized, the Appellant arrested, victim and Appellant forwarded for medical examination and witnesses examined. It transpired that the victim, aged about 16 years, was studying in Class VIII in Goom Secondary School, Kitam, South Sikkim, while the Appellant, aged about 24 years, a resident of Tongsong Tea Garden, Darjeeling, was working in Hyderabad. Five or six months prior to the incident, the Appellant called the victim on her father's cell phone, thereafter they took to conversing regularly. She was told by the Appellant that he served in the Indian Army and earned ₹ 32,000/- (Rupees thirty two thousand) only, per month. The victim being thus interested started a relationship with him. On 13-08-2013, he called the victim to Jorethang and after persuading her took her with him, first to Siliguri and thereafter to Delhi. Through the time she spent with him, he had sexual intercourse with her.

6. On completion of investigation, Charge-sheet was filed against the Appellant under Sections 363/365/376 of the IPC and Section 4 of the POCSO Act. The Learned Trial Court on the basis of *prima facie* materials framed Charge against the Appellant under Section 366 of the IPC, Section 6 of the POCSO Act read with Section 376(2) of the IPC. On the Appellant entering a plea of "not guilty", the trial commenced, during the course of which the Prosecution examined eleven witnesses. In order to enable the

Appellant to explain the circumstances appearing in the evidence against him, he was examined under Section 313 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), where he denied involvement in the offence. Thereafter, the Learned Trial Court on the basis of the evidence so furnished, came to the finding that the victim was a consenting party throughout, therefore, the Appellant could not be convicted under Section 366 of the IPC. He was, however, convicted under Section 6 of the POCSO Act read with Section 376(2) of the IPC, and sentenced as reflected hereinabove.

7. What arises for determination by this Court is –

(i) *Whether the delay in lodging of the FIR has been sufficiently explained?*

(ii) *Whether the Appellant can raise the issue of the authenticity of the Birth Certificate at the Appellate stage, not having contested it before the Learned Trial Court?*

(iii) *Whether the Learned Trial Court convicted and sentenced the Appellant erroneously?*

8. Addressing first the question of the delay in lodging of the FIR, Exhibit 7, the evidence of P.W.8 and P.W.10 the brother and father of the victim respectively, reveal that after the victim went missing they made efforts to trace her but later learnt from a friend of the victim that she had gone with the appellant. P.W.8 then went to Delhi search for the victim. Their evidence establishes sufficiently that efforts were made by them in the first instance to locate P.W.9 and on their search being in vain, P.W.10 lodged Exhibit 7. On this count, we may refer beneficially to the

observation of the Hon'ble Supreme Court in ***Deepak*** vs. ***State of Haryana***[6] 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)].****"***

Consequently, on the anvil of the aforesaid decision it can be assumed that P.W.10 was circumspect in lodging Exhibit 7. On consideration of the evidence on record, it cannot be said that there was any untoward delay in the lodging of the FIR, the delay having been sufficiently explained.

9. Now, turning to address the second question, I am constrained to observe here that the authenticity of this document has been rather belatedly raised before this Court. In this context, we may briefly walk through the evidence of the witnesses, who testified with regard to the Exhibit 2, i.e., P.Ws 1, 2, 8, 9, 10 and 11. P.W.1 and P.W.2 were witnesses to the seizure of Exhibit 2 from the possession of P.W.8, the brother of the victim. P.W.1 and P.W.2 have been consistent in their deposition even under cross-examination that, Exhibit 2 was seized in their presence, but the defence did not venture to question the witnesses about the authenticity of Exhibit 2. Exhibit 2 was seized from P.W.8, no questions were addressed to this witness under cross-examination

6. (2015) 4 SCC 762

as to how he came to be in possession of Exhibit 2 nor were questions raised about its genuineness. P.W.9, the victim affirmed that her date of birth is "07-07-1997" and identified Exhibit 2, her birth certificate, however, no questions were forthcoming under cross-examination to test its veracity. P.W.10 the victim's father identified the birth certificate as that of his daughter, under cross-examination no question was put forth challenging the validity of the document. The only question that appears to have been raised before P.W.10 is whether the birth certificate of his daughter was made after she started going to School to which he replied in the affirmative. No questions were formulated to the I.O., who for his part on a suggestion put to him that Exhibit 2 was not seized by him, he denied it and affirmed that he had seized Exhibit 2. Apart from these peremptory questions, concerning Exhibit 2 during cross-examination, no incisive questions were put to the witness to test Exhibit 2.

10. This brings us to Section 35 and Section 74 of the Evidence Act. In ***Kirtan Sahu, after him Uma Sahuani and Others*** vs. ***Thakur Sahu and Others***[7] the Hon'ble Orissa High Court has held that—

> ***"2.*** *Section 35 of the Evidence Act provides:*
>
> *"Any entry in any public or other official book, register or 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 is kept, is itself a relevant fact."*
>
> *To render a document admissible under this section three conditions must be satisfied: First of all the entry that is relied upon must be one in any publication or other official book, register or record; secondly it must be*

7. AIR 1972 Orissa 158

> *an entry stating a fact in issue or a relevant fact; and thirdly it must be made by a public servant in the discharge of his official duty, or by any other person in performance of the duty specially enjoined by law. Such documents have been admissible in evidence on account of their public nature, though their authenticity be not confirmed by the usual tests of truth, namely, the swearing and the cross-examination of the persons who prepared them. They are entitled to the extraordinary degree of confidence partly because they are required by law to be kept, partly because their contents are of public interest and notoriety but principally because they are made under sanction of an oath of office, or at least under that of official duty by accredited agents appointed for that purpose."*

11. Section 74 of the Evidence Act defines public document 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."*

Thus, Exhibit 2 comes under the purview of both the above Sections.

12. In ***Murugan***[3] the Hon'ble Apex Court while discussing the veracity of the Birth Certificate issued by the Municipality, following which the Headmaster had also issued a School Certificate, opined that —

> ***"22.*** *It is evident from the aforesaid documents that prosecutrix Shankari (PW 4) had developed a love affair with A-1, but there is nothing on record on the basis of which she had written that her hospital age was 17 years. No reliance can be placed on such a letter in view of the certificates issued by the Municipality and the School. It is a matter of common knowledge that the birth certificate issued by the Municipality generally does not*

> *contain the name of the child, for the reason, that it is recorded on the basis of the information furnished either by the hospital or parents just after the birth of the child and by that time the child is not named.*
>
> *……*
>
> ***26.*** *In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30-3-1984; registration was made on 5-4-1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Headmaster on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. Both these entries in the school register as well as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW 15), the mother of the prosecutrix. She had been cross-examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW 4), which she flatly denied. Her deposition remained unshaken and is fully reliable.”*

Hence, the Hon’ble Supreme Court allowed the documents in evidence indicating that the victim was a minor although it did not bear her name.

13. At Paragraphs 23 and 24, it was held as follows;

> ***“23.*** *In Mohd. Ikram Hussain v. State of U.P. [AIR 1964 SC 1625] this Court had an occasion to examine a similar issue and held as under: (AIR p.1631, para 16)*
>
> > *“16. In the present case Kaniz Fatima was stated to be under the age of 18. There were two certified copies from school registers which showed that on 20-6-1960 she was under 17 years of age. There [was] also the affidavit of the father stating the date of her birth and the statement of Kaniz Fatima to the police with regard to her own age. These amounted to evidence under the Indian Evidence Act and the entries in the school registers were made ante litem motam. As against this the learned Judges apparently held that Kaniz Fatima was over 18 years of age. They relied upon what was said to have been mentioned in a report of the Doctor who examined Kaniz Fatima,.... The High Court thus reached the conclusion about the majority without any evidence before it in support of it and in the face of direct evidence against it.”*

> ***24.*** *The Documents made ante litem motam can be relied upon safely, when such documents are admissible under Section 35 of the Indian Evidence Act, 1872. (Vide Umesh Chandra v. State of Rajasthan [(1982) 2 SCC 202] and State of Bihar v. Radha Krishna Singh [(1983) 3 SCC 118].”*

Thus, in the instant case, the evidence of P.W.10 reveals that the document was prepared *ante litem motam,* in other words, before the lawsuit started which indicates that if this be the position then P.W.9 and P.W.10 had no motive to lie.

14. In ***Sham Lal***[4] while discussing the presumption as to genuineness of public documents, the Hon’ble Apex Court was pleased to hold 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 documents 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 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. Even otherwise such a document falls within the ambit of Section 74, Evidence Act, and is admissible per se without formal proof.*
>
> ***23.*** *Even if such document is excluded from consideration, the defendants, as held under Questions 1 and 2 above, have not been able to rebut the presumption available under Section 112, Evidence Act.**”***
>
> ***[emphasis supplied]***

On the touchstone of the principles reflected hereinabove, on examination of the evidence on record no question either about the authenticity or the admissibility or mode of proof of Exhibit 2 was made before the Learned Trial Court by the Appellant. He cannot at this stage raise the bogey of prejudice or falsity of Exhibit 2.

15. It has been held by several judicial pronouncements that the reason why entry made by a public servant in a public or other official book, register or record stating a fact in issue or a relevant fact has been made relevant, is that, when a public servant makes it himself, in the discharge of his official duty, the probability of its being truly and correctly recorded is high. It is the public duty of a person who keeps the register to make such entries after satisfying himself of the truth and that entries in register of birth, death or marriage are at least *prima facie,* though they may not always be conclusive evidence. It is not necessary to prove who made the entries and what was the source of his information. **[see Chellammal vs. Angamuthu and Others : 1978 CRI.L.J. 752]**

16. It would be trite to point out that the Appellant has relied on ***Madan Mohan Singh and Others*** vs. ***Rajni Kant and Another***[8], wherein it has been held as under;

> ***"14.*** *Therefore, a document may be admissible, but as to whether the entry contained therein has anyprobative value may still be required to be examined in the facts and circumstances of a particular case. The aforesaid legal proposition stands fortified by the judgments of this Court in Ram Prasad Sharma v. State of Bihar, AIR 1970 SC 326; Ram Murti v. State of Haryana, AIR 1970 SC 1029; Dayaram and Ors. v. Dawalatshah and Anr., AIR 1971 SC 681; Harpal Singh and Anr. v*

8. AIR 2010 SC 2933

> *State of Himachal Pradesh, AIR 1981 SC 361; Ravinder Singh Gorkhi v. State of U.P. (2006) 5 SCC 584 (AIR 2006 SC 2157 : 2006 AIR SCW 2648); Babloo Pasi v. State of Jharkhand and Anr. (2008) 13 SCC 133 (AIR 2009 SC 314 : 2008 AIR SCW 7332); Desh Raj v. Bodh Raj, AIR 2008 SC 632; and Ram Suresh Singh v. Prabhat Singh @Chhotu Singh and Anr. (2009) 6 SCC 681 (AIR 2009 SC 2805 : 2009 AIR SCW 4261). In these cases, it has been held that even if the entry was made in an official record by the concerned official 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."*

But this aspect has already been discussed and is not being reiterated to prevent verbosity, the decision in ***Sham Lal***[4] suffices. In view of the foregoing discussions and on careful perusal of the impugned Judgment and the discussions herein, it is clear that no objection was raised when Exhibit 2 was tendered and received in evidence before the Learned Trial Court and it is settled law that in such a situation this question cannot be brought up at the Appellate stage. The victim as per the document was below eighteen years of age and thereby a "child" as defined under Section 2(1)(d) of the POCSO Act. Once she is found to be a child irrespective of the fact that the act may be consensual, the Appellant can be afforded no respite.

17. In the end result, there is no infirmity or perversity in the impugned Judgment or Order on Sentence, which are evidently not erroneous and warrants no interference.

18. Consequently, the Appeal is dismissed.

19. No order as to costs.

20. Copy of this Judgment be remitted to the Learned Trial Court forthwith along with Records of the Court.

Sd/-
(Meenakshi Madan Rai)
Judge
16-06-2017

Approved for reporting : **Yes**

Internet : **Yes**

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