

Criminal Appeal No. 31 of 2016
 Krishna Pradhan v. State of Sikkim
 With
 Criminal Appeal No. 07 of 2017
 State of Sikkim v. Kiren Chettri & Anr.

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

D.B.: HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE
HON'BLE MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

Criminal Appeal No. 31 of 2016

Krishna Pradhan,
 S/o Mani Kumar Pradhan,
 R/o Upper Mamring,
 South Sikkim,

.... Appellant

versus

State of Sikkim

.... Respondent

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

Appearance:

Ms. Gita Bista, Legal Aid Counsel for the Appellant.

Ms. Pollin Rai, Assistant Public Prosecutor for the State-
 Respondent.

With

Criminal Appeal No. 07 of 2017

State of Sikkim

.... Appellant

versus

1. Kiren Chettri,
 S/o K. B. Chettri
 R/o Simik Lingzey,
 East Sikkim.

2. Laxuman Gurung,
 S/o Ram Bahadur Gurung,
 R/o Upper Mamring,
 South Sikkim.

.... Respondents

**Appeal under Section 378(1) of the Code of Criminal
Procedure, 1973.**

Appearance:

Mrs. Pollin Rai, Assistant Public Prosecutor for the State-Appellant.

Mr. Tashi Norbu Basi, Legal Aid Counsel for Respondent No.1.

Mrs. Zola Megi, Advocate for Respondent No.2.

J U D G M E N T
(27.05.2019)

Bhaskar Raj Pradhan, J

1. The father (P.W.1) of two young girls lodged a written report on 25.07.2013 at the Ranipool police station. It alleged that his two daughters; the elder girl (P.W.2) aged 16 years and the younger girl (P.W.3) aged 12 years, who had gone to Singtam Bazaar on 21.07.2013 at 9.00 a.m. had not returned home. He requested for help to search them. Pursuant thereto P.S. Case No.29/2013 got registered on 25.07.2013 and the case endorsed for investigation.

2. It is the prosecution case that the two girls were traced out at Rangpo Bazaar by one of their relatives and brought to Ranipool Police Station. The girls stated to the police that they had been enticed by unknown persons, wrongfully confined in hotels at Singtam Bazaar and subjected to sexual intercourse. The police registered a case and took it up for investigation.

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3. We shall examine two Criminal Appeals in this common judgment as both relate to events that transpired with the two girls during the period they left Singtam and till they ultimately returned after a few days. We are conscious that Criminal Appeal No.07 of 2017 has been preferred by the State and therefore, it is against the judgment of acquittal. We must bear in mind that the presumption of innocence in favour of Kiren Chettri and Laxuman Gurung has been fortified by their acquittal. Under such circumstances, if two reasonable conclusions are possible on the basis of evidence on record, we should not disturb the finding of acquittal.

4. The Investigating Officer filed a charge-sheet dated 29.10.2013 against three accused persons, Krishna Pradhan (the Appellant in Criminal Appeal No. 31 of 2016), Kiren Chettri and Laxuman Gurung (Respondent Nos. 1 and 2 in Criminal Appeal No. 07 of 2017) under Section 343, 363, 376 read with Section 34 IPC, 1860 and under Section 3 of the POCSO Act, 2012.

5. On 23.09.2014 the learned Special Judge framed charges against all the three accused persons.

6. The learned Special Judge convicted Krishna Pradhan under Section 4 of the POCSO Act, 2012 but acquitted him for the offence under Section 363/34 IPC, 1860. Kiren Chettri and Laxuman Gurung were acquitted from all charges. The

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judgment of conviction dated 29.08.2016 is assailed by Krishna Pradhan in Criminal Appeal No. 31 of 2016. The acquittal of Kiren Chettri and Laxuman Gurung are challenged by the State in Criminal Appeal No.07 of 2017. Krishna Pradhan's acquittal for alleged offence under Section 363/34 IPC, 1860 is not challenged.

Minority of the two girls:

7. The learned Special Judge on the basis of the evidence produced found that both the girls were below 18 years as on July, 2013 and hence a child within the meaning of Section 2(1)(d) of the POCSO Act, 2012.

8. The primary attack by the learned defence Counsels was on the failure of the prosecution to establish the minority of the two girls. The learned Special Judge has relied upon the attested copies of the birth certificates (exhibit-7 and exhibit-8) of the two girls and the medical evidence of Dr. Keshav Giri, (P.W.20) the Radiologist of STNM Hospital to hold that the girls were minors. The learned Special Judge held that the seizure of both the birth certificates have been confirmed by Bishnu Kumar Rai (P.W.4) and Puran Rai (P.W.5). He also took into account the deposition of the father (P.W.1) and held that it would be safe to conclude that the girls were below 18 years as on July, 2013.

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9. The consistent and cogent evidence of the father (P.W.1) would have been the best evidence if it was supported by unimpeachable documents. The father (P.W.1) testified on 03.03.2014 that the girls aged 14 and 17 were his daughters. He did not however, identify their birth certificates but merely stated that the police had seized them from his residence. In cross-examination he admitted that he was not present when the birth certificates of his daughters were seized by the police. The father (P.W.1) was the one who lodged the FIR (exhibit-1) and he exhibited the same in Court stating that it was scribed by a fellow villager on his instructions. The FIR lodged on 25.07.2013 under the signature of the father (P.W.1) states that his two daughters aged 16 years and 12 years had gone missing. There was discrepancy in the age of the girls in the FIR and the deposition of the father (P.W.1) and it was necessary for the learned Special Judge to seek for unimpeachable document to establish their minority. This was needed because the father (P.W.1) gave two different ages for the girls and was, therefore, uncertain about their age. Neither did the prosecution explain the discrepancy in their evidence nor did the defence confront the father about the age of the girl as given by the father in the FIR (exhibit-1) and his deposition. The defence also did not deny the testimony of the father that the girls were aged 14 and 17 years. However, the discrepancy in the age is evident from the FIR and the

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deposition of the father which we cannot ignore. The elder girl (P.W.2) while deposing before Court on 04.03.2014 stated that she was 19 years then and that she was 17 years old in the year 2013. There is a difference of one year between the FIR and evidence of the elder girl (P.W.2) about her age. There is a similar difference of one year in the age of the elder girl (P.W.2) as given by her in her deposition and by her father recorded the same month. The elder girl (P.W.2) also stated that her date of birth is 25.11.1996. The attested birth certificate of the elder girl (P.W.2) however, records that her date of birth was 25.12.1996.

10. The younger girl (P.W.3) deposed on 09.03.2015 and stated that she was presently 15 years old. The age of the younger girl (P.W.3) given by the father (P.W.1) in the FIR and his deposition is consistent. The younger girl (P.W.3) however, stated that she did not know the date and month of her birth and whether her father (P.W.1) changed her year of birth to reduce her age in the birth certificate.

11. The two other evidences available therefore, are the attested copies of the birth certificates and the ossification test. The birth certificates were not identified by the father (P.W.1), the elder girl (P.W.2) or the younger girl (P.W.3). The learned Special Judge relied upon two seizure witnesses to confirm the seizure. Bishnu Kumar Rai (P.W.4) exhibited the

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birth certificates of the girls. However, Bishnu Kumar Rai (P.W.4) admitted in cross-examination that when he reached the police station the birth certificates were already on the table. He had stated in his examination that some police personnel from Ranipool Police Station had visited the residence of the girls and seized the birth certificates. Puran Rai (P.W.5), contrary to what Bishnu Kumar Rai (P.W.4) had stated in his examination-in-chief, deposed that the police had called him to the Ranipool Police Station to witness the seizure of the birth certificates of the two girls. In cross-examination, Puran Rai (P.W.5) deposed that apart from himself and the police there was no one else when the seizure of the birth certificates was made. The learned defence Counsel contested before us that attested copies of the said birth certificates which are marked as (exhibit-6 and exhibit-7) were not admissible. Bishnu Kumar Rai (P.W.4) exhibited the original birth certificates. This is clear from the fact that the defence Counsel had not protest against the exhibition of the said birth certificates. Further in the office note on the right margin of order sheet dated 25.03.2015 there is an endorsement which records “*receive original birth certificates of my daughters (younger girl (P.W.3) and elder girl (P.W.2))-sd-*”. It seems that the original birth certificates had been handed over to the father (P.W.1) of the girls and in its place the attested photocopies marked as (exhibit-6 and exhibit-7). In

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fact the Investigating Officer (P.W.19) testified having seized the birth certificates from the residence of the girls. He also deposed that exhibit-7/1 and exhibit-8 are the compared copies of the birth certificate. The birth certificates have been exhibited by two seizure witnesses who had no idea about the contents thereof. Neither the Registrar of Births & Deaths nor the authority who attested the photo copies of the birth certificates have been examined. The Investigating Officer (P.W.19) has candidly admitted in cross-examination that he has not verified the age of the girls from the Births & Deaths Cell of the concerned hospital from where the birth certificates were issued. He has also admitted that he did not visit the school where the girls last attended to ascertain their date of birth. The Investigating Officer (P.W.19) admitted that the age of the girls had been recorded different before various authorities. We are therefore, of the view that no reliance can be placed on the contents of the birth certificates due to the vacillating evidence.

12. The only evidence left to determine the age of the girls therefore, are the bone age estimation reports (exhibit-37 and exhibit-38). The learned Special Judge has also relied upon the same. It is settled proposition, as of now, that the medical evidence as to the age of a person, though a very useful guiding factor, is not conclusive and has to be considered along with other cogent evidence. Both the bone age

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estimation reports prepared by Dr. Keshav Giri (P.W.20) and his evidence are cryptic and do not qualify as expert opinions. Even if one was to accept the bone age estimation report (exhibit-38) the fact that the Dr. Keshav Giri (P.W.20) had opined that the upper age of the elder girl (P.W.2) may have been 17 would attract the ratio of the judgment of the Supreme Court in re: **Jaya Mala v. Govt. Of J & K¹** and the Court could take judicial notice that the margin of error in age ascertained by radiological examination is two years on either side. This would therefore, make the Court presume that the elder girl (P.W.2) was a major at the time of commission of the alleged offence. This would therefore, render the acquittal of Kiren Chettri and Laxuman Gurung unquestionable as bone age estimation report (exhibit-38) was evidence produced by the prosecution which they are bound by. The bone age estimation report (exhibit-37) also does not inspire confidence to saddle criminal liability on the basis of such cryptic report about the estimated age of the younger girl (P.W.3) too.

13. It has been repeatedly held by the Supreme Court that it is not feasible or desirable to lay down an abstract formula to determine the age of a person. Date of birth must be determined on the basis of material on record and on appreciation of evidence adduced by the parties. However it is

¹ (1982) 2 SCC 538

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mandatory for the prosecution to establish the minority of the victims by leading cogent and clinching evidence.

14. In the circumstances, we are of the firm view that the finding of the learned Special Judge that the birth certificates and the cryptic bone age estimation reports of the girls has proved their minority is legally untenable. Under the POCSO Act, 2012 a reverse burden of proof is imposed upon an accused. The requirement of proof of age of the girl to establish her minority must be strictly complied with and cogently proved.

15. The prosecution's failure to prove the minority of the girls by leading cogent evidence takes the case out of the rigours of the POCSO Act, 2012 as well as Section 363 IPC, 1860.

16. We now proceed to examine whether the prosecution has been able to establish the other ingredients of the offences charged against Kiren Chettri, Laxuman Gurung and Krishna Pradhan.

17. The identification of Kiren Chettri, Laxuman Gurung and Krishna Pradhan during Test Identification Parade was of no consequence as the girls had identified them at the police station itself after they were rounded up by the police. The police had rounded them up on the basis of the descriptions given by the girls. The girls thus, quite obviously, identified

them in Court with absolute certainty. In the natural course of human conduct this was but apparent. There is no discernible reason as to why they would be wrongly identified by the girls. The identification of Kiren Chettri, Laxuman Gurung and Krishna Pradhan by the girls is unquestionable even if we discard the Test Identification Parade.

Evidence against Kiren Chettri:

18. Kiren Chettri was charged for kidnapping the two minor girls from the lawful guardianship and committing an offence under Section 363 IPC, 1860 on the evening of 21.07.2013. He was also charged for committing penetrative sexual assault under Section 3 of the POCSO Act, 2012 on the elder girl (P.W.2) on the same night.

19. The elder girl (P.W.2) stated that the incident took place on the 23.06.2013. The younger girl (P.W.3) deposed that it happened on 22.06.2013. The FIR lodged by the father (P.W.1) is dated 25.07.2013 in which he stated that the girls had left home on 21.07.2013 and had not returned. The girls were examined by Dr. Paras Mani Karki (P.W.7) on 27.07.2013. Therefore, there is no certainty regarding the date of the commission of the alleged offence. The learned Special Judge found it impossible to convict Kiren Chettri due to the inconsistency in the evidence of the girls. The deposition of the girls suggests that they had got into the

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truck driven by Kiren Chettri on their own volition. Both the girls however, during their examination-in-chief insisted that Kiren Chettri did not stop the truck where they wanted to get off and instead proceeded towards Kalijhora, West Bengal in spite of their protest. However, during cross-examination the elder girl (P.W.2) admitted that Kiren Chettri stopped the truck when they waved for lift. She also admitted that he asked them where they were going, took them to Singtam where they desired to go and bought them food too. She also admitted that it was on their request that Kiren Chettri took them to Siliguri. The allegation against Kiren Chettri of taking or enticing the girls out of the keeping of their lawful guardianship without the consent of their father (P.W.1) which is the second ingredient of Section 363 IPC, 1860 cannot also stand.

20. The elder girl (P.W.2) has deposed that Kiren Chettri forced himself on her and had sexual intercourse and threatened to kill her if she did not relent after removing the younger girl (P.W.3) from the truck. She also alleged that he once again forced himself on her and had sexual intercourse with her while the younger girl (P.W.3) slept in the truck the next night at Teesta after coming back from Siliguri. The elder girl deposed that Kiren Chettri had taken them to Siliguri on their request as they were afraid to return home. The elder girl (P.W.2) also deposed that on the third day after they left

Teesta and reached 8th mile she sent her sister home to find out the situation there while she stayed back in the truck. The younger girl's (P.W.3) deposition about the elder girl (P.W.2) having sexual intercourse with Kiren Chettri is hearsay. The younger girl (P.W.3) however, admitted that Kiren Chettri did not force himself either on her or the elder girl (P.W.2) during the night they spent in the truck at Teesta. She also admitted that she did not witness Kiren Chettri sexually assaulting her sister. The allegation against Kiren Chettri of forcing himself on the elder girl (P.W.2) on two occasions and also threatening to kill her if she did not relent is palpably false. It would have been relevant to consider whether Kiren Chettri did have sexual intercourse with the elder girl (P.W.2) if her minority had been proved. The learned Special Judge found it would not be wise to take the evidence of the two girls as the absolute truth. The State has preferred the Appeal against a judgment of acquittal in favour of Kiren Chettri. Keeping in mind the parameters of the law while examining a case of acquittal we are of the view that the judgment of acquittal in favour of Kiren Chettri cannot be faulted.

Evidence against Laxuman Gurung and Krishna Pradhan:

21. Laxuman Gurung was charged for two offences. He was charged for the offence of kidnapping the two minor girls on

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24.07.2013 along with Krishna Pradhan from the lawful guardianship of their father thereby committing offence under Section 363 read with Section 34 IPC, 1860. He was also charged for committing penetrative sexual assault under Section 3 of the POCSO Act, 2012 on 24.07.2013 at Hotel Carnation at Singtam on the elder girl (P.W.2). The learned Special Judge has acquitted Laxuman Gurung of all charges.

22. According to the girls they had gone to Singtam with Laxuman Gurung after travelling with Kiren Chetti for two days on their own volition. No case has been made out to fasten liability of kidnapping from lawful guardianship of the father (P.W.1) against Laxuman Gurung more so when the minority of the girls have not been proved either.

23. Two charges were framed against Krishna Pradhan. The first charge was under Section 363 read with Section 34 IPC, 1860 for kidnapping the two minor girls on 24.07.2014 from the lawful guardianship of their father along with Laxman Gurung. The second charge was for commission of penetrative sexual assault on the younger girl (P.W.3) under Section 3 of the POCSO Act, 2012. The State has not preferred any Appeal against the impugned judgment of acquittal in favour of Krishna Pradhan for the offence of kidnapping the girls from the lawful guardianship of their

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father (P.W.1) and thus we do not propose to examine the same.

24. We shall therefore examine the charges of penetrative sexual assaults on the elder girl (P.W.2) by Laxuman Gurung and on the younger girl (P.W.3) by Krishna Pradhan both on 24.07.2013 at hotel Carnation at Singtam.

25. The learned Special Judge has come to the conclusion that the girls may have been used to sexual intercourse and may have had sexual intercourse with Krishna Pradhan voluntarily but taking into consideration their age (below 18 years) it amounts to an offence under the POCSO Act, 2012.

26. The deposition of the girls does suggest that they had voluntarily gone with Krishna Pradhan and Laxuman Gurung to Singtam. Both the girls depose about spending two nights with them in two hotels at Singtam. The elder girl (P.W.2) deposes that she spent the first night with Laxuman Gurung while the younger girl (P.W.3) stayed with Krishna Pradhan. According to her the next night she spent with Krishna Pradhan and the younger girl (P.W.3) spent it with Laxuman Gurung. The younger girl (P.W.3) also deposed that she spent the first night with Krishna Pradhan when he forced himself on her and had sexual intercourse. However, regarding the next day the younger girl (P.W.3) had a completely different

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story to tell. She deposed that the two girls spent the second night with each other in one room.

27. The two girls and their father (P.W.1) admit that they were habituated in travelling to different places hailing vehicles on the highway and coming back after few days. Both the girls hesitate to speak the truth though it is obvious that they were afraid of being reprimanded by the parents. It is also apparent that the parents of the girls were used to the girls travelling and staying out for several days. The father (P.W.1) candidly admitted about this fact in cross-examination.

28. There is a material difference between voluntarily indulging in sexual act and someone forcing themselves on the girls and having sexual intercourse. Whereas the POCSO Act, 2012 may make no difference and consent of minors would be no consent the reliability of the deposition would suffer when it is found that the girls in spite of having indulged in consensual sexual acts had sought to give it the colour of forceful sexual assault against the accused. We are of the view that the evidence of the girls is neither wholly reliable nor wholly unreliable. When the Court is faced with such situation it is essential that corroboration is necessarily sought for. In such circumstances, oral testimony of the girls

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alone would not be sufficient as it would be difficult to sift the grain from the chaff.

29. At this juncture it is important to examine the evidences which the learned Special Judge held corroborated the depositions of the girls resulting in the conviction of Krishna Pradhan.

30. A perusal of exhibit-13 shows that it is hotel Carnation's daily domestic visitors report register. One Krishna Pradhan's name is written therein with details of age, sex, father's name, address and occupation. However, the other two entries are not in the name of the girls. The learned Special Judge has held that the involvement of Krishna Pradhan has not only been confirmed by the girls but also been proved by the guest register. Ganesh Gurung (P.W.6), Sishir Lamichaney (P.W.8) and Poonam Lamichaney (P.W.13) have merely proved the seizure of the hotel guest register but did not prove the entries therein. They did not identify either Krishna Pradhan or Laxuman Gurung in Court. There is no explanation about the other two names which are not of the girls. There is no entry in the name of Laxuman Gurung in the guest register of hotel Carnation. None of the entries have been exhibited or proved by the prosecution witnesses. The guest register of carnation hotel does not corroborate the testimony of the girls against Laxuman Gurung and Krishna Pradhan.

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31. The charges framed against Laxuman Gurung and Krishna Pradhan were of commission of the offence at hotel Carantion on 24.07.2013 and not at Sangam hotel on 25.07.2013. The Learned Special Judge has however relied upon the guest register of hotel Sangam (exhibit-24) to hold Krishna Pradhan guilty too. The entries if proved along with the entries in the hotel guest register of hotel Carnation would have been relevant. Mel Maya Pradhan (P.W.12), Arun Subba (P.W.14) and Biswas Amirul (P.W.15) are the relevant witnesses. Mel Maya Pradhan (P.W.12) admitted that the entries made in the hotel guest register were not made by her. She also admitted that she was not certain that the entries therein were correct. Arun Subba (P.W.14) only deposed about the seizure of the guest register. Biswas Amirul (P.W.15) did not even know whether the police seized any hotel register or not. They also did not identify Krishna Pradhan or Laxuman Gurung in Court. The entries in the hotel guest register have not been exhibited or proved. These entries pressed into service are the entries dated 25.07.2013. It has the name of one Krishna Pradhan written therein. Had the prosecution proved the relevant entry in the hotel guest register it was permissible for the learned Special Judge to compare the signature therein with the admitted signature of Krishna Pradhan on the charge dated 23.09.2014. The Court under Section 73 of the Indian Evidence Act, 1872 is entitled

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to compare the disputed and admitted signature. However, besides producing the hotel guest register no attempt was even made to prove the relevant entries therein. If the prosecution had identified the relevant entry and exhibited the same the defence would have had occasion to dispute the entries. As this was not done the learned Special Judge could not have taken the entry therein as the “*disputed*” entry and compared the same at the time of writing judgment. It is seen that no expert opinion was obtained about the signature and handwriting appearing in the alleged entry in the hotel guest register. The other name entered therein was not of Laxuman Gurung but of one Laxmit Pradhan. The Investigating Officer has admitted that he had not found any entry in the hotel register pertaining to Laxuman Gurung and he also could not find any witness who had seen Laxuman Gurung check in or check out of the hotels. He honestly admitted that he did not seize any document which Krishna Pradhan or Kiren Chettri may have provided to the hotels where they checked in. Similarly the names of the girls are not entered therein. Thus, contrary to what the learned Special Judge has held neither the entries in the guest registers of Carnation hotel and hotel Sangam have been proved nor have they corroborated the statements of the girls. Suspicion do arise that Laxuman Gurung and the girls had used false names in the hotels and the entry in the name of Krishna Pradhan is in fact the

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Appellant in Criminal Appeal No. 31 of 2016. Suspicion however so strong cannot take place of proof.

32. The learned Special Judge has further held that the medical evidence supports the prosecution case that the girls were subjected to sexual intercourse.

33. Dr. Paras Mani Karki (P.W.7), the Gynaecologist on examination of the younger girl (P.W.3) recorded that on local examination no perennial injury was detected and the vaginal examination reflected that the hymen was ruptured and admitted two fingers at ease. He also recorded that no active bleeding was found at the time of examination. The Gynaecologist recorded that no motile or non-motile spermatozoa were seen in the vaginal and vulva wash. In his deposition in Court the Gynaecologist stated that on the basis of his examination and the pathological report he was of the opinion that there was no evidence of forcible sexual intercourse and accordingly he prepared the medico legal examination report (exhibit-14). This opinion is however, missing from the medico legal examination report (exhibit-14). In the medico legal examination report (exhibit-14) the Gynaecologist has recorded his observation but has not given his opinion. In cross-examination the Gynaecologist has admitted that during the time of the younger girl's (P.W.3) examination she was not bleeding from her genital and if she

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had been subjected to several sexual assaults as mentioned by her she would have sustained serious injuries in her genital. The Gynaecologist admitted that on his examination of the younger girl (P.W.3) as two fingers could be easily inserted in her genital he was of the opinion that she is used to having frequent sexual intercourse. He admitted that he did not find any injury over the part of her body including her genital and that he could not say whether she had had recent sexual intercourse. The Gynaecologist admitted that if the girl had recent forceful sexual intercourse, in all probability, there would have been bleeding and injury in a genital.

34. The Gynaecologist also examined the elder girl (P.W.2). He recorded that there were no injuries in her perennial area. The vaginal examination reflected torn hymen but no fresh bleeding and it admitted two fingers at ease. Based on his examination the Gynaecologist opined that there was no evidence of recent forcible sexual intercourse on the girl and accordingly he prepared the medico legal examination report (exhibit-14). The medico legal examination report (exhibit-14) however, does not record his opinion of there being no evidence of recent forcible sexual intercourse as narrated by him in his deposition. The Gynaecologist admitted that during the time of his examination the elder girl (P.W.2) was not bleeding from her genital and had she been subjected to several sexual assaults, as mentioned by her, she would have

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sustained serious injuries in her genital. He also admitted that on his examination of the elder girl (P.W.2) as two fingers could be easily inserted in her genital, he was of the opinion that she was used to frequent sexual intercourse. The Gynaecologist admitted that he did not find any injury over any part of her body including her genital and that on her examination he could not say whether she had had recent sexual intercourse. He admitted that if the girl had recent forceful sexual intercourse, in all probability there would have been bleeding and injury in her genital.

35. The allegations made by the girls were of recent forcible sexual intercourse. The medical evidence may have reflected possible previous sexual intercourse. However, the opinion of the Gynaecologist was that there was no evidence of recent forcible sexual intercourse. The girls were medically examined on 27.07.2013 after they were taken to the police station. The elder girl (P.W.2) stated that she had sexual intercourse twice with Kiren Chettri on the 23.06.2013, with Laxuman Gurung on the next day and with Krishna Pradhan the day after. The younger girl (P.W.3) deposed that she had sexual intercourse with Krishna Pradhan two days before they were found by their father (P.W.1) after which they were medically examined. The medical evidence does not point to any specific accused. The conclusion of the learned Special Judge that the medical evidence supports the prosecution case of the girls being

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subjected to sexual intercourse cannot fasten the verdict of guilt specifically upon any individual. There is no other corroborative evidence found relevant by the learned Special Judge or available.

36. The defence has however, examined six witnesses in their defence including the accused persons themselves. As we have held that the prosecution has failed to establish the minority of the girls we do not propose to examine their evidence in detail. However, Kiren Chettri, Laxuman Gurung and Krishna Pradhan have all deposed that they have been falsely implicated and denied the prosecution version. In fact the oral evidence of Kiren Chettri (D.W.1) and Laxuman Gurung (D.W.3) is sought to be corroborated by the oral evidence of Anand Pradhan (D.W.2) and Ajit Tamang (D.W.4) respectively. The evidence led by the defence has not been demolished by the prosecution. However, the cross-examination of the elder girl (P.W.2) by Kiren Chettri reflects that he had admitted having given lift to the two girls thus, rendering his defence false. This would definitely be a link. However, we have found that the prosecution has not been able to establish the offences charged against Kiren Chettri. Thus, even when we consider this link it is seen that the evidence produced against Kiren Chettri is not enough for the purpose of conviction. Similarly, if the prosecution had established the commission of the alleged offences by leading

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cogent and unflinching evidence then the oral evidence of the defence witnesses led by Laxuman Gurung and Krishna Pradhan could have been held to be false. However, we find that the evidence led by the prosecution in the present case wavering in proving the offences beyond reasonable doubt. In fact both the girls have also unequivocally admitted during their cross-examination that their parents had tutored them to give evidence against Kiren Chettri, Laxuman Gurung and Krishna Pradhan. The Investigating Officer admitted having recorded statement of both the girls under Section 161 Cr.P.C. 1973 on three occasions and that in the first statement given by the girls to him they had not mentioned about the accused persons committing sexual assault on them.

37. The acquittal of Laxuman Gurung cannot be faulted. We cannot also agree with the finding of the learned Special Judge that the involvement of Krishna Pradhan has been proved by the hotel guest registers and the medical evidence or that the statements of the girls against Krishna Pradhan have been corroborated by the hotel guest registers.

38. Consequently, we must give the benefit of doubt to Krishna Pradhan. The learned Special Judge has acquitted Kiren Chettri and Laxuman Gurung. We do not consider this a fit case to interfere with their acquittal.

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39. Resultantly, Criminal Appeal No. 31 of 2016 is allowed and the conviction of Krishna Pradhan is set aside. Krishna Pradhan's bail bonds are discharged. He shall be released forthwith if he is not required in any other case.

40. In Criminal Appeal No.07 of 2017 the acquittals of Kiren Chettri and Laxuman Gurung are upheld.

41. A copy of this judgment shall be sent to the Court of the learned Special Judge, POCSO Act, 2012, East District at Gangtok, East Sikkim.

(Bhaskar Raj Pradhan)
Judge
27.05.2019

(Meenakshi Madan Rai)
Judge
27.05.2019

to/

Approved for reporting: **yes.**
Internet: **yes.**