THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appeal Jurisdiction)

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

Criminal Appeal No. 36 of 2018

State of Sikkim .... Appellant

versus

1. Girjaman Rai @ Kami,
Son of Dhan Bahadur Rai,
Resident of Lower Lingchum,
West Sikkim.

2. Suk Bahadur Gurung @ Maila,
Son of Bir Bahadur Gurung,
Resident of Lower Sardung,
West Sikkim.

3. Ran Maya Gurung (Subba)
Wife of Suk Bahadur Gurung,
Resident of Lower Sardung,
West Sikkim .... Respondents

Appeal under Section 378 of the Code of Criminal Procedure, 1973.

Appearance:

Mr. Karma Thinlay, Additional Public Prosecutor with Mr. Thupden Youngda, Additional Public Prosecutor with Mr. S. K. Chettri, Assistant Public Prosecutor for the State-Appellant.

Mr. Manish Kumar Jain, Advocate for the Respondent Nos. 1 and 2.

J U D G M E N T
(09.05.2019)

Bhaskar Raj Pradhan, J

1. The present Appeal by the State raises two important issues relating to a criminal prosecution under the Protection

of Children from Sexual Offences Act, 2012 (POCSO Act, 2012). The first issue raised is regarding the quality of the victim's testimony. The second is regarding the quality of proof required to determine the age of a victim.

2. The State is aggrieved by the acquittal of the Respondents in a Sessions Trial Case against them. The first and the second Respondents were indicted for commission of gang penetrative sexual assault and penetrative sexual assault thereby making the victim (P.W.1) pregnant both amounting to aggravated penetrative sexual assaults under Section 5(g)/5(j)(ii) as well as for committing penetrative sexual assault under Section 3(a) of the (POCSO Act, 2012). In addition they also faced indictments for rape, criminal intimidation and wrongful confinement under Section 376-D/506/342 read with Section 34 of the Indian Penal Code, 1860 (IPC, 1860). The third Respondent was charged for committing aggravated penetrative sexual assault under Section 5(g) and for committing penetrative sexual assault as defined in Section 3(b) of the POCSO Act, 2012. In addition the third Respondent was also indicted for abetting the commission of rape, criminal intimidation and wrongful confinement under Section 109/376-D/506/342 read with Section 34 of the IPC, 1860.

3. Mr. Karma Thinlay Namgyal, learned Additional Public Prosecutor for the State-Appellant, during the hearing, with regard to the first issue, submitted that the testimony of a

victim of sexual offence is vital and unless there are compelling reasons which necessitated looking for corroboration, the Court should act on the testimony of the victim of the sexual assault alone to convict the Respondent. He relied upon the judgment of the Supreme Court in re: ***Acharaparambath Pradeepan v. State of Kerala***[1] and contended that a child witness undisputedly is competent to testify if he understands the question put to him and gives rational answers. With reference to the second issue he submitted that the learned Special Judge ought to have considered the birth certificate of the victim produced and exhibited by the prosecution to establish the minority of the victim. He hinged his case upon the judgment of the Supreme Court in re: ***Murugan alias Sattu v. State of Tamil Nadu***[2] and submitted that the prosecution could have relied upon the birth certificate to ascertain the age of the victim. Relying upon the judgment of the Supreme Court in re: ***Madamanchi Ramappa v. Muthaluru Bojjappa***[3] he further submitted that further proof of public document is not necessary.

4. *Per contra* Mr. Manish Kumar Jain, learned Advocate for the Respondents submitted that the impugned judgment dated 27.02.2018 was a reasoned judgment of acquittal based on scientific evidence confirming the innocence of the

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[1] **(2006) 13 SCC 643**
[2] **(2011) 6 SCC 111**
[3] **AIR 1963 SC 1633**

Respondents and thus call for no interference. He also submitted that the prosecution had failed to prove the minority of the victim as well. He relied upon the judgment of the Division Bench of this Court in re: ***Sancha Hang Limboo v. State of Sikkim***[4] and contended that admissibility of a document is one thing, while proof of its contents is an altogether different aspect.

5. We have been taken through the evidence produced during the trial. We have examined the same in great detail.

6. The prosecution case, briefly, was that the victim born to casual labourers on 10.02.2000 hailed from a poor scheduled caste family. The family lived in very poor economic condition. They did not even have television at home. Therefore, the victim used to frequently visit the second and third Respondent's house to watch television. Four/five months before the receipt of the First Information Report (FIR) (exhibit-8) the victim had gone to their house to watch television. While doing so the second Respondent arrived home. Later the first Respondent also arrived there. He was quite drunk. After dinner the third Respondent persuaded the victim to come and sleep in the next room. The second and third Respondents made the victim lie down on the mattress and removed her clothes. Thereafter, the third Respondent inserted her finger into her vagina and asked the first Respondent to rape her.

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[4] **SLR (2018) Sikkim 1**

The second Respondent also touched and fondled her breast but did not rape her. The victim did not cry as the Respondents warned her not to shout for help. After the incident the victim came to her house and slept. She did not disclose about the incident to anyone as she was scared after being threatened by the Respondents. On 10.01.2016 the victim had gone to the house of P.W.6 who saw the swollen abdomen of the victim. The victim told P.W.6 about the incident and how the three Respondents had committed sexual assault on her. The next day i.e. 11.01.2016 a urine test was conducted on the victim. The test confirmed her pregnancy and the fact that the pregnancy was due to the sexual assault on her. On 12.01.2016 the P.W.6 informed about it to the father (P.W.7) of the victim who lodged the FIR on 13.01.2016.

7. The learned Special Judge would come to the conclusion that prosecution had failed to establish the offence against the Respondents and therefore the benefit of doubt must go in their favour.

8. The learned Special Judge disbelieved the testimony of the victim on the basis of the DNA profiling and analysis done of the blood sample of the victim, her child and the first Respondent. The learned Special Judge noticed that prosecution had fixed the responsibility of the victim's pregnancy on the first Respondent as it was alleged that the victim had become pregnant due to the rape committed by

him. The learned Special Judge recorded that the DNA profiling and analysis had come to a firm conclusion that the victim was in fact the biological mother of the infant. However, the first Respondent was not the biological father opined the said report.

9. The learned Special Judge also held that under the POCSO Act, 2012 it is necessary for the prosecution to prove that the victim was a minor at the time of the incident. The prosecution had produced the birth certificate of the victim. The learned Special Judge came to the conclusion that neither the victim nor the father of the victim had deposed about her date of birth. In fact the father of the victim had categorically stated that he did not remember the date of birth of the victim. The learned Special Judge also noticed that the date of birth in the birth certificate was recorded as 10.02.2000 but the said birth certificate was procured only on 02.04.2009. The Registrar of Birth and Deaths was not examined to prove the birth certificate and that the mandate of the law laid down by the Supreme Court in ***Mahadeo v. State of Maharashtra***[5] had not been followed by the prosecution as the certificate of birth from the school first attendant or the matriculation certificate had also not been produced. The learned Special Judge thus concluded that the prosecution had also failed to prove the birth certificate. In view of the anomaly appearing in the birth

[5] **(2013) 14 SCC 637**

certificate itself the learned Special Judge opined that it would be unsafe to rely upon it and conclude that the date of birth of the victim was 10.02.2000 as the birth certificate was not admissible in evidence. It was held that no presumption as to the proof of the contents of the birth certificate could be drawn as laid down under Section 79 of the Indian Evidence Act, 1872.

10. The learned Special Judge examined whether the sole testimony of the victim could be relied upon to secure the conviction of the second and the third Respondents as well. The victim had implicated them for aiding, abetting and committing sexual assault on her. The learned Special Judge held that if a person comes to the Court with *"half cooked truth"* and does not reveal the correct facts and circumstances it would be highly unsafe for the Court to rely on such a testimony and punish the said Respondents for serious offences under the POCSO Act, 2012. It was held that in such circumstance it was necessary to look for corroboration. The learned Special Judge examined the evidence of the father and the mother (P.W.3) of the victim and held that the parents had not supported the case of the prosecution and they had failed to prove that the victim was sexually assaulted.

11. In re: ***Chandrappa v. State of Karnataka***[6] the Supreme Court reviewed the law on the power of the Appellate Court in

[6] **(2007) 4 SCC 415**

reversing a finding of acquittal and laid down the following guiding principles:

> ***"42.*** *From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:*
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> *(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.*
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> *(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.*
>
> *(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.*
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> *(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.*
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> *(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court.****"***

12. The Supreme Court has consistently followed the principles laid down in ***Chandrappa (supra).*** In re: ***Sampat Babso***

Kale and Another v. State of Maharashtra[7] following the said principles the Supreme Court, once again, held :

> ***"7****. With regard to the powers of an appellate court in an appeal against acquittal, the law is well established that the presumption of innocence which is attached to every accused person gets strengthened when such an accused is acquitted by the trial court and the High Court should not lightly interfere with the decision of the trial court which has recorded the evidence and observed the demeanour of witnesses. .....***"**

13. The prosecution alleges that the victim was a child and therefore the offences alleged were tried under the POCSO Act, 2012 as well. As rightly held by the learned Special Judge in a case punishable under the POCSO Act, 2012 it is necessary for the prosecution to prove that the victim was a minor below the age of 18 years at the time of the incident.

14. In re: ***Ramappa (supra)*** relied upon by the learned Counsel for the State the Supreme Court held that the admissibility of evidence is no doubt point of law, but once it is shown that the evidence on which courts of fact have acted was admissible and relevant, it is not open to a party feeling aggrieved by the findings recorded by the courts of fact to contend before the High Court in second appeal that the said evidence is not sufficient to justify the findings of fact in question. The Supreme Court further held that it has been always recognised that the sufficiency or adequacy of evidence to support a finding of fact is a matter for decision of the court of facts and

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[7] **2019 SCC OnLine SC 498**

cannot be agitated in second appeal. In the said case the certified copy of Changes Register had been exhibited during the trial without any objection raised to mode of proof either in Trial Court or in Appellate Court. It was in this context that the Supreme Court held that the High Court was in error in rejecting such document on the ground that it had not been proved.

15. Date of birth is a question of fact which must be cogently proved by leading evidence. The allegation of sexual assault coupled with the proof of minority of the victim drags an accused to the rigours of the POCSO Act, 2012 which mandates a reverse burden of proof. Therefore, it is absolutely vital to prove the minority of the victim. The *"best evidence rule"* must be necessarily followed while proving the contents of a birth certificate.

16. On this aspect regarding determination of the age of a victim in prosecutions under the POCSO Act, 2012 it is important to consider three judgments rendered by the Division Bench of this Court.

17. This Court in re: ***Mangala Mishra @ Dawa Tamang @ Jack v. State of Sikkim***[8] examined whether the prosecution was able to establish that the victim was a child, as defined under Section 2(d) of the POCSO Act, 2012. This Court examined the said birth certificate and held that it had not been established in

[8] **2018 SCC OnLine Sikk 215**

terms of the required legal parameters. Section 35 of the Indian Evidence Act, 1872 was examined and it was held that the entries mentioned in the said section must be established by necessary evidence. This Court held that it was essential to show that a document was prepared by the public servant in discharge of his official duty. This Court also examined Section 74 of the Indian Evidence Act, 1872 and the judgment of the Supreme Court in re: ***Madan Mohan Singh v. Rajni Kant***[9] which in turn examined various pronouncements of the Supreme Court and culled out the parameters for consideration as follows:

> *(i) A document may be admissible, but as to whether the entry contained therein has any probative value may still be required to be examined in the facts and circumstances of a particular case.*
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> *(ii) In several cases the Supreme Court had held that even if the entry was made in any official record by the official concerned in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has been made and as to 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.*
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> *(iii) Similarly in several other cases the Supreme Court had also held that such entries may be in any public document i.e. school register, voters' list or family register prepared under the Rules and Regulations, etc. in force, and may be admissible under Section 35 of the Evidence Act.*
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> *(iv) So far as the entries made in the official record by an official or person authorised in performance of official duties are concerned, they may be admissible under Section 35 of the Evidence Act but the Court has a right to examine their probative value. The authenticity of the entries would depend on whose information such entries stood recorded and what was his source of information. The entries in school register/ school leaving certificate require to be proved in accordance with law*

[9] **(2010) 9 SCC 209**

and the standard of proof required in such cases remained the same as in any other civil or criminal cases.

(v) For determining the age of a person, the best evidence is of his/her parents, if it is supported by unimpeachable documents. In case the date of birth depicted in the school register/certificate stands belied by the unimpeachable evidence of reliable persons and contemporaneous documents like the date of birth register of the Municipal Corporation, Government hospital/nursing home, etc., the entry in the school register is to be discarded.

(vi) If a person wants to rely on a particular date of birth and wants to press a document in service, he has to prove its authenticity in terms of Section 32(5) or Section 50, 51, 59, 60 and 61, etc. of the Evidence Act by examining a person having special means of knowledge, authenticity of date, time, etc. mentioned therein.

18. In re: ***Mangala Misra (supra)*** it was seen that the evidence produced by the prosecution was contradictory and no register of the Chief Registrar of Births and Deaths was furnished to substantiate the entries made in the birth certificate. It was also noticed that no witness was examined to prove the entries therein. Hence, this Court concluded that the prosecution had failed to establish that the victim was a child and rejected the purported birth certificate as proof of age.

19. In re: ***Sancha Hang Limboo (supra)*** this Court clarified that the birth certificate may be admissible under Section 35 of the Indian Evidence Act, 1872, but the Court is not barred from taking evidence to test the authenticity of the entries made therein. This Court held that admissibility of a document is one thing, while proof of its contents is an altogether different aspect. This Court also held that a birth certificate is a public

document falling under Section 74 of the Indian Evidence Act, 1872. It was noticed that objection as to the admissibility and mode of proof of document was not taken at the trial before it was received in evidence and marked as exhibit. Thus it was held that the birth certificate cannot be questioned at the appellate stage.

20. In re: ***Lakhi Ram Takbi v. State of Sikkim***[10] this Court held that the seizure of the birth certificate had been established and that it fulfilled the requirements of both Section 35 and Section 74 of the Indian Evidence Act, 1872. It was held that since no doubt was raised about the authenticity of the original birth certificate by way of examination of witnesses before the learned Trial Court this question could not be brought up before the Appellate Court since it was admitted without formal proof. In the said case the Headmaster of the School attended by the victim was examined as a prosecution witness who produced the original register maintained and exhibited the certified copy thereof. This Court noticed that the defence had failed to cross-examine regarding proof of entries therein and therefore, it was held that the certificate issued by the Headmaster which indicated the date of birth of the victim also was not demolished. Considering the evidences produced including the birth certificate, copy of the entries contained in the school register and the evidence of the Headmaster of the

[10] **Crl. Appeal No. 15 of 2017**

school this Court held that the prosecution had proved the victim's minority.

21. In re: ***Murugan (supra)*** the Supreme Court examined various documents i.e. the FIR, certificate of birth issued under Section 17 of the Registration of Births and Deaths Act, 1969 (the 1969 Act), the date of birth certificate issued by the Headmaster of the school as well as the evidence of the Radiologist and the test report opining that the victim's age was about 18 years. The Supreme Court also examined the oral evidences of various witnesses including the mother who had deposed about the date of birth being 14 years of age and the Headmistress of the school proving the certificate issued by the school. It was noticed that the birth certificate issued by the Municipality did not contain the name of the child. It was in this background that the Supreme Court held that documents made *ante litem motam* can be relied upon safely, when such documents are admissible under Section 35 of the Indian Evidence Act, 1872. It was noticed that although the registration was made one month after the birth the names of the parents and address were correctly mentioned and thus there was no reason to doubt the veracity of the said certificate. The Supreme Court also noticed that 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. It

was noticed that both those entries in the school register as well as in the Municipality had come much before the criminal prosecution started and those entries stood fully supported and corroborated by the evidence of the mother of the victim who had been cross-examined at length.

22. The common determinative factor which runs in the judgments examined *supra* is the consideration of the evidence produced to determine the age of the victim. The aim of the Court of facts is to come to a firm conclusion about the minority of the victim. Like all other facts in issue the determination of the age of the victim must necessarily be proved by cogent evidence needed in a criminal trial. The POCSO Act, 2012 does not diminish or dilute the Indian Evidence Act, 1872.

23. The birth certificate is a certificate issued under the 1969 Act. The Registrar of Births & Deaths appointed under the 1969 Act is required to enter information of the birth given to him either orally or otherwise in the register maintained. The informant who gives the information of the birth of a child is required to be provided free of charge an extract of the prescribed particulars under his hand from the register relating to such birth. The name of the informant is also to be recorded in the register maintained under the 1969 Act. Proved by its signatory i.e. the maker, the birth certificate would stand proved. The maker of the birth certificate would be able to

depose about the contents of the birth certificate based on the information recorded in the register maintained under the 1969 Act. If the register is therefore, produced and proved it would prove the authenticity of what is recorded in the birth certificate. This would prove that the contents of the birth certificate are the extract of the contents of the register maintained under the 1969 Act. The contents of the register, however, are entered from the information provided by the informant as required under the 1969 Act. The truth about the contents of the information recorded in the register however, is yet another matter. Usually the informant would be the parents or either of them. Section 8 of the 1969 Act provides for the duty of the persons specified therein to give or cause to be given, either orally or in writing, according to the best of their knowledge and belief, information to the Registrar of the several particulars required to be entered in the forms prescribed in respect of births. Section 10 of the 1969 Act imposes a duty upon certain persons to notify births. The person specified therein would have special knowledge about the birth of the child. The birth certificate issued under the 1969 Act is therefore an extract of the entries made in the register issued under Section 12 or 17 of the 1969 Act.

24. The birth of a child would be known to the parents and therefore the evidence of the parents has been accepted as best evidence if it is supported by unimpeachable documents.

Unfortunately in the present case the parents of the victim did not depose about the date of birth of the victim. Neither did the victim. The prosecution has not proved the birth certificate through its maker i.e. the Registrar of Births & Deaths as well. It was not even exhibited and proved by the parents of the victim.

25. There were two seizure witnesses of the birth certificate. P.W.2 and P.W.4 deposed that the birth certificate was seized on 14.01.2016 from the possession of the father of the victim. In cross-examination they admitted they did not know the date of birth of the alleged victim. The seizure memo (exhibit-4) which evidenced the seizure was proved by Mahendra Pradhan (P.W.16), the Station House Officer (SHO) of the Gyalshing Police Station, who had initially taken up the investigation of the case as well as P.W.2 and P.W.4. The father of the victim and the two seizure witnesses (P.W.2 and P.W.4) only proved the seizure of the birth certificate of the victim from the father but not the contents thereof.

26. The birth certificate is a public document and as per Section 77 of the Indian Evidence Act, 1872 certified copies of a public document may be produced in proof of its contents. In re: ***Om Prakash Berlia v. Unit Trust of India***[11] the Bombay High Court held that although secondary evidence is admissible of a public document by way of it certified copy, the party who

[11]**AIR 1983 Bombay 1**

produced it is not relieved of his obligations to prove the execution of document just as if the original has been produced, unless the case was covered by Section 90 of the Indian Evidence Act, 1872 or the legislature had otherwise expressly excepted it under the provisions of Indian Evidence Act, 1872. It was also held that a certified copy of a public document can be admitted as secondary evidence to prove only what the document states. The Bombay High Court thus held that the truth of what the document states must be separately established.

27. Mere production of a birth certificate without even authenticating the same by proving it through its maker is however, not enough to prove the age of the victim. The age of the victim must be proved by leading clinching evidence. The cogency of the evidence led would ultimately help the Court in determining the age of the victim.

28. The victim did not depose about her age or her date of birth during her examination. In cross-examination she admitted that she did not know her date of birth. The victim's parents did not depose about the victim's age or her date of birth. The father of the victim identified the birth certificate after he was declared hostile. However, during cross-examination by the defence the father of the victim stated that he did not know the date of birth of the victim. There is no evidence of either the parents or the victim herself about her

age. The cross-examination of the prosecution witnesses by the defence does not reflect that they had not raised any doubt about the age of the victim.

29. The Learned Special Judge found it unsafe to rely upon the birth certificate to come to a finding that the date of birth of the victim is 10.02.2000 since the parents as well as the victim did not know the victims age or her date of birth. The finding of the learned Special Judge that the prosecution had failed to prove the contents of the birth certificate cannot be faulted.

30. The FIR was lodged by the father of the victim. It was lodged on 13.01.2016 several months after the date of the incident as asserted by the prosecution. It alleged that the first and second Respondents lured and raped the victim few months ago. The formal FIR (exhibit-9) was registered and investigation taken up on the basis of said allegation which made out commission of cognizable offences. However, the victim's father during his deposition admitted that he did not know who lodged the FIR and that he was not aware of its contents. He also admitted that the contents of the written FIR and the formal FIR were not read over and explained to him. He deposed that he merely affixed his signature thereon as asked by one Kharanand Sharma and that he did not know if that person had any enmity with the Respondents. K. N. Sharma (P.W.12), *per contra*, deposed that he had ultimately

scribed the report about the alleged sexual assault on the victim by the first and second Respondents although he had declined to do so on his first request. The evidence of the father and K. N. Sharma (P.W.12) are not consistent regarding the lodging of the FIR and the surrounding circumstances. The hesitance of the father to stand by the FIR purportedly lodged by him regarding the alleged heinous crime committed against his own daughter must be noticed and renders the information suspect.

31. The allegation against the Respondents made by the victim was heinous but slightly different from the allegation made in the FIR. The FIR had alleged that both the first and the second respondent had lured and raped the victim. According to the victim's testimony the second respondent had not raped her. The allegation in her testimony was that the third Respondent called the victim to her house to watch television, grabbed one of her legs and asked the second Respondent to grab the other after which she inserted her finger inside the victim's vagina. The victim deposed that the third Respondent, thereafter, asked the first Respondent to rape the victim and the first Respondent raped her in front of the other two Respondents. The victim did not depose about the date, month or year when the alleged rape took place.

32. The victim did not disclose about commission of any sexual intercourse, rape or otherwise by any other person. The prosecution was certain it was only the first Respondent who had raped the victim on that particular day due to which the victim had become pregnant and ultimately delivered the infant. Apparently, the victim also did not tell anyone about the heinous act. The parents were completely unaware about it. They even learnt about the victim's pregnancy few months later. The mother of the victim deposed that she came to learn about the victim's pregnancy just two three months prior to the delivery of the victim's child. She did not depose that even then the victim had confided to her about the heinous act of rape and sexual assault allegedly committed on her. The victim's mother merely accused that they were responsible for her daughter's pregnancy. The father of the victim also did not depose about the victim disclosing to him or to his wife about the alleged incident. He merely deposed learning about the victim's pregnancy from P.W.6 and the pregnancy test conducted on her. In fact the prosecution had declared the victim's father hostile and cross-examined him. On such cross-examination the victim's father admitted having stated to the police that P.W.6 had informed him about the second and third Respondents having grabbed the victim and instigating the first Respondent to rape her. However, on being cross-examined by the defence the victim's father admitted that the

victim did not inform him about the alleged incident and that he had heard about it from P.W.6. He also admitted that P.W.6 had only told him about the victim's pregnancy and nothing about the involvement of the Respondents in the alleged heinous act. However, P.W.6 did not mention that the victim had told her about the incident as alleged. P.W.6 deposed that the victim, on finding out about her pregnancy after the test, told her that the first Respondent was responsible for her pregnancy. On the other hand the victim stated that she had only informed P.W.6 about her pregnancy and nothing else. The evidence of the father, P.W.6 and the victim on this aspect also does not inspire confidence needed in a criminal prosecution.

33. The pregnancy of the victim is sought to be proved by the evidence of Dr. Tukki D. Bhutia (P.W.5) the Gynaecologist posted at District Hospital, Gyalshing. She deposed that the investigation of the victim's urine sample resulted in testing positive for pregnancy. P.W.15 deposed that the victim was staying in the short stay home where she was the in-charge and on 26.04.2016 she had delivered a girl child at the District Hospital, Namchi. However, in cross-examination she admitted that she did not have any document to show either that the victim was staying at her short stay home or that she had delivered a girl child at District Hospital, Namchi. The victim testified that she had recently delivered a female child at

District Hospital, Namchi. However, the victim's mother strangely admitted during her cross-examination that she did not know that the victim was pregnant and had delivered a child. The victim's father too, strangely again, also admitted that he was not aware that his daughter was actually pregnant and had given birth to a daughter.

34. Bishal Rai (P.W.17) the then SDPO, Gyalshing, and the final Investigating Officer testified that the victim had delivered a baby girl on 26.04.2016. He also stated that to ascertain the paternity of the new born baby, the blood sample of the victim, her child and the first Respondent were collected by him and sent for DNA analysis. He however, did not exhibit the blood sample authentication forms purportedly taking blood samples of the victim, her baby and the first Respondent. Dr. Soma Roy (P.W.18), Scientist-B at CFSL, Kolkatta testified that she had received one sealed cloth parcel containing blood sample for DNA profiling to prove paternity on 18.07.2016. Dr. Soma Roy (P.W.18) exhibited the said blood sample authentication forms of the victim, her child and the first Respondent. The witnesses to the said blood sample authentication forms were however, not examined. Therefore, the factum of the blood samples having been taken from the victim, her child and the first Respondent stands not proved.

35. It is the case of the prosecution that DNA profiling was done on the blood samples of the victim, her child and the first

Respondent. Dr. Soma Roy examined the blood samples sent to her for forensic examination. The expert opinion is detailed. It cogently records the result of examination of the blood samples, the observations of the expert and the conclusions. On the basis of the test conducted by Dr. Soma Roy she concluded that the first Respondent was not the biological father of the baby although she was the daughter of the victim.

36. In the absence of clear evidence to connect the taking of the blood samples from the victim, her baby and the first Respondent it is difficult to connect the result of the forensic examination to the present prosecution. However, the prosecution is bound by the evidence it leads. More so when it renders the defence probable. It is the prosecution case that the blood samples examined by the expert were of the victim, her baby and the first Respondent. Dr. Soma Roy's conclusion that the first Respondent was not the biological father of the child born from the victim completely demolishes the substratum of the prosecution case. The prosecution as well as the victim had categorically and clearly insisted that it was the first Respondent and the first Respondent alone who had committed rape on her. Neither the victim nor the Investigating Officer disclosed about any other person having had sexual intercourse with the victim around the time. If the evidence of Dr. Soma Roy is to be believed then the father of the child born to the victim was someone else other than the first

Respondent. The victim admitted that during the same year the alleged incident had occurred she had stayed at Ranipool as a maid. She also admitted that a person not related to them used to come to their house and stay. The victim's mother testified that the victim had been given as a maid to a lady in Ranipool and that she had returned one or one and half months before they learnt about the pregnancy. The defence version that the father of the child could be someone else has been made probable by the prosecution evidence.

37. The prosecution has led no evidence to establish the intention of the three Respondents to commit such a heinous act. This gathers significance in the peculiar circumstances of the present prosecution since the victim's mother admitted that the victim used to often go to the house of the second and third Respondents to watch television, eat food and also sleep there. She admitted that the victim was treated like their own sister by the second and third Respondents and that the victim had never complained to her about any ill-treatment by them. In cross-examination the victim also admitted of sharing very good relationship with the second and third Respondents and that she would often go to their house to watch television and stay overnight. The victim did not attribute any reason for the said Respondents to commit such a heinous act. In such circumstances, it would be extremely difficult to hold them guilty based on the sole testimony of the victim and as rightly

held by the learned Special Judge, corroboration must be sought for. However, corroboration was wanting.

38. The allegation against the second Respondent by the victim was only of holding the victim's leg on the instruction of his wife, the third Respondent, who had held the other while she inserted her finger into the victim's vagina. The allegation therefore, was of one singular incident which involved all the three Respondents. In such circumstances, when the allegation against the first Respondent fails, it would be a travesty of justice to rely upon the same sole testimony of the victim to saddle the second Respondent for commission of gang penetrative sexual assault for making the victim pregnant as a consequence of sexual assault; for penetrative sexual assault as well as for rape. Similarly the charge against the third Respondent for commission of aggravated penetrative sexual assault; for commission of penetrative sexual assault; for abetting the commission of rape on the victim punishable; and for wrongful confinement must also fail. In so far as the charge of criminal intimidation against the Respondents is concerned the victim has not even made an allegation to the said effect. The said charge against all the Respondents also cannot stand.

39. The presumption of innocence now fortified by the Respondents acquittal has not been dislodged by the prosecution. The victim's testimony remains doubtful, the

prosecution version incomplete. The absolute truth has not been placed before the Court. The father of the victim's new born child remains unidentified. A delicate balance is required to be maintained between the presumption that a victim would not ordinarily lie and a presumption of innocence of the accused. The prosecution's failure to investigate further and tell the Court about the father of the victim's child is a major inconsistency and lacunae which shakes the very foundation of their case. The victim's version required corroboration in the present case. However, the evidence led by the prosecution failed to corroborate the testimony of the victim. In fact the expert opinion contradicted the testimony of the victim and rendered it improbable. Therefore, following the principles laid down in ***Chandrappa (supra)*** and ***Sampat Babso Kale (supra)*** we without any hesitance hold that the judgment of acquittal passed by the learned Special Judge does not merit any interference.

40. The appeal preferred by the State is dismissed.

(Bhaskar Raj Pradhan)
Judge
09.05.2019

(Meenakshi Madan Rai)
Judge
09.05.2019

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