THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appeal Jurisdiction)

DATED : 22nd SEPTEMBER, 2017

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

Crl.A. No.33 of 2016

Appellant : Robin Gurung,
Aged about 22 years,
S/o Chandra Kumar Gurung,
R/o Lower Nandugaon,
South Sikkim
[Presently in Central Prison,
Rongyek, East Sikkim].

versus

Respondent : State of Sikkim

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

Appearance

Mrs. Gita Bista, Advocate (Legal Aid Counsel) and Ms. Monika Rai, Advocate for the Appellant.

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

J U D G M E N T

Meenakshi Madan Rai, J.

1. Aggrieved by the Judgment and Order on Sentence, dated 30-09-2016, of the Learned Special Judge (POCSO Act, 2012), South Sikkim, at Namchi, in Sessions Trial (POCSO) Case No.21 of 2015, *State of Sikkim* vs. *Robin Gurung*, the instant Appeal has been preferred.

2. Vide the impugned Judgment, the Appellant was convicted of the offences charged with and sentenced as follows;

(i) *for the offence under Sections 5(l)/6 of the Protection of Children from Sexual Offences Act, 2012 (for short "POCSO Act"), to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.50,000/- (Rupees fifty thousand), only.*

(ii) *for the offence under Section 376(2)(i) and (n) of the IPC, to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.50,000/- (Rupees fifty thousand), only.*

(iii) *for the offence dated 29-08-2015, under Section 354B of the IPC,, to undergo simple imprisonment for a period of 4 years and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand), only.*

(iv) *for the offence dated 01-09-2015, under Section 354B of the IPC, to undergo simple imprisonment for a period of 4 years and to pay a fine of Rs.25,000/- (Rupees twenty-five thousand), only.*

All the sentences of fine bore a default stipulation, while the sentences of imprisonment were ordered to run concurrently, duly setting off the period of imprisonment already undergone.

3. The Prosecution case, before the Learned Trial Court was that, P.W.3, uncle of the victim, lodged Exhibit 5, a First Information Report (FIR), before the Jorethang Police Station, South Sikkim, on 30-09-2015, at 2200 hours, informing therein that the victim, P.W.1, had been sexually assaulted by one Robin Gurung, resident of Chisopani, South Sikkim, on 29-08-2015 and the incident was brought to his notice on 30-09-2015, giving rise to Exhibit 5.

4. The FIR was registered as JPS Case FIR No.54/2015, under Section 4 of the POCSO Act, against the said accused and investigation taken up, during the course of which, the victim was medically examined at the Jorethang Public Health Clinic with the consent of her guardian and later her statement recorded under Section 164 of the Code of Criminal Procedure, 1908 (for short "Cr.P.C."). The accused was arrested on 30-09-2015.

5. It transpired that the accused/Appellant (hereinafter "Appellant") aged about 20 years and the victim, a minor aged about 13 years, a student of 5th standard in a School, in West Sikkim, were in a relationship, for the past nine months. On 28-09-2015, the victim fell ill in her School complaining of nausea. The School Authorities suspected foul play, but as no revelation was forthcoming from the victim about any untoward incident, she was handed over to her legal guardian for further enquiry, upon which she revealed to P.W.5, that she had been sexually assaulted by the Appellant, in the jungle of Lambutar, Jorethang, on 29-08-2015 and 01-09-2015. Efforts were made by P.W.3 to settle the matter with the Appellant, in vain, which led to the delay in lodging the FIR. Accordingly, on completion of investigation, Charge-sheet was submitted against the Appellant under Section 4 of the POCSO Act.

6. The Learned Trial Court framed Charge against the Appellant under Section 5(l), punishable under Section 6 of the POCSO Act, Section 376(2)(i) and (n) of the IPC and Section 354B of the IPC on two counts, i.e., for the offence on 29-08-2017 and on 01-09-2017.

7. On a plea of "not guilty" by the Appellant, the trial commenced, which concluded with the conviction of the Appellant and the sentence, as detailed hereinabove.

8. Before this Court, it was argued by Learned Counsel for the Appellant that, the investigation and evidence has clearly revealed that both the Appellant and the victim were in a relationship and, therefore, the Appellant cannot be held at ransom for a consensual act. Drawing strength from evidence of P.W.10, the Doctor, who examined the victim, it was urged that the medical examination which was conducted on 01-10-2015, indicated no injuries on the person of the victim or her private parts, besides an old hymeneal tear, which under cross-examination of the witness, was found to be more than a month old. The Doctor had clarified that any hymeneal tear would take about three to four weeks to heal and had deposed that P.W.1 gave a history of sexual assault on 29-08-2015 and 28-09-2015. As the medical examination was conducted on 01-10-2015, a few days after the second assault, any injury ought to be fresh. The Appellant thus could not be held responsible for the injury which was evidently an old one.

9. It was next contended that the Learned Trial Court convicted the Appellant without considering the relevant materials in his favour, inasmuch as the age of the victim is doubtful, as the entries pertaining to P.W.1 in the concerned School Admission Register show that, her Birth Certificate had not been produced during her admission to School. Besides, the delay in lodging of the

FIR, after about a month of the alleged incident remains unexplained. It was also urged that the sole uncorroborated evidence of the victim does not suffice to convict the Appellant, thus, the Prosecution having failed to prove the case beyond a reasonable doubt, the impugned Order of conviction and sentence deserve to be set aside.

10. The *contra* argument raised by the Prosecution was that the delay in lodging of the FIR has been explained by P.W.3, as he has clearly stated in cross-examination that, he first came to learn about the incident on 30-09-2015, following which, they called the Appellant, presumably to settle the matter. On the Appellant's failure to appear before them, the FIR was lodged. Moreover, it is evident that P.W.3 could lodge Exhibit 5 only after he was informed of it by P.W.5. The victim, P.W.1, herself has admitted that subsequent to the sexual assault on her, by the Appellant on 29-08-2015, she did not disclose the incident to anyone apprehending dire consequences from the Appellant. Later, in the month of September 2015, when he repeated the sexual assault and she became unwell in School, she told the Principal about the matter, which was reported to the Police. That, the evidence of the victim and P.W.3, therefore, suffices to explain the delay in the lodging of the FIR. On this count, reliance was placed on ***State of Himachal Pradesh*** vs. ***Prem Singh***[1] wherein the Hon'ble Supreme Court has laid down that, the delay in lodging of the FIR in a case of sexual assault, cannot be equated with the case involving other offences, as several factors

[1] (2009) 1 SCC 420

weigh in the mind of the prosecutrix and her family members before coming to the Police Station to lodge a Complaint. That, in a tradition-bound society prevalent in India, especially in rural areas, it would be quite unsafe to throw out the Prosecution case merely on the ground that there is some delay in lodging the FIR.

11. Countering the argument pertaining to the age of the victim, it was canvassed that no cross-examination was conducted before the Learned Trial Court on this count and cannot be raised now before the Appellate Forum. The fact of sexual assault is established by the evidence of the victim herself, which being consistent, requires no corroboration. That, in view of the aforesaid circumstances, the impugned Judgment and Sentence requires no interference.

12. We have heard *in extenso* the rival contentions advanced by Learned Counsel for the parties, carefully perused the evidence and documents on record and the impugned Judgment and Order on Sentence.

13. The question that falls for consideration before this Court is, whether the Appellant had indeed committed the offences as charged or was he erroneously convicted by the Learned Trial Court.

14. It would but be appropriate to first consider the evidence on record. Thus, addressing the first argument of Learned Counsel for the Appellant that no physical injuries persisted on the

person of the victim, nor was the allegation of sexual assault borne out by medical evidence, we may carefully analyse the evidence of the victim, P.W.1, a minor, to whom the Learned Trial Court put some questions to gauge her ability to depose before the Court. On being so satisfied, her evidence was recorded. Admitting to a love affair with the Appellant, she went on to state that on 29-08-2015, during the day, he called her over the phone requiring her to meet him in a jungle at Lambutar, where he forcibly took off her clothes and sexually assaulted her by inserting his genital into hers. Thereafter, in the month of September 2015, he repeated the act with her once again at the same place. On the first occasion, she kept the incident under wraps, having been threatened with dire consequences by the Appellant if she spoke of it, while on the second occasion, he threatened to reveal the first incident to everyone, if she failed to meet him at the place of his choice. On her becoming unwell in School, the entire incident unravelled, leading to the lodging of Exhibit 5 and the medical examination. The occurrence of the two incidents of sexual assault remained uncontroverted, despite the grueling cross-examination that the victim was subjected to. The evidence of the victim that she felt nauseous in School, is supported by the evidence of P.W.9, the Principal of the School, where P.W.1 was studying. Following the illness of the victim she was handed over to P.W.5, her grandmother, after the Panchayat, P.W.4 was informed of the ill-health of P.W.1 and who reached the School. This is duly corroborated by P.W.4 himself. P.W.5 in her evidence has

supported the evidence of P.W.9 to the effect that, the victim fell ill on the relevant day in September 2015, and she, i.e., P.W.5, was summoned to the School on this account. The evidence of the aforesaid witnesses establishes the fact that the victim had fallen ill and on enquiry revealed the incidents of sexual assault to P.W.5.

15. At this juncture, we may turn to the evidence of P.W.10, the Doctor, who examined the victim on 01-10-2015, who had been forwarded to her with a history of having been sexually assaulted on 29-08-2015 and 28-09-2015. P.W.10 found no injuries on the person of P.W.1, but found a hymeneal tear probably more than a month old. According to her, any hymeneal tear would take about three to four weeks to heal. It was, on this aspect, that Learned Counsel for the Appellant sought to explain away the involvement of the Appellant as, according to the doctor, the last incident, as per history furnished to her, occurred on 28-09-2015. That, fresh injuries ought to have been detected on the private part of the victim in view of the date of medical examination, viz.; 01-10-2015, but only an old tear was found. While considering this argument, it is correct that no specific date of the second incident has been indicated, but the Court is in such circumstance to consider the provisions of Section 29 of the POCSO Act, which provides as follows;

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

Therefore, based on the evidence of P.W.1, it cannot be said that the victim was not subjected to sexual assault twice by the Appellant.

16. On perusal of the cross-examination of P.W.10 and on consideration of Exhibit 11, the Medicolegal Examination Report prepared by her, it is evident that she has stated specifically that "C*linical and pathological evidence do not suggest recent forceful or violent penetrative sexual act*". Therefore, what can be ruled out if at all, is use of violence, but the fact of commission of the sexual act persists. In this context, assuming on the basis of the evidence of P.W.1 and P.W.7, that P.W.1 was in an affair with the Appellant and assuming that the sexual act was consensual, her consent cannot absolve the adult Appellant of the criminal nature of his act, since the consent of a minor is not a valid consent.

17. In ***Satish Kumar Jayanti Lal Dabgar*** vs. ***State of Gujarat***[2] the facts under discussion therein was of the rape of a minor below 16 years of age, the Hon'ble Supreme Court, in this context, held, that when the prosecutrix is less than 16 years of age, Clause sixthly of Section 375 of the IPC would get attracted making her consent for sexual intercourse immaterial and inconsequential. We may briefly refer to the relevant clause, viz.; sixthly of Section 375 of the IPC;

> **"375. Rape**.—A man is said to commit "rape" if he—
>
> ……
>
> under circumstances falling under any of the seven following descriptions:—

[2] (2015) 7 SCC 359

> ……
>
> *Sixthly.*— With or without her consent, when she is under sixteen years of age.
>
> ……**"**

18. Reverting back, therefore, to the observation of the Hon'ble Supreme Court in ***Satish Kumar Jayanti Lal Dabgar***[2], it was held that;

> **"15.** The legislature has introduced the aforesaid provision with sound rationale and there is an important objective behind such a provision. It is considered that a minor is incapable of thinking rationally and giving any consent. For this reason, whether it is civil law or criminal law, the consent of a minor is not treated as valid consent. Here the provision is concerning a girl child who is not only minor but less than 16 years of age. A minor girl can be easily lured into giving consent for such an act without understanding the implications thereof. Such a consent, therefore, is treated as not an informed consent given after understanding the pros and cons as well as consequences of the intended action. Therefore, as a necessary corollary, duty is cast on the other person in not taking advantage of the so-called consent given by a girl who is less than 16 years of age. Even when there is a consent of a girl below 16 years, the other partner in the sexual act is treated as criminal who has committed the offence of rape. The law leaves no choice to him and he cannot plead that the act was consensual. A fortiori, the so-called consent of the prosecutrix below 16 years of age cannot be treated as mitigating circumstance.
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> **16.** Once we put the things in right perspective in the manner stated above, we have to treat it as a case where the appellant has committed rape of a minor girl which is regarded as a heinous crime. Such an act of sexual assault has to be abhorred. If the consent of minor is treated as a mitigating circumstance, it may lead to disastrous consequences. This view of ours gets strengthened when we keep in mind the letter and spirit behind the Protection of Children from Sexual Offences Act, 2012.**"**

This observation is clearly applicable to the circumstances in the case at hand.

19. Besides, her statement that he forcibly took off her clothes and had intercourse with her, despite her refusal cannot be

overlooked. P.W.10 may not have detected injuries on her body, but it is now settled by a catena of judicial pronouncements that every victim of rape is not expected to have injuries on her body, as evidence of the offence perpetrated on her.

20. The Hon'ble Supreme Court in ***Krishan*** vs. ***State of Haryana***[3] has ruled that it is not expected that every rape victim should have injuries on her body to prove her case. In ***State of Rajasthan*** vs. ***N. K. the Accused***[4], it held in Paragraph 18 as follows;

> **"18.** …….. The absence of visible marks of injuries on the person of the prosecutrix on the date of her medical examination would not necessarily mean that she had not suffered any injuries or that she had offered no resistance at the time of commission of the crime. Absence of injuries on the person of the prosecutrix is not necessarily an evidence of falsity of the allegation or an evidence of consent on the part of the prosecutrix. It will all depend on the facts and circumstances of each case. In *Sk. Zakir* [*Sk. Zakir* v. *State of Bihar*, (1983) 4 SCC 10 : 1983 SCC (Cri) 76 : 1983 Cri LJ 1285] absence of any injuries on the person of the prosecutrix, who was the helpless victim of rape, belonging to a backward community, living in a remote area not knowing the need of rushing to a doctor after the occurrence of the incident, was held not enough for discrediting the statement of the prosecutrix if the other evidence was believable. In *Balwant Singh* [*Balwant Singh* v. *State of Punjab*, (1987) 2 SCC 27 : 1987 SCC (Cri) 249 : 1987 Cri LJ 971] this Court held that every resistance need not necessarily be accompanied by some injury on the body of the victim; the prosecutrix being a girl of 19/20 years of age was not in the facts and circumstances of the case expected to offer such resistance as would cause injuries to her body. In *Karnel Singh* [*Karnel Singh* v. *State of M.P.*, (1995) 5 SCC 518 : 1995 SCC (Cri) 977] the prosecutrix was made to lie down on a pile of sand. This Court held that absence of marks of external injuries on the person of the prosecutrix cannot be adopted as a formula for inferring consent on the part of the prosecutrix and holding that she was a willing party to the act of sexual intercourse. It will all depend on the facts and circumstances of each case. A Judge of facts shall have to apply a common-sense rule while testing the reasonability of the prosecution case. The prosecutrix on account of age or infirmity or overpowered by fear or force may have been incapable of offering any resistance. She might have sustained injuries but on account of lapse of time the injuries might have healed and marks vanished.**"**

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[3] (2014) 13 SCC 574

[4] (2000) 5 SCC 30

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

21. While dealing with the next argument advanced by Learned Counsel for the Appellant, pertaining to the age of the victim, it would be essential to peruse Exhibit 3, the Birth Certificate, of the victim. The date of birth of the victim therein is recorded as "05-10-2002", while the date of registration of the birth, as per the document, evidently took place only on 19-05-2011. The Certificate, Exhibit 3, was issued on 02-06-2011. Firstly, no irregularity can be culled out on this count, as the victim and her family belong to a rural area, hence, ignorance of immediate registration of birth would be a mitigating factor. Besides, the incident took place in the months of August and September 2015, whereas Exhibit 3, the Certificate, was issued in the year 2011. In ***Murugan alias Settu*** vs. ***State of Tamil Nadu***[5] 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;

> **"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

[5] (2011) 6 SCC 111

> 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.**"**

Thus, the document having been prepared *ante litem motam*, it cannot be said that it was manufactured for the purposes of the instant case. In any event, the authenticity of this document was not questioned before the Learned Trial Court during the cross-examination of either P.W.1, P.W.3, P.W.5, P.W.9, P.W.14 or for that matter P.W.12, the Investigating Officer (for short "I.O."). The bogey of a fake document cannot be raised now at this stage.

22. Coming to the question of the delay in lodging of the FIR, which according to Learned Counsel for the Appellant, remains unexplained. We may briefly consider Exhibit 5 and the Prosecution evidence led on this count. Exhibit 5 has been lodged on 30-09-2015, alleging therein that, the victim had been raped by the Appellant on 29-08-2015. As per P.W.12, the I.O., his investigation revealed that the minor victim had been raped on two occasions at Lambutar jungle, but it was only on 28-09-2015 that she revealed the matter to her guardians. The evidence of P.W.12 must necessarily be read with the evidence of P.W.3, the witness who lodged Exhibit 5. He has, in close conformity with the evidence of P.W.12, stated that he came to learn of the incident on 30-09-2015. Along with his evidence, it would also be apposite to look into the evidence of P.W.1, the victim, who has stated that the first incident occurred on 29-08-2015 following which a threat held out by the Appellant of dire consequences, she did not divulge the incident to

any person. The second incident occurred in the month of September 2015. Evidently, the victim look ill in School on 28-09-2015, as already discussed. The evidence of P.W.10 indicates that the victim was examined by her on 01-10-2015 having been brought with allegedly history of sexual intercourse on "29-08-2015 and 28-09-2015". If P.W.9 had not been sensitive to the condition of P.W.1 and acted with promptness the incident would evidently have gone unreported. Pursuant thereto, P.W.1 informed P.W.5, who for her part, narrated the incident to P.W.3. Admittedly, P.W.3 on learning about the incident, called the Appellant, presumably to make an effort at settlement and on the Appellant's failure to present himself before them, lodged Exhibit 5 on 30-09-2015. Considering the gamut of the facts and circumstances the offence involved and the background of the victim and her relatives, who are villagers, we are of the considered opinion that the delay has been sufficiently explained.

23. 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

[6] (2015) 4 SCC 762

> view of this Court as has been held in State of Punjab v. Gurmit Singh [(1996) 2 SCC 384]."

Consequently, on the bedrock of this decision, it is evident that in the matter at hand, P.W.3 has weighed the advantages and dis-advantages of lodging the Complaint, coupled with the belated narration to him of the incident resulting in the delay.

24. The next argument advanced pertained to the conviction of the Appellant being based on the sole uncorroborated evidence of the victim. It is now well-settled Law that corroboration of the victim in such matters is not required if the evidence of the victim is consistent and inspires confidence. In ***Mohd. Imran Khan*** vs. ***State Government (NCT of Delhi)***[7] the Hon'ble Supreme Court opined as follows;

> **"22.** It is a trite law that a woman, who is the victim of sexual assault, is not an accomplice to the crime but is a victim of another person's lust. The prosecutrix stands at a higher pedestal than an injured witness as she suffers from emotional injury. Therefore, her evidence need not be tested with the same amount of suspicion as that of an accomplice. The Indian Evidence Act, 1872 (hereinafter called "the Evidence Act"), nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 of Evidence Act and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act similar to Illustration (*b*) to Section 114 which requires it to look for corroboration. If for some reason the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged,

[7] (2011) 10 SCC 192

the court should ordinarily have no hesitation in accepting her evidence.**"**

25. In ***State of Himachal Pradesh*** vs. ***Suresh Kumar alias DC***[8] it was observed as follows;

> **"20.** This Court observed as follows in *State of Rajasthan* v. *Om Prakash* [(2002) 5 SCC 745] at p.753: (SCC para 13)
>
> > "*13.* The conviction for offence under Section 376 IPC can be based on the sole testimony of a rape victim is a well-settled proposition. In *State of Punjab* v. *Gurmit Singh* [(1996) 2 SCC 384], referring to *State of Maharashtra* v. *Chandraprakash Kewalchand Jain* [(1990) 1 SCC 550] this Court held that it must not be overlooked that a woman or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. It has also been observed in the said decision by Dr Justice A.S. Anand (as His Lordship then was), speaking for the Court that the inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury.**"**
>
> > **21.** "*7.* In *Panchhi* v. *State of U.P.* [(1998) 7 SCC 177], it was observed by this Court that the evidence of a child witness cannot be rejected outright but the evidence must be evaluated carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. The court has to assess as to whether the statement of the victim before the court is the voluntary expression of the victim and that she was not under the influence of others." [as observed in *Mohd. Kalam* v. *State of Bihar, p.259, para 7*]
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> Relying on the aforesaid decision, in *Mohd. Kalam* v. *State of Bihar* [(2008) 7 SCC 257], this Court has observed that the evidence of a child cannot be rejected outrightly and the same must be evaluated with great circumspection. The aforesaid law laid down by this Court is squarely applicable in the facts and circumstances of the present case.**"**

[8] (2009) 16 SCC 697

26. In ***Dinesh alias Buddha*** vs. ***State of Rajasthan***[9], it was held by the Hon'ble Supreme in Paragraph 11 as follows;

> **"11.** In the Indian setting, refusal to act on the testimony of the victim of sexual assault in the absence of corroboration as a rule, is adding insult to injury. A girl or a woman in the tradition bound non-permissive society of India would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity had ever occurred. She would be conscious of the danger of being ostracized by the society and when in the face of these factors the crime is brought to light, there is inbuilt assurance that the charge is genuine rather than fabricated. Just as a witness who has sustained an injury, which is not shown or believed to be self-inflicted, is the best witness in the sense that he is least likely to exculpate the real offender, the evidence of a victim of sex offence is entitled to great weight, absence of corroboration notwithstanding. A woman or a girl who is raped is not an accomplice. Corroboration is not the sine qua non for conviction in a rape case. The observations of Vivian Bose, J. in *Rameshwar* v. *State of Rajasthan* [AIR 1952 SC 54] were: (SCR p.386)
>
> > "The rule, which according to the cases has hardened into one of law, is not that corroboration is essential before there can be a conviction but that the necessity of corroboration, as a matter of prudence, except where the circumstances make it safe to dispense with it, must be present to the mind of the judge,...".

Therefore, the evidence of P.W.1 being consistent and cogent about the occurrence of the incident of rape on two occasions inspires confidence and requires no corroboration.

27. Besides, Section 30 of the POCSO Act provides that;

> **"30. Presumption of culpable mental state**.—(1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability.
>
> *Explanation*.—In this section, "culpable mental state" includes intention, motive, knowledge of a fact and the belief in, or reason to believe, a fact.**"**

[9] (2006) 3 SCC 771

The Appellant has not availed of the provision of Section 30 of the POCSO Act, which affords him the opportunity of rebutting the presumption set out in Section 29 of the POCSO Act.

28. In the end result, after careful consideration of the evidence on record and the discussions which have ensued above, we are of the considered opinion that the finding of the Learned Trial Court brooks no interference and we consequently uphold the conviction and sentence meted out to the Appellant.

29. However, it may be remarked here that the charges have been framed rather unhappily with nary a care to detail. For the offence under Section 376(2)(i) and (n) of the IPC, a single charge has been framed, whereas it is evident that the said offences are individual offences, inasmuch as Section 376(2)(i) is for commission of rape on a woman when she is under 16 years of age, while the offence under Section 376(2)(n) is commission of rape repeatedly on the same woman. That apart, the Learned Trial Court while clubbing the offences committed on 29-08-2017 and 01-09-2017, stated that the sexual assault had been committed repeatedly on the said two occasions, when infact, the first incident occurred on 29-08-2015, the question of 'repeatedly' on that date, therefore, does not arise. Further, the penalty for the offence under Section 376(2)(i) and Section 376(2)(n) of the IPC, ought to have been separately awarded, but no attention has been bestowed on this detail. Considering that the Learned Trial Court has granted a composite sentence under Section 376(2)(i) and (n) of the IPC,

conclusion thereof would be that *the Court contemplated the sentences to run concurrently and just expressed the maximum sentence which the Court thought that the accused should undergo for what he had done*. Thus, much was held by the Hon'ble Allahabad High Court in ***Murlidhar Dalmia*** vs. ***State***[10] and is ostensibly applicable herein. It was further held therein that "*We, therefore, hold that the single sentence of imprisonment for the various offences for which an accused is convicted does not vitiate the trial, ...*". Needless to say we garner support from this observation.

30. Before concluding, we deem it absolutely necessary to point out that in ***Budha Singh Tamang*** vs. ***State of Sikkim***[11], it was observed by one of us (*Rai, J.*), that, the Protection of Children from Sexual Offences Act, 2012, is a special Act for protection of children from offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest of well being of the children. In this background, in Chapter VIII of Section 33(7) of the POCSO Act mandates, as follows;

> **"33. Procedure and powers of Special Court.**—……
>
> (7) The Special Court shall ensure that the identity of the child is not disclosed at any time during the course of investigation or trial:
>
> Provided that for reasons to be recorded in writing, the Special Court may permit such disclosure, if in its opinion such disclosure is in the interest of the child.
>
> *Explanation*.—For the purposes of this sub-section, the identity of the child shall include the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed.**"**

[10] AIR 1953 All 245
[11] Crl.A. No.26 of 2015 dated 19-04-2016

It was also observed therein that despite the said provision, the Learned Special Court has not taken any protective measures, as required by Law and has disclosed the name of the victim *et al* without recording reasons for the necessity of such disclosure.

31. On going through the records of the Judgment impugned herein, the saving grace is that the evidence of the victim was recorded on 04-02-2016 before the pronouncement of ***Budha Singh Tamang***[11], i.e., 19-04-2016. This, however, does not absolve the Learned Trial Court from bearing in mind, the provisions of the Act. It is a Special Court constituted for the purposes of the POCSO Act and it is only appropriate and expected that the said Special Court would be aware of the provisions and the purpose of enacting the POCSO Act before proceeding to divulge the name and address of the victim and her kith and kin. In the same Judgment, this Court has also referred to the decision of ***Premiya alias Prem Prakash*** vs. ***State of Rajasthan***[12], where it was held as follows;

> **"3.** We do not propose to mention the name of the victim.
>
> "*2.* … Section 228-A IPC makes disclosure of identity of victim of certain offences punishable. Printing or publishing the name or any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is, the restriction does not relate to printing or publication of judgment by the High Court or the Supreme Court. But keeping in view the social object of preventing social victimization or ostracism of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of this Court, the High Court or the lower court, the name of the victim should not be indicated."

[12] (2008) 10 SCC 81

> We have chosen to describe her as "the victim" in the judgment. (See *State of Karnataka* v. *Puttaraja* [(2004) 1 SCC 475], at SCC pp. 478-79, para 2 and *Dinesh* v. *State of Rajasthan* [(2006) 3 SCC 771]"

32. Later in time, this Court in ***Deo Kumar Rai*** vs. ***State of Sikkim***[13] again, one of us (*Pradhan, J.*), has observed as follows;

> **"110.** It is seen that the Investigating Officer while preparing the charge-sheet; the Learned Judicial Magistrate while recording the statement of Ms. R and Ms. S under Section 164 of Cr.P.C. and the Learned Special Judge while recoding the deposition of Ms. R and Ms. S were not conscious that the identity of the child cannot be compromised and that the identity of the child is not only the name of the child but the whole identity of the child, the identity of the child's family, school, relatives, neighbourhood or any other information by which the identity of the child may be revealed. It is urged that the guidelines laid down by this Court in ***Rabin Burman v. State of Sikkim*** [2017 SCC OnLine Sikk 143] be followed to ensure strict compliance of the law with regard to non disclosure of the identity of the child with the sensitivity the situation commands.**"**

33. The Learned Special Judge (POCSO Act, 2012), has to be circumspect and knowledgeable about the required provision of Law to prevent any *faux pas* and apply the Law stringently giving paramount importance to the safety and privacy of the victim.

34. That, having been said, the Learned Trial Court has awarded compensation of Rs.1,00,000/- (Rupees one lakh), only, to the victim, in terms of the Sikkim Compensation to Victims Dependents (Amendment) Schemes, 2013, which is found to be appropriate.

35. No order as to costs.

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[13] Crl. Appeal No. 13 of 2016 dated 13-09-2017

36. Copy of this Judgment be transmitted to all the Learned Trial Courts in Sikkim for information and compliance by the Learned Special Judges (POCSO Act, 2012).

37. Records of the Learned Trial Court be remitted forthwith.

sd/-
(Bhaskar Raj Pradhan)
Judge
22-09-2017

sd/-
(Meenakshi Madan Rai)
Judge
22-09-2017

Approved for reporting : **Yes**

Internet : **Yes**

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