THE HIGH COURT OF SIKKIM : GANGTOK

(Criminal Appellate Jurisdiction)

DATED: 25th October, 2017

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

Criminal Appeal No. 08 of 2017

Appellant : Lall Bahadur Kami, aged 24 years
Son of Man Bdr. Biswakarma,
Resident of Berfok,
West Sikkim.
[presently at State Central Jail, Rongyek, East Sikkim]

versus

Respondent : The State of Sikkim

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

Appearance

Mr. R.C. Sharma, Legal Aid Counsel for the Appellant.

Mr. J.B. Pradhan, Public Prosecutor with Mr. S.K. Chettri and Mrs. Pollin Rai, Assistant Public Prosecutors for the State-Respondent.

J U D G M E N T

Meenakshi Madan Rai, J.

1. This Appeal assails the Judgment and Order on Sentence of the Court of the Special Judge, (POCSO), West Sikkim at

Gyalshing, in S.T. (POCSO) Case No. 03 of 2016, dated 9.12.2016, in which the learned Trial Court convicted the Appellant of the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act'), and sentenced him to undergo rigorous imprisonment for a term of 12 years and fine, with a default clause of imprisonment. The Appellant was also convicted under Section 376(2)(j), Section 376(2)(l) and Section 376(2)(n) of the Indian Penal Code, 1860 (hereinafter "the IPC"), and sentenced to undergo rigorous imprisonment for a term of 12 years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only, with default stipulations, for each of these offences. The sentences were ordered to run concurrently, duly setting off the period of imprisonment already undergone by the Appellant.

2. The Prosecution alleges that the Appellant (aged about 23 years), a driver by profession, induced the allegedly disabled Victim, P.W.-1 (aged about 17 years 8 months), on 5.2.2016, at around 1700 hours when she was attending a marriage ceremony near Dentam Bazaar, to accompany him to a hotel. He gave her liquor and asked her to spend the night with him in the hotel. On her refusal, they set off for her home but en route, he sexually abused her on a footpath and then inside a deserted house. P.W.-4, her mother, made efforts to trace her that night, in vain. On 6.2.2016, at around 5 a.m., the Appellant left the place of occurrence while the Victim returned home. On enquiry by her mother, she revealed the incident to her, which led to the lodging of

the First Information Report (hereinafter "FIR") Exhibit-6 on 6.2.2016, with the assistance of P.W.-3, P.W.-5 and P.W.-6. The FIR was registered on the same day against the Appellant under Section 376 of the IPC read with Section 4 of the POCSO Act, investigation initiated and the Appellant arrested on 6.2.2016. On completion of investigation, Charge-Sheet was submitted against the Appellant under Sections 376/419 of the IPC read with Sections 5/5 (k), (l) and Section 6 of the POCSO Act. The learned Trial Court framed charges against the Appellant under Sections 5(k) and 5(l) of the POCSO Act, punishable under Section 6 of the POCSO Act and under Section 376(2)(j), Section 376(2)(l) and Section 376(2)(n) of the IPC. On a plea of "not guilty" by the Appellant, the Prosecution furnished and examined 15 witnesses, in a bid to establish its case beyond a reasonable doubt. After examining the Appellant under Section 313 of the Code of Criminal Procedure, 1973, hearing the arguments of the parties and considering the entire evidence on record, the learned Trial Court convicted and sentenced the Appellant as aforestated. Aggrieved, the Appellant is before this Court.

3. In Appeal, it is contended that contradictory evidence was adduced by the Prosecution witnesses, since it is the admission of P.W.-1 in her cross-examination that she did not relate the alleged incident to her mother, who on the contrary stated that when she enquired about the matter, her daughter told her that the Appellant forced her to accompany him and thereafter, committed the offence. Consequently, she lodged the FIR. That, an adverse

inference can also be drawn against the Prosecution, as according to P.W.-4, who was also at the venue informed her that P.W.-1 had received a phone call there but P.W.-4 was not made a Prosecution witness, neither was the hotel owner, where the accused allegedly took the Victim. According to the Victim, after leaving the hotel she used the 'Bhir Bato' ('Bhir' being the Nepali word for cliff), a concrete footpath and the Appellant started following her. Admittedly, people of the locality frequented the footpath while the deserted house is also located near the said footpath. Meaning thereby that had hue and cry been raised, it could easily have been heard, thus leading to the safe assumption that the Victim raised no cries for help. The Investigating Officer (for short 'I.O.') P.W-13, admitted that there are houses and a market between the alleged road and Dentam Bazaar but none had seen the Victim and the Appellant together. That, the evidence of the I.O. relied on by the Convicting Court, to the effect that the Appellant lured the Victim by continuously meeting her, buying her sweets and snacks, recharging her Cell Phone, lacks substantiation by evidence of other Prosecution witnesses or the Victim. The alleged overall disability of the Victim is disproved by the evidence of P.W.-6, as well as the Victim herself, making Exhibit-5, the 'Certificate for persons with disabilities', a suspect document. It was also advanced that if Exhibit-5, issued on 8.7.2014, is to be taken into consideration, the age of the Victim depicted therein is 18 years, in contradiction to Exhibit-4, the Birth Certificate of the Victim, which records her date of birth as 13.6.1998. That, P.W.-7, the Doctor who examined the Victim, has

testified that redness in the fourchette could be the result of infection or itching and the hymenal tear due to stretching and rigorous exercise. The Doctor also admitted that the blunt injury as mentioned in her Report, Exhibit-8, may occur by a fall from a height but the learned Trial Court failed to consider these aspects.

4. The next argument canvassed was concerning the authenticity of Exhibit-4, as P.W.-14, the person who issued Exhibit-4, has admitted that there is no document in the Court records to indicate the basis on which Exhibit-4 was issued to the Victim. Further, no Births and Deaths Register/Extract copy of Births and Deaths Register were maintained in the hospital where P.W.-14 was working and although, the Victim was allegedly born on 13.06.1998, P.W.-14 could proffer no explanation as to why her birth was registered only in 2004. P.W.-15, the person who prepared Exhibit-4, admitted that there was no document on the basis of which Exhibit-4 was issued in the name of the Victim, nor did he know the reason for its late issuance. The identity of the accused is not established with clarity, as the I.O. has deposed that the Victim had told everyone that she had a sexual relationship with a person named Santosh Chhetri *dada*, thereby making it nebulous as to whether the Accused is the same person who sexually violated the Victim.

5. That, in view of the aforesaid infirmities, the Judgment of the learned Trial Court is unsustainable in law, not only due to the

contradictions in the Prosecution evidence but for the reason that the learned Trial Court failed to comply with the well settled principle of Law, that if two views are possible, the one in favour of the accused must be preferred. Hence, the impugned Judgment of Conviction and the Order on Sentence of the learned Trial Court, be set aside and quashed.

6. *Per contra*, it was the contention of learned Public Prosecutor that it is no longer *res integra* that injuries are necessary on a victim of rape to establish that the offence had occurred. In support thereof, he drew the attention of this Court to ***Krishan vs. State of Haryana***[1]. That, the redness in the fourchette as stated by P.W.-7, in fact suffices to establish that the offence had indeed occurred. Countering the argument pertaining to the age of the Victim, it was submitted that the learned Trial Court while discussing Exhibit-4 has correctly relied on ***Mahadeo S/o Kerba Maske vs. State of Maharashtra and Another***[2]***.*** That, Exhibit-4, the Birth Certificate of the Victim, was duly scrutinized by the learned Trial Court, who concluded that it was neither fabricated nor manufactured and that the delayed registration could be the result of the ignorance of the village dwelling parents. In any event, the Birth Certificate of the Victim was not contested at the time of evidence before the learned Trial Court and cannot be raised at this stage. That, the statement of the victim pertaining to the incident requires no corroboration. On

[1] (2014) 13 SCC 574

[2] (2013) 14 SCC 637

this count, reliance was placed on ***State of H.P. vs. Asha Ram***[3] and ***State of Himachal Pradesh vs. Suresh Kumar alias DC***[4].

7. The learned Public Prosecutor would further contend that there are no contradictions in the evidence of the Victim and P.W.-4, as would be evident if the testimony of P.W-4 and P.W.-5 are read in consonance with each other. So far as the disability of the Victim is concerned, the learned Trial Court has found that Exhibit-5 was duly issued by the State Medical Board and bears the signatures and seals of three Members of the Board as well as the seal of the Social Welfare Division, Social Justice Empowerment & Welfare Department, Government of Sikkim and the Victim was found to have 70% overall disability. This was confirmed by the evidence of P.W.-7, the Doctor who examined the Victim and found her to be mentally challenged. However, in view of the age of the Victim indicated on Exhibit-5, being inconsistent with Exhibit-4, which is the appropriate document, it was submitted that the Prosecution does not seek to rely on Exhibit-5. Hence, the Appeal be dismissed.

8. The opposing arguments were heard at length, records of the learned Trial Court perused as also the impugned Judgment.

9. The questions that arise for consideration are;

(1) Whether the Prosecution has been successful in establishing that the age of the Victim was 17 years 8 months at the time of the incident, i.e. on 5.2.2016?

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[3] (2005) 13 SCC 766

[4] (2009) 16 SCC 697

(2) Whether the learned Trial Court was correct in convicting the Appellant as charged?

10. The Prosecution, in order to establish the Victim's age, has placed reliance on Exhibit-4, which is the Birth Certificate issued by the Chief Registrar of Births and Deaths, Health and Family Welfare Department, Government of Sikkim. The learned Trial Court while discussing this document, has placed reliance on ***Mahadeo S/o Kerba Maske vs. State of Maharashtra and Another*** (supra), wherein reference was made to the statutory provisions contained in the Juvenile Justice (Care and Protection of Children) Rules, 2007, where under Rule 12 the procedure to be followed in determining the age of the juvenile have been set out. Rule 12(3) of the said Rules states that;

> *"12. (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, by the Committee by seeking evidence by obtaining-*
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> *(a)(i) the matriculation or equivalent certificates, if available; and in the absence whereof;*
>
> *(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;*
>
> *(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat."*

The Hon'ble Supreme Court observed that in the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of the Victim as well.

11. In ***Murugan alias Settu vs. State of Tamil Nadu***[5], the Hon'ble Supreme Court held as follows;

> *"**25.** This Court in Madan Mohan Singh & Ors. v. Rajni Kant & Anr. [AIR 2010 SC 2933], considered a large number of judgments including Brij Mojan Singh v. Priya Brat Narain Sinha [AIR 1965 SC 282], Birad Mal Singhvi v. Anand Purohit [AIR 1988 SC 1796], Updesh Kumar v. Prithvi Singh [AIR 2001 SC 703], State of Punjab v. Mohinder Singh [AIR 2005 SC 1868], Vishnu v. State of Maharashtra [AIR 2006 SC 508], Satpal Singh v. State of Haryana [(2010) 8 SCC 714], **and came to the conclusion that while considering such an issue and documents admissible under Section 35 of the Evidence Act, the court has a right to examine the probative value of the contents of the document. The authenticity of entries may also depend on whose information such entry stood recorded and what was his source of information, meaning thereby, that such document may also require corroboration in some cases."***

12. In ***Birad Mal Singhvi v. Anand Purohit***[6], the Hon'ble Supreme Court observed as follows;

> *"**15.** The High Court held that in view of the entries contained in the Exs. 8, 9, 10, 11 and 12 proved by Anantram Sharma PW 3 and Kailash Chandra Taparia PW 5, the date of birth of Hukmichand and Suraj Prakash Joshi was proved and on the assumption it held that two candidates had attained more than 25 years of age on the date of their nomination. In our opinion the High Court committed serious error. Section 35 of the Indian Evidence Act lays down that entry in any public, official book, register, record stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty specially enjoined by the law of the country is itself the relevant fact. To render a document admissible under Section 35, three conditions must be satisfied, firstly, entry that is relied on must be one in a public or other official book, register or record, secondly, it must be an entry stating a fact in issue or relevant fact, and thirdly, it must be made by a public servant in discharge of his official duty, or any other person in performance of a duty specially enjoined by law. An entry relating to date of birth made in the school register is relevant and admissible under Section 35 of the Act but the entry regarding to the age of a person*

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[5] (2011) 6 SCC 111

[6] AIR 1988 SC 1796

> *in a school register is of not much evidentiary value to prove the age of the person in the absence of material on which the age was recorded. In Raja Janaki Nath Roy v. Jyotish Chandra Acharya Chowdhury, AIR 1941 Cal 41 a Division Bench of the Calcutta High Court discarded the entry in school register about the age of a party to the suit on the ground that there was no evidence to show on what material the entry in the register about the age of the plaintiff was made. The principle so laid down has been accepted by almost all the High Courts in the country see Jagan Nath v. Moti Ram, AIR 1951 Punjab 377, Sakhi Ram v. Presiding Officer, Labour Court, North Bihar, Muzzafarpur, AIR 1966 Patna 459, Ghanchi Vora Samsuddin Isabhai v. State of Gujarat, AIR 1970 Guj 178 and Radha Kishan Tickoo v. Bhushan Lal Tickoo, AIR 1971 J & K 62. In addition to these decisions the High Courts of Allahabad, Bombay, Madras have considered the question of probative value of an entry regarding the date of birth made in the scholar's register on in (sic) school certificate in election cases. The Courts have consistently held that the date of birth mentioned in the scholar's register of secondary school certificate has no probative value unless either the parents are examined or the person on whose information the entry may have been made, is examined, see Jagdamba Prasad v. Sri Jagannath Prasad, (1969) 42 ELR 465 (All), K. Paramalai v. L. M. Alangaram, (1967) 31 ELR 401 (Mad), Krishna Rao Maharu Patil v. Onkar Narayan Wagh, (1958) 14 ELR 386 (Bom)."*
>
> [emphasis supplied]

13. In ***Alamelu and Another vs. State represented by Inspector of Police***[7], the Hon'ble Supreme Court held as follows;

> *"**43.** The same proposition of law is reiterated by this Court in Narbada Devi Gupta v. Birendra Kumar Jaiswal [(2003) 8 SCC 745] where this Court observed as follows: (SCC p. 751, para 16)*
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> > *"16. … The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the evidence of those persons who can vouch safe for the truth of the facts in issue.""*

[7] (2011) 2 SCC 385

14. In **CIDCO vs. Vasudha Gorakhnath Mandevlekar**[8], it was held that

> *"18. The deaths and births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent."*

Reliance was also placed on **Birad Mal Singhvi v. Anand Purohit's** Judgment (supra).

15. The above ratiocinations have clarified the stand pertaining to entries in public documents, leaving the Courts the prerogative of testing the authenticity of an entry regarding the date of birth of a person in a public document. We may now usefully refer to the provisions of Sections 35 and Section 74 of the Indian Evidence Act, 1872, which reads as follows;

> "**35. Relevancy of entry in public record or an electronic record made in performance of duty.** - Any entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact."

16. And Section 74 of the Indian Evidence Act, 1872, defines public documents as follows;

> "**74. Public documents**.—The following documents are public documents:-
> (1) Documents forming the acts, or records of the acts—

[8] (2009) 7 SCC 283

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, of any part of India or of the Commonwealth, or of a foreign country;

(2) Public records kept in any State of private documents."

The provisions are self explanatory.

17. The reason why entries made by a public servant in a public register or record stating a fact in issue or a relevant fact as per Section 35 supra, has been made relevant is that when such entries are made in the discharge of duties of a public servant, the presumption is of its correctness. Consequently, a public document must be shown to have been prepared by a public servant in the discharge of his official duty and form the act and records of a public officer. Such documents can be accepted in evidence, subject to the riders that can be culled out from the afore quoted judicial pronouncements.

18. Traversing the evidence furnished with regard to the age of the Victim, Exhibit-4, the Birth Certificate, records her date of birth as 13.6.1998. On the date of the alleged offence *viz*; 5.2.2016, the Victim would be 17 years 8 months. Although, it was contended by the State-Respondent that this document was unquestioned during trial, the evidence on record divulges otherwise. As per the evidence of P.W.-3, P.W.-4 and P.W.-5, Exhibit-4 was seized from the possession of P.W.-4, the Victim's mother. However, neither the

School Admission Register nor the Register of Births and Deaths or the Class-X Marks Statement of the Victim was seized by the I.O. Thus, Exhibit-4 was seized in isolation. That, having been said, can reliance be placed on this document solely because it bears an official stamp and seal of the Registrar of Births and Deaths, West Sikkim, which is the line of reasoning adopted by the learned Trial Court. In our considered opinion, the answer would be in the negative as none of the Prosecution witnesses have been able to vouchsafe for the truth of the contents thereof.

19. P.W.-14, who was the Medical Officer at Dentam Primary Health Centre, identified his signature on Exhibit-4 and claimed to have put his signature therein after due verification of the record. Which record he is referring to has not been revealed. Admittedly, no Births and Deaths Register was furnished before the learned Trial Court by the Prosecution, although such a Register as per the witness, is maintained in their hospital. This ground itself would suffice to draw an adverse inference against the Prosecution under illustration (g) of Section 114 of the Evidence Act. Needless, therefore, to remark that his evidence sheds no light on the preparation of Exhibit-4. P.W.-15, the Dealing Assistant at Dentam Primary Health Centre at the relevant time, claims to have prepared Exhibit-4 in his own handwriting on the orders of the Sub-Divisional Magistrate, Gyalshing, West Sikkim. The Sub-Divisional Magistrate has not been examined as a witness to substantiate this statement. No reasons have been put forth as to why the Sub-Divisional

Magistrate, Gyalshing, would order preparation of Exhibit-4. P.W.-15 admits to the lack of any document in the Court, to establish the basis for preparation of Exhibit-4. P.W.-4 has not deposed that Exhibit-4 was prepared as per her instructions or that of her late husband. As per P.W.-4, the Victim is studying in Class-X at Gyalshing, duly corroborated by P.W.-1, the Victim, who claims to have taken her Class-X exams from an Open School at Gyalshing and that she was in possession of her Class-X Marks Statement. But the existence of this document can only be assumed, in the absence of its seizure. Learned Public Prosecutor sought to wash his hands off Exhibit-5, the "Certificate for persons with disabilities", issued by the STNM hospital, Gangtok on 8.7.2014, where the age of the Victim has been recorded as 18 years, considering the anomaly in the age of the Victim in the document with that recorded in Exhibit-4. This is indeed an incongruous stand, as the Prosecution cannot rely on a document in the Trial Court and seek to fend it off, if the contents appear inconvenient and realization dawns at the Appellate stage. All the same, we hasten to add that Exhibit-5 is disregarded by this Court for reasons enumerated later.

20. This Court is conscious and aware that the Birth Certificate of the Victim gains precedence over every other document as proof of age, however, we may beneficially refer to the Judgments hereinabove and hold that the entry in the Birth Certificate can be sought to be substantiated by entries made in the Births and Deaths Register, duly entered on the instructions of the

parents or legal guardians. Such a Register is admittedly maintained in the Dentam Primary Health Centre, where Exhibit-4 was prepared but was not produced for the perusal of the learned Trial Court for unexplained reasons. We are, thus, constrained to hold that the evidence furnished casts a shadow on the probative value of Exhibit-4, thereby rendering it unfit for consideration.

21. While dealing with Exhibit-5, although the learned Public Prosecutor sought to disregard this document for the aforesaid reasons, in doing so he would also be disregarding the fact that the document certifies the Victim to be 70% overall disabled. When we proceed to examine the evidence of P.W.-4, although she has correctly identified Exhibit-5, she has totally neglected and failed to establish that her daughter was disabled, for that matter neither has P.W.-5. The Victim's Aunt, P.W.-6, under cross-examination, negatives any speech, hearing or general behavioural disabilities of P.W.-1. The Doctor, P.W.-7, who examined the Victim stated that she found the Victim to be "mentally challenged" but failed to elucidate the point. More importantly, when the Victim was examined as per the provisions of Section 33 of the POCSO Act and Section 118 of the Indian Evidence Act, 1872, prior to recording her evidence, the learned Judge recorded that "*Having examined the witness, I find that she is not prevented from understanding the questions put to her despite her age. She has given rational answers to the questions put to her and is, therefore, found competent to testify*". This indicates that the Victim apparently showed no signs of

being challenged in any manner. The Prosecution for its part, on examining the Victim, did not draw out any evidence as proof of the Victim's mental or physical disability. The elephant in the room of course is the fact that, Exhibit-5 has not been proved as per the provisions of the Indian Evidence Act, 1872. Although, three doctors have signed on it, none was produced as a Prosecution witness, neither was the concerned Register or a certified copy of the relevant entry furnished before the learned Trial Court, negating the document of any probative value and undeserving of consideration.

22. From a summation of the Prosecution evidence and the discussions above, it is clear that the age of the Victim has not been established as 17 years 8 months. It would be trite to point out that the Prosecution is required to prove its case beyond a reasonable doubt, which has not been adhered to for the purposes of Exhibit-4.

23. What calls for consideration next is whether the Victim was forcefully sexually assaulted by the accused? From the evidence of P.W.-1, it emerges that she was in the house of one Santosh Daju at Ganger Busty, when the appellant called her on her Mobile phone and asked her to come to the road. She went to meet him at the said location, leaving behind one "Antaray Baje" whom she had accompanied to the wedding. Pausing here for a moment, we may mull on the fact that after the phone call, P.W.-1 has voluntarily gone to the Appellant, alone, leaving behind the senior citizen she had accompanied. Thereafter, according to her, the Appellant took

her to a hotel, forced her to drink alcohol and asked her to sleep with him in the hotel to which she disagreed and she left the hotel. She did not raise an alarm at the hotel despite the disagreeable suggestion made to her by the Appellant. No person from the hotel, wended their way into the Prosecution list of witnesses. As per her, he followed her and then sexually assaulted her. It is not denied that she had a Mobile phone in her possession but she did not resort to its use to seek help. It is not her case that the Appellant physically confined or constrained her at any point of time. According to the I.O., the Appellant called the Victim at around 5 p.m., which is in contradiction to 9 p.m., as testified by the P.W.-1. As per P.W.4, the Victim returned home around 5 a.m., the next morning, i.e. 6.2.2016, but she did not deem it worthwhile to inform P.W.-4 of any harrowing incident nor did P.W.-4 find P.W.-1 traumatized. It is also in the evidence of P.W.-4 that after returning home, P.W.-1 went to sleep and woke up around 7 a.m. and started studying, thereby displaying no untoward behaviour or indicating that she had indeed been sexually assaulted against her will. Assuming from the evidence of P.W.-1 that the offence occurred between 9 p.m. to 10 p.m. on 5.2.2016, the Prosecution has failed in its duty to establish the whereabouts of the Victim thereafter till 5 a.m. of 6.2.2016. The Victim has not claimed that the Appellant held her physically captive during the intervening hours, leading to the inevitable conclusion that she remained voluntarily with the Appellant.

24. The incident allegedly occurred on 5.2.2016, the Appellant was apparently arrested on 6.2.2016, the Victim was medically examined on 7.2.2016, on the third day of the incident. The Doctor found redness in the fourchette but opined that it may also be caused due to infection/itching. Although, the undergarments of the Victim and the Accused, MO-I and MO-II respectively, were forwarded for forensic examination, no blood, semen or other body fluid was detected in the said Exhibits, as revealed in Exhibit-15. It is no one's case that the Appellant absconded after the incident, this is a mitigating circumstance. In view of the foregoing discussions, there appears to be no forceful sexual assault on the Victim.

25. In consideration of the entirety of the facts and circumstances, evidence on record and the ensuing discussions, we find that the learned Trial Court erred in convicting the Appellant. Consequently, the impugned Judgment and Order on Sentence of the learned Trial Court is set aside.

26. The Appellant is acquitted of all the offences charged with. He be set at liberty forthwith, if not involved in any other matter.

27. Appeal allowed.

28. Fine, if any deposited by the Appellant in terms of the impugned Order on Sentence be reimbursed to him by the concerned authorities within a month from today.

29. Copy of this Judgment be sent to the Court of the Special Judge (POCSO), West Sikkim at Gyalshing, for information and compliance.

30. Records of the learned Trial Court be remitted forthwith.

Sd/-
(Bhaskar Raj Pradhan)
Judge
25.10.2017

Sd/-
(Meenakshi Madan Rai)
Judge
25.10.2017

Approved for reporting : Yes

Internet : Yes

bp/avi