IN THE HIGH COURT OF SIKKIM: GANGTOK

(Criminal Appellate Jurisdiction)

SINGLE BENCH: - BHASKAR RAJ PRADHAN, JUDGE.

Crl. Appeal No. 13 of 2016

Deo Kumar Rai

… Appellant.

Versus

State of Sikkim … Respondent.

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

Appearance:

Mr. Zangpo Sherpa, Legal Aid Counsel with Ms. Mon Maya Subba, Advocates for the Appellant.

Mr. S.K Chettri and Mr. D. K. Siwakoti, Assistant Public Prosecutor for the State-Respondent.

J U D G M E N T

(13.09.2017)

Bhaskar Raj Pradhan, J

1. The Judgment of the Learned Special Court dated 17.09.2015 (the impugned judgment) sentences the convict to undergo simple imprisonment of 5 years and to pay a fine of ₹10,000/- (Rupees ten thousand) only under Section 9 (m) and 9 (n) and punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012 (POCSO Act, 2012). In default of payment of fine, the convict was directed to further undergo simple imprisonment of 3 (three) months. However, the period of detention already undergone by the convict during investigation

and trial was to be set off against this period of imprisonment as provided under Section 428 Cr.P.C. The fine, if recovered, was to be handed over to the victim as compensation under Section 357 of the Code of Criminal Procedure, 1973 (Cr.P.C.).

2. The convict/appellant herein seeks to assail the impugned judgment passed by the Special Judge. Mr. Zangpo Sherpa, Legal Aid Counsel for the Appellant submits that the Learned Special Judge ought not to have relied upon the testimony of the victims alone when there were certain inconsistencies in the facts. He further submits that the Learned Special Court had erred in not considering the delay in lodging the First Information Report (FIR). He further submits that the prosecution had failed to examine necessary witnesses and the testimonies of those witnesses who had been examined were inconsistent. Mr. Zangpo Sherpa, relies upon ***Mohd Ali alias Guddu v. State of U.P.***[1] ***and Govt. of NCT of Delhi v. Mullah Muzib***[2]***.***

3. The Apex Court in re: ***Mohd Ali alias Guddu (supra)*** would hold that there can be no iota of doubt that the conviction can be based on soul testimony of prosecutrix, even without corroboration, if it is impeachable and beyond reproach***.*** However, when a Court on studied scrutiny of the evidence finds it difficult to accept the version of the prosecutrix, because it is not irreproachable, then there is a requirement for search of such direct or circumstantial evidence which would lend assurance to her testimony and in such cases where such other evidence does not support the story of the prosecutrix it can be discarded.

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[1] **2015 (7) SCC 272**
[2] **2015 SCC OnLine Del 7228**

4. The facts of the case in re: ***Mullah Muzib (supra)*** is distinguishable as would be seen in the later part of this judgment. ***Mullah Muzib (supra)*** was a case of material contradiction in the testimonies of the two witnesses, the victim and his uncle, because of which the High Court had held that the evidence produced is not cogent enough to prove that the accused had carnal intercourse with the victim.

5. Mr. S. K. Chettri, Learned Assistant Public Prosecutor for the State would strongly contend that the judgment sought to be assailed was a reasoned one, the testimonies of the two child victims were cogent and reliable, the prosecution had been able to establish the ingredients of the offences charged and therefore the same needs no interference. Mr. S. K. Chettri, relies upon ***Dharma Rama Bhargare v. State of Maharashtra***[3]***, Gurbachan Singh v. Satpal Singh & Ors***[4]***., State of H.P. v. Asha Ram***[5]***, State of Himachal Pradesh v. Suresh Kumar Alias DC***[6]***., Mohd. Imran Khan v. State Government (NCT of Delhi)***[7]***, Swaroop Singh v. State of Madhya Pradesh***[8] and ***Sanjok Rai v. State of Sikkim***[9] ***.***

FACTUAL MATRIX

6. The relevant facts for the purpose of deciding this appeal is that on 31.12.2014 at 19.00 hrs an FIR was lodged at the Naya Bazar Police Station by P.W.4 alleging commission of rape on two

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[3] **(1973) 1 SCC 537**.
[4] **(1990) 1 SCC 445**
[5] **(2005) 13 SCC 766**
[6] **(2009) 16 SCC 697**
[7] **(2011) 10 SCC 192**
[8] **(2013) 14 SCC 565**
[9] **2017 SCC OnLine Sikk 76.**

minor children, Ms. R and Ms. S, by the convict. The investigation was conducted by P.W.13. The charge-sheet was filed on 16.02.2015. On 18.03.2015 the Learned Special Judge framed two charges. The first charge related to minor victim Ms. R, aged 11 years. It was alleged that since 2012 to December, 2014 the convict being a relative of Ms. R, committed aggravated sexual assault on her repeatedly, which offence fell under Section 9(l), 9(m) and 9(n) and punishable under Section 10 of the POCSO Act, 2012. The second charge related to the aggravated sexual assault on the other child victim, Ms. S, aged about 6 years. It was alleged that sometime in the year 2014 the said offence was committed by the convict, which offence fell under Section 9(m) and punishable under Section 10 of the POCSO Act, 2012. 13 witnesses were examined by the prosecution.

7. The victim, Ms. R, was examined as P.W.2. Her mother was examined as P.W.1 and her father was examined as P.W.6., Ms R's sister-in-law, who noticed some swelling over the chest of Ms. R, inquired about it and was informed by Ms. R that she was sexually assaulted by her 'dewa' (uncle), was examined as P.W.8.

8. The next victim, Ms. S, was examined as P.W.3. Her father was examined as P.W.5.

9. First informant for both the offences was examined as P.W.4. P.W.7 and P.W.9 are the seizure witnesses of the birth certificates of Ms. R, and Ms. S, vide seizure memos (Exhibit-7 and Exhibit-9).

10. P.W.11 is the Gynaecologist at the STNM Hospital, Gangtok who examined Ms. R and Ms. S, both on 01.01.2015 and proved his reports (Exhibit-13 and Exhibit-12) respectively.

11. P.W.12 was the Station House Officer (SHO) at the relevant time of lodging the first information by P.W.4 alleging that his elder brother, the convict, had committed rape on Ms. R and Ms. S.

12. P.W. 13 was the Investigating Officer who on completion of the investigation laid the charge-sheet before the Court of the Learned Special Judge. Charges were framed on 18.03.2015 and the trial culminated in the conviction of the convict.

EVIDENCE RELATING TO ASSUALT ON Ms. R.

13. Ms. R has deposed that she knows the accused who is her 'Dewa' (uncle). She further states that on 14.11.2014, after attending her school, she went to the place where her mother works at the site. At the site she went to drink water to the house of the convict. When she was drinking the water given by P.W.4, the brother of the convict, P.W.4 left. Thereafter, the convict came from behind and fondled her breasts and threatened her not to tell anyone. Ms. R further states that only after several days, she told about the incident to her sister-in-law, P.W.8. Ms. R identified her signatures on the questionnaire put by the Magistrate (Exhibit-1) and her statement recorded under Section 164 Cr.P.C. (Exhibit-2).

14. In cross examination Ms. R confirmed that on 14.11.2014 P.W.4 and his brother, the convict, where together in

their house. Ms. R also admitted that she narrated about the alleged incident to P.W.8 only after few days and she did not tell her mother about the same. Ms. R further admitted that the relation between the convict and her family was not healthy and cordial. Ms. R clearly denied the suggestion of the defence Counsel that the convict had not come from behind and fondled her breasts and that the convict had not threatened her not to disclose to anyone about the incident. Ms. R could not recollect when her statement was recorded by the Police.

15. P.W.8 deposed that about 4 to 5 months prior to the date of her deposition in Court (i.e. 16.04.2015) she had noticed some swelling over the chest of Ms. R, inquired from her about the same and was told by Ms. R, that she was sexually assaulted by her 'Dewa' (uncle). P.W.8 thereafter informed Ms. R's mother, P.W.1 about the incident. Thereafter, they inquired about the incident from the convict, who replied that P.W.1 had taken some loan from him and taking advantage of that the convict used to sexually assault Ms. R.

16. On cross examination P.W.8 admitted that she had informed P.W.1 about the incident in the month of November, 2014 but does not remember the exact date. P.W.8 denied the suggestion made by the defence that Ms. R had not disclosed about the commission of sexual assault on her by the convict. P.W.8 also denied the suggestion made by the defence that her allegation that the convict had admitted to the crime was a false statement. P.W.8 admitted that P.W.1 was also present with her when the convict confessed about the incident. P.W.8 also admitted that the relation between the convict and P.W.1 was not good and cordial. P.W.8

denied the suggestion made by the defence that it was because of this strained relationship that Ms. R's family had lodged the false complaint against the convict.

17. P.W.1, the mother of Ms. R, recognized the convict as her brother-in-law. On 14.11.2014, P.W.8 told her that the convict had committed rape on Ms. R. P.W.1 requested P.W.8 to inquire about the matter from Ms. R, after which P.W.8 inquired from Ms. R and confirmed that the convict had committed rape on Ms. R. After that P.W.1 inquired about the incident from Ms. R, reported the matter to the village Panchayat and thereafter they reported it to the Police.

18. In cross examination P.W.1 reiterated her statement about P.W.8 informing her that the convict had committed rape on Ms. R. She also admitted, in cross examination, that she had also noticed that the breast of Ms. R was swollen. P.W.1 admitted that they had reported the matter to the Police after seven days of the incident. P.W.1 admitted of having taken a loan of ₹ 3000/- from the convict prior to the incident and that she had not returned the amount to the convict. P.W.1 denied that the relation between the convict and her was not cordial prior to the incident. All other suggestion made by the defence was denied by P.W.8.

19. P.W.6, the father of Ms. R, also identified the convict as his cousin. P.W.6 deposed that on 31.12.2014 he learnt that convict had committed sexual assault on Ms. R and Ms. S and thereafter they reported the matter before the Panchayat and later to the Police. P.W.6 also deposed that on 31.12.2014 the Police had seized birth certificate of his daughter, Ms. R and identified Exhibit-

8 as the birth certificate of Ms. R. P.W. 6 also deposed that on the same day the Police had also seized the birth certificate of Ms. S vide Exhibit-9 and identified the said birth certificate as Exhibit-10.

20. In cross examination, P.W.6 admitted that P.W.1 was his wife. P.W.6 denied the suggestion that his wife had informed about the alleged incident during second or third week of November, 2014. P.W.6 admitted that he did not have any personal knowledge about this case and that what he deposed was on the basis of hearsay. P.W.6 denied the suggestion of the defence that the relation between his family and the convict was not good or cordial prior to the incident. P.W.6 also admitted that the complaint (Exhibit-5) was prepared on instruction given by the Police and it was prepared at a place in West Sikkim. P.W.6 denied the suggestion made by the defence that his wife had not told him that the convict had committed sexual assault on Ms. R and Ms. S.

21. The evidence of Ms. R, was amply corroborated by the evidence of P.W.8 to whom Ms. R narrated about the incident. The evidence of P.W.8 is corroborated by the evidence of P.W.1, the mother of Ms. R to whom P.W.8 narrated what was told to P.W.8 by Ms. R.

22. P.W.4, the first informant and the natural brother of the convict, identified the convict in Court. P.W.4 stated that on 29.12.2014, one lady from his village (not examined), told him that the convict had committed rape on her minor grand-daughter, Ms. S and another Ms. R. P.W.4 further deposed that again on 31.12.2014 P.W.1 also told him that P.W.8 had told her that the convict had committed rape on Ms. R and Ms. S and thereafter as

per the request made by the 'Panchayat' (not examined), affixed his signature to the FIR (Exhibit-5). P.W.4 identified his signatures in (Exhibit-5) and the formal FIR (Exhibit-6). P.W.4 also identified (Exhibit-6).

23. In cross examination, P.W.4 admitted that the FIR (Exhibit-5) was not scribed by him but by the 'Panchayat' and he did not know the contents thereof. P.W.4 further stated that he had not given any instructions while preparing the FIR. P.W.4 admitted that the signature in the FIR (Exhibit-5) was his and volunteered to say that it was prepared at his house by the 'Panchayat' in the presence of Police. P.W.4 admitted that the Police had visited his house before lodging of the FIR. P.W.4 further admitted that he had no personal knowledge about the case. P.W.4 denied the suggestions of the defence that he had not been told by the grandmother of the victim, and P.W.1 about the alleged incidents. P.W.4 further stated that he could not say whether the relation between the convict and Ms. R's family was cordial or not. P.W.4 stated that he could not say whether Ms. R came to his house for drinking water prior to the incident. P.W.4 further stated that he could not say as to when the alleged incident occurred. P.W.4 admitted that he did not know what the FIR (Exhibit-6) was but admitted that he had signed the same at his residence and identified his signature.

24. P.W.7 and P.W.9 both identified the convict in the Court as their co-villager. They are seizure witnesses. P.W.7 and P.W.9 stated that the Police had seized the birth certificate of Ms. S (Exhibit-8) vide seizure memo (Exhibit-7) and identified their signatures thereon.

25. P.W.11 is the Gynaecologist who examined Ms. R on 01.01.2015 at 6.55 p.m. Ms. R was brought for examination with the alleged history of assault by the convict. Ms. R told P.W.11 that she was molested by the convict on 14.11.2014 by playing/massaging the breast area of Ms. R from the back. Ms. R denied sexual intercourse or penetration to P.W.11. On clinical examination of Ms. R P.W.11 gave a finding that there was no sufficient injury to determine sexual intercourse but fondling of the breast was likely. The cross examination of P.W.11 by the defence yielded no fruitful result in their favour.

EVIDENCE RELATING TO ASSUALT ON Ms. S.

26. Ms. S also identified the convict in Court as a co-villager. She could not remember the date, month and year of the incident. On the relevant day when she was returning from school, alone on reaching the house of the convict, the convict held Ms. S and rubbed himself against her for some time. The convict then told Ms. S not to tell anyone about the incident and also gave ₹ 11/- to her. Ms. S went home and told her mother about it. Ms. S identified her signatures on the questionnaire put by the Magistrate (Exhibit-3) and her statement recorded under Section 164 Cr.P.C. (Exhibit-4).

27. On cross examination Ms. S denied the suggestion of the defence that they were other persons present at the time of the incident. She reiterated that she had narrated about the incident to her mother only. She could not remember when her statement was recorded. All other suggestions made by the defence were denied by Ms. S.

28. P.W.5, the father of Ms. S identified the convict in Court as a co-villager. P.W.5 stated that on 31.12.2014, at around 5 to 6 p.m., his wife telephonically called him to the house of the convict. P.W.5 further stated that when he went to the house of the convict his wife informed him that the convict had committed sexual assault on his minor daughter, Ms. S. He saw that the convict was taken by the Police.

29. In cross examination P.W.5 admitted that he had no personal knowledge about the case and it was based on hearsay. P.W.5 denied all other suggestion made by the defence.

30. P.W.6, as stated earlier, also stated that the Police has seized the birth certificate (Exhibit-10) of Ms. S vide seizure memo (Exhibit-9).

31. P.W.7 and P.W.9 both identified the convict in the Court as their co-villager. They are seizure witnesses. P.W.7 and P.W.9 stated that the Police had seized the birth certificate of Ms. S (Exhibit-10) vide seizure memo (Exhibit-9) and identified their signatures thereon.

32. P.W.11 is the Gynaecologist who examined Ms. S on 01.01.2015 at 7.05 p.m. Ms. S was brought for examination with the alleged history of assault by the convict. Ms. S told P.W.11 that she was sexually assaulted by the convict on her way back from school. According to P.W.11 Ms. S could not recollect the date by her but remembered she was given ₹ 11/- by the convict after which he took out his private part and rubbed against her. Ms. S denied penetration. On clinical examination of Ms. S, P.W.11 gave a finding that there was no evidence of penetrative sexual

intercourse. The cross examination of P.W.11 by the defence yielded no fruitful result in their favour.

33. P.W.12, the SHO of the Police Station, proved the FIR (Exhibit-5), the registration of the case and the endorsement of the same to Sub-Inspector, P.W.13, for investigation.

CONSIDERATION

34. It is settled law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. It is equally well settled that the evidence of prosecutrix is more reliable than that of an injured witness.

35. The Apex Court would have occasion to examine a case of a father charged for raping his own daughter in which the High Court had reversed the order of conviction passed by the Trial Court in spite of the testimony of the prosecutrix remaining unimpeached after lengthy cross examination. This was also a case in which suggestion was that a false case had been hoisted against the accused at the instance of her mother (who had strained relations with the father and residing separately). in re: ***State of H.P. v. Asha Ram (supra)*** the Apex Court would hold:-

> *"5. We record our displeasure and dismay, the way the High Court dealt casually with an offence so grave, as in the case at hand, overlooking the alarming and shocking increase of sexual assault on minor girls. The High Court was swayed by the sheer insensitivity, totally oblivious of the growing menace of sexual violence against minors much less by the father. The High Court also totally overlooked the prosecution evidence, which inspired confidence and merited acceptance. It is now a well-settled principle of law that conviction can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital, unless there are compelling reasons which necessitate looking for corroboration of her*

statement, the courts should find no difficulty in acting 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. It is also a well-settled principle of law that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case".

36. In re: ***State of Himachal Pradesh v. Sanjay Kumar***[10] the Apex Court would hold:-

"31. After thorough analysis of all relevant and attendant factors, we are of the opinion that none of the grounds, on which the High Court has cleared the respondent, has any merit. By now it is well settled that the testimony of a victim in cases of sexual offences is vital and unless there are compelling reasons which necessitate looking for corroboration of a statement, the courts should find no difficulty to act on the testimony of the victim of a sexual assault alone to convict the accused. No doubt, her testimony has to inspire confidence. Seeking corroboration to a statement before relying upon the same as a rule, in such cases, would literally amount to adding insult to injury. The deposition of the prosecutrix has, thus, to be taken as a whole. Needless to reiterate that the victim of rape is not an accomplice and her evidence can be acted upon without corroboration. She stands at a higher pedestal than an injured witness does. If the court finds it difficult to accept her version, it may seek corroboration from some evidence which lends assurance to her version. To insist on corroboration, except in the rarest of rare cases, is to equate one who is a victim of the lust of another with an accomplice to a crime and thereby insult womanhood. It would be adding insult to injury to tell a woman that her claim of rape will not be believed unless it is corroborated in material particulars, as in the case of an accomplice to a crime. Why should the evidence of the girl or the woman who complains of rape or sexual molestation be viewed with the aid of spectacles fitted with lenses tinged with doubt, disbelief or suspicion? The plea about lack of corroboration has no substance (See Bhupinder Sharma v. State of H.P. [Bhupinder Sharma v. State of H.P., (2003) 8 SCC 551 : 2004 SCC (Cri) 31]). Notwithstanding this legal position, in the instant case, we even find enough corroborative material as well, which is discussed hereinabove."

37. The evidence produced makes it unequivocally clear that at the time of the actual assault, Ms. R and the convict were the only two present. The evidence of Ms. R is truthful and reliable. The defence could not break her in spite of her tender age. The fact that she narrated the incident to P.W.8 is corroborated by P.W.8 and P.W.1.

[10] **(2017) 2 SCC 51**

38. P.W.4, the natural brother of the convict and incidentally the first informant, naturally, in cross examination, stated that he could not say whether Ms. R came to his house for drinking water prior to the incident. P.W.4's hesitation to recollect the fact does not weaken the evidence of Ms. R. More so, when P.W.4, the first informant does not deny his signature on the written FIR (Exhibit-5) and the formal FIR (Exhibit-6). It is quite obvious that the hesitation was due to the fact that the convict was, in fact, the real brother of P.W.4.

39. Similarly, the evidence produced with reference to the alleged offence against Ms. S also makes it evident that at the time of the sexual assault on Ms. S by the convict they were the only two present. The deposition of Ms. S is also truthful and reliable.

40. The evidence of Ms. S however stands alone. Although P.W.5, the father of Ms. S, was examined according to him it was his wife who told him about the incident. Mr. Zangpo Sherpa appearing for the convict would argue that the mother of Ms. S not being examined, the Special Court ought to have considered this fact before holding that the evidence of the prosecutrix is unimpeachable. Unfortunately, the mother of Ms. S and the wife of P.W. 5, was not brought to the witness box. The truth of the evidence of P.W.5 of what he heard from the mother of Ms. S cannot be accepted, being hearsay. However, the evidence of Ms. S stood the cross examination of the defence and remained un-demolished. The Learned Special Judge has relied upon her testimony. There is no cogent reason for this Court to upset the said finding of the Learned Special Judge.

41. The Learned Special Judge on examination of the evidence held that the evidence of both Ms. R and Ms. S could not be discredited in cross examination. The Learned Special Judge would believe the evidence of P.W.1 the mother of Ms. R. The Learned Special Judge rejected the argument of the defence that the non examination of the mother of Ms. S and the Panchayat had created reasonable doubt on the prosecution case by holding that since there were no eye witnesses their non examination was of no consequence. This Court finds no necessity to upset the above finding of the Learned Special Court.

42. The relevant provisions of the POCSO Act, 2012 are extracted herein below:-

> *"9.* ***Aggravated Sexual Assault****.-*
>
> *(m) Whoever commits sexual assault on a child below twelve years; or*
>
> *(n) whoever, being a relative of the child through blood or adoption or marriage or guardianship or in foster care, or having domestic relationship with a parent of the child, or who is living in the same or shared household with the child, commits sexual assault on such child;....."*
>
> .....
>
> *is set to commit aggravated sexual assault."*

43. The term sexual assault has been defined in Section 7 of the POCSO Act, 2012, which provides:-

> *"7. Sexual Assault.-Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such persons or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault."*

44. The ingredients of aggravated sexual assault in terms of Section 9(m) of the POCSO Act, 2012 are:

1. Commission of sexual assault,
2. That sexual assault must be on a child below 12 years.

45. The ingredient of sexual assault as defined in Section 7 of the POCSO Act, 2012 are:

1. Sexual intent,
2. Touch of the vagina, penis, anus or breast of the child by the accused or making the child touch the vagina, penis, anus or breast of the accused or any other person or
   doing any other act with sexual intent which involves physical contact without penetration.

46. The word 'child' has been defined in Section 2(d) of the POCSO Act, 2012 as under:-

> *"2(d) "child" means any person below the age of [eighteen] years;"*

47. On examination of the evidence, the Learned Special Judge had come to a finding that:-

> *"33. On the date of incident the victims were aged about 11 years and 6 years. In Exhibit-8 and Exhibit-10 the Birth Certificate (s) (sic), dates of birth of the victims are 22.09.2004 and 26.12.2008. In fact the defence has not disputed the age of the minor victims."*

48. Mr. Zangpo Sherpa, appearing for the convict does not, fairly, contest the finding of the Learned Special Judge regarding the age of Ms. R and Ms. S before this Court also. This Court sees no cogent reason to disturb the finding of the Learned Special Judge regarding the age of Ms. R and Ms. S. relying upon the birth certificates of Ms. S (exhibit-10) issued on 24.02.2009 and Ms. R (exhibit-8) issued on 30.04.2008 by the Government of Sikkim, Office of the Chief Registrar Birth and Death, Department of Health Care, Human Services & Family Welfare Department. P.W.7 and P.W.9 have proved the seizure of the birth certificates of Ms. R vide seizure memo (exhibit-7) and of Ms. S vide seizure memo (exhibit-9). P.W.7 is the father of Ms. R. Both the birth certificates are

certificate issued by the Government and issued under Section 12/17 of the Registration of Births and Deaths Act, 1969 and Rule 8/13 of the Sikkim Registration of Births and Deaths Rule, 1999 certifying that the information has been taken from the original record of birth which is the register for the particular area and giving details of the date of birth, place of birth, name of mother, name of father, nationality of father and mother, address of the parents at the time of birth, permanent address, registration number, date of issue and date of registration. Under Section 35 of the Indian Evidence Act, 1872 an entry in any public or other official book, register or record or an electronic record, stating of fact in issue or relevant fact, and made by a public servant in the discharge of official duty, or by any other person in performance of a duty especially 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. The said Exhibit-8 and Exhibit-10 are under the signature of the Registrar of Births and Deaths. The said birth certificates are admissible in evidence.

49. Ms. R stated that the convict is 'Dewa' (uncle). P.W.1, mother of Ms. R stated that the convict is her brother-in-law. P.W.6 the father of Ms. R stated that the convict was his cousin. The convict was therefore a relative of Ms. R through blood.

50. Ms. R stated that the convict came from behind, fondled her breast and threatened her not to tell anyone. It is evident that the convict had committed aggravated sexual assault as defined in Sections 9 (m) and 9 (n) of the POCSO Act, 2012. The sexual intent of the convict is clear from the act of fondling Ms. R's breast and threatening her not to tell anyone.

51. Ms. S stated that the convict held her and rubbed himself against her for some time. The convict also told Ms. S not to tell anyone and further gave an amount of ₹ 11/- to her. It is evident that the convict had committed aggravated sexual assault as defined under Section 9 (m) of the POCSO Act, 2012. The sexual intent is clear from the act of the convict of rubbing himself against Ms. S and thereafter telling Ms. S not to tell anyone and further giving an amount of ₹ 11/- to her.

52. Mr. Zangpo Sherpa, would argue that there was inconsistency in the version of the Prosecution witnesses.

53. The evidence produced reflects that besides Ms. R and Ms. S and the convict there was no one else when the alleged offences were committed on Ms. R and Ms. S on two different occasions. Thus, minor discrepancies, are bound to occur when the other witnesses who merely heard what was told to them narrate about the incident. It is significant to note that the evidence of Ms. R and Ms. S, although both of tender age, are cogent and unblemished in spite of being subjected to cross examination by the defence. The minor discrepancies pointed out by Mr. Zangpo Sherpa does not relate to the ingredients of the offences for which the convict is aggrieved.

54. While examining such cases of sexual abuse on minor children it would be vital to keep in mind the observations of the Apex Court in re: ***State of H.P. v. Sanjay Kumar (supra)***:-

> *"22**.** We have already narrated the case of the prosecution as well as the testimonies of the prosecutrix, her mother PW 1 and the medical evidence. After going through the evidence of the prosecutrix and her mother, we find that apart from some minor and trivial discrepancies with regard to the period of stomach ache or about the medicine taken from the local doctor/chemist, insofar as material particulars of the incident are concerned, version of both these*

> *witnesses is in sync with each other. Here is a case where charge of sexual assault on a girl aged nine years is levelled. More pertinently, this is to be seen in the context that the respondent, who is accused of the crime, is the uncle in relation. Entire matter has to be examined in this perspective taking into consideration the realities of life that prevail in Indian social milieu*."

55. Mr. Zangpo Sherpa further sought to point out various discrepancies between the statement of Ms. R under Section 164 Cr.P.C. and her deposition in Court.

56. The defence had ample opportunity to use the said previous statement of Ms. R taken under Section 164 Cr.P.C. to contradict Ms. R. However, the defence did not do so. At the Appellate stage the convict cannot be permitted to take advantage of such discrepancies, even if it is existed, when the defence failed to contradict Ms. R in the manner provided under law. It must be remembered that evidence given in the Court under oath has great sanctity, which is why it is called substantive evidence. A statement under Section 164 Cr.P.C. can be used for both corroboration and contradiction. The object of recording a statement under section 164 Cr.P.C. is to deter the witness from changing a stand by denying the contents of her previously recorded statement and to tide over immunity from prosecution by the witness under Section 164 Cr.P.C. At the time of recording a statement under Section 164 Cr.P.C. no opportunity is provided to cross examine the witness and as such it cannot be treated as substantive evidence. (See: ***R. Shaji v. State of Kerala***[11]*)*.

57. Under Section 145 of the Indian Evidence Act, 1872 a witness may be cross examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in

[11] **(2013) 14 SCC 266**

question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. Under Section 157 of the Indian Evidence Act, 1872 in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. Thus the discrepancies pointed out by Mr. Zangpo Sherpa cannot come to the rescue of the convict at the Appellate stage.

58. Mr. Zangpo Sherpa would also argue that the evidence of Prosecution witnesses would show that the relation between the convict and P.W.1, the mother of the victim, Ms. R was not good and cordial prior to the incident. The Learned Special Judge has examined this argument and held that: –

> *"26. PW-1 is the mother of the victim R. Even if, the relation between PW-1 and accused is not good then also it is not believable that she use the prosecutrix as an instrument to wreak her vengeance against the accused. She being the mother cannot be expected to expose the modesty of her own daughter. I do not think that the mother of the victim will use her minor daughter as an instrument for her enmity with the accused, if any, and jeopardize her life involving in such kind of heinous offence."*

59. This Court is in complete agreement with the reasoning given by the Learned Special Court as quoted above. The observations made by the Apex Court in paragraph 5 of the judgment in re: ***State of H.P. v. Sanjay Kumar (supra)*** quoted above, on a similar factual narrative, would suffice to reject the contention of Mr. Zangpo Sherpa.

60. Mr. Zangpo Sherpa would also argue that as per Ms. R the date of the alleged incident is 14.11.2014 but the FIR was filed only on 31.12.2014 and as such there is a delay in the FIR which was not considered by the Learned Special Judge. This statement that the contention of delay was not considered by the Learned Special Judge, however, is incorrect. Paragraphs 20 and 21 of the Judgment of the Learned Special Judge deals extensively on the aspect of delay in lodging the FIR and rejects the same.

61. Ms. R stated that the incident was of 14.11.2014 and that she informed P.W.8 after several days. P.W.8 states that after inquiring about the swelling over Ms. R's chest from Ms. R and on being told she was sexually assaulted by her 'Dewa' (uncle) she informed P.W.1, the mother of Ms. R, about what she heard from Ms. R. In cross examination P.W.8 admitted that she had informed P.W.1 about the incident in the month of November, 2014 but does not remember the exact date. There is a contradiction in the statement of P.W.1, on when she was informed by P.W.8 because in her deposition in Court, P.W.1 states that on 14.11.2014 itself she was informed by P.W.8 that convict had committed rape on Ms. R. However, P.W.1 goes on to state that she requested P.W.8 thereafter to inquire about the matter from Ms. R who on inquiry confirmed the same after which P.W.1 inquired about the incident directly from Ms. R, reported the matter to the Village Panchayat and thereafter they reported to the Police. Evidently the evidence is not cogent regarding when and how the information regarding the sexual assault on Ms. R was transmitted till it reached the Police Station.

62. Ms. S does not remember at all the date, month and year of the incident. P.W.5 the father of Ms. S stated that on 31.12.2014 his wife called him to the house of the convict and on reaching there she informed him that the convict had sexually assaulted Ms. S. The fact that P.W.5 received a telephone call from his wife on 31.12.2014 and heard from her after reaching the house of the convict is admissible in evidence under Section 60 of the Indian Evidence Act, 1872. The FIR was lodged by P.W.4 on 31.12.2014 itself who states that on 21.12.2014 he received information about the incident from one Lady (not examined), grandmother of Ms. S about rape having been committed by the convict on both Ms. S and Ms. R. P.W.4 further goes to state that on 31.12.2014 P.W.1 also told her that P.W.8 told her that the convict had committed rape on Ms. R and Ms. S and thereafter on the request of the Panchayat he affixed his signature on the FIR.

63. However, the evidence of Ms. R and Ms. S on the material aspect of commission of aggravated sexual assault on them does inspire confidence. In such event discrepancies as pointed out above, of other witnesses, who did not have direct knowledge about the aggravated sexual assault on Ms. R and Ms. S, or of P.W.4, the first informant and an interested witness, fades into insignificance when the direct and cogent evidence of Ms. R and Ms. S are available. There are no contradictions on the direct evidences given by Ms. R and Ms. S about the crime and the other witnesses examined by the prosecution.

64. In ***State of Himachal Pradesh v. Sanjay Kumar***[12] the Apex Court would examine a delay in lodging an FIR of 3 years on which

[12] **(2017) 2 SCC 51**

ground the High Court of Himachal Pradesh had been swayed and over turned the judgment of conviction in a rape case rendered by the Trial Court. The Apex Court in the said Judgment would hold:-

> "**30.** *By no means, it is suggested that whenever such charge of rape is made, where the victim is a child, it has to be treated as a gospel truth and the accused person has to be convicted. We have already discussed above the manner in which the testimony of the prosecutrix is to be examined and analysed in order to find out the truth therein and to ensure that deposition of the victim is trustworthy. At the same time, after taking all due precautions which are necessary, when it is found that the prosecution version is worth believing, the case is to be dealt with all sensitivity that is needed in such cases. In such a situation one has to take stock of the realities of life as well. Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers. The danger is more within than outside. Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, not difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally, there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims."*

65. This Court has examined the evidence of Ms. R and Ms. S and come to the conclusion that the same are not only truthful and reliable but their evidences alone could be the basis of conviction. In such circumstances, as held by the Apex Court, it is important to deal with it with all sensitivity that is needed in such cases taking stock of the realities of life. The assault amounts to aggravated sexual assault under the POCSO Act, 2012. The victims are children aged 6 and 11 years. The incident relates to a rural area of West Sikkim. The families of both Ms. R and Ms. S come from lower income strata of Society. The convict was a relative of Mr. R and a co-villager of Ms. S. Consciousness, alertness and consequences of procedural laws would definitely not be considerations for such witnesses who are bound to make exaggerations, and sometimes

embellish the evidence. When such heinous offences are committed on minor children it may perhaps also be expected that the family members may be confused, ill advised and may not understand the nuances of not reporting the crime on time. As far back in the year 1973 V. R. Krishna Iyer J, would hold, and very appropriate to the present case, in re*: **Shivaji Sahabrao Bobade & Anr. v. State of Maharashtra***[13]:-

> *"(8) Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that the variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.....*
>
> *11 .....The sluggish chronometric sense of the country-side community in India is notorious since time is hardly of the essence of their slow life; and even urban folk make mistakes about time when no particular reason to observe and remember the hour of minor event like taking a morning meal existed."*

SENTENCE

66. The Learned Special Judge was examining two different offences committed by the convict to different victims, Ms. R and Ms. S. However, the Learned Special Judge, in the operative part of the judgment, held as under:-

> *"I, therefore, hold that the accused Deo Kumar Rai is guilty under Section 9 (m) and 9 (n) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012. Thus, I do hereby convict the accused Deo Kumar Rai under Section 9 (m) and 9 (n) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012."*

[13] **(1973) 2 SCC 793**

67. Vide order on sentence dated 17.09.2015 the Learned Special Judge would sentence the convict in the following manner:-

> *"4. After considering the submissions made by Ld. Addl. Special P. P. as well as Ld. Counsel for the convict and considering the facts and circumstances of the case, the ends of justice would meet if the convict Deo Kumar Rai is sentenced to undergo:-*
>
> *Simple imprisonment of 5 years and to pay a fine of Rs.10,000/- (Rupees ten thousand) only under Section 9 (m) and 9 (n) of Protection of Children from Sexual Offences Act, 2012, punishable under Section 10 of Protection of Children from Sexual Offences Act, 2012. In default of payment of fine, the convict shall further undergo simple imprisonment of 3 (three) months.*
>
> *However, the period of detention already undergone by convict during investigation and trial shall be set off against this period of imprisonment as provided under Section 428 Cr.P.C..*
>
> *5. The fine amount (supra), if recovered shall be handed over to the victims as compensation under Section 357 of the Code of Criminal Procedure, 1973."*

68. Section 9 (n) of the POCSO Act, 2012, as quoted above, deals with commission of sexual assault on a child being a relative of the child. Section 9 (m) of the POCSO Act, 2012 however deals with sexual assault on a child below 12 years. Both Ms. R and Ms. S being below 12 years the convict was liable to be convicted and punished under Section 9 (m) of the POCSO Act, 2012 for having committed sexual assault on a child below 12 years.

69. Section 71 IPC provides:-

> *"71.* ***Limit of punishment of offence made up of several offences.-****Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.*
>
> *Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or*
>
> *where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,*
>
> *the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."*

70. In re: ***STATE REPRESENTED BY INSPECTOR OF POLICE, PUDUKOTTAI, T.N v. A. PARTHIBAN***[14], held as under:-

> *"7. The crucial question is whether the alleged act is an offence and if the answer is in the affirmative, whether it is capable of being construed as offence under one or more provisions. That is the essence of Section 71 IPC, in the backdrop of Section 220 CrPC."*

71. Section 71 IPC would thus be attracted. The convict, in so far as it relates to the offence committed on Ms. R, shall not be punished with the punishment of more than one of such offences.

72. Section 9 (n) of the POCSO Act, 2012, as quoted above, however, deals with commission of sexual assault on a child being a relative of the child. The evidence available makes it evident that Ms. R is a relative of the convict. Ms. R stated that the convict is her 'Dewa' (uncle). P.W.8, P.W.1 and P.W.6 also corroborated the said fact. Thus the convict was liable to be convicted and punished under Section 9 (n) of the POCSO Act, 2012, also.

73. While conducting a trial of different offences allegedly committed against two victims the Special Judge must clearly and cogently specify the offences of which, and the Sections of the POCSO Act, 2012 under which, the accused is convicted and punishment to which he is sentenced.

74. The Learned Special Judge, while writing the operative part of the judgment seem to have lost sight of the law and the fact that the Learned Special Judge was in fact conducting a trial of two separate and distinct offences committed on two victims. This is a requirement under the provision of Section 354 Cr.P.C.

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[14] **(2006) 11 SCC 473**

75. The Learned Special Judge while conducting a trial of two offences committed against two victims must keep conscious of the fact that the Special Court is required to render justice to two victims.

76. Section 31 of the Cr.P.C. which deals with sentences in cases of conviction of several offences at one trial provides:-

> *"31.* ***Sentence in cases of conviction of several offences at one trial.*** *-*
>
> *(1) When a person is convicted at one trial of two or more offences, the Court may, subject to the provisions of section 71 of the Indian Penal Code (45 of 1860), sentence him for such offences, to the several punishments prescribed therefore which such Court is competent to inflict; such punishments when consisting of imprisonment to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.*
>
> *(2) In the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court: Provided that-*
>
> *(a) in no case shall such person be sentenced to imprisonment for longer period than fourteen years;*
>
> *(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.*
>
> *(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence."*

77. Section 10 of the POCSO Act, 2012 provides:-

> *"10. Punishment for aggravated sexual assault.-Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be*

less than five years but which may extend to seven years, and shall also be liable to fine."

78. Each of the offences defined in sub-section (a) to (u) of Section 9 of the POCSO Act, 2012 are distinct and different offences having different ingredients. Thus, the convict was liable to be punished separately for the offence committed on Ms. R under Section 9 (n) and on Ms. S under Section 9 (m). Under Section 10 each of the said offences under Section 9 (m) and 9 (n) of the POCSO Act, 2012 shall be punished with imprisonment of either description for a term which shall not be less than 5 years but which may extent to 7 years, and shall also be liable to fine. Thus the convict was liable for the offence on Ms. S under Section 9 (m) of the POCSO Act, 2012 for a term which shall not be less than 5 years but which may extend to 7 years, and shall also be liable to fine. Similarly, the convict was also liable for the offence on Ms. R under section 9 (n) of the POCSO Act, 2012 for a term which shall not be less than 5 years but which may extend to 7 years, and shall also be liable to fine.

79. The Learned Special Judge while sentencing must keep in mind the provisions of Section 31 Cr.P.C. which provides that when a person is convicted at one trial of two or more offences, the Court may, subject to the provision of section 71 of the IPC, sentence him for such offences, the several punishments prescribed thereof which such Court is competent to inflict. It is desirable that the Learned Special Court should at least record what punishment it awards for each of the two distinct offences. As this is not done complications would necessary arise at the appellate stage. Proper course of action would have been to pass a separate sentence for

each offence. The question in such situations as to what interpretation should be given to such a composite sentence was pursuasively answered by a Division Bench of the Allahabad High Court in re: ***Murlidhar Dalmia v. State***[15] in which it would hold:-

> **"***Such a view does find support from some cases, but we do not agree with the view and are of opinion that such a composite sentence of imprisonment should be taken to mean that identical sentence was awarded for each of the offences of which the accused was convicted and that all such identical sentences for all the offences were ordered to run concurrently. This seems to us to be the most logical interpretation as otherwise the appellate or the revisional court cannot be in a position to determine the specific punishments which the trial court is supposed to have contemplated to award for each offence and whose total was simply mentioned as the sentence awarded to the accused. It can be said that ordinarily courts do make the separate sentences concurrent and that it is only in special cases that the courts order sentences to run consecutively. Section 35, Code of Criminal Procedure, provides that when a person is convicted at one trial of two or more offences, the court may sentence him for such offences to the several punishments prescribed therefor which such court was competent to inflict and that such punishments, when consisting of imprisonment or transportation, shall commence the one after the expiration of the other in such order as the court may direct, unless the court directs that such punishments shall run concurrently. This means that when a court intends to award separate sentences for the various offences to run consecutively it is to express the order in which the sentences for the various offences would run. When the court passes just one sentence for the various offences, it would be too much to suppose that the court had separate sentences for each offence in mind and failed to give expression to its intention about the extent of the sentences and also failed to mention the order in which the sentences for the various offences were to run.*
>
> *It would be more probable in such a case 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. No difficulty arises in interpreting one sentence awarded as a sentence for each offence with the direction that the sentences were to run concurrently. A difficulty may arise when the sentence awarded be in excess of the maximum sentence which could have been awarded for any of the offences of which the accused had been convicted, because in that case it would not be proper to hold that the court intended to pass an illegal sentence and did pass an illegal sentence. In such a case it can be held that the sentence passed for such an offence was the maximum fixed under law for that offence and that the court ordered such maximum sentence to run concurrently with the higher sentence passed for other offences. This view agrees with the view expressed by this Court in Sohan Ahir v. King-Emperor(1), where DANIELS, J., interpreted a sentence of 18 months' rigorous imprisonment under sections 326 and 147, Indian Penal Code as meaning that the Magistrate passed concurrent identical sentences under each section. When the composite sentence consists of or includes fine, the amount of fine should be taken ordinarily to be the total of the fines the*

[15] **1952 SCC OnLine All 232 : ILR (1953) 1 All 834 : AIR 1953 All 245**

trial court intended to impose for various offences and it may be presumed in the absence of any special circumstances that an equal amount of fine was imposed for each offence. It would follow that the acquittal of the accused for some offence must mean corresponding reduction in fine."

80. Section 537 of the old Criminal Procedure Code corresponds to the present Section 465 of Cr.P.C. No failure of justice would have occasioned the convict for the irregularity in passing a composite sentence by the Learned Special Judge.

81. Therefore, so interpreted, while this Court confirms the composite sentences awarded by the Learned Special Judge, it is hoped that the Learned Special Judge while imposing sentence may keep in mind the aforesaid observations.

82. The convict is therefore sentenced for the offence on Ms. S under Section 9 (m) of the POCSO Act, 2012 for a term of 5 years and to pay a fine of ₹ 5,000/- (Rupees five thousand) and further the convict is also sentenced for the offence on Ms. R under section 9 (n) of the POCSO Act, 2012 for a term of 5 years and to pay a fine of ₹ 5,000/- (Rupees five thousand). The sentences to run concurrently.

83. The Learned Special Judge has directed that the period of detention already under gone by convict during investigation and trial shall be set off against the period of imprisonment as provided under Section 428 Cr.P.C. The said direction is maintained.

84. The Learned Special Judge has also directed that the fine amount, if recovered shall be handed over to the victims as compensation under Section 357 of the Cr.P.C. The same is also maintained.

COMPENSATION

85. Section 33 (8) of the POCSO Act, 2012 provides:-

> *"33 (8) In appropriate cases, the Special Court may, in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child."*

86. Rule 7 of the Protection of Children from Sexual Offences Rules, 2012 (POCSO Rules, 2012) provides:-

> *"7.**Compensation**.—(1) The Special Court may, in appropriate cases, on its own or on an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the First Information Report. Such interim compensation paid to the child shall be adjusted against the final compensation, if any.*
>
> *(2) The Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted, or where the case ends in acquittal or discharge, or the accused is not traced or identified, and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.*
>
> *(3) Where the Special Court, under sub-section (8) of Section 33 of the Act read with sub-sections (2) and (3) of Section 357-A of the Code of Criminal Procedure, makes a direction for the award of compensation to the victim, it shall take into account all relevant factors relating to the loss or injury caused to the victim, including the following—*
>
> *(i) type of abuse, gravity of the offence and the severity of the mental or physical harm or injury suffered by the child;*
>
> *(ii) the expenditure incurred or likely to be incurred on his medical treatment for physical and/or mental health;*
>
> *(iii) loss of educational opportunity as a consequence of the offence, including absence from school due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;*
>
> *(iv) loss of employment as a result of the offence, including absence from place of employment due to mental trauma, bodily injury, medical treatment, investigation and trial of the offence, or any other reason;*
>
> *(v) the relationship of the child to the offender, if any;*
>
> *(vi) whether the abuse was a single isolated incidence or whether the abuse took place over a period of time;*
>
> *(vii) whether the child become pregnant as a result of the offence;*
>
> *(viii) whether the child contracted a sexually transmitted disease (STD) as a result of the offence;*
>
> *(ix) whether the child contracted human immunodeficiency virus (HIV) as a result of the offence;*

(x) any disability suffered by the child as a result of the offence;

(xi) financial condition of the child against whom the offence has been committed so as to determine his need for rehabilitation;

(xii) any other factor that the Special Court may consider to be relevant.

(4) The compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357-A of the Code of Criminal Procedure or any other laws for the time being in force, or, where such fund or scheme does not exist, by the State Government.

(5) The State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

(6) Nothing in these rules shall prevent a child or his parent or guardian or any other person in whom the child has trust and confidence from submitting an application for seeking relief under any other rules or scheme of the Central Government or State Government."

87. Section 357 of Cr.P.C. provides:-

*"357. **Order to pay compensation**.-(1) When a Court imposes a sentence of fine or a sentence (including a sentence of death) of which fine forms a part, the Court may, when passing judgment order the whole or any part of the fine recovered to be applied-*

(a) in defraying the expenses properly incurred in the prosecution;

(b) in the payment to any person of compensation for any loss or injury caused by the offence, when compensation is, in the opinion of the Court, recoverable by such person in a Civil Court;

(c) when any person is convicted of any offence for having caused the death of another person or of having abetted the commission of such an offence, in paying compensation to the persons who are, under the Fatal Accidents Act, 1855 (13 of 1855), entitled to recover damages from the person sentenced for the loss resulting to them from such death;

(d) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or if an appeal be presented, before the decision of the appeal.

(3) When a Court imposes a sentence, of which fine does not form a part, the Court may, when passing judgment order the accused person to pay, by way of compensation such amount as may be specified in the order to the person who has suffered any loss or injury

by reason of the act for which the accused person has been so sentenced.

(4) An order under this section may also be made by an Appellant Court or by the High Court or Court of Session when exercising its powers of revision.

(5) At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under this section."

88. Section 357 A of Cr.P.C. provides:-

*"**357A. Victim compensation scheme. -** (1) Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.*

(2) Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

(3) If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 357 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

(4) Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

(5) On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

(6) The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit."

89. In exercise of the powers conferred by Section 357 (A) of Cr.P.C. the Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2013 came into force in Sikkim on 24.06.2013. The said Scheme was amended vide Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2013 and the maximum limit of compensation was

enhanced under particular heads of loss or injury. On 25.11.2016 Sikkim Compensation of Victims or his Dependents (Amendment) Schemes, 2016 was notified in the Sikkim Government Gazette making it applicable from 18.11.2016. The said amendment of 2016 further enhances the maximum limit of compensation on various heads of loss or injury.

90. Section 357 of Cr.P.C. relates to compensation payable by the convict. Section 357 (A) of Cr.P.C. on the other hand deals with Victim Compensation Schemes of State Government's for providing funds for the purpose of compensation to the victim or his dependence who have suffered loss or injury as a result of the crime and who require rehabilitation.

91. Under Section 33 (8) of the POCSO Act, 2012 the Special Court, in appropriate cases in addition to the punishment, direct payment of such compensation as may be prescribed to the child for any physical or mental trauma caused to him or for immediate rehabilitation of such child. The Learned Special Judge has however, not complied with the mandatory duty of the court to apply its mind to the question of the award or refusal of compensation in a particular case in every criminal case.

92. Under Rule 7 (1) of the POCSO Rules, 2012 the Special Court may, in appropriate cases, on its own or an application filed by or on behalf of the child, pass an order for interim compensation to meet the immediate needs of the child for relief or rehabilitation at any stage after registration of the FIR. Such interim

compensation paid to the child shall be adjusted against the final compensation, if any. In the present case the Learned Special Judge has not considered payment of compensation, interim or otherwise, as mandated under Section 33 (8) of the POCSO Act, 2012 read with Rule 7 of the POCSO Rules, 2012.

93. Under the provisions of Rule 7 (2) of the POCSO Rules, 2012, the Special Court may, on its own or on an application filed by or on behalf of the victim, recommend the award of compensation where the accused is convicted and in the opinion of the Special Court the child has suffered loss or injury as a result of that offence.

94. Under Rule 7 (3) of the POCSO Rules, 2012, which is an inclusive Rule and therefore not exhaustive, the relevant factors to be considered while directing compensation have been enumerated for the guidance of the Special Court.

95. Under Rule 7 (4) of the POCSO Rules, 2012, the compensation awarded by the Special Court is to be paid by the State Government from the Victims Compensation Fund or other scheme or fund established by it for the purposes of compensating and rehabilitating victims under Section 357 A of Cr.P.C. or any other law for the time in force.

96. Under Rule 7 (5) of the POCSO Rules, 2012, the State Government shall pay the compensation ordered by the Special Court within 30 days of receipt of such order.

97. Under Rule 7 (6) of the POCSO Rules, 2012 a child or his parent or guardian or any other person in whom the child has trust and confidence may submit an application for seeking relief under any other rules or schemes of the Central Government or State Government.

98. Many a times due to the peculiar facts of the case a Trial Judge may be faced with the situation where it is found that in addition to the punishment, compensation must be directed to be paid. In such situations the Trial Court is not helpless. Section 33 (8) of the POCSO Act, 2012 read with Rule 7 of the POCSO Rules, 2012 was made precisely for the said purpose. The Special Judge has the power and therefore must also exercise it, in appropriate cases, to direct payment of compensation as per the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date. The aforesaid provisions are victim centric. It is meant for the purpose of rehabilitation of the victim who has suffered loss or injury as a result of the crime and who require rehabilitation. The Special Court is required to consider whether or not there is a need for directing payment of compensation by firstly making adequate inquiry and thereafter giving reasons. The quantum of compensation must be as prescribed under the provisions of the Sikkim Compensation to Victims or his Dependents Scheme, 2011 as amended till date. As per the schedule thereto the particulars of loss or injury as well as the maximum limit of compensation is provided. While making the recommendation by the Court and while deciding the quantum of compensation payable under the Sikkim Compensation to Victims

or his Dependents Scheme, 2011 as amended till date the ethos of Section 33(8) of the POCSO Act, 2012, Rule 7 of the POCSO Rules, 2012 and Section 357(A) of Cr.P.C. which have direct roots in the concept of victimology must always be in its mind.

99. In re: ***Ankush Shivahi Gaikwad v. State of Maharastra***[16] the Apex Court would hold:-

> *"**33.** The long line of judicial pronouncements of this Court recognised in no uncertain terms a paradigm shift in the approach towards victims of crimes who were held entitled to reparation, restitution or compensation for loss or injury suffered by them. This shift from retribution to restitution began in the mid-1960s and gained momentum in the decades that followed. Interestingly the clock appears to have come full circle by the lawmakers and courts going back in a great measure to what was in ancient times common place. Harvard Law Review (1984) in an article on Victim Restitution in Criminal Law Process: A Procedural Analysis sums up the historical perspective of the concept of restitution in the following words:*
>
> *"Far from being a novel approach to sentencing, restitution has been employed as a punitive sanction throughout history. In ancient societies, before the conceptual separation of civil and criminal law, it was standard practice to require an offender to reimburse the victim or his family for any loss caused by the offense. The primary purpose of such restitution was not to compensate the victim, but to protect the offender from violent retaliation by the victim or the community. It was a means by which the offender could buy back the peace he had broken. As the State gradually established a monopoly over the institution of punishment, and a division between civil and criminal law emerged, the victim's right to compensation was incorporated into civil law."*

100. In re***: State of Madhya Pradesh v. Mehtaab***[17] the Apex Court would hold:-

> *"8. Apart from the sentence and fine/compensation to be paid by the accused, the court has to award compensation by the State under Section 357-A CrPC when the accused is not in a position to pay fair compensation as laid down by this Court in Suresh v. State of Haryana. This Court held:*
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> > *"16. We are of the view that it is the duty of the courts, on taking cognizance of a criminal offence, to ascertain whether there is tangible material to show commission of crime, whether the victim is identifiable and whether the victim of crime needs immediate financial relief. On being satisfied on an application or on its own motion, the court ought to direct grant of interim compensation, subject to final compensation being determined later. Such duty continues at every stage of a criminal case where compensation ought to be given and has*

[16] **(2013) 6 SCC 770**
[17] **(2015) 5 SCC 197**

not been given, irrespective of the application by the victim. At the stage of final hearing it is obligatory on the part of the court to advert to the provision and record a finding whether a case for grant of compensation has been made out and, if so, who is entitled to compensation and how much. Award of such compensation can be interim. Gravity or offence and need of victim are some of the guiding factors to be kept in mind, apart from such other factors as may be found relevant in the facts and circumstances of an individual case.

101. In re: ***Hari Singh v. Sukhbir Singh***[18], 551 the Apex Court would hold:-

> ***"10.*** *Sub-section (1) of Section 357 provides power to award compensation to victims of the offence out of the sentence of fine imposed on accused. In this case, we are not concerned with sub-section (1). We are concerned only with sub-section (3). It is an important provision but courts have seldom invoked it. Perhaps due to ignorance of the object of it. It empowers the court to award compensation to victims while passing judgment of conviction. In addition to conviction, the court may order the accused to pay some amount by way of compensation to victim who has suffered by the action of accused. It may be noted that this power of courts to award compensation is not ancillary to other sentences but it is in addition thereto. This power was intended to do something to reassure the victim that he or she is not forgotten in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. It is, to some extent, a constructive approach to crimes. It is indeed a step forward in our criminal justice system. We, therefore, recommend to all courts to exercise this power liberally so as to meet the ends of justice in a better way.*
>
> ***11.*** *The payment by way of compensation must, however, be reasonable. What is reasonable, may depend upon the facts and circumstances of each case. The quantum of compensation may be determined by taking into account the nature of crime, the justness of claim by the victim and the ability of accused to pay. If there are more than one accused they may be asked to pay in equal terms unless their capacity to pay varies considerably. The payment may also vary depending upon the acts of each accused. Reasonable period for payment of compensation, if necessary by instalments, may also be given. The court may enforce the order by imposing sentence in default.*
>
> ***12.*** *Joginder in this case is an unfortunate victim. His power of speech has been permanently impaired. Doctor has certified that he is unable to speak and that is why he has not stepped into the witness box for the prosecution. The lifelong disability of the victim ought not to be bypassed by the court. He must be made to feel that the court and accused have taken care of him. Any such measure which would give him succour is far better than a sentence by deterrence."*

[18] (1988) 4 SCC

102. In re: ***Manohar Singh v. State of Rajasthan & Ors.***[19] the Apex Court would hold:-

> *"11. Just compensation to the victim has to be fixed having regard to the medical and other expenses, pain and suffering, loss of earning and other relevant factors. While punishment to the accused is one aspect, determination of just compensation to the victim is the other. At times, evidence is not available in this regard. Some guess work in such a situation is inevitable. The compensation is payable under Sections 357 and 357-A CrPC. While under Section 357 CrPC, financial capacity of the accused has to be kept in mind, Section 357-A CrPC under which compensation comes out of the State funds, has to be invoked to make up the requirement of just compensation."*

103. In re: ***Ankush Shivahi Gaikwad (supra)*** the Apex Court would hold:-

> *"66. To sum up: while the award or refusal of compensation in a particular case may be within the court's discretion, there exists a mandatory duty on the court to apply its mind to the question in every criminal case. Application of mind to the question is best disclosed by recording reasons for awarding/refusing compensation. It is axiomatic that for any exercise involving application of mind, the Court ought to have the necessary material which it would evaluate to arrive at a fair and reasonable conclusion. It is also beyond dispute that the occasion to consider the question of award of compensation would logically arise only after the court records a conviction of the accused. Capacity of the accused to pay which constitutes an important aspect of any order under Section 357 CrPC would involve a certain enquiry albeit summary unless of course the facts as emerging in the course of the trial are so clear that the court considers it unnecessary to do so. Such an enquiry can precede an order on sentence to enable the court to take a view, both on the question of sentence and compensation that it may in its wisdom decide to award to the victim or his/her family."*

104. In the present case aggravated sexual assault on Ms. R and Ms. S has been proved against the convict. The fine imposed by the Learned Special Judge of ₹ 10,000/- (Rupees ten thousand) is payable as compensation only on realisation from the convict. It is obviously not adequate, keeping in mind the fact that there are two victims aged 6 and 11 years, who have suffered aggravated sexual assaults.

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[19] **2015 (89) ACC 266 (SC)**

105. In terms of Section 33 (8) of the POCSO Act, 2012 read with the POCSO Rules, 2012 and Section 357 (A) (3) of Cr.P.C. the Learned Special Judge was required to come to a conclusion whether the compensation awarded under Section 357 of Cr.P.C. is adequate or not for the rehabilitation of Ms. R and Ms. S. The considerations are cogently enumerated in Rule 7 of the POCSO Rule, 2012. In the facts of the present case the type of abuse, gravity of the offence and the severity of the mental and physical harm suffered by the victims would be relevant. The fact that the aggravated sexual assault on Ms. R and Ms. S were isolated incidents would also be a relevant factor. Equally important would be the financial condition of Ms. R and Ms. S which as per the evidence available was definitely not good. The shock of such heinous sexual assault by Ms. R's own uncle on Ms. R and by a person known to Ms. S on Ms. S would also be a relevant consideration. The Special Court is required to ask itself as to what is required to rehabilitate the victim who has suffered both mentally and physically to get over that trauma. The Learned Special Judge did not do so. Under the Sikkim Compensation to Victims or his Dependents Schemes, 2011 as amended till date for sexual assault (excluding rape) an amount of ₹50,000/- (Rupees fifty thousand) is prescribed as the maximum limit of compensation. As such the Sikkim State Legal Services Authority is directed to pay Ms. R and Ms. S just compensation of ₹45,000/- (Rupees forty five thousand) each from the Victim Compensation Fund provided by the State Government to it. The said amounts shall be deposited in interest bearing fixed deposits in the accounts of Ms. R and Ms. S payable to them on their turning 18 years of age. If Ms. R and Ms. S do not have saving accounts for the

purpose of opening of fixed deposits as directed, the Sikkim State Legal Services Authority shall assist Ms. R and Ms. S through its panel lawyers to do so. As required under Rule 7 (5) of the POCSO Rules, 2012 the State Government shall pay the compensation within 30 days of the receipt of this judgment.

106. The Appeal against conviction is dismissed. The sentences imposed by the Learned Special Judge's stands explained as above.

107. The convict is in jail. He shall continue there to serve the remaining of the sentences.

108. Copy of this judgment be remitted to the Court of learned Special Judge, East Sikkim at Gangtok, forthwith along with records of the Court for compliance. Copy of this judgment may also be forwarded to the Sikkim State Legal Services Authority for payment of compensation payable to Ms. R and Ms. S and for compliance of other directions.

109. Urgent certified photocopy of this judgment, if applied for, be supplied to the learned Counsels for the parties upon compliance of all formalities.

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***[20] 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.

(Bhaskar Raj Pradhan)
Judge
13.09.2017

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

[20] **2017 SCC OnLine Sikk 143**